

IN THE SUPREME COURT OF OHIO

RICHARD CORDRAY, OHIO)
 ATTORNEY GENERAL, et al.,)
)
 Plaintiffs-Appellants,)
)
 v.)
)
 THE INTERNATIONAL)
 PREPARATORY SCHOOL, et al.,)
)
 Defendants-Appellees.)

CASE NO. 2009-1418
 On Appeal from the Cuyahoga County
 Court of Appeals
 Eighth Appellate District
 Court of Appeals
 Case No. 91912

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BRIEF OF *AMICI CURIAE* THE OHIO FEDERATION OF TEACHERS, THE OHIO SCHOOL BOARDS ASSOCIATION, THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, THE BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES IN SUPPORT OF APPELLANTS

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INTERESTS OF THE AMICI CURIAE

Five leading statewide educational organizations have joined to support the appeal of the Ohio Attorney General and Ohio Department of Education in this case because Charter Schools and their Treasurers must be held to the same standards of financial accountability as traditional public schools and their Treasurers. The Amici are:

- The Ohio Federation of Teachers (“OFT”), an unincorporated association that represents more than 20,000 Ohio public school teachers and other Ohio public school employees. OFT is a long-standing advocate for Ohio’s public schools and the children who attend them.
- The Ohio School Boards Association (“OSBA”), which represents nearly 100% of the elected and appointed board members in all of the various city, local, exempted village, educational service center and joint vocational school districts throughout the State of Ohio. OSBA’s activities include extensive informational support and consulting activity such as board development and training, legal information, and policy analysis.
- The Ohio Association of School Business Officials (“OASBO”), which represents more than 1,000 Ohio public school Treasurers, business managers, food service and transportation directors and other confidential employees. OASBO is dedicated to learning, sharing and utilizing better methods of school business administration and accountability;
- The Buckeye Association of School Administrators (“BASA”), which represents over 850 active Ohio public school superintendents and administrators, as well as

members who are graduate students, retirees or persons associated with Ohio's colleges and universities; and

- The Ohio Association of Public School Employees ("OAPSE"), which represents more than 37,000 non-teaching Ohio public school employees committed to providing quality public education to Ohio's children and families.

(collectively, the "Ohio Educators").

Through their joint appearance as *amici curiae*, OFT, OSBA, OASBO, BASA and OAPSE (collectively The "Ohio Educators") seek to direct the Court's attention to the following facts and legal arguments which they believe should lead to a reversal of the Court of Appeals' decision in this case.

Ohio needs a strong, reliable and effective system of public schools, not simply to prepare Ohio children for their future, but also to keep and attract the employers and families who judge a state by the quality of education it provides to its children. The primacy of public education for Ohio was recognized in Article VI, 2 of Ohio's Constitution, requiring the General Assembly to provide for a "thorough and efficient system of common schools."

These Ohio Educators favor interpretations of Ohio law which foster the protection and preservation of Ohio's public education funds. We join Ohio's Attorney General in urging that the fiscal officers of Ohio's community schools be held to the same standards as all other Ohio public officials, including the Treasurers of traditional public school districts. Ohio's scarce education dollars must be spent for a proper educational purpose. All public school Treasurers should be held accountable for any loss or misuse of public education funds entrusted to them.

FACTUAL BACKGROUND

A. Too Many Of Ohio's Community Schools Share A History Of Fiscal Mismanagement.

Community schools are organized as either non-profit or public benefit corporations, but they have been declared by the Ohio General Assembly and this Court to be “public schools,” and part of Ohio’s system of common schools.¹ The amount of Ohio education funds diverted annually from traditional public schools to community schools has steadily increased since 1997.² In the current fiscal year approximately \$648 million, or about 7% of Ohio’s education funds³ will be directed to community schools, often referred to as charter schools. Currently about 88,000 Ohio school children are enrolled in charter schools.⁴ Since the 1997 arrival of this public education “alternative” in Ohio, more than \$3.5 billion in state educational funds have gone to charter schools.⁵

With this shift of state education resources has come repeated examples of fiscal mismanagement and improper use of public funds at community schools.

Charter schools receive public education funds diverted from local school districts, through a formula tied to student enrollment.⁶ As a result, charter schools have a strong economic incentive to inflate student enrollment to exploit the state’s funding formula. And because charter schools have little direct oversight by the state, the “industry” has drawn for-

¹ R.C. 3314.01(B). *Cincinnati City School District Bd. of Ed. v. State Bd. of Education (1st Dist.)*, 176 Ohio App. 3d 157, 2008-Ohio-1434.

² OEA Research Bulletin, October 2009, p. 4.

³ OEA Research Bulletin, October 2009, p. 4.

<https://www.ohea.org/GD/Templates/Pages/OEA/OEADetail.aspx?page=3&TopicRelationID=110&Content=16314>; See also Legislative Services Commission, “Table 2: State Source GRF, LGF, LPEG Expenditures, FYs 1975-1022” (July 20, 2009) (available at <http://ibo.state.oh.us/fiscal/budget/revenuehistory/historicalexpensituresrevenue/table2-actenacted-7-20-2009>).

⁴ *Id.*

⁵ *Id.*

⁶ R.C. 3314.08.

profit management companies and unscrupulous “operators,” who have been eager to exploit a cash rich and oversight poor funding environment. In the process, Ohio’s taxpayers and school children have been exploited.

Since the charter school experiment began in 1997, the Ohio Auditor and Ohio’s media have unearthed numerous examples of misfeasance and malfeasance that have enriched community school operators and officers at the expense of Ohio taxpayers. When a community school shuts down at mid-year, or the Auditor issues findings to recover funds, the school’s bank accounts are often empty. Students and their families are left out in the cold, and Ohio’s taxpayers are left holding the bag for state dollars gone missing, or for unpaid payroll tax, health insurance or pension obligations.

In 2002, Ohio Auditor James Petro noted that the loose regulatory standards applicable to community schools “expose the community school to fraudulent expenditures.”⁷ Auditor Petro noted then that financial recordkeeping was so inadequate at some community schools that the Auditor could not even perform an audit.⁸ That problem continues under current Auditor Mary Taylor, who recently listed nine community schools as “unauditable” as of July 2009. Some of the schools she listed have been unauditable since 2004.⁹

Disclosures of fiscal mismanagement and dishonesty at charter schools have become all too common in recent years, as shown by the following publicized examples from just the last few months:

- Audit Reports issued by Auditor Taylor in November, 2009 for Cincinnati-based Nia University Community School (recently

⁷ Ohio Auditor of State Report, entitled “Ohio Department of Education Community Schools Operational Review, 2/7/2002, filed with Appellants’ Appendix, Ohio Supreme Court Case No. 2004-1668.

⁸ *Id.*

⁹ <http://www.auditor.state.oh.us/>(follow link to pdf of “unauditable list”).

renamed “Aspiring to Excellence in Achievement Academy”), identified “thousands of dollars in taxes owed to state, federal and local governments, and thousands of dollars that employees were allegedly overpaid.” The audits also describe conflicts of interest in which school officials benefited from financial deals with the schools they managed.¹⁰

- A September 2009 State Audit Report for Cincinnati’s Harmony School, which shut down in December 2008, included “findings for recovery” of more than \$2.6 million, and twelve separate items of “material non-compliance.” One example: the failure of the School’s Treasurer to obtain the Surety Bond required by state law.¹¹ But the school had shut down months earlier, with no prospects of recovery by the state without the ability to recover from the Treasurer or other school officials entrusted with state funds.

In a series of reports in May 2009, the Dayton Daily News documented more examples of fiscal misfeasance and malfeasance at local charter schools using a common Treasurer:

- Audits of nine charter schools using the same Columbus-based Treasurer, uncovered “schools mired in debt, racked with accounting errors and missing documentation for tens of thousands of dollars in expenditures.” Problems included failure to pay to the government the taxes withheld from employee paychecks, and lapsed workers’ compensation coverage, due to failure to pay the Ohio Bureau of Workers’ Compensation (“BWC”).¹²
- The failure of the same charter school Treasurer to pay the health insurance premiums for teachers and staff at New City Charter School in Dayton, which resulted in lapsed coverage for school employees.¹³

¹⁰ “Auditor Wants Mt. Auburn Charter School Investigated,” Cincinnati Enquirer, 11/25/09, <http://news.cincinnati.com/article/20091124/NEWS0102/911250369/Auditor-wants-Mount-Auburn-charter-school-investigated>.

¹¹ Audit of Harmony Community School, for year ended June 30, 1997, issued September 21, 2009 (<http://www.auditor.state.oh.us/auditsearch/detail.aspx?ReportID=78143>).

¹² Dayton Daily News, 5/24/09 “Questions Arise About Charter Schools’ Books,” http://www.daytondailynews.com/news/dayton-news/charter-schools-served-by-treasurer-dogged-by-fiscal-problems-131629.html?cxttype=rss_local-news.

¹³ Dayton Daily News, 5/19/09 “Charter School Stops Paying; Teacher Insurance Lapses,” <http://www.daytondailynews.com/news/dayton-news/charter-school-stops-paying-teacher-insurance-lapses-124542.html>

- The same Treasurer was found in an audit of Nu Bethel Center of Excellence, to have allowed \$28,000 in illegal expenditures. He also failed to pay the taxes withheld from teacher and staff paychecks to the state and federal government.¹⁴

B. TIPS' Collapse Shows The Need For Strict Public Official Liability For Charter School Treasurers.

This case presents facts that are sadly typical of the sorry history of Ohio community school fiscal mismanagement. It arises from the collapse in 2005 of The International Preparatory School ("TIPS"), a charter school located in Cleveland.

Defendant Hasina Shabazz was a founder of TIPS and served as its Treasurer.¹⁵ TIPS closed abruptly in October 2005, leaving families scrambling to find new schools for their children only a few weeks into the school year. As state officials sifted through the fiscal ruins, the State Auditor found what has become all too common among community schools – fraudulent, inflated claims of enrollment that allowed the school to receive more than \$1.4 million in state education funds to which it was not entitled, at the expense of the local school district.¹⁶ The Auditor issued a Finding of Recovery as allowed by R.C. 9.39, against TIPS, School Treasurer Shabazz and the estate of her husband.

Not surprisingly, TIPS' bank account was empty. As a result, the taxpayers' ability to recover the State's missing education dollars depended on the ability to recover some portion of the lost money from the school's Treasurer, who was obligated to safeguard these public funds. But, the Court of Appeals found that a charter school Treasurer had the same protection from

¹⁴ Dayton Daily News, 5/8/2009, "Audit Finds Illegal Spending at Charter School," http://www.daytondailynews.com/news/dayton-news/audit-finds-illegal-spending-at-charter-school-111758.html?cxtype=rss_local-news

¹⁵ *Cordray v. The International Preparatory School (TIPS)*, 8th Dist. No. 91912, 2009-Ohio-2364 at ¶ 6.

¹⁶ *Id.* at ¶ 4.

personal liability as an officer of a private corporation, not like a public school treasurer or other “public official” who had lost public funds.

That decision should be reversed. If charter schools really are “public schools,” their Treasurers must be held to the same standard of accountability for the public funds entrusted to them, just like the Treasurers of Ohio’s traditional public school districts.

ARGUMENT

APPELLANTS’ PROPOSITION OF LAW:

Treasurers Of Community Schools Are “Public Officials” That Are Strictly Liable For All Public Money Received Or Collected By Them During Their Time In Office.

The Eighth District Court of Appeals wrongly decided that a charter school Treasurer is not a “public official” under R.C. 9.39, and, therefore, cannot be held strictly liable like other public school Treasurers for the loss of public funds. Instead, the Court improperly treated a charter school Treasurer as if she was an officer or director of a private, non-profit corporation, requiring proof of personal wrongdoing sufficient to pierce the corporate veil. *Cordray v. International Preparatory School*, 8th Dist. App. No. 91912, 2009-Ohio-2364, ¶ 51.

That decision was contrary to unambiguous statutes and the decision of this Court. Charter school Treasurers are “public officials” as that term is used in R.C. 117.01(E) and R.C. 9.38(1) and are strictly accountable for the state education funds entrusted to them, just like the Treasurers of traditional public school districts.¹⁷

¹⁷ *Eschelby v. Bd. of Education* (1902), 66 Ohio St. 71, 73 (“absolute” liability for a public school Treasurer); *State v. Herbert* (1976), 49 Ohio St.2d 88, 97; *State v. Gaul* (8th Dist. 1977), 117 Ohio App.3d 839.

A. Unambiguous Statutory Language Makes Charter School Treasurers Ohio “Public Officials.”

This action was filed pursuant to R.C. 117.28 and 117.36, based on the liability established at R.C. 9.39, which provides that:

All public officials are liable for all public money received or collected by them or by their subordinates under color of office. (emphasis added).

At issue in this case is whether Community School Treasurers are “public officials,” and whether the state education funds they safeguard are received under “color of office.” The statutes and decisions of this Court show without doubt that the answer to both questions is “yes.”

First, the statutes make clear that charter school Treasurers are “public officials:”

- R.C. 9.38 provides that the terms “public official,” “color of office” and “public office” as used in Section 9.39 have “the same meaning as in Section 117.01 of the Revised Code.” Thus, Ohio statutes provide specific definitions for these terms.
- “Public official” as defined at R.C. 117.01(E) means “any officer, employee, or duly authorized representative or agent of a public office.”
- R.C. 117.01(D) broadly defines “public office” to mean “any state agency, public institution, political subdivision, or other organization, office, agency, institution, or other entity established by the laws of this state for the exercise of any function of government.” (emphasis added).
- R.C. 117.01(A) provides that “color of office.” means “actually, purportedly, or allegedly done under any law, ordinance, resolution, order or other pretension to official right, power, or authority.”

The community schools authorized by R.C. Chapter 3314 are, without doubt, “public offices.” They are public institutions, political subdivisions and/or other institutions or entities “established by the laws of this state [R.C. Chapter 3314] for the exercise of any function of government.” The government function they perform is “public education.” The General Assembly provided that “a community school created under this chapter is a public school, independent of any school district, and is part of the State’s program of education.” R.C. 3314.01(B). (emphasis added)

In addition, funds handled by charter school Treasurers are received “under color of office,” because such funds are paid by the state under the authority of R.C. 3314.08, which describes the funding formula for charter schools.

Other provisions of state law also provide that “community schools,” despite their peculiar organizational structure, are “public schools.” As an example, R.C. 3314.08(F) provides that “a community school shall be considered a school district and its governing authority shall be considered a board of education for the purpose of applying to any state or federal agency for grants”

Court decisions reaffirm that charter school Treasurers are employed by a “public office,” and handle state education funds under “color of office,” making them “public officials.” In *State ex rel. Ohio Congress of Parents and Teachers v. State Board of Education*, (2006) 111 Ohio St.3d 568, 2006-Ohio-5512 (“*Ohio PTA*”), a majority of this Court concluded that the community schools established by R.C. 3314 “are independently governed public schools that are funded from state revenues pursuant to R.C. Chapter 3314.” (emphasis added)

This Court summarized its findings as follows:

The General Assembly explained that “a community school created under this Chapter is a public school, independent of any

school district, and is part of the State's program of education." R.C. 3314.01(B). Community schools are state-funded, R.C. 3314.08(D), but each is privately run. R.C. 3314.01 and 3314.02(B) and (C)(1). . . . While community schools are exempt from certain state laws and regulations, R.C. 3314.04, they must comply with many of the same statewide academic standards, R.C. 3314.03(A)(11).

111 Ohio St.3d at 569.

In rejecting arguments made by several of these same Ohio Educators, the Court acknowledged that "the Ohio Constitution requires establishment of a system of common schools. . . . [T]he General Assembly has augmented the State's public school systems with public community schools." *Id.* at 577 (emphasis added).

The U.S. Court of Appeals for the Sixth Circuit recently agreed. In *Greater Heights Academy v. Zelman* (6th Cir. 2008), 522 F.3d 678, 680, the Court considered this Court's decision in *Ohio PTA*, concluding:

After considering Ohio statutory and case law, as well as the substantiative control that Ohio exerts on its community schools, it is apparent that community schools are political subdivisions of the State.

See also, State ex rel., Rogers, Attorney General v. New Choices Community School, 2d Dist. No. 23031, 2009-Ohio-4608 (concluding that a community school is a "political subdivision").

In summary, the unambiguous statutory language, this Court's holding in *Ohio PTA*, and the 6th Circuit's holding in *Greater Heights Academy*, establish that Ohio's community schools are "political subdivisions." As a result, Treasurers employed by Ohio's community schools are "public officials" who should be held accountable for public monies they receive on behalf of a "public office."

A community school Treasurer is a "public official" because he is an "officer, employee or duly authorized representative or agent of a public office." R.C. 117.01(D) and (E).

B. The Court of Appeals Erred in Concluding There Was No Statutory Definition of “Public Official.”

The Court of Appeals disregarded the plain statutory language of R.C. 9.39, which incorporates the definitions of R.C. 117.01. Instead, the Court found that R.C. 9.39 “does not define ‘public officials.’” 2009-Ohio-2364 at fn. 4, ¶ 32. The Court then proceeded to search for an “ordinary meaning” of “public officials,” citing *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, ¶36. The Court settled on a narrow dictionary definition of “public official” as someone who is “legally elected or appointed to office and who exercises governmental functions.” *Id.*, citing Merriam Webster’s Collegiate Dictionary, Tenth Ed. 1993. This definition, the Court found, excluded School Treasurers employed by publicly funded community schools.

This far narrower definition of “public official” is contrary to the broader statutory definition at R.C. 117.01(E), which includes “any officer, employee, or duly authorized representative or agent of a public office.” Because the General Assembly unambiguously provided by statute a definition of “public official,” at R.C. 117.01(E), to use in imposing liability under R.C. 9.39, this Court should follow that clear statutory definition and reject the contradictory “ordinary meaning” extracted from a dictionary by the Court.

By failing to look to the statutory definition of “public officials,” the Court of Appeals disregarded the mandate of R.C. 1.42, which provides that “Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” This Court has looked to the “usual and ordinary” meaning of a word only in the absence of a statutory definition. *Brecksville v. Cook* (1996) 75 Ohio St.3d, 1996-Ohio-171. The Court of Appeals improperly disregarded the legislative definitions of “public official” in R.C.117.01(D) and (E) when it resorted to a narrower dictionary definition.

C. The Court of Appeals Erred in Applying The More General Provision of R.C. 1702.55 Rather Than the More Specific Provisions of R.C. 9.38 and R.C. 117.01(E).

In finding that charter school Treasurers are not “public officials” under R.C. 9.39, the Court of Appeals failed to follow the rule for statutory construction set forth at R.C. 1.51, which provides that:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevails.

In this case, the more general provision is R.C. 1702.55 limits the liability of officers and directors of non-profit corporations. In contrast, R.C. 9.39 and 117.01 are “special or local provision(s)” which establish strict liability for any “public officials” handling public money “under color of office” for a “public office.” This “special provision” covers a non-profit corporation acting as a public school under R.C. 3314.01(B).

While the more general law may limit the liability of the officer of a non-profit corporation, the more local or specific law applies strict liability to Treasurers of the smaller subset of non-profit corporations functioning as a “public office,” and handling state funds under “color of office.”

This Court has set a high standard for nullifying a statute through R.C. 1.51, finding that “[w]hen two statutory provisions are alleged to be in conflict, R.C. 1.51 requires us to construe them, where possible, to give effect to both.”¹⁸ The only exception is when “they are

¹⁸ *Board of Education of Gahanna-Jefferson Local School District v. Zaino* (2001), 93 Ohio St.3d 231, 234 (emphasis in original).

irreconcilable and in hopeless conflict.”¹⁹ This Court has also held that there is no real conflict when both statutes can be used, albeit in different circumstances.²⁰

In this case, the Court can readily find that the apparent conflict between R.C. 1702.55 and R.C. 9.39 is not irreconcilable. As the Ohio Attorney General has argued, the strict liability imposed by R.C. 9.39 on charter school Treasurers for the state funds they receive is personal, and is distinct from an liability derived simply from their status as officers of a non-profit corporation. *See State v. Herbert* (1976), 49 Ohio St.2d 88, 97. A community school Treasurer assumes a position of trust when accepting an appointment to receive and expend state education funds. Ms. Shabaz “assume[d] upon [her]self the duty of receiving and safely keeping the public money.” *State, for the Use of Wyandott Co. v. Harper* (1856), 6 Ohio St. 608, 610. Here, these statutory duties were personal, and are distinct from the duties of an officer of a more typical non-profit corporation, which does not receive and spend public funds.

As a result, a community school Treasurer is subject to strict liability under R.C. 9.39, despite the apparent conflict with R.C. 1702.55.

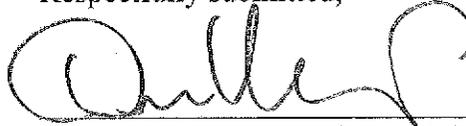
¹⁹ *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 29.

²⁰ *Zaino*, 93 Ohio St.3d at 235.

CONCLUSION

The Treasurers of Ohio community schools are “public officials,” subject to strict liability for the public funds entrusted to them under R.C. 9.39, just like other Ohio public school Treasurers. The Court of Appeals decision should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 13th, 2010, a copy of the foregoing was served via regular U.S. Mail, postage prepaid upon the following:

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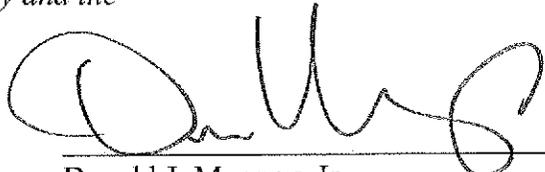
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