

ORIGINAL

In the
Supreme Court of Ohio

RICHARD CORDRAY, OHIO ATTORNEY GENERAL, et al.,	:	Case No. 2009-1418
	:	
Plaintiffs-Appellants,	:	On Appeal from the
	:	Cuyahoga County Court of Appeals,
v.	:	Eighth Appellate District
	:	
THE INTERNATIONAL PREPARATORY SCHOOL, et al.,	:	Court of Appeals Case
	:	No. 91912
	:	
Defendant-Appellees.	:	

**REPLY BRIEF OF APPELLANTS RICHARD CORDRAY AND
THE OHIO DEPARTMENT OF EDUCATION**

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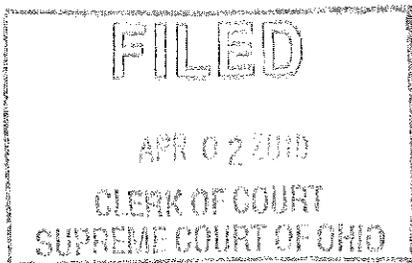


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INTRODUCTION

As explained in the State's opening brief, R.C. 9.39 codifies the longstanding common law rule that public officials are strictly liable for public funds received on their watch. See *Seward v. Nat'l Sur. Co.* (1929), 120 Ohio St. 47, 49-50. The provision has no exceptions: "All public officials are liable for all public money received or collected by them or their subordinates under color of office." As the State observed, a "public official" is "any officer" of a "political subdivision" or "entity established by the laws of this state for the exercise of any function of government." R.C. 117.01(D), (E). Appellee Hasina Shabazz does not (and cannot) contest the plain meaning of these statutory provisions.

When those provisions are applied to the facts of this case, the result is clear. As treasurer, Shabazz was the "public official[]" responsible "for all public money received" by the now-defunct International Preparatory School ("TIPS"). And, under this Court's precedents, a community school is *both* a "political subdivision" and an "entity established by the laws of this state for the exercise of any function of government." Shabazz therefore falls within the four corners of R.C. 9.39. She is strictly liable for the \$1.4 million in public education money that TIPS improperly collected during her tenure.

Shabazz and her amici raise four arguments in response: (1) Shabazz was not in fact the treasurer of TIPS; (2) Shabazz is not a "public official" because TIPS was neither a "political subdivision," nor an "entity . . . exercis[ing] any function of government"; (3) R.C. 9.39 is displaced by the statutes governing community schools; and (4) Shabazz is not personally liable for TIPS's corporate obligations. None of these arguments withstands scrutiny.

ARGUMENT

A. Shabazz's admissions establish that she was the treasurer of TIPS.

Shabazz appears to acknowledge that a “treasurer” is typically a “public official” for the purposes of liability under R.C. 9.39. (Br. at 7, 9). She nevertheless disclaims liability because “[s]he was not the treasurer of [TIPS],” but simply “the treasurer of the board of directors.” (Br. at 7). This argument—that TIPS was somehow distinct from its corporate parent—flounders on two levels.

First, Shabazz's attempt to separate TIPS into two distinct legal entities—the community school and a corporation—fails as a matter of law. R.C. 3314.03(A)(1) mandates that community schools “be established as” corporations. See *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512, ¶ 66 (“Community schools may only be organized as . . . corporations.”). The school and the corporation are therefore one and the same. Because Shabazz was, by her own admission, the treasurer of the TIPS board of directors, she was also the treasurer of TIPS itself.

Second, Shabazz has admitted her status as treasurer of the *TIPS school* on multiple occasions. Although she says now that “the position . . . was held by other individuals” (Br. at 8), Shabazz conceded at her deposition that TIPS obtained a bond for her. (Dep. of Hasina Shabazz (May 19, 2008), at pp. 28, 30). Ohio law mandates that a community school obtain such bonds only for its “designated fiscal officer.” R.C. 3314.011. Shabazz also testified that she signed the school's checks, prepared its budgets, issued its financial forecasts under R.C. 3314.03(A)(15), and handled its purchases—tasks performed by a school's treasurer. (Dep. of Hasina Shabazz (May 19, 2008), pp. 14, 25). Additionally, Shabazz did not deny the allegation in the State's complaint that TIPS was a public school and that she was the school's treasurer. (First Am. Compl. at ¶¶ 5, 6, Supp. at S-91-S-92; Answer at ¶¶ 5, 6, Supp. at S-124). She

likewise made no effort to rebut the Auditor's multiple findings that she acted as the school's treasurer. (Verified Compl., Ex. A, at finding 2001-01 and 2001-02, Supp. at S-28; Am. Compl., Ex. 1, at finding 2005-01 and 2005-06, Supp. at S-107, S-110). Because these averments and findings were not contested below, they are deemed admitted as a matter of law. See Civ. R. 8(D); R.C. 117.36.

In a last-ditch effort to avoid this conclusion, Shabazz invokes the cloak of summary judgment; she claims "that there is some debate" as to the nature of her position with TIPS. (Br. at 8). To the contrary, there is no debate. Shabazz failed to rebut the State's prima facie evidence that she was the treasurer of TIPS, and her "school versus corporation" distinction has no legal foundation. Shabazz was, in every sense, the treasurer of the TIPS school.

B. Shabazz, as the treasurer of TIPS, was a public official.

Shabazz next argues that, even if she was the treasurer of TIPS, she is not a "public official" under R.C. 9.39. (Br. at 9). As discussed above, the term "public official" encompasses any officer of a "political subdivision" or an "entity established by the laws of this state for the exercise of any function of government." R.C. 117.01(D), (E). Because TIPS qualifies under either definition, Shabazz is a public official subject to liability under R.C. 9.39.

1. Ohio Congress confirms that community schools are political subdivisions.

As the State noted in its opening brief, the General Assembly has classified community schools as "political subdivisions" in a number of contexts. Notably, community schools are treated as "political subdivisions" under Ohio's political subdivision liability statute, and under public employee collective bargaining statutes. R.C. 2744.01(F); R.C. 4117.01(B). This is of no moment, Shabazz says, because community schools "can be political subdivisions for some purposes but not others." (Br. at 11). Then, she summarily asserts that "TIPS is not a political subdivision for purposes of R.C. 9.39." (Br. at 11).

Shabazz fails to cite a single code section to support her sometimes-we-are, but sometimes-we-are-not theory, nor does any statutory support exist. In instance after instance, the General Assembly has treated community schools like political subdivisions, not like private entities. Community schools must comply with the State’s auditing requirements and its public records, open meeting, and ethics laws. R.C. 3314.03(A)(8), (A)(11). They are funded through state tax revenues, R.C. 3314.08; they must return remaining funds and equipment to the State upon closing, R.C. 3314.074; and they must be nonsectarian and non-discriminatory, R.C. 3314.06(A), (D). The fact that the General Assembly has subjected community schools to an assortment of laws generally reserved for public entities undercuts Shabazz’s contention that TIPS is a private entity shielded from R.C. 9.39. See *Greater Heights Acad. v. Zelman* (6th Cir. 2008), 522 F.3d 678, 680 (“[C]onsidering Ohio’s statutory and case law, as well as the substantive control that Ohio exerts on its community schools, it is apparent that community schools are political subdivisions of the state.”); *State ex rel. Rogers v. New Choices Cmty. Sch.* (2d Dist.), No. 3912, 2009-Ohio-4608, ¶¶ 28, 50 (same).

If doubt remains on the issue, this Court’s decision in *Ohio Congress* resolves it. In that case, the appellants—a collective of public school boards, teachers, and parents—challenged the General Assembly’s decision to establish and sanction community schools in R.C. Chapter 3314. 2006-Ohio-5512 at ¶ 1. Among other claims, they argued that the State could not provide loan guarantees to community schools under Section 5, Article VIII of the Ohio Constitution. *Id.* at ¶ 69. The schools were organized as non-profit corporations under R.C. 3314.03(A)(1), and, as appellants observed, the State could not constitutionally “assume the debts of . . . any corporation.” *Id.* at ¶ 71 (quoting Ohio Const., art. VIII, § 5). In response, the community

schools asserted that they must instead be “regarded as school districts because they are required to comply with certain Ohio laws as if they were school districts.” *Id.* at ¶ 72.

The Court accepted that argument: “[C]ommunity schools belong to the state’s system of common schools” and “they are ‘part of the state’s program of education.’” *Id.* (citing R.C. 3314.01(B)). “As a result, they are *not private business corporations*,” and the State could lend to them notwithstanding the prohibitions in Section 5. *Id.* (emphasis added). Simply put, *Ohio Congress* confirms that Ohio law views community schools as political subdivisions, and not “private, non-governmental entit[ies]” as Shabazz argues. (Br. at 10).

As a final matter, Shabazz and her amici maintain that the Attorney General’s position contradicts earlier opinions issued by his office, (Br. at 10, Amici Br. at 11 n.4), but that is not so. The Attorney General’s Office has stated that “a nonprofit corporation formed under R.C. Chapter 1702, *as a general rule*, is neither established by, nor functions as, an agency of state or local government.” 2000 Ohio Atty. Gen. Op. No. 00-06, at 7 (emphasis added). This statement is simply a general rule of thumb, not a blanket decree. In certain circumstances, a nonprofit corporation may indeed qualify as a political subdivision. See *State ex rel. Freedom Commc’ns, Inc. v. Elida Cmty. Fire Co.* (1998), 82 Ohio St. 3d 578, 579 (“The mere fact that ECFC is a private, nonprofit corporation does not preclude it from being a public office.”). An entity’s status “‘depends on the *specific statutory purpose* for which the determination is being made.’” 2000 Ohio Atty. Gen. Op. No. 00-06, at 7 n.7 (citation omitted and emphasis added).

Further, community schools fit comfortably within the Attorney General’s interpretation of the term “political subdivision”—“a limited geographical area of the State, within which a public agency is authorized to exercise some governmental function.” 2004 Ohio Atty. Gen. Op. No. 04-014, at 16 (citation omitted). R.C. 3314.01(B) states that community schools are “public

schools,” and that they “are part of the state’s program of education.” Further, R.C. 3314.02(C)(1) limits their location to certain “challenged school district[s].” Accordingly, no support exists for Shabazz’s assertions; the Attorney General’s position that community schools are “political subdivisions” is entirely consistent with his office’s previous opinions.

As discussed above, *Ohio Congress* conclusively resolved the status of community schools under Ohio law. The community schools urged this Court to “regard[] [them] as school districts.” *Ohio Congress*, 2006-Ohio-5512 at ¶ 72. After examining R.C. Chapter 3314 and its purpose, the Court agreed. *Id.* Under that holding, TIPS is akin to a public school district and, hence, a political subdivision.

2. *Ohio Congress* confirms that community schools are established by the laws of this state for the exercise of a function of government.

Even if there were some doubt about whether community schools are political subdivisions (and there is not), these schools are also “entit[ies] established by the laws of this state for the exercise of a[] function of government.” R.C. 117.01(D). As such, the schools are “public offices” under R.C. 117.01, and their officers are subject to liability under R.C. 9.39.

First, community schools are indisputably “established by the laws of this state.” Under Section 2, Article VI of the Ohio Constitution, the General Assembly shall “secure a thorough and efficient system of common schools throughout the state.” The legislature used this constitutional authority to enact R.C. Chapter 3314, which established community schools in Ohio. See *Ohio Congress*, 2006-Ohio-5512 at ¶ 30 (“In enacting community school legislation, the General Assembly . . . provid[ed] for statewide schools that have more flexibility in their operation.”). But for the laws of this State, community schools like TIPS could not exist. Indeed, R.C. Chapter 3314 repeatedly states that the schools are “established” under its provisions. See, e.g., R.C. 3314.02(A)(7), (E)(1), (E)(3); R.C. 3314.041; R.C. 3314.08(D).

Second, community schools indisputably perform a “function of government.” K-12 education is a historic governmental function: “Like traditional schools, community schools are funded by the state . . . and are charged with educating Ohio children.” *Ohio Congress*, 2006-Ohio-5512 at ¶ 72; accord *Freedom Commc’ns*, 82 Ohio St. 3d at 579 (“An entity organized for rendering service to residents of the community and supported by public taxation is a public institution.”). As this Court has stated, “they belong to the state’s system of common schools,” and, therefore, perform a function of government. *Ohio Congress*, 2006-Ohio-5512 at ¶ 72. Neither Shabazz nor her amici respond to this inescapable conclusion.

Regardless of the pathway one takes through R.C. 117.01(D), community schools qualify as “public offices.” They are both political subdivisions and entities established by the laws of the state to perform a governmental function. Hence, their officers are “public officials” under R.C. 117.01(E), and subject to liability under R.C. 9.39.

C. R.C. Chapter 3314 does not displace R.C. 9.39.

Under R.C. 3314.04, community “school[s] [are] exempt from all state laws and rules pertaining to schools, school districts, and boards of education.” The provision excuses community schools “from most state laws and regulations dealing with public schools,” thereby allowing them “more flexibility in their operation,” but still mandating compliance with basic curriculum standards, standardized testing, and health and safety standards. *Ohio Congress*, 2006-Ohio-5512 at ¶ 30 & n.6. According to Shabazz and her amici, “[t]his is the clearest indication of the General Assembly’s intention that R.C. 9.39 does not apply to persons serving as directors or officers of a community school.” (Amici Br. at 6; Shabazz Br. at 12). This interpretation is untenable for three distinct reasons.

First, Shabazz misreads the language of the provision. R.C. 3314.04 exempts only the community “*school . . . from state laws and rules*” pertaining to public school districts. (Emphasis added). It does not exempt *employees* and *officials* of the school.

Second, Shabazz disregards the fact that the General Assembly expressly shielded community school officials from some liabilities in R.C. Chapter 3314, and that liability under R.C. 9.39 was not among them. The law limits the officials’ personal liability for certain torts and for the school’s contractual liabilities. R.C. 3314.07(E); R.C. 3314.071. That the General Assembly then failed to exempt community school officials from R.C. 9.39 liability in this Chapter confirms that it had no desire to do so. See *Thomas v. Freeman* (1997), 79 Ohio St. 3d 221, 224-25 (“[I]f a statute specifies one exception to a general rule . . . other exceptions or effects are excluded.”) (citation omitted).

Third, Shabazz’s interpretation would lead to absurd results. She argues that community schools are exempted from “general provisions” of the revised code like R.C. 9.39. (Br. 12). Her amici repeat this position: If a statute “is not included in the list of statutes the General Assembly expressly made applicable to community schools in R.C. 3314.03(A)(11)(d),” it “does not apply.” (Br. at 6). If this were true, then community schools would be exempt from a host of generally applicable laws pertaining to zoning, the environment, intellectual property, real property, and the like. The General Assembly has never given any entity such a blanket exemption from a wide array of laws, and there is no evidence that it did so here.

As shown by its plain language (and as observed by this Court in *Ohio Congress*), R.C. 3314.04’s objective is far more modest: It “exempts community schools from most state laws and regulations *dealing with public schools.*” *Ohio Congress*, 2006-Ohio-5512 at ¶ 30 n.6

(emphasis added). The provision does not shield community schools—or their officers—from generally applicable laws like R.C. 9.39.

D. The fact that TIPS was operated by a corporation does not negate Shabazz’s liability under R.C. 9.39.

In her final legal argument, Shabazz asserts that “directors of a corporation . . . have no personal liability for any obligations of the corporation.” (Br. at 13). Her amici repeat this theme: “Community school directors and officers are to be treated in the same way as other not-for-profit directors and officers.” (Br. at 6). This argument mistakenly equates TIPS to a private corporation. As discussed above, TIPS qualifies as a “public office” under R.C. 117.01(D), and these protections do not apply.

It is axiomatic that “shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation.” *Dombroski v. Wellpoint, Inc.*, 119 Ohio St. 3d 506, 2008-Ohio-4827, ¶ 16. These protections are memorialized in R.C. 1702.55(A), which shields “[t]he members, the directors, and the officers of a corporation” from “personal[] liab[ility] for any obligation of the corporation.”

Whatever the scope of these protections, they have no applicability to *public* offices and *public* officials. “It has been the general policy . . . to hold the public official accountable for the moneys that come into his hands as such official.” *Seward*, 120 Ohio St. at 49-50. The official who receives public funds is strictly liable for any losses, irrespective of fault or negligence. *Id.* at syl. ¶ 2; accord *State ex rel. Wyandot County v. Harper* (1856), 6 Ohio St. 607, 610 (“[T]he treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law,” he “voluntarily takes upon himself the risks incident to the office,” and such an official “is, in effect, an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands.”). As this Court

has long recognized, a less stringent rule “would open the door very wide for the accomplishment of the grossest frauds” upon the public. *Seward*, 120 Ohio St. at 50

As discussed above, TIPS was not a “private business corporation[.]” *Ohio Congress*, 2006-Ohio-5512 at ¶ 72. Rather, the State disbursed millions of dollars to a “public office” because TIPS “belong[ed] to the state’s system of common schools.” *Id.* And the public official responsible for those funds—Shabazz, as TIPS’s treasurer—is strictly liable for any loss or misuse. See *Eshelby v. Bd. of Educ.* (1902), 66 Ohio St. 71, 73 (“[I]t [is] quite clear that the liability of the [school district’s] treasurer is absolute.”).

Simply put, the State is not attempting to enforce a corporate obligation, but the strict duty of liability that has long been imposed on those entrusted with public money. Because Shabazz was a “public official,” she may not seek shelter under R.C. 1702.55.

E. All of the public policy considerations support the State’s position in this case.

Shabazz’s amici offer a number of policy arguments against application of R.C. 9.39 to community school treasurers. They highlight the success that some community schools have achieved in improving educational outcomes, and they summarize the mechanisms in R.C. Chapter 3314 that permit oversight of community schools by sponsors and the State. (Amici Br. at 2, 8). If a particular school is mishandling public funds, amici observe, the State may shut it down. (Amici Br. at 3). And if an individual treasurer commits fraud or handles public money in bad faith, she should be held personally liable. (Amici Br. at 7). But applying R.C. 9.39 to community school treasurers, amici declare, would have a “serious chilling effect” on “[t]he innovative spirit (and excellence in education) that characterize community schools.” (Amici Br. at 8-9).

These policy considerations are not relevant to the Court’s statutory inquiry. See *Kaminski v. Metal & Wire Prods. Co.*, No. 2008-0857, 2010-Ohio-1027, ¶ 61 (“[I]t is not the role of the

courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly.”). As discussed above, the application of R.C. 9.39 is clear in this case. TIPS was a public entity, and Shabazz was its treasurer. Under the statute, she is strictly liable for TIPS’s improper receipt and subsequent improper expenditure of some \$1.4 million in public money.

Even if the policy considerations were relevant, however, they favor the State. The General Assembly afforded community schools “more flexibility in their operation,” permitting greater experimentation in educational approaches and curricular programs. *Ohio Congress*, 2006-Ohio-5512 at ¶ 30. It also altered oversight methods, placing greater emphasis on “parental choice and sponsor control” in “hold[ing] community schools accountable” for their success or failure in educating students. *Id.* at ¶ 31.

But there is no evidence that the General Assembly intended to relax the traditional standards of care for those community school officials entrusted with public money. After all, that official has one strict, but narrow duty—“disburse the money according to law.” *Sheward*, 120 Ohio St. at 51. As this Court recognized long ago, the treasurer had an equally strict standard of care; she “is, in effect, an insurance against the delinquencies of himself, and against the fault and wrongs of others in regard to the trust placed in his hands.” *Harper*, 6 Ohio St. at 610. This absolute liability is a “risk[] incident to the office.” *Id.*

The need for this strict standard of care is all the more pronounced in the education funding context. As this Court is well aware, the State’s fiscal resources are finite, but crucial to the survival and success of all public schools. In this case, the \$1.4 million in taxpayer money that improperly went to TIPS based on false enrollment reports was \$1.4 million that did not go to other public schools, both traditional and community. Furthermore, as amici themselves

acknowledge, many community schools are plagued by fiscal mismanagement of public funds. (Amici Br. at 3). When a school implodes, as happened here, typically little to no money remains in the school's coffers. The State's only recourse is to recover against the individual accountable for those funds—the treasurer. Requiring the State now to show personal fault or fraud as a prerequisite for liability, as amici urge (Amici Br. at 7), would contradict a century of this Court's precedents, hamstringing the State's efforts to recover improperly acquired funds, and “open the door very wide for the accomplishment of the grossest frauds” by the treasurer's subordinates. *Seward*, 120 Ohio St. at 50.

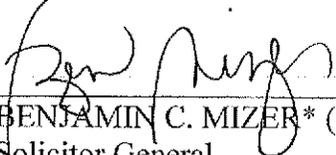
At bottom, neither Shabazz nor her amici have offered a cogent reason for why community school treasurers should be any less accountable than other public school treasurers for taxpayer money. Both officials are equally part of “the state's system of common schools.” *Ohio Congress*, 2006-Ohio-5512 at ¶ 72. The plain language of R.C. 9.39, this Court's precedents, and sound public policy treat them equally as well; the law “place[s] final responsibility for public funds on the[ir] shoulders.” *State ex rel. Vill. of Linndale v. Masten* (1985), 18 Ohio St. 3d 228, 229. In this case, TIPS improperly collected \$1.4 million in taxpayer money. Shabazz, as treasurer, is strictly liable for those funds.

CONCLUSION

For these reasons, this Court should reverse the decision by the Eighth District Court of Appeals and affirm the summary judgment entered by the trial court.

Respectfully submitted,

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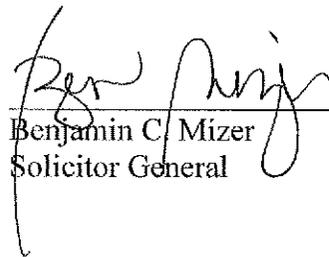
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellants Richard Cordray and The Ohio Department of Education was served by U.S. mail this 2nd day of April, 2010, upon the following counsel:

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