

IN THE SUPREME COURT OF OHIO

ORIGINAL

Board of Education of the City School
District of the City of Cincinnati,

Appellant,

v.

Roger T. Conners, et al.,

Appellees.

Case No: 2011-0673

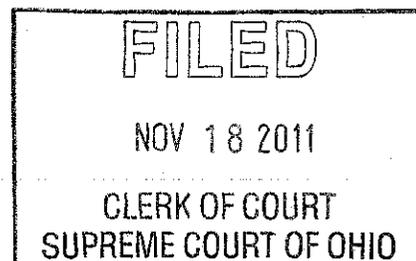
On Appeal From the Hamilton County
Court Of Appeals, First Appellate
District

**MERIT BRIEF OF AMICI CURIAE OHIO ALLIANCE FOR PUBLIC CHARTER
SCHOOLS, BLACK ALLIANCE FOR EDUCATIONAL OPPORTUNITIES,
NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS,
OHIO COALITION FOR QUALITY EDUCATION AND SCHOOL CHOICE OHIO
IN SUPPORT OF APPELLEES ROGER T. CONNERS, ET AL.**

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I. INTRODUCTION

Like the schools that make up the Cincinnati Public School District, charter schools, known as community schools in Ohio, are part of Ohio's public school family.¹ Established in 1997 as a means of enhancing our district-based public school system, Ohio's public charter school program aims to infuse innovation into the public education system while expanding the educational options available to Ohio's parents and students. Ohio's 350 charter schools, housed largely in "challenged" urban districts, afford at least one option — a public school of their choice — to many families with few others.²

Today, charter schools are a core component of Ohio's public education system. Over 100,000 Ohio children receive their public education at a charter school. And these schools continue to improve on their performance. Ohio's charter schools have outperformed urban-area traditional districts, including Dayton, Toledo, Youngstown, and, it bears noting, Cincinnati, on "value-added" rankings four of the last five years.³ Yet despite this growing success, securing adequate and affordable facilities remains one of the greatest challenges facing charter schools. Although publicly funded, Ohio's charter schools lack access to many of the resources enjoyed by school districts. Among other challenges, charter schools cannot draw from a local tax base to fund facilities, nor can they partner with the Ohio Schools Facilities Commission, which funds construction and renovation projects for traditional school districts. These obstacles not only

¹ R.C. 3314.01; *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148.

² R.C. 3314.02(A)(3) and (c)(1) (noting that charter schools may open in Ohio's "challenged" school districts).

³ See Marianne Lombardo, Ohio Alliance for Public Charter Schools, Ohio Community Charter Schools 2010-11 Valued-Added Data Analysis (2011), available at http://www.oapcs.org/files/u115/OAPCS_Value_Added_Analysis_10-11.pdf.

stunt charter school growth and success, but they also discourage high-performing charter school operators from opening schools in Ohio.⁴

Regrettably, Cincinnati Public Schools (CPS) has further exacerbated the facilities challenges faced by Ohio's charter schools. Because Ohio is unable to fund new facilities for charter schools at the same level it funds facilities for school districts, the State, to at least partially fill that gap, requires that unused schools buildings be made available to charter schools, see R.C. 3313.41(G). In violation of Ohio public policy, CPS, by way of an unwarranted deed restriction, attempted to prevent an unused public school building from being used by a public charter school. CPS's deed restriction contravenes public policy not only by limiting the availability of facilities for public charter schools, but also by obstructing the right of Ohio students to obtain an education at the public school of their choice.

Indeed, there can be little doubt that the State's clear public policy favors making public school facilities available for use by public school children, whether through a traditional public school or a public charter school. That fact is clear not only from R.C. 3313.41 and other statutes in effect at the time of CPS's unlawful deed restriction, but also from recent legislative developments. On the heels of the First District's decision below addressing R.C. 3313.41(G)'s public policy underpinnings, the General Assembly reviewed the statute at issue as part of the 2011 legislative process. Had the General Assembly disagreed with the First District's public policy analysis, it presumably would have amended the statute to essentially "overrule" the decision below. But far from overruling that decision, the legislature instead *reaffirmed* Ohio's

⁴ See, e.g., Mike Lafferty, Top Non-Profit Charter School Models Leave Ohio Behind, Ohio Education Gadfly (Jan. 13, 2010) (available at http://www.edexcellencemedia.net/gadfly/oh/2010/OH_Gadfly_1-13-10.html#A1).

public policy in this area, removing from R.C. 3313.41(G) the requirement that a facility be “suitable for classroom space” before it must be offered to a charter school.⁵ Recognizing the procedural loophole CPS attempted to exploit, the General Assembly closed that loophole, reiterating the clear public policy favoring making unused public school buildings available to public school children.

Many of the points raised by CPS and its *amici* in their briefs serve more to distract from this central issue, rather than to help clarify it. To start, CPS’s Proposition of Law addresses the purported recognition below of a “public policy in favor of community schools over public schools” CPS Br. at 4, 13; see also OSBA Br. at 4. Setting aside that fact that *community schools are public schools too*, the critical flaw with CPS’s proposition is that the analysis in this case has nothing to do with whether public policy favors one school over another. Rather, as the courts below recognized, Ohio public policy reflects that public school buildings should be available for public school use, to the benefit of Ohio children. In other words, the public policy at issue is one that, if it “favors” anyone, favors promoting public educational opportunities for Ohio school children. CPS inhibited those opportunities, and the courts below rightly invalidated their anti-educational actions.

CPS’s other arguments are equally unavailing. All agree that courts cannot make public policy. Cf. CPS Br. at 6-7. Nor is that what has happened here, where the courts below, far from making public policy, merely recognized the clear public policy articulated by the State’s policy-making branches.

No more availing is CPS’s contention that had “the General Assembly intended to prohibit public school districts from utilizing deed restrictions, it would be very simple for it to have done so.” CPS Br. at 6. To be sure, the Revised Code does not expressly address this

⁵ R.C. 3313.41(G) (129th Gen. Assembly, H.B. No. 153, § 101.01, eff. 9/29/2011).

precise factual sequence, likely because the General Assembly never imagined that a public school district would attempt to inhibit public education in this manner. That said, the point of Ohio's public policy doctrine is that articulated public policy bars actions and contracts that would lead to "results which the law seeks to prevent," regardless whether the law specifically addresses every factual scenario that may arise.⁶ Laws reflect broad public policies, and here, CPS acted in direct contravention of that established policy.

As the lower courts unanimously found, CPS's actions violated Ohio public policy. The Court should affirm the decision below.

II. INTERESTS OF *AMICI CURIAE*

A host of entities committed to public education join this *amici curiae* brief:

- The *Ohio Alliance for Public Charter Schools* is a non-profit, non-partisan, independent membership organization dedicated to the enhancement and sustainability of quality charter schools. The Alliance strives to promote the growth of public charter schools in Ohio while maintaining high accountability standards for those schools.
- The *Black Alliance for Educational Options* is a national non-profit, non-partisan membership organization whose mission is to increase access to high-quality educational options for Black children by actively supporting parental choice policies and programs that empower low-income and working-class Black families.
- The *National Alliance for Public Charter Schools*, a national non-profit organization, is committed to advancing the public charter school sector. The Alliance aims to provide access to high quality public school options for all students by fostering a strong public charter school sector across the country. The Alliance both advocates for improved public policies and builds the capacity of state charter school associations to better serve charter schools.
- The *Ohio Coalition for Quality Education* is a grassroots advocate for public charter schools. The Coalition supports and advocates for public charter schools around Ohio.
- *School Choice Ohio* is a nonprofit committed to the goal of giving every child access to a quality education. School Choice Ohio works to educate the public and our elected leaders on the importance of empowering parents to find the best educational setting for their children.

⁶ *Eagle v. Fred Martin Motor Co.* (2004), 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 (quoting *King v. King* (1900), 63 Ohio St. 363, 372, 59 N.E. 111).

Amici curiae understand the challenges charter schools face in finding suitable facilities, challenges that take valuable time from advancing the school's educational mission. They submit this brief in support of appellee Dr. Roger Conners because CPS's deed restriction both violates public policy, as set by the General Assembly, and undercuts the State's effort to make quality public educational opportunities available to all students.

III. STATEMENT OF FACTS

A complete discussion of the facts underlying this case are included in Roger Conners's merit brief.

IV. ARGUMENT/ PROPOSITION OF LAW: CINCINNATI PUBLIC SCHOOLS'S ATTEMPT TO PREVENT UNUSED CLASSROOM FACILITIES FROM BEING USED AS A PUBLIC SCHOOL VIOLATES OHIO PUBLIC POLICY FAVORING THE USE OF PUBLIC SCHOOL BUILDINGS BY PUBLIC SCHOOL STUDENTS

CPS's deed restriction runs afoul of Ohio public policy, one that understandably helps public charter schools bridge the wide facilities gap they face. Simply put, state public policy favors allowing public school children to be educated in a quality facility. Yet for public charter schools and their students, finding appropriate, affordable facilities remain one of their biggest challenges. CPS's attempt to make that challenge even greater, in the process weakening the public school options available to Ohio's schoolchildren, violates established public policy, see R.C. 3313.41(G) (requiring that unused school property be offered to a charter school).

A. Charter Schools Face Challenges In Obtaining Educational Facilities.

Finding appropriate facilities is perhaps the most significant challenge to opening and operating a successful charter school. In Ohio, charter schools, unlike traditional public schools, do not have bonding authority, nor can they collect local property taxes. Additionally, most charter schools do not have the credit history and legal status to obtain facilities financing on

their own. As a result, charter schools must rely on their limited capital funds and operating revenue to pay for facilities.

These facilities funding challenges are particularly severe in Ohio, when compared to national practices. Some states provide per-pupil facilities allowances for charter students. Others allow for lease reimbursement. And still others permit charters to seek bonding through school districts. Yet under current Ohio law, none of these avenues are available. It is thus perhaps no surprise that, with respect to facilities funding, Ohio ranked lowest among all states in a recent comparison of state charter school laws.⁷

In light of these challenges, Ohio charter schools must be creative in finding facilities. For instance, the Tech Con Institute, a Dayton charter school, utilizes a former car dealership for its facility. Another school, Columbus's Horizon Science Academy High School, operates out of an old furniture store. And still other schools use strip malls, old warehouses, or church basements for their facilities. As a result, numerous Ohio charter schools are forced to tackle their educational mission without libraries, gymnasiums, playgrounds, and/or significant classroom space.

Consider the case of the Columbus Collegiate Academy (CCA). CCA, a high-performing charter school, received a national award for having the highest academic achievement gains among charter middle schools. Remarkably, it accomplished this feat despite spending the first three years of its operation in a church next to a dollar store and a laundromat. From its opening

⁷ In the National Alliance for Public Charter School's 2011 ranking of state charter laws among the 41 states, see http://www.publiccharters.org/data/files/Publication_docs/NAPCS_LawRankings_V12_Full.pdf 20110330T165043.pdf, Ohio scored zero out of 12 possible points in the facilities category. In another report from the National Alliance, which takes a closer look at Ohio's charter laws, the authors note, "Ohio lacks all of the model law's provisions for equitable charter school access to capital funding and facilities. These provisions are essential to ensure that charter schools have appropriate facilities in which to educate their students and are not forced to cannibalize their operational costs—a financial disadvantage that, at best, is unfair to charter students, and is potentially devastating for charter schools." See http://www.charterschoolquality.org/media/1180/BCSQ_BuildingQualityOhio.pdf.

in 2007, CCA repeatedly attempted to obtain various unused buildings owned by the Columbus School District. Its attempts were met with continued resistance. Indeed, CCA was not even allowed to submit an application for a building until 2010. And even then, the school lost its first bid for a nearby vacant elementary school when the district decided to lease the building to Groove U, a for-profit, startup music industry program with no record of success. According to the district, CCA was deemed a “competing service,” and thus disfavored.⁸ Mounting public pressure ultimately forced the district to work with CCA, and a deal was finally reached last winter to lease a different vacant building to CCA.

Despite their struggles to secure appropriate facilities, charter schools, on the whole, continue to improve their record of achievement. Charter school demand is on the rise, with enrollment up nearly 10% from two years ago. So too is charter school performance, as these public charter schools hold their own with, and often exceed the performance of, comparable traditional public schools. At the very least, charter schools produce similar results to traditional public schools, at less cost to taxpayers.⁹ More telling, charters have outperformed traditional district schools in urban areas for four of the past five years.¹⁰ Indeed, based on 2010-11 state achievement data, more Cincinnati-area charter schools exceeded the expected growth on state achievement tests than did CPS schools.¹¹

⁸ Jennifer Smith Richards, *Charters bypassed as tenant*, COLUMBUS DISPATCH, October 31, 2010.

⁹ Molly Bloom, *As a Group, Charter Schools Deliver Similar Performance for Less Money*, StateImpact Ohio, available at <http://stateimpact.npr.org/ohio/2011/10/19/as-a-group-ohio-charter-schools-deliver-similar-performance-for-less-money/>.

¹⁰ Press Release, OAPCS, 2010-11 Ohio Charter School Performance Continues to Add Value to Ohio Public Education, (Aug, 23, 2011). Release based on data provided by the Ohio Department of Education.

¹¹ Id.

B. Ohio Public Policy, Epitomized By R.C. 3313.41(G), Reflects That Public Charter Schools And Their Students Deserve Access To Buildings Unused By Traditional Public Schools.

Recognizing that dollars, to the extent possible, should be spent *in* the classroom—supporting instruction, personnel, and professional development—not *on* classroom buildings, the General Assembly enacted R.C. 3313.41(G), which requires that unused public school buildings be made available to charter schools. As the General Assembly understood, traditional public schools are better positioned to construct new facilities, leaving them with unused buildings they no longer need. After all, traditional district schools enjoy the right to use property and local tax levies to raise money for facilities. District schools also have access to billions of dollars in facilities funding through the Ohio Schools Facilities Commission (“OSFC”), as noted by *amicus curiae* Ohio School Boards Association.¹² Established in 1997 in the midst of the *DeRolph* litigation, the Commission has helped more than 75 percent of Ohio school districts fund, plan, design, build, or renovate schools. One of the many districts OSFC is assisting is the Cincinnati Public School District, which is currently in the sixth year of a ten-year, \$1 billion rebuilding plan.

While charter schools struggle to find appropriate facilities, Ohio’s urban districts are building new buildings and shuttering others, sometimes in favor of a new facility, and sometimes in light of declining student enrollment.¹³ Indeed, in 2009, when Dr. Conners purchased the building at issue from CPS, eight other buildings were auctioned off by the school district, many of which had recently been used as schools. Yet while CPS and other districts enjoy the use of new, state-funded buildings, many districts are concurrently thwarting efforts by

¹² See OSBA Amicus Curiae Br. at 10 (“[f]or many years, CPS has been renovating and/or replacing most of its school buildings”).

¹³ See Jennifer Smith Richards, *Schools Rebuilt but lack Students*, COLUMBUS DISPATCH, Nov. 6, 2011, at A1.

charter schools to purchase buildings rejected by the districts, even where those buildings would be used to service public school children, as part of the State's comprehensive public education system.

Encouragingly, some districts have taken a more cooperative approach to working with charter schools. Earlier this year, a charter school opened in a building also occupied by a Cleveland district school, marking the first time a charter and district school have co-located in Ohio. *Amici* encourages such collaboration, which occurs more frequently in other states, and hopes that more districts begin to recognize how such shared practices can be mutually beneficial. But even districts resistant to collaboration must abide by state policies that require them to offer their unused buildings to charters.

C. R.C. 3313.41 Is Part Of A Complex Statutory Regime Governing Ohio's Public School System, Including Public Charter Schools.

Making unused school facilities available to charter schools is part of the State's statutory regime governing public schools. By attempting to prevent a public school from acquiring a facility it had a right to utilize as a public school, CPS improperly frustrates this legislative scheme.

As the Court well knows, charter schools are public schools, "part of the state's program of education."¹⁴ Under the State's statutory system, charter schools are exempt from some laws and regulations, but must comply with many of the federal and state standards that apply to other public schools. And in other instances, charter schools face unique requirements.

For instance, charter schools face strict, unique accountability and closure requirements. The success of the charter school movement depends upon strong accountability requirements, including closing underperforming charter schools. And Ohio, it bears noting, has some of the

¹⁴ *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 87 N.E. 2d 1148, at ¶7.

toughest automatic school closure laws in the nation.¹⁵ Simply put, chronically underperforming charter schools close. Last year, four charter schools were closed for failing to demonstrate adequate achievement; three others were closed for lacking financial viability. What is more, recent amendments to Ohio law include several new accountability requirements, which *amici* supported. Among those changes, charter school sponsors will now be ranked according to the performance of their schools, and those with a high percentage of poorly performing schools will be prohibited from sponsoring additional schools.¹⁶

These strict requirements refute two points made by appellants and their *amicus curiae*. First, they reflect a public policy favoring strong, innovative, and accountable public schools. The General Assembly has enacted (and refined) a statutory scheme to achieve these separate, albeit interconnected, goals. Equally true, “that the legislature has regulated community schools does not negate its enactment of a statute that clearly favors school boards first offering classroom space that is not being used to community schools.”¹⁷ Ohio’s statutory scheme promotes public educational alternatives by making unused public school buildings available to public charter schools. At the same time, Ohio law requires close monitoring of a charter school’s fiscal and academic performance. Thus, what CPS describes in their Merit Brief (at 14) as an apparent weakness in the charter school program — that nine sponsors may no longer sponsor schools — in reality is a strength, as it proves that accountability and performance matter, as the State intended.

¹⁵ Ohio tied for second in the National Alliance for Public Charter Schools’ comparison of state charter laws regarding the process of renewing and revoking charter school contracts. See Todd Ziebarth, National Alliance for Public Charter Schools, *Measuring Up to the Model: A Ranking of State Charter Laws* (2nd ed. 2011), available at http://www.publiccharters.org/data/files/Publication_docs/NAPCS_LawRankings_V12_Full.pdf_20110330T165043.pdf/.

¹⁶ R.C. 3313.016.

¹⁷ *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 2011-Ohio-1084, at ¶9.

Second, the strict statutory scheme governing charter schools also reflects the fact that CPS has no role in directly regulating charter schools, nor is it authorized to undercut their educational mission by improperly denying them the use of otherwise unused school facilities. As Ohio lawmakers have recognized, once charter schools have been approved to open by the State and their sponsor, they must be given the chance to demonstrate performance. School districts play no role in monitoring that performance, nor are they authorized to interfere with the public educational mission undertaken by charter schools by denying them unused facilities. Equally true, unlike traditional public schools, charter schools that fail to perform are shut down. But these decisions are made by the school's sponsor, in accordance with the charter contract and state law—not by a school district.¹⁸ Nor does a district have any say in whether or where a charter school can open.¹⁹ In the same vein, laws requiring districts to offer unused buildings to charters helps new charter schools focus more of their time and energy on instruction and academics. CPS's deed restriction is directly at odds with this regulatory system and the public policy it espouses.

D. CPS Frustrated The Legislative Scheme Regulating Ohio's Public Schools By Attempting To Exclude Public Charter School Students From Utilizing Unused Public School Buildings.

Ohio public policy requires that charter schools have access to unused school buildings. The CPS deed restriction frustrates this policy by prohibiting Dr. Conners from using the building he purchased to operate a public charter school. Deed restrictions like this one, which violate public policy, are unenforceable.

¹⁸ Charter schools enter into contracts with sponsors, which may include additional provisions than those required by law. The sponsor is responsible for monitoring the school and ensuring that the school adheres to the contract terms. The sponsor can decide to terminate or non-renew a contract; alternatively, the school can face automatic closure according to state law for financial or academic reasons. See R.C. 3314.03.

¹⁹ Charter schools may open in Ohio's "Big Eight" urban districts, including Cincinnati. R.C. 3314.02 (A) (2).

1. Ohio public policy favors the transfer of unused public school facilities to charter schools.

Ohio's "public policy" is determined by the legislature through the enactment of statutes. Here, the General Assembly has determined that society benefits by allowing public charter schools to purchase or lease unused public school buildings, and it has passed laws that facilitate this policy. While CPS enjoys the right to disagree with that public policy, it does not enjoy the right to circumvent that policy through a deed restriction.

Ohio's long-accepted definition of public policy requires that "no subject can lawfully do that which has a tendency to be injurious to the public or against the public good."²⁰ What constitutes "the public good" is reflected by the laws passed by the General Assembly.²¹ That is so because "the legislative branch is the ultimate arbiter of public policy."²²

Public policy firmly supports the transfer of unused school buildings to charter schools. By way of background, the General Assembly created charter schools in 1997 when it enacted R.C. Chapter 3314.²³ Charter schools are independently governed public schools funded from state revenues.²⁴ The legislative purpose of creating charter schools was to "provid[e] parents a choice of academic environments for their children and provid[e] the education community with the opportunity to establish limited experimental educational programs in a deregulated setting."²⁵

²⁰ *Dixon v. Van Sweringen Co.* (1929), 121 Ohio St. 56, 62-63, 166 N.E. 887.

²¹ *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 566-67, 1998-Ohio-184, 697 N.E.2d 198.

²² *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, 472, 2007-Ohio-6948, 880 N.E.2d 420 (internal citation and quotation marks omitted).

²³ Am.Sub.H.B. No. 215, 147 Ohio Laws, Part I, 909, 1187 (emphases added).

²⁴ *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Edn.* (2006), 111 Ohio St.3d 568, 569, 2006-Ohio-5512, 857 N.E.2d 1148.

²⁵ Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043.

To facilitate the creation of charter schools, the General Assembly subsequently enacted R.C. 3313.41(G). That section establishes a clear public policy in favor of selling unused public school facilities to charter schools. In disposing of property constituting “classroom space,” a district “shall” offer such property to a “community school”:

“[w]hen a school district board of education decides to dispose of real property suitable for use as classroom space * * * *it shall first offer that property for sale to the governing authorities of the start-up community schools * * * located within the territory of the school district, at a price that is not higher than the appraised fair market value of that property.*”²⁶

The same is true for similar property that has “not been used” for a year:

“[w]hen a school district board of education has not used real property suitable for classroom space for * * * educational purpose[s] for one full school year * * * it shall offer that property for sale to the governing authorities of the start-up community schools * * * located within the territory of the school district, at a price that is not higher than the appraised fair market value of that property.”²⁷

Together, these statutes make plain the public policy requirement that public charter schools have the opportunity to operate out of unused public school buildings. CPS’s decision first to unilaterally deem its public school buildings “unsuitable” for school purposes, and second to later include a deed restriction seeking to prevent Dr. Connors from using the building to operate a charter school, plainly are at odds with Ohio public policy.

Recent changes to the language of R.C. 3313.41(G) cement this plain public policy. This legislative term, the General Assembly removed the term “suitable for classroom space” from the law, to address CPS’s conduct in this case, namely, deciding internally that school buildings are unsuitable for classroom space – at least by charter schools, although not the district for future

²⁶ Former R.C. 3313.41(G)(1). The statute was amended by 129th General Assembly, H.B. No. 153, § 101.01, which went into effect on September 29, 2011.

²⁷ Id. at (G)(2).

purposes, apparently – to avoid the statutory (and thus public policy) requirements of Ohio law.²⁸ Indeed, as the First District found, CPS’s claim that the building was not suitable for classroom use was “belied by the deed restriction itself, which allows the possibility that the restriction would not apply should CPS itself decide to use the property for school purposes in the future.”²⁹ Other factors point to the same conclusion regarding suitability: the Cincinnati Building Department approved the building as a school; the building has passed all City of Cincinnati health, safety, fire, and zoning inspections; the school’s sponsor deemed it suitable; and the school received state and federal grants, which implies that the school was indeed suitable.³⁰ CPS’s unilateral declaration was wrong as a matter of public policy when it occurred, and it has even less justification today.

2. The CPS deed restriction is unenforceable because it violates Ohio public policy.

Because Ohio courts refuse to enforce contract terms that violate public policy, the courts below correctly invalidated the deed restriction at issue here. Restrictions on the free use of land are viewed unfavorably. Accordingly, courts construe deed restrictions narrowly, in favor of the free use of land.³¹ Equally true, courts do not enforce deed restrictions that would violate public policy: “[T]he owner of land, desiring to protect and improve the neighborhood for any special purpose, may impose such restrictions as he sees fit in making sales of his land, *provided such restrictions are not against public policy.*”³²

²⁸ See R.C. 3313.41(G) (eff. Sept. 29, 2011); see also R.C. 3313.411 (eff. Sept. 29, 2011) (requiring districts to offer for sale or lease to charter schools any facilities that have been unused for two years).

²⁹ *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 2011-Ohio-1084, at ¶11.

³⁰ See generally Merit Brief of Appellees.

³¹ See, e.g., *Hunt v. Held* (1914), 90 Ohio St. 280, 107 N.E. 765, paragraph one of the syllabus; *Houk v. Ross* (1973), 34 Ohio St.2d 77, 296 N.E.2d 266, paragraph two of the syllabus; *Benner v. Hammond* (1996), 109 Ohio App.3d 822, 827, 673 N.E.2d 205; *Carranor Woods Prpty. Owners Assn. v. Driscoll* (1958), 106 Ohio App. 95, 101, 153 N.E.2d 681.

³² *Dixon v. Van Sweringen Co.* (1929), 121 Ohio St. 56, 60, 166 N.E. 887 (Emphasis added).

Contract provisions that violate public policy are unenforceable.³³ A deed is a contract.³⁴ Therefore, the trial court was correct in refusing to enforce CPS's deed restriction.

An analogous issue came before the Court in *Grange Mutual Casualty Co. v. Lindsey*, where the Court held that an automobile liability insurance contract provision was void per public policy.³⁵ The contract provision at issue there purported to offset coverage under an underinsured motorist provision by the amount of benefits paid under the medical provision in the same contract. The General Assembly, however, had mandated, through R.C. 3937.18, that all automobile liability insurance policies in Ohio include underinsured motorist coverage. Because enforcement of the contract provision would defeat the purpose of the statute, the contract was deemed unenforceable in accordance with public policy.³⁶ The same is true here, where CPS seeks to accomplish by contract what the law prohibits. Just as the subrogation provision in the Grange insurance contract was void, so too is CPS's deed restriction, due to conflicting Ohio public policy.

If the CPS deed restriction *were* valid, CPS and other school districts could effectively abrogate R.C. 3313.41(G). After all, even though the General Assembly requires that charter schools be able to purchase unused school buildings, such deed restrictions would entirely frustrate that statutory right.

While Ohio courts have not previously been asked to void a deed restriction that prevents the use of property for school purposes, other courts have concluded that such deed restrictions

³³ See, e.g., *Grange Mut. Casualty Co. v. Lindsey* (1986), 22 Ohio St. 3d 153, 155, 489 N.E.2d 281 (discussed *infra*), superseded by statute as stated in *State Farm Mut. Ins. Co. v. Grace* (2009), 123 Ohio St.3d 471, 2009-Ohio-5934, 918 N.E.2d 135 at ¶ 28; *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 184-185, 70 N.E.2d 447 (voiding apartment rental contract prohibiting children from occupying the premises as against public policy).

³⁴ *Dixon v. Van Sweringen Co.* (1929), 121 Ohio St. 56, 63, 166 N.E. 887.

³⁵ *Grange*, *supra*.

³⁶ *Id.*

violate public policy. In *Clifton George Co. v. Great Southern Life Insurance Co.*, a Texas appellate court held that a deed restriction against commercial use was unenforceable against an entity seeking to use the property as a for-profit school, as such a restriction would violate Texas public policy, which, like Ohio public policy, encourages education.³⁷ On the same basis, another Texas appellate court invalidated a restrictive covenant against using property for business purposes when applied to a teacher who used the property to operate a day school.³⁸ Similarly, Ohio law favors making public school buildings available for use by public school students. CPS's deed restriction is directly at odds with that public policy choice.

V. CONCLUSION

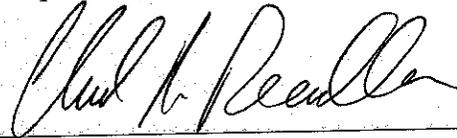
Ohio created charter schools to enhance the public school options available to Ohio parents and their schoolchildren. To facilitate these goals, and to alleviate the facilities burden placed upon charter schools, the General Assembly requires public school districts such as CPS to offer unused school buildings for sale to charter schools. Because CPS's deed restriction frustrates this policy, the Court should hold that the deed restriction is unenforceable.

³⁷ (Tex.App. 1923), 247 S.W. 912, 914, 1923 Tex. App. LEXIS 630.

³⁸ *Bryan v. Darlington* (Tex.Civ.App. 1947), 207 S.W.2d 681, 682, 1947 Tex. App. LEXIS 1040.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of Amici Curiae of Ohio Alliance for Public Charter Schools, Black Alliance for Educational Opportunities, National Alliance for Public Charter Schools, Ohio Coalition for Quality Education, and School Choice Ohio was served by ordinary U.S. Mail, on November 17, 2011, on the following:

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