

In the
Supreme Court of Ohio

CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

STATE BOARD OF EDUCATION OF
OHIO, *et al.*,

Defendants-Appellants.

Case No. 2008-1480

On Appeal from the
Hamilton County
Court of Appeals,
First Appellate District

Court of Appeals Case
No. C-070494

**MERIT BRIEF OF DEFENDANTS-APPELLANTS THE STATE BOARD OF
EDUCATION OF OHIO AND THE OHIO DEPARTMENT OF EDUCATION**

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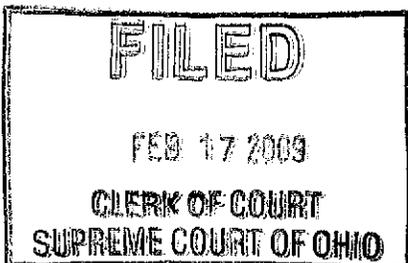


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INTRODUCTION

Ohio's Equal Access to Justice Act ("EAJA"), R.C. 2335.39, is a fee-shifting statute designed to help parties of lesser means, in select situations, afford the cost of litigating against the State. The EAJA is thus an exception to the traditional "American Rule," under which parties typically pay their own attorney fees. This exception is limited in several ways. It applies only when the State's position is not "substantially justified," meaning that the State pays not every time it loses, but only when it takes unreasonable positions. R.C. 2335.39(B)(2). It applies only when the State "initiat[es] the matter in controversy," not when the other party starts the dispute. *Id.* And, most important here, the EAJA is limited to paying fees for those who cannot easily afford lawyers, not for those wealthy individuals or large entities that can afford to pay their own way. Specifically, the EAJA excludes from eligibility those individuals or entities that have either a high net worth or more than 500 employees. R.C. 2335.39(A)(2). The defined entities include nearly every conceivable type of entity—namely, "partnership[s], corporation[s], association[s], or organization[s]"—so the eligibility of all entities depends on their net worth and employment.

The issue here is simple: Plaintiff-Appellee Cincinnati City School District ("School District" or "District") falls within the plain meaning of the term "organization," and it is thus ineligible for fees because it has over 500 employees. The appeals court mistakenly looked past the provision's plain meaning and invoked the canon of *ejusdem generis*, which says that when a general term follows more specific terms, the general term may be read to include only items in the same class as the specific items. See *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.* (10th Dist.), 176 Ohio App. 3d 678, 2008-Ohio-2845 ("App. Op.," Ex. 3, Appendix at A-5), ¶ 18. The appeals court opined that the other named entities, such as corporations, exist "generally to make a profit," and because government organizations are in the business of

governing rather than profit-seeking, they do not count as “organizations” at all. *Id.* at ¶¶ 21-23. That conclusion was wrong for several reasons.

First, because the plain meaning of the term “organization” includes governmental and non-profit organizations, the Court need not resort to *ejusdem generis* or other principle used only to resolve ambiguities. R.C. 1.42 and this Court’s precedents require that words in a statute be given their “common, ordinary and accepted meaning[.]” *State v. Singer* (1977), 50 Ohio St. 2d 103, 108. Both lay and legal dictionaries agree that an “organization” includes any group of people working together in a structured manner for a common purpose, and, in fact, *Black’s Law Dictionary* defines “organization” to include a “government or governmental subdivision or agency.” And government agencies are defined as organizations in other contexts, in both the Revised Code and in case law. See, e.g., R.C. 1343.01(BB) (“‘Organization’ includes a corporation, government, governmental subdivision or agency”). Statutory canons cannot and should not overcome this plain meaning.

Second, even if *ejusdem generis* somehow applies here, that doctrine does not support the exclusion of government agencies from the term “organization.” The appeals court viewed the terms “partnership, corporation, [and] association” as indicating a class of for-profit entities, thus excluding government units. App. Op. at ¶¶ 21-23. But the preceding terms are not so limited. “Corporations” may be not-for-profit or even governmental municipal corporations. In fact, the EAJA’s net-worth exclusion specifies that not-for-profit corporations shall *not* be excluded from fee eligibility by virtue of net worth, which shows that non-profits are included as a type of corporation and may be excluded based on employment. R.C. 2335.39(A)(2)(c). Further, “association” is commonly understood to include professional and trade associations, not just for-profit businesses. So the “for-profit” grouping cannot be properly inferred from the first

three items, leaving no justification for imposing a for-profit restriction on the last item, “organization.”

Third and finally, the unwarranted exclusion of government entities from the term “organization” means that *all* such entities are eligible for fees, regardless of means, and that interpretation frustrates the General Assembly’s intent to limit fee awards to economically disadvantaged litigants. The net-worth limit and the employee-based size limit show that the General Assembly wanted to fund only those who might not otherwise be able to fund litigation. See *Unification Church v. INS* (D.C. Cir. 1985), 762 F.2d 1077, 1082 (noting Congress’s desire, in analogous federal EAJA, “not to subsidize . . . large entities easily able to afford legal services.”). Shifting legal fees from one layer of government to another, even where the largest political subdivisions are involved, does not serve the limited purpose of helping the needy to defend themselves in disputes initiated by the State.

For all these reasons, the Court should hold that the Cincinnati School District, or any political subdivision, is an “organization” that is subject to the EAJA’s size limits, and is thus ineligible to seek attorney fees from the State.

STATEMENT OF THE CASE AND FACTS

A. The School District prevailed in its lawsuit against the State challenging school funding calculations.

The School District sued the State Board of Education of Ohio and the Ohio Department of Education (“State”), challenging the method used to provide funding to public school districts. The School District prevailed on summary judgment before the trial court, and the appeals court affirmed. App. Op. at ¶ 1. After this Court agreed to review the case, the parties settled the merits, and the case was dismissed on the parties’ joint motion. See *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, No. 2008-0919, Entry of Oct. 24, 2008 (granting dismissal).

B. The trial court denied the School District's Motion for attorney fees.

The School District moved the trial court for attorneys' fees under the Equal Access to Justice Act, R.C. 2335.39, a fee-shifting statute that applies, under certain conditions, to parties who prevail in litigation against the State. The EAJA allows a "prevailing eligible party" to apply for fees and sets various conditions, starting with the requirement that the party be "eligible." An entity is an "eligible party" *unless* it is any of the following excluded entities:

- (a) The state;
- (b) An individual whose net worth exceeded one million dollars at the time the action or appeal was filed;
- (c) A sole owner of an unincorporated business that had, or a partnership, corporation, association, or organization that had, a net worth exceeding five million dollars at the time the action or appeal was filed, except that an organization that is described in subsection 501(c)(3) and is tax exempt under subsection 501(a) of the Internal Revenue Code shall not be excluded as an eligible party under this division because of its net worth;
- (d) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or organization that employed, more than five hundred persons at the time the action or appeal was filed.

R.C. 2335.39(A)(2). Ohio Administrative Code 109-2-01, promulgated by the Attorney General under R.C. 119.093, defines an eligible party's "net worth."

The State opposed the School District's fees motion on the ground that the District is an "organization" with over 500 employees. Entry Denying Motion of Plaintiff for Attorney Fees Pursuant to R.C. 2335.39, June 8, 2007, Hamilton Cty. Court of Common Pleas ("Com. Pl. Op.," Ex. 4, Appendix at A-13.) Com. Pl. Op. at 1. The State argued that the School District is ineligible under the net-worth provision, and it also opposed the fees motion on grounds other than eligibility, which are not before the Court. See Mem. in Opp. to Plaintiff's Motion for Attorney Fees, filed Feb. 15, 2007.

The School District did not contest that it has over 500 employees, but it argued that it did not constitute an “organization” under the fee-shifting statute. Com. Pl. Op. at 1-2. Because R.C. 2335.39(A)(2)(d) does not define “organization,” the trial court looked to *Black’s Law Dictionary* and a lay dictionary. *Id.* at 2. It noted that *Black’s* says that “[o]rganization includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.” *Id.* (citing *Black’s Law Dictionary* (5th Ed. 1979)). The trial court also cited an online dictionary, “dictionary.com,” which defined “organization” as “a group of people organized for some end or work.” *Id.* (citing *Dictionary.com Unabridged* (2006), available at <http://dictionary.reference.com/browse/organization>). *Id.* The trial court concluded that the School District was an “organization,” and because it employed more than 500 people when the action was filed, the District was ineligible. *Id.* at 7. The trial court accordingly denied the motion for fees. *Id.*

C. The appeals court reversed and found the District eligible for fees.

The appeals court reversed. Although the lower court noted the reciprocal common meanings of “organization” and “school district,” the appeals court held that under ejusdem generis, “the term ‘organization’ . . . was not intended to encompass entities such as a school district.” App. Op. at ¶ 23. After looking to *Black’s Law Dictionary* for definitions of “partnership,” “corporation,” “association,” and “unincorporated business,” the appeals court concluded that the School District was not an “organization” because the four other entities listed were not governmental in nature. App. Op. at ¶ 22. The appeal courts did not dispute the trial court’s finding that the plain meaning of “organization” included government units. It merely found that the ejusdem generis canon applied, as noted, and it further concluded that its reading “comports with the basic purpose” of the statute. App. Op. at ¶ 24.

The State asked this Court to review the case, and the Court accepted jurisdiction. See Order of Dec. 31, 2008, Case No. 2008-1480.

ARGUMENT

Appellant State of Ohio's Proposition of Law:

A school district with more than 500 employees is an "organization" barred from recovering attorney fees by R.C. 2335.39(A)(2)(d).

The School District here, and any other governmental unit, is an "organization" under the EAJA. First, the plain meaning of the term "organization" includes school districts, because nothing about the term either explicitly nor implicitly excludes governmental organizations. That plain meaning ends the inquiry, because canons of construction, such as ejusdem generis, operate only to resolve ambiguity. Second, even if ambiguity exists and ejusdem generis applies, the canon does not mandate an interpretation that excludes governments from the scope of the term "organization," because the nearby terms are not limited to for-profit entities. Finally, the General Assembly's plain intent was to limit fee awards to economically disadvantaged litigants, and it frustrates that purpose to award fees to even the largest subdivisions, with staffs of full-time lawyers.

A. The plain meaning of the term "organization" includes government organizations such as the School District.

Both R.C. 1.42 and the Court's precedent provide that words used in the Revised Code "shall be . . . construed according to . . . common usage." R.C. 1.42; *Maschari v. Tone*, 103 Ohio St. 3d 411, 2004-Ohio-5342, ¶ 12 (same); *State v. Singer* (1977), 50 Ohio St. 2d 103, 108 (applying "common, ordinary and accepted meaning unless the legislature has clearly expressed a contrary intention."). Here, that common understanding of the term "organization" includes government entities such as the School District.

First, lay and legal dictionaries show that “organization” includes government organizations. The Court has repeatedly looked to dictionaries to determine the “common, everyday meaning of a word[.]” *Campus Bus Serv. v. Zaino*, 98 Ohio St. 3d 463, 2003-Ohio-1915, ¶ 21 (citing lay dictionary); *Hughes v. Ohio Dep’t of Commerce*, 114 Ohio St. 3d 47, 2007-Ohio-2877, ¶ 14 (citing *Black’s Law Dictionary*); *Fehrenbach v. O’Malley*, 113 Ohio St. 3d 18, 2007-Ohio-971, ¶ 21 (same). One dictionary defines an “organization” as a “group of persons organized for a particular purpose; an association” *American Heritage Dictionary of the English Language*, 962 (4th ed. 2000), available at <http://www.bartleby.com/61/63/O0116300.html>. Another dictionary says the term “organization” means “[a] group whose members work together for a shared purpose in a continuing way.” *Cambridge Dictionary of American English*, available at http://dictionary.cambridge.org/define.asp?key=organization*1+0&dict=A. And an online-only dictionary, *Dictionary.com*, defines the term as “a group of people organized for some end or work.” Available at <http://dictionary.reference.com/browse/organization>. These dictionary definitions plainly include the School District. As the trial court noted, any ongoing group meets the definition, and at most, one might exclude a purely ad hoc group, for a short-term limited purpose, from the meaning of organization. See Com. Pl. Op. at 3.

Black’s Law Dictionary also uses a broad definition that expressly includes government units. *Black’s* states: “As term is used in commercial law, includes a corporation, government or governmental subdivision or agency . . .” *Black’s Law Dictionary* 759 (6th Ed. 1991), see Com. Pl. Op. at 3 (citing Fifth Edition). Although that definition refers to commercial law, that simply reflects the fact that most, but not all, other organizations may be different types of business entities, such as corporations, partnerships, and the like.

Along with the dictionary definition, common usage in other contexts, in both statutes and cases, shows that government agencies are a type of organization. Ohio's enactment of the Uniform Commercial Code says that "'Organization' includes a corporation, government, governmental subdivision or agency." R.C. 1343.01(BB).

Case law supports that general usage includes government entities as "organizations." One federal court noted that a dictionary's, and thus the statute's, "definition[] certainly include[s] governments within the class of organizations." *Adams v. United States* (S.D. Ill. 1965), 241 F. Supp. 383, 385. Several courts have repeatedly found that the federal government is an organization. *Farmers Ins. Exch. v. Jones* (Utah 1973), 515 P.2d 1275, 1276 ("It seems obvious to us that the United States . . . is an organization[.]"); *Vaughn v. United States* (E.D. Tenn. 1964), 225 F. Supp. 890, 891 ("The United States does seem to come squarely within" the definition of an "organization legally responsible for the use" of an automobile). A state has been held to be an organization, *Disabled Rights Action Comm. v. Las Vegas Events, Inc.* (9th Cir. 2004), 375 F.3d 861, 874, as has a county hospital, *Franklin County Mem. Hosp. v. Mississippi Farm Bur. Mut. Ins. Co.* (Miss. 2008), 975 So. 2d 872, 876-77. Those holdings make sense when one considers that such entities are "people organized in [] specific way[s] for the purpose of constituting a system of government. [They are] organization[s] pure and simple[.]" *Adams*, 241 F. Supp. at 385.

Beyond these cases and statutes, several well-known governmental entities use the term "organization" in their titles, especially at the international level, including the World Health Organization, the Organization of American States, the North Atlantic Treaty Organization, and others.

In light of this plain meaning and common understanding, this Court need not resort to canons of construction, whether *ejusdem generis* or any other. “Where 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.” *Sears v. Weimer* (1944), 143 Ohio St. 312, syllabus at ¶ 5. Statutes with plain meaning are “to be applied, not interpreted.” *Id.*

The Court has specifically applied this rule to the *ejusdem generis* canon, explaining that it does not overcome plain meaning: “*ejusdem generis* is but a rule of construction . . . It is not to be employed in any case to subvert a meaning clearly expressed” by the statute. *State v. Wells* (1945), 146 Ohio St. 131, 135. Courts universally agree that *ejusdem generis* is reserved for use in resolving ambiguities, and it can never be used to overcome plain meaning and common usage. For example, this Court declined to apply *ejusdem generis* when the text indicated that the general term should not be limited to a narrow class, but should be read to include everything within its plain meaning. *State ex rel. Div. of Wildlife v. Barker* (1983), 8 Ohio St. 3d 39, 41. Similarly, a federal court declined to resort to *ejusdem generis* to exclude earth-moving equipment from a law prohibiting the theft of a “self-propelled vehicle designed for running on land,” because the equipment met that plain description. *United States v. Tobeler* (9th Cir. 2002), 311 F.3d 1201, 1205-06. That court put it succinctly: “when a statute’s plain meaning is apparent, there is no need to resort to the rule of *ejusdem generis*[.]” *Id.* at 1206.

Consequently, the Court can and should stop at applying the plain meaning of the term “organization.” As an organization under that plain meaning, the School District, like any other governmental organization with over 500 employees, is ineligible for fees under the EAJA.

B. Even if the Court applies ejusdem generis, that canon does not mandate the exclusion of governmental organizations from the term “organization.”

As explained above, the Court need not, and should not, reach the canon of ejusdem generis. Nevertheless, even if the Court looks to that canon, it does not lead to the exclusion of governmental entities from the scope of the term “organization.”

The canon of ejusdem generis provides that “[w]here general words follow specific words . . . the general words are construed to embrace only objects similar in nature to . . . the preceding specific words.” *State v. Wells* (1944), 146 Ohio St. 131, 134 (quoting 2 *Sutherland Statutory Construction* (3d Ed.), 395, Section 4909). Or, as the Court put it more recently,

When there is a listing of specific terms followed by a catchall word or phrase which is linked to the specific terms by the word “other,” and the statute is to be strictly construed, we apply the doctrine of *ejusdem generis*. . . . Under the rule of *ejusdem generis*, where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms.

Moulton Gas Svc. v. Zaino, 97 Ohio St. 3d 48, 2002-Ohio-5309, ¶ 4 (citation and quotation omitted). Here, the appeals court reasoned that the three preceding terms of “partnership, corporation, association” were specific terms that indicated for-profit status, so it concluded that the term “organization” should likewise be limited to for-profit entities. App. Op. at ¶¶ 21-23. The appeals court was wrong, both because it misconstrued how *ejusdem generis* works and because it based its application on a false premise, as the statute’s terms do not establish a category of for-profit entities.

First, the sentence at issue does not fit the classic pattern for invoking *ejusdem generis* to begin with. As both *Wells* and the leading treatise on statutory construction explain, *ejusdem generis* is triggered only when a general word is listed after other, more specific, ones. *Wells*, 146 Ohio St. at 134; Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory*

Construction, § 47:20 (2007 Ed.) (“Where a general term appears . . . with other general terms . . . *eiusdem generis* does not apply.”). And as the Court further detailed in *Moulton*, the canon is typically indicated when “there is a listing of specific terms followed by a catchall word or phrase which is linked to the specific terms by the word ‘other,’ and the statute is to be strictly construed,” *Moulton*, 2002-Ohio-5309 at ¶ 4. Further, “[t]he rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named.” *State ex rel. Div. of Wildlife*, 8 Ohio St. 3d at 41 n. 3.

Here, the clause does not include several specific terms joined to a general one with the conjunction “and other.” Not only is the standard “and other” missing here, but also, the first three terms are not narrow, specific ones. The terms “partnership,” “corporation,” and “association” are themselves general, as is “organization.” Each describes general categories containing multiple subtypes. Partnerships are limited, general, special, and sub-partnerships. Corporations may be for-profit, not-for-profit, public benefit, close, publicly traded, municipal, public, and quasi-corporations. Associations are business, religious, fraternal, private, quasi-public and public associations. Consequently, “organization” is just one of multiple general terms, so *eiusdem generis* is not even triggered.

Second, even if the canon is triggered, its application does not exclude government entities from the term “organization.” As *Wells* explained, when a general term follows specific ones, the canon serves to limit the general term to include only objects in the same class as the preceding specific terms. *Wells*, 146 Ohio St. at 134. Thus, the canon leads to applying the private, for-profit limit to “organization” only if that limit defines a class of the first three members: “partnership, corporation, [and] association.”

But those first three items includes both non-profit and government entities. Most important, the category “corporation” includes not only not-for-profit corporations, but also municipal corporations and other governmental corporations. Ohio’s Constitution establishes “municipal corporations,” and the Court has recognized that other types of governmental entities are “public corporations.” Ohio Const., Art. XVIII; *Hamilton County Bd. of Mental Retardation v. Prof’ls Guild of Ohio* (1989), 46 Ohio St. 3d 147, 149-150 (“A political subdivision of a state is embraced within the meaning of the word ‘person’ by a statute such as *R.C. 119.01(F)* defining ‘person’ as including a corporation, association or partnership. . . . A body corporate and politic is a governmental body or public corporation having powers and duties of government.”). “Public-private partnerships” are expressly recognized in Ohio and federal law. See, e.g., *R.C. 3313.603(C)(6)*, *3326.03(B)*, 10 U.S.C. § 2474(b), 20 U.S.C. § 1153(b)(2). Finally, *R.C. 149.01* also regulates “quasi-public . . . associations,” and other portions of the Code authorize public entities and public officials to form associations to perform public functions. *R.C. 759.36*, *5552.04(C)*. Indeed, this Court has described school districts themselves as “quasi corporations.” *Wayman v. Bd. of Educ.* (1966), 5 Ohio St. 2d 248, 249 (“It is well settled that a board of education is a quasi corporation acting for the public as one of the state’s ministerial education agencies ‘for the organization, administration and control of the public school system of the state.’”).

Further, not only are associations sometimes private, but the term is used almost exclusively to describe not-for-profit entities. For example, well-known trade or professional groups are often titled as associations: the American and Ohio Bar Associations, the Ohio Medical Association, the Ohio Dental Association, and so on. Of course, such groups are not governmental, but they are not-for-profit, undercutting the appeals court’s for-profit limitation.

And once that for-profit line is crossed, it makes little sense to assume that the General Assembly meant to exclude not only profit-making business, but also large charitable organizations, from eligibility, while preserving eligibility for all government entities, no matter their size or resources.

Third, not only do the reasons above show why the canon does not operate to establish a for-profit requirement, but equally important, the EAJA's express reference to not-for-profit "organizations" in the net-worth provision shows that the term organization cannot be limited to for-profit businesses in the number-of-employees provisions. Specifically, R.C. 2335.39(A)(2)(c) excludes from eligibility any of the named entities that have "a net worth exceeding five million dollars at the time the action or appeal was filed, except that an *organization* that is described in subsection 501(c)(3) and is tax exempt under subsection 501(a) of the Internal Revenue Code shall not be excluded as an eligible party under this division because of its net worth." (emphasis added). In other words, this provision contemplates that not-for-profit organizations would otherwise fall under this net-worth provision, so it excludes them, and that means that such not-for-profits do fall under the term organization in the number-of-employees provision. Thus, charities with over 500 employees are excluded from eligibility, but charities are not excluded for high net worth. Again, that does not show in and of itself that governments are included, but it does mean that the appeals court's for-profit restriction is mistaken, and thus the case for excluding governments must rest on some issue other than profit.

Consequently, the appeals court's theory of *eiusdem generis* does not work. Because no other persuasive theory of *eiusdem generis* has been advanced, the School District cannot use that canon to escape exclusion from eligibility under the EAJA.

C. Excluding governments from the term “organization,” thereby rendering all governments eligible for fees regardless of size and resources, frustrates the EAJA’s purpose of awarding attorney fees only to litigants with fewer resources.

Allowing the School District to be eligible for fees would not only violate the plain meaning of the statute, but it would also frustrate the General Assembly’s plain intent in enacting the EAJA: awarding attorney fees to parties that might find it difficult to afford litigation with the State, while withholding fees from those who can afford to pay their own way.

The Court follows the rule that particular words in a statute are to be construed to further the statute’s general purpose. “Where a statute is silent as to the meaning of a word . . . courts . . . must give such word a meaning consistent with other provisions of the statute and the objective to be achieved thereby.” *Heidtman v. Shaker Heights* (1955), 163 Ohio St. 109, syllabus at ¶ 1. The Court therefore “avoids adopting a construction of a statute that would result in circumventing the evident purpose of the enactment.” *State ex rel. Cincinnati Post v. City of Cincinnati* (1996), 76 Ohio St. 3d 540, 543. As noted above, the doctrine of ejusdem generis cannot override a statute’s plain meaning, and similarly, the doctrine cannot override a statute’s plain intent, either. “The doctrine of ejusdem generis . . . is not to be employed in any case to subvert a meaning clearly expressed or to defeat the plain intent of the General Assembly, and it does not warrant a court in confining the operation of a statute within limits narrower than those intended by the lawmakers.” *Wells*, 146 Ohio St. at 134 (emphasis added).

The EAJA’s purpose is to enable “relatively impecunious [] parties to challenge . . . governmental behavior[.]” *Haghighi v. Moody* (1st Dist.), 152 Ohio App. 3d 600, 2003-Ohio-2203, ¶ 10 (emphasis added); Costantini & Skindell, *Fee Shifting in Ohio: An Overview of Ohio’s Version of the Equal Access to Justice Act* (1989), 18 Cap. U. L. Rev. 201, 207. The General Assembly made that purpose plain by enacting the net-worth limitations of R.C. 2335.39(A)(2)(c). The employee-size limitations of subsection (d) show that the General

Assembly also adopted a presumption that large entities, regardless of net worth, can afford to pay their own way. As a court construing the analogous federal law put it, “one clear purpose . . . was to limit the beneficiaries . . . to those entities otherwise unable to defend themselves.” *Unification Church v. INS* (D.C. Cir. 1985), 762 F.2d 1077, 1089. And limiting awards to those needy parties means denying awards to those with the means to fend for themselves. “When [parties] have the economic power to pursue litigation against the government without being deterred by the costs, the congressional purposes . . . are undermined by an award[.]” *Nat’l Truck Equip. Ass’n v. Nat’l Highway Traffic Safety Admin.* (6th Cir. 1992), 972 F.2d 669, 674. Disregarding parties’ resources frustrates the legislature’s “desire not to subsidize . . . large entities easily able to afford legal services.” *Unification Church*, 762 F.2d at 1082.

Those principles require reversal. Local governments’ financial resources vary widely; some have few, others have more. The general EAJA approach is to distinguish between entities based on size and resources, but the decision below erases all such distinctions. Notably, the State’s reading of the statute does not eliminate fees for all government entities; rather, it preserves fees for the government units that fall below the thresholds for net worth and number of employees. But the School District’s and appeals court’s view makes all local entities eligible for fees, regardless of their ability to pay their lawyers, and that violates the EAJA’s basic intent.

Further, government entities are frequent litigants against the State, and many of those entities have staffs of lawyers to litigate. *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605 (declaratory judgment case between city and State on home rule issues); *Cuyahoga County Bd. of Comm’rs v. State*, 112 Ohio St. 3d 59, 2006-Ohio-6499 (declaratory judgment case between county and State regarding administration of welfare program); *Lorain County v. Ohio Unemployment Comp. Review Comm’n*, 113 Ohio St. 3d 124,

2007-Ohio-1247 (unemployment appeal by county); *State ex rel. Eaton City Sch. Dist. Bd. of Educ. v. State Employment Relations Board*, 64 Ohio St. 3d 383, 1992-Ohio-9 (mandamus case filed by school district on labor law issues). As these cases show, the local-government litigants vary widely in structure; some fit within the other categories listed in R.C. 2335.39(A)(2)(d), such as municipal corporations, and some do not. Further, those local litigants vary in size; some are small cities such as Clyde, others are Ohio's larger local governments, such as Cuyahoga County or, as here, the Cincinnati School District. Some of these, such as counties and cities, typically have staffs of in-house lawyers that handle their litigation, just as the State does, while others may hire outside lawyers. Government entities are as varied as businesses, and it seems doubtful that the General Assembly, which designed the EAJA to limit fee awards to smaller litigants, would have wanted to subsidize all local-government litigants regardless of their size and access to counsel.

In fact, the General Assembly included a different provision to exclude fee awards for even the poorest private parties when those parties have government-subsidized lawyers, and that provision, although not at issue, further supports the State's view. In R.C. 2335.39(F)(3)(a), the General Assembly provided that fees are not available to a party who defeats the State in an administrative appeal under R.C. 119.12 if she was "represented in the appeal by an attorney who was paid pursuant to an appropriation by the federal or state government or a local government." It applies when a government-paid lawyer works for a needy private client, regardless of whether on staff at an agency such as the Ohio Legal Rights Service, or at a private non-profit supported by grants. Notably, this exclusion is not based on the party's resources, in that she might otherwise be destitute, but solely on the idea that some level of government—including a local government—has already paid for her lawyer, so the State need not subsidize

such a lawyer by fee-shifting. That provision does not apply here, because this is not a case under R.C. 119.12, but the provision reinforces the policy against fee-shifting when that fee-shifting merely transfers costs from another government entity's budget to the State's, as opposed to when fees are needed to ensure that a litigant has the means to litigate at all.

Finally, to the extent it provides guidance despite its different text and structure, the analogous federal EAJA supports the State's view. The federal statute, as originally enacted, was similar to the Ohio EAJA, except that the laws used a mirror-image structure: while the Ohio law *excludes* parties that exceed the thresholds for net worth and number of employees, the federal law only *included* parties as eligible if they met the definitions and fell below the thresholds. See 28 U.S.C. § 2412(d)(2)(B); *Cent. Midwest Interstate Low-Level Radioactive Waste Comm'n v. O'Leary* (C.D. Ill. 1995), 873 F. Supp. 159, 161. That meant that local governments wanted to be included as "organizations" so that they could be eligible. Some lower courts denied fees to all local governments, regardless of the thresholds, and Congress responded by amending the EAJA to include the phrase "unit of local government." See Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 1, 99 Stat. 183 (1985); see *Cent. Midwest Interstate Low-Level Radioactive Waste Comm'n*, 873 F. Supp. at 161 (explaining amendment and that governments were included by amendment because they were not organizations); *Comm'rs of Highways of the Towns of Annawan, et al. v. United States*, 684 F.2d 443, 445 (7th Cir. 1982) (denying fees to political subdivisions because they were not "organizations").

The federal EAJA's express inclusion of governments, subject to the thresholds, eliminates any useful comparisons now, and the earlier pre-amendment precedent is of limited value both because the issue was never resolved and because the statute's mirror-image approach skews any

comparisons. But one useful point to note is that, under the pre-amendment version, because governments needed to qualify as “organizations” first, and then meet the thresholds, the two options were that *no* governments would receive awards or that only smaller ones would. No reading would have subsidized all governments. Even then, some courts held against allowing any governments’ eligibility, based on the policy of helping only those with lesser ability to obtain counsel. See e.g., *Comm’rs of Highways of the Towns of Annawan, et al.*, 684 F.2d at 445. Here, by sharp contrast, the two competing views are different. As noted above, the State’s view would allow fees to local governments below the thresholds, while the School District’s view would grant fees to all governments regardless of means. So to the extent the federal comparison is useful, it shows that (1) at most the State and federal EAJAs were meant to allow *some* government units to be eligible for fees and (2) the legislature can always change things.

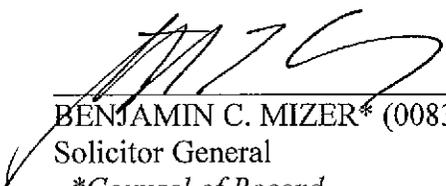
The better view, until the General Assembly says otherwise, is to deny fees, both because that best implements the General Assembly’s goal of limiting the EAJA fee awards to those who cannot as easily afford lawyers, and more important, as explained in Part A above, the plain meaning of the term “organization” includes government organizations such as the School District.

CONCLUSION

For the above reasons, this Court should reverse the decision below and reinstate the trial court's dismissal of the fee motion. If the Court affirms, it should remand to allow the trial court to apply the remainder of the statute and determine if any fee award is justified, and if so, in what amount.

Respectfully submitted,

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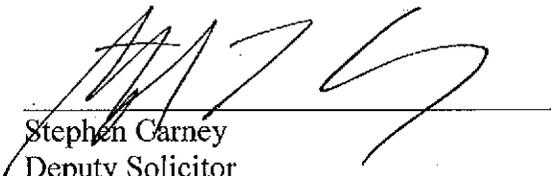
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendants-Appellants State Board of Education of Ohio and Ohio Department of Education was served by U.S. mail this 17th day of February, 2009, upon the following counsel:

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In the
Supreme Court of Ohio

08-1480

CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

STATE BOARD OF EDUCATION OF
OHIO, *et al.*,

Defendants-Appellants.

Case No. :
: **08-1480**
:
: On Appeal from the
: Hamilton County
: Court of Appeals,
: First Appellate District
:
: Court of Appeals Case
: No. C-070494

**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS,
STATE BOARD OF EDUCATION OF OHIO AND
OHIO DEPARTMENT OF EDUCATION**

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FILED
JUL 28 2008
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SUPREME COURT OF OHIO

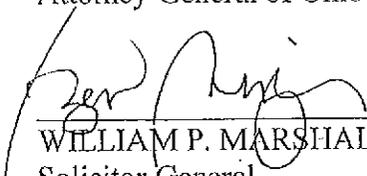
**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS,
STATE BOARD OF EDUCATION OF OHIO AND
OHIO DEPARTMENT OF EDUCATION**

Defendants-Appellants, State Board of Education of Ohio and Ohio Department of Education, give notice of their discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3) and Rule III, Section 1, from a decision of the Hamilton County Court of Appeals, First Appellate District, journalized in Case No. C-070494 on June 13, 2008. Date-stamped copies of the First District's Judgment Entry and Decision are attached as Exhibits 1 and 2, respectively, to Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest and presents a substantial constitutional question.

Respectfully submitted,

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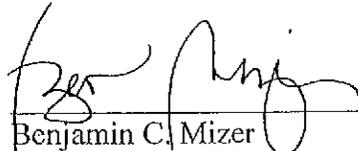
Counsel for Defendants-Appellants
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendants-Appellants State Board of Education of Ohio and Ohio Department of Education was served by U.S. mail this 28th day of July, 2008, on the following counsel:

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Deputy Solicitor

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



D78809038

CINCINNATI CITY SCHOOL
DISTRICT BOARD OF EDUCATION,

Plaintiff-Appellant,

vs.

STATE BOARD OF EDUCATION OF
OHIO

and

OHIO DEPARTMENT OF
EDUCATION,

Defendants-Appellees.

APPEAL NO. C-0700494 ✓
TRIAL NO. A-0603908

JUDGMENT ENTRY.

§



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on June 13, 2008 per Order of the Court.

By: _____

Presiding Judge

FILED
IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

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JUN 13 2008

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

CINCINNATI CITY SCHOOL
DISTRICT BOARD OF EDUCATION,

Plaintiff-Appellant,

vs.

STATE BOARD OF EDUCATION OF
OHIO

and

OHIO DEPARTMENT OF
EDUCATION,

Defendants-Appellees.

APPEAL NO. C-070494
TRIAL NO. A-0603908

DECISION.



PRESENTED TO THE CLERK
OF COURTS FOR FILING

JUN 13 2008

COURT OF APPEALS



D78815079

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: June 13, 2008

Bricker & Eckler LLP, Nicholas A. Pittner, James J. Hughes III, Jennifer A. Flint,
and *C. Allen Shaffer*, for Plaintiff-Appellant,

Marc Dann, Attorney General, and *Todd R. Marti*, Assistant Attorney General, for
Defendants-Appellees.

Please note: This case has been removed from the accelerated calendar.

17

SYLVIA S. HENDON, Judge.

{¶1} Plaintiff-appellant, the Cincinnati City School District Board of Education (“the District”), filed suit against defendants-appellees, the State Board of Education of Ohio and the Ohio Department of Education (“the State Board”). The District sought to challenge the State Board’s method of providing funding to public school districts. The District was successful in its lawsuit. The trial court granted it summary judgment, and this court recently upheld the trial court’s decision.¹

{¶2} Subsequent to the entry of summary judgment, the District filed a motion pursuant to R.C. 2335.39 seeking compensation for the attorney fees that it had incurred. The trial court denied the motion for attorney fees on the ground that the District was not an eligible party entitled to such fees.

{¶3} The District has appealed from the trial court’s denial of its motion for attorney fees, arguing in its sole assignment of error that the trial court’s ruling was in error. For the following reasons, the judgment of the trial court is reversed.

R.C. 2335.39 and the Trial Court’s Decision

{¶4} R.C. 2335.39 provides that a prevailing eligible party in a civil suit against the state may seek compensation for attorney fees. R.C. 2335.39(A)(2) defines who is an eligible party. It specifically states that an eligible party is “a party to an action or appeal involving the state, other than the following: (a) The state; (b) An individual whose net worth exceeded one million dollars at the time the action or appeal was filed; (c) A sole owner of an unincorporated business that had, or a

¹ See *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 1st Dist. No. C-070084, 2008-Ohio-1434.

partnership, corporation, association, or organization that had, a net worth exceeding five million dollars at the time the action or appeal was filed * * *; (d) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or organization that employed, more than five hundred persons at the time the action or appeal was filed.”

{¶5} The trial court determined that, under R.C. 2335.39(A)(2)(d), the District was an organization that employed more than 500 persons at the time that the underlying action had been filed. R.C. 2335.39 does not define “organization.” Because the legislature chose not to define the term, the trial court relied on the dictionary definition of “organization” to determine whether the District fell within this category. The trial court specifically relied on the Fifth Edition of Black’s Law Dictionary, which states that “[o]rganization includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.”² The trial court additionally cited the *dictionary.com* definition of organization as “a group of people organized for some end or work.”

{¶6} Concluding that the District was an organization employing more than 500 people, the trial court denied its motion for attorney fees.

Standard of Review

{¶7} We must first determine what standard is applicable to our review of the trial court’s decision.

{¶8} The District argues that the central issue on appeal is a question of law concerning whether the trial court correctly construed R.C. 2335.39(A) to determine

² Black’s Law Dictionary (5 Ed.Rev.1979) 991.

that the District was an organization. Consequently, the District asserts that this court must review de novo the trial court's denial of its motion for attorney fees.

{¶9} But the State Board argues that this court must review the trial court's decision for an abuse of discretion, as that is the applicable standard of review for fee decisions.

{¶10} The State Board correctly notes that R.C. 2335.39(B)(2)(b) provides that "[t]he order of the court may be modified by the appellate court only if it finds that the grant or the failure to grant an award, or the calculation of the amount of an award, involved an abuse of discretion."

{¶11} But it is also well settled that the interpretation of statutory authority is a question of law that is reviewed de novo.³ In this case, the trial court declined to grant a fee award after interpreting the term "organization" in R.C. 2335.39(A)(2)(d) to include a school district. The failure to grant a fee award directly correlated with the trial court's interpretation of the term "organization." Accordingly, we determine that, as the central issue in this appeal is a question of law, our review of the trial court's decision is de novo.

Eligible Party

{¶12} We must now determine whether the District is an eligible party under R.C. 2335.39(A)(2). The term "eligible party" is defined in terms of exclusions. In other words, all parties to an action or appeal involving the state other than those described in subdivisions (A)(2)(a) through (A)(2)(d) are eligible parties.

³ *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶18.

R.C. 2335.39(A)(2)(a), (b), and (c)

{¶13} R.C. 2335.39(A)(2)(a) provides that “the state” is not an eligible party. The statute further indicates that the term “state” should be accorded “the same meaning as in section 2743.01 of the Revised Code.”⁴ R.C. 2743.01(A) defines state as “the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state. ‘State’ does not include political subdivisions.”

{¶14} R.C. 2743.01(B) further defines the term “political subdivisions” as “municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.” This statute clearly indicates that a school district is a political subdivision. And political subdivisions are not included in the definition of “state.” Consequently, the District is not “the state” and is not excluded as an eligible party under R.C. 2335.39(A)(2)(a).

{¶15} No assertion has been made that the District should be excluded as an eligible party under R.C. 2335.39(A)(2)(b) or (c). And it is clear from the definition of these subdivisions that they are not applicable to the District. Consequently, they need not be further addressed.

R.C. 2335.39(A)(2)(d)

{¶16} As we have stated, R.C. 2335.39(A)(2)(d) excludes as an eligible party “[a] sole owner of an unincorporated business that employed, or a partnership,

⁴ See R.C. 2335.39(A)(6).

corporation, association, or organization that employed, more than five hundred persons at the time the action or appeal was filed.”

{¶17} The statute does not define the terms contained in the subdivision, and the District does not openly and obviously fall within any of the enumerated categories. Because the statute itself does not define “organization,” the trial court relied on the dictionary definition of the term to conclude that the District was an organization. We cannot agree with the trial court’s conclusion.

{¶18} When interpreting this statute, we must keep in mind an important principle of statutory construction, that of ejusdem generis. “Under the rule of ejusdem generis, where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms.”⁵

{¶19} R.C. 2335.39(A)(2)(d) lists the following terms: unincorporated business, partnership, corporation, association, and organization. After applying the principle of ejusdem generis, we determine that city school districts do not share similar characteristics with the other entities listed in this statute and that they should not be considered organizations.

{¶20} Black’s Law Dictionary defines a school district as a “political subdivision of a state, created by the legislature and invested with local powers of self-government, to build, maintain, fund, and support the public schools within its

⁵ *Moulton Gas Serv., Inc. v. Zaino*, 97 Ohio St.3d 48, 2002-Ohio-5309, 776 N.E.2d 72, ¶14, quoting *State v. Aspell* (1967), 10 Ohio St.2d 1, 225 N.E.2d 226, paragraph two of the syllabus.

territory and to otherwise assist the state in administering its educational responsibilities.”⁶ A school district is clearly an entity responsible for governmental activities for the purpose of ensuring a functioning public school system.

{¶21} But the definition of the other entities listed in R.C. 2335.39(A)(2)(d) indicates that they do not share a similar purpose. Black’s Law Dictionary defines “partnership” as a “voluntary association of two or more persons who own and carry on a business for profit.”⁷ “Corporation” is defined as an “entity having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely.”⁸ And an “association” is both an “unincorporated organization that is not a legal entity separate from the persons who compose it” and a “gathering of people for a common purpose.”⁹ Last, while Black’s Law Dictionary does not specifically define “unincorporated business,” it does define the term business as a “commercial enterprise carried on for profit.”¹⁰

{¶22} The definitions of partnerships, corporations, associations, and unincorporated businesses indicate that such entities do not possess governmental powers, but rather are usually private bodies. The purpose of these entities is generally to make a profit for their members, not to assist the state or to regulate a not-for-profit entity such as a public school. Further, the governing bodies of these entities are not elected by popular vote in the manner pertaining to a school board.

{¶23} All the foregoing observations lead us to conclude that the term “organization” in R.C. 2335.39(A)(2)(d) was not intended to encompass entities such as a school district.

⁶ Black’s Law Dictionary (8 Ed.Rev.2004) 1373.

⁷ Id. at 1152.

⁸ Id. at 365.

⁹ Id. at 132.

¹⁰ Id. at 211.

{¶24} And although a determination still must be made as to the merits of the District's fee claim and the amount the District is entitled to recover in attorney fees, we note that our conclusion comports with the basic purpose of R.C. 2335.39. The District was forced to bring this action because the State Board had failed to follow the method for calculating school funding mandated by the Ohio Revised Code. The State Board's action led to this lawsuit, and as the District prevailed in its lawsuit, the trial court should consider the merits of its claim for attorney fees.

{¶25} Because a school district is not an organization, the trial court erred in determining that the District was not an eligible party under R.C. 2335.39(A)(2). The District's assignment of error is sustained.

Conclusion

{¶26} Having sustained the District's sole assignment of error, we reverse the trial court's judgment and remand this case for the trial court to reconsider the District's motion for attorney fees based on the determination that the District is an eligible party.

Judgment reversed and cause remanded.

SUNDERMANN, P.J., and CUNNINGHAM, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

ENTERED
JUN 08 2007

EXHIBIT 4

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Cincinnati City School District : Case No. A0603908
Board of Education, :
Plaintiff, :
v. :
State Board of Education of Ohio, et al., : Judge Nelson
Defendants. :
Entry Denying Motion of Plaintiff for
Attorney Fees Pursuant to R.C. 2335.39



This matter now comes before the court on a motion of Plaintiff Cincinnati School District Board of Education for attorney fees pursuant to R.C. 2335.39. Because the court concludes that the Cincinnati School District is not an “eligible party” for a fee award under that statute, Plaintiff’s motion is denied.

R.C. 2335.39(B) provides that a “prevailing eligible party” in an action to which the State is a party is entitled to compensation for fees unless the State shows that its “position in initiating the matter in controversy was substantially justified or that special circumstances make an award unjust.” “Eligible party” is defined to *exclude*: (a) the State (not including political subdivisions); (b) any individual with a net worth of more than one million dollars; (c) any “partnership, corporation, association, or organization” with a net worth exceeding five million dollars, except that a 501(c)(3) tax exempt “organization” shall not be excluded because of its net worth; and (d) any “partnership, corporation, association, or organization that employed more than five hundred persons at the time the action ... was filed.” R.C. 2335.39(A)(2)(a-d).

Plaintiff acknowledged at argument (and, by implication, in its subsequent Supplemental Memorandum) that it employed more than 500 people at the relevant time, but asserts that it is not

a “partnership, corporation, association, or organization.” Therefore, Plaintiff argues, it is not precluded from seeking to recover its fees from the State under the statute.

Ohio’s Supreme Court has established that a local board of education is a “quasi corporation.” *Wayman v. Board of Education, Akron City School District* (1966), 5 Ohio St. 2d 248, 249; *Board of Education v. Board of Revision* (1999), 85 Ohio St. 3d 156, 160. Although that status quite arguably militates against Plaintiff’s classification for present purposes as a “corporation,” *cf.* Defendants’ 05/03/07 Supplemental Memorandum at 2, it does not put Plaintiff outside the definition of an “organization.”

Plaintiff’s three briefs on this subject all have taken the position that Plaintiff school district is not an “organization,” but none has assayed a definition of that term. That omission, sustained over an impressive number of pages, is understandable in light of the usual meaning of the word. The Fifth Edition of *Black’s Law Dictionary* (from 1979, six years prior to enactment of the statutory language at issue) says that “Organization includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.” Similarly, *dictionary.com* references “a group of people organized for some end or work.” And although the drafters of R.C. 2335.39 saw no need to include a definition of “organization” in that section, the Code does specify elsewhere, in connection with other purposes, that “organization” has the meaning ascribed to it by *Black’s* and includes a “governmental subdivision.” R.C. 1301.01(BB) (uniform commercial code); *cf.* R.C. 2743.01(B) (school district is a type of “political subdivision”).

Although Plaintiff cannot say what an ‘organization’ is, it knows where one should *not* turn for a definition, *see* Supplemental Memo at 2 (the court cannot “resolve this dispute simply

by referencing the definition of the term 'organization' in the dictionary"), and it contends that whatever the word may mean in the context of the statute, it does not include Plaintiff, *see id.* (the term "does not include a unit of government or a public school district"). The arguments that Plaintiff advances in support of these propositions are rather elaborate, and unconvincing.

Plaintiff argues first that the principle of *ejusdem generis* suggests that a school district is not to be considered an "organization" under the statute. Plaintiff's Supplemental Memo at 4-6. Referring to the litany of "partnership, corporation, association, or organization" that R.C. 2335.39(A)(2)(d) sets forth in denoting the types of entities that are not "eligible parties" when they employ more than 500 people, Plaintiff correctly notes that "organization" is "[t]he more expansive term," and urges that it be "given meaning similar to those that begin the statutory list." *Id.* at 4.¹ That analysis, however, does not establish that a school board is not an "organization."

Ejusdem generis, of course, "does not necessarily require that the general provision be limited in its scope to the identical things specifically named." *State, Division of Wildlife v. Baker* (1983), 8 Ohio St.3d 39, 41 n. 3. Although the principle might counsel against including as an "organization" some loose confederation of individuals briefly combining in pursuit of an ad hoc purpose, it does not here weigh in favor of excluding "quasi corporations" as fundamentally distinct in kind from corporations or associations. *Cf.*, *Wayman*, 5 Ohio St.2d at 249 ("It is well settled that a board of education is a quasi corporation acting for the public ... 'for the organization ... of the public school system' In short, a board of education is a body corporate and politic of the state of Ohio"). And Plaintiff's view that such a distinction is justified by the fact that school boards are not commercial enterprises run for a profit, *see* Supplemental Memo at

¹ Plaintiff's acknowledgement in this *ejusdem generis* argument that "organization" is "similar to" but "more expansive" than "corporation" or "association" belies Plaintiff's assertion elsewhere that "organization" should not be construed to encompass such other terms. *Cf.* Plaintiff's Supplemental Memo at 2. Nor does Plaintiff begin to

6, fails to consider both that the statute (1) explicitly contemplates that non-profit corporations can fall within the definition of “organization,” and (2) exempts non-profits from the eligibility exclusion created on the basis of high net-worth, while *not* exempting non-profits from the eligibility exclusion created on the large employer basis. *Compare* R.C. 2335.39(A)(2)(c) (“an organization that is [a 501(c)(3)] shall not be excluded as an eligible party ... because of its net worth”) *with* R.C. 2335.39(A)(2)(d) (excluding without exception any “organization that employed more than five hundred persons”). Certainly the principle of *ejusdem generis* is not inconsistent with application of the principle of *expressio unius*.

The court also is unconvinced by Plaintiff’s argument that because local school boards are not excluded by R.C. 2335.39(A)(2)(a) (“The state”), they cannot be excluded by R.C. 2335.39(A)(2)(d) (organizations employing more than 500 people). The former subsection captures all State-wide governmental entities, regardless of size and including the smallest boards and commissions; the latter subsection comprehends organizations that employ more than 500 people, while not reaching, for example, political subdivisions that employ fewer than 500 people. Nothing in law or logic prohibits the legislature from establishing both categories, and one does not render the other “meaningless.” *Compare* Plaintiff’s Reply at 4 *with* Plaintiff’s Supplemental Memo at 8 (noting one federal legislator’s policy concern with helping particularly “small” jurisdictions).

In its final argument, Plaintiff turns to its construction of the legislative history of the federal Equal Access to Justice Act, 28 U.S.C. 2412. Plaintiff explains that as amended in 1985 (just after the effective date of the Ohio statute at issue here), the EAJA explicitly permits fee recoveries by units of local government with less than a net worth of \$7,000,000 and fewer than

suggest a reasonable meaning of “organization” that somehow would exclude types of corporations or partnerships. *Cf.* R.C. 2335.39(A)(2)(c) (using term “organization” specifically to include 501(c)(3) corporations).

500 employees. Plaintiff's Supplemental Memo at 10; 28 U.S.C. 2412(d)(2)(B). That is essentially the same policy choice that the Ohio legislature has made.

Plaintiff seeks to explain that the 1985 version of the federal law came in response to certain federal court decisions that had viewed the policy behind EAJA as excluding from eligibility even the smallest units of local government (by reading them *out* of the word "organization" as used in the EAJA qualifying language, which is not formulated in the same manner as Ohio's list of exclusions). Interestingly, Plaintiff here quotes a Congressman as urging that EAJA permit fee recovery by "any small *organization*, whether private or governmental" Plaintiff's Supplemental Memo at 9 (quoting Rep. Fish, emphasis added).

The two pre-1985 federal EAJA cases on which Plaintiff bases its argument, however, reflect an approach that appears to abandon the interpretation of statutory language in favor of promoting the court's own gloss on how best to achieve perceived policy goals. Thus, the court in *Citizens Council of Delaware Co. v. Brinegar* (3rd Cir. 1984), 741 F.2d 584, 590-91, acknowledged that the "dictionary definition" of the term "organization" does "include governmental bodies" -- but refused to "make a fortress out of a dictionary," on the grounds that "the sympathetic and imaginative discovery" of a statute's perceived "object" is "the surest guide" to its meaning. *See also id.* at 591 ("we no longer follow a rigid, semantic approach to statutory construction, lest we construe a statute within its letter, but beyond Congress's intent"). Suffice it to say that such an approach does not reflect the emphasis of the courts of the State of Ohio in construing the Ohio Revised Code. *See, e.g., Haghghi v. Moody* (1st Dist. 2003), 152 Ohio App.3d 600, 603 ("General principles of statutory interpretation dictate that if the language of a statute is clear and unambiguous, it must be applied as written. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545").

Brinegar, incidentally, went on to examine selected portions of legislative history in effort to determine the “specific intent” of two Congressmen (a “specific intent” contrary to the dictionary definition of the ordinary words used in the EAJA itself). In so doing, the court risked elevating the words of two out of 535 Congressmen -- speaking at one subcommittee of one committee of one house in a discussion never voted on by either chamber or presented to the President for his signature or veto -- over the text of the enacted statute. *Brinegar*, 741 F.2d at 592 (“Since Congress did not change the pertinent definitional language before passing the bill that was the subject of the colloquy, we can only conclude that there was an intent to exclude governmental bodies from EAJA’s reach”).² It did so in pursuit of a perceived policy to bar any governmental agency of any size from benefiting from the statutory fee shifting provision (a “policy” that Congress disavowed the very next year). Plaintiff in the instant case attempts the difficult balancing act of purporting to favor that interpretive style, while urging a diametrically opposed policy result. (The other case cited here by Plaintiff, *Commissioners of Highways of Towns of Annawan v. United States* (7th Cir. 1982), 684 F.2d 443, is to the same effect as *Brinegar*, although less flamboyant. 684 F.2d at 445 [purpose of EAJA was to vindicate rights of “private citizens;” thus, no governmental bodies “were intended to come within the scope of the Act”].)

Again, however, Ohio courts in construing Ohio statutes tend to follow the approach specified by Chief Justice Marshall: “In construing these laws, it has been truly stated to be the

² Plaintiff would take a giant leap farther still from this view of congressional waiver by inaction in the wake of a discussion between two Congressmen at a subcommittee hearing. Citing the same U. S. congressional subcommittee testimony, see Plaintiff’s Supplemental Memo at 7-8, Plaintiff seeks to charge the Ohio legislature with knowledge of and a duty to respond to the Washington, D.C. conversation: “When the Ohio version of the EAJA became effective on April 11, 1985, the General Assembly had the benefit of the above referenced federal legislative dialogue concluding that the term ‘organization’ does not include a unit of local government, including public school districts.” Plaintiff’s Supplemental Memo at 9. Plaintiff cites no Ohio authority for the proposition that any such “benefit” is to be inferred.

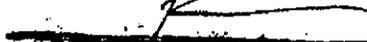
duty of the Court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it." *Schooner Paulina's Cargo v. United States* (1812), 11 U.S. 52, 60; *see also, e.g., Pierce v. Underwood* (1988), 487 U.S. 552, 566 (it is "the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means"); *State v. Lowe* (2007), 112 Ohio St.3d 507, 519 ("The court must first look to the plain language of the statute itself to determine legislative intent.... We apply a statute as written when its meaning is unambiguous and definite An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language"); *State ex rel. Canales-Flores v. Lucas Co. Board of Elections* (2005), 108 Ohio St.3d 129, 134 (where statutory words are clear, "no resort to liberal construction or an examination of the legislative history is warranted"); *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81 ("[u]nambiguous statutes are to be applied according to the plain meaning of the words used").

Plaintiff's argument depends on the notion that a local school board is not an "organization" for purposes of R.C. 2335.39(A)(2). Having reviewed the briefing and the statute, and having found no Ohio case law standing for that proposition, the court does not adopt the theory. Plaintiff's motion is denied. There is no just cause for delay.

SO ORDERED.

ENTERED

JUN 08 2007


~~Fred Nelson, Judge~~
Judge

COURT OF COMMON PLEAS ENTER  FRED NELSON, Judge THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED COSTS HEREIN.
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1 of 1 DOCUMENT

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH DECEMBER 9, 2008 ***
 *** ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2008 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 11, 2008 ***

TITLE 23. COURTS -- COMMON PLEAS
 CHAPTER 2335. FEES; COSTS
 UNCLAIMED COSTS

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§ 2335.39. Prevailing eligible party in civil action against state may move for compensation for attorney fees

(A) As used in this section:

(1) "Court" means any court of record.

(2) "Eligible party" means a party to an action or appeal involving the state, other than the following:

(a) The state;

(b) An individual whose net worth exceeded one million dollars at the time the action or appeal was filed;

(c) A sole owner of an unincorporated business that had, or a partnership, corporation, association, or organization that had, a net worth exceeding five million dollars at the time the action or appeal was filed, except that an organization that is described in subsection 501(c)(3) and is tax exempt under subsection 501(a) of the Internal Revenue Code shall not be excluded as an eligible party under this division because of its net worth;

(d) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or organization that employed, more than five hundred persons at the time the action or appeal was filed.

(3) "Fees" means reasonable attorney's fees, in an amount not to exceed seventy-five dollars per hour or a higher hourly fee approved by the court.

(4) "Internal Revenue Code" means the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as amended.

(5) "Prevailing eligible party" means an eligible party that prevails in an action or appeal involving the state.

(6) "State" has the same meaning as in section 2743.01 of the Revised Code.

(B) (1) Except as provided in divisions (B)(2) and (F) of this section, in a civil action, or appeal of a judgment in a civil action, to which the state is a party, or in an appeal of an adjudication order of an agency pursuant to section 119.12 of the Revised Code, the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal. Compensation, when payable to a prevailing eligible party under this section, is in addition to any other costs and expenses that may be awarded to that party by the court pursuant to law or rule.

A prevailing eligible party that desires an award of compensation for fees shall file a motion requesting the award with the court within thirty days after the court enters final judgment in the action or appeal. The motion shall do all of the following:

- (a) Identify the party;
- (b) Indicate that the party is the prevailing eligible party and is entitled to receive an award of compensation for fees;
- (c) Include a statement that the state's position in initiating the matter in controversy was not substantially justified;
- (d) Indicate the amount sought as an award;
- (e) Itemize all fees sought in the requested award. The itemization shall include a statement from any attorney who represented the prevailing eligible party, that indicates the fees charged, the actual time expended, and the rate at which the fees were calculated.

(2) Upon the filing of a motion under this section, the court shall review the request for the award of compensation for fees and determine whether the position of the state in initiating the matter in controversy was substantially justified, whether special circumstances make an award unjust, and whether the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy. The court shall issue an order, in writing, on the motion of the prevailing eligible party, which order shall include a statement indicating whether an award has been granted, the findings and conclusions underlying it, the reasons or bases for the findings and conclusions, and, if an award has been granted, its amount. The order shall be included in the record of the action or appeal, and the clerk of the court shall mail a certified copy of it to the state and the prevailing eligible party.

With respect to a motion under this section, the state has the burden of proving that its position in initiating the matter in controversy was substantially justified, that special circumstances make an award unjust, or that the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy.

A court considering a motion under this section may deny an award entirely, or reduce the amount of an award that otherwise would be payable, to a prevailing eligible party only as follows:

- (a) If the court determines that the state has sustained its burden of proof that its position in initiating the matter in controversy was substantially justified or that special circumstances make an award unjust, the motion shall be denied;
- (b) If the court determines that the state has sustained its burden of proof that the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy, the court may reduce the amount of an award, or deny an award, to that party to the extent of that conduct.

An order of a court considering a motion under this section is appealable as in other cases, by a prevailing eligible party that is denied an award or receives a reduced award. If the case is an appeal of the adjudication order of an agency pursuant to *section 119.12 of the Revised Code*, the agency may appeal an order granting an award. The order of the court may be modified by the appellate court only if it finds that the grant or the failure to grant an award, or the calculation of the amount of an award, involved an abuse of discretion.

(C) Compensation for fees awarded to a prevailing eligible party under this section may be paid by the specific branch of the state government or the state department, board, office, commission, agency, institution, or other instrumentality over which the party prevailed in the action or appeal from any funds available to it for payment of such compensation. If compensation is not paid from such funds or such funds are not available, upon the filing of the court's order in favor of the prevailing eligible party with the clerk of the court of claims, the order shall be treated as if it were a judgment under Chapter 2743. of the Revised Code and be payable in accordance with the procedures specified in *section 2743.19 of the Revised Code*, except that interest shall not be paid in relation to the award.

(D) If compensation for fees is awarded under this section to a prevailing eligible party that is appealing an agency adjudication order pursuant to *section 119.12 of the Revised Code*, it shall include the fees incurred in the appeal and, if

requested in the motion, the fees incurred by the party in the adjudication hearing conducted under Chapter 119. of the Revised Code. A motion containing such a request shall itemize, in the manner described in division (B)(1)(e) of *section 119.092 [119.09.2] of the Revised Code*, the fees, as defined in that section, that are sought in an award.

(E) Each court that orders during any fiscal year compensation for fees to be paid to a prevailing eligible party pursuant to this section shall prepare a report for that year. The report shall be completed no later than the first day of October of the fiscal year following the fiscal year covered by the report, and copies of it shall be filed with the general assembly. It shall contain the following information:

(1) The total amount and total number of awards of compensation for fees required to be paid to prevailing eligible parties;

(2) The amount and nature of each individual award ordered;

(3) Any other information that may aid the general assembly in evaluating the scope and impact of awards of compensation for fees.

(F) The provisions of this section do not apply in any of the following:

(1) Appropriation proceedings under Chapter 163. of the Revised Code;

(2) Civil actions or appeals of civil actions that involve torts;

(3) An appeal pursuant to *section 119.12 of the Revised Code* that involves any of the following:

(a) An adjudication order entered after a hearing described in division (F) of *section 119.092 [119.09.2] of the Revised Code*;

(b) A prevailing eligible party represented in the appeal by an attorney who was paid pursuant to an appropriation by the federal or state government or a local government;

(c) An administrative appeal decision made under *section 5101.35 of the Revised Code*.