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
v.	:	of Appeals Eighth Appellate District
THE INTERNATIONAL PREPARATORY, SCHOOL, et al.,	:	Court of Appeals Case No. 91912
Defendants - Appellees.	:	

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES

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PRELIMINARY STATEMENT

This amicus curie brief is submitted in support of affirmance of the decision of the Court of Appeals (Eighth Appellate District) holding that the trial court erred in granting summary judgment to plaintiffs-appellants in that there remain genuine issues of material facts as to the individual defendants' personal liability.

Identification and Interest of Amici

Amici curiae are state and national advocates for public school improvement which focus particularly on community or (as such schools are often called) "charter" school issues.

Imagine Charter Schools is a charter school management company, currently operating seventy-three charter schools serving some 31,000 students. Twelve Imagine Schools are located in Ohio. Imagine Schools are governed by a board of directors typically made up of members of the local community who oversee the operation of the schools consistent with the Community School Law.

The Center for Education Reform, based in Washington, D.C., has for sixteen years promoted charter schools as a solution to too often failing public schools. There are now 5,043 charter schools in thirty-nine states and the District of Columbia serving over 1.5 million students and their families. CER has a long relationship with charter advocates in Ohio and, working with House and Senate leaders, helped yield a strong set of accountability measures for community schools. CER advances substantive reforms that produce high standards, accountability and freedom of choice.

Atlantic Legal Foundation, a public interest law firm has, for more than a decade, supported public school choice and charter schools. It has represented individual charter schools and charter school advocates in New York, where it is based, and elsewhere.

Community or "Charter" Schools

Community schools in Ohio and charter schools elsewhere, have had a demonstrable impact on improving public school education at the primary and secondary levels. As a professor of education reform at the University of Arkansas has written:

> "The highest quality studies have consistently shown that students learn more in charter schools. In New York City, Stanford economist Caroline Hoxby found that students accepted by lottery to charter schools were significantly outpacing the academic progress of their peers who lost the lottery and were forced to return to district schools"

Jay P. Greene, "The Union War on Charter Schools," The Wall Street Journal, April 16, 2009.

As reported by The New York Times, Secretary of Education Arne Duncan views charter schools "as crucial in the fight to turn around failing schools." "Mr. Duncan and that $4.3 Billion," The New York Times, September 28, 2009 at A22.

Other federal officials similarly have praised the mission of charter schools: "outstanding charter schools are proving that low-income and minority kids can achieve at the highest levels, graduate from college and thrive as adults." U.S. Rep. George Miller, Chair, Committee on Education and Labor, June 4, 2009, available at http://edlabor.house.. gove/newsroom/2009/06/outstanding-charter-schools-pr.shtul.

Governor Arnold Schwarzenegger also is enthusiastic about charters:

> "When it comes to educating our kids, nothing works at the public school level like charter schools.... Charter schools blaze new trails in public education, using new and innovative teaching methods. They require parents, teachers and the community to be supportive and involved in students' education, possibly the single most important ingredient in a school's success."

Speech at National Charter Schools Conference, Sacramento, CA, March 2, 2006, available at http:gov.ca.gov/press-release/361/.

Ohio is home to 293 community schools serving more than 94,000 students. These schools are clustered in the state's "Big 8" school districts—their largest, most troubled cities. According to a report by the local charter association, 48 percent of Ohio's 115

community schools within the Big 8 Boundaries exceeded the state's expectations for yearly progress as measured by the Ohio Achievement Test, while only 39 percent of traditional district schools met this standard. An additional 27 percent of community schools met the state's yearly progress goal, for a total of 75 percent of schools that met or exceeded the expectations set forth by the State Board of Education.

This is not to suggest that all charter schools achieve their academic goals or that there will not be financial difficulties. Some schools have been troubled by fiscal mismanagement and even misappropriation of funds. But where charter schools fail in meeting education goals or suffer from the mishandling of finances, the schools can be closed by their sponsors or by state regulators. To date, forty-eight of Ohio's community schools have been closed.

STATEMENT OF FACTS

The International Preparatory School ("TIPS") was an Ohio non-profit corporation under Chapter 1702 of the Revised Code. TIPS operated as a community school under Chapter 3314 of the Revised Code, until it was closed in 2005. (Court of Appeals Opinion at 2).

TIPS board of trustees (or board of directors) consisted of six trustees. The board of trustees developed and set policy for the school; board members received no compensation for their services. School administrators managed the day-to-day operations of the community school. School administrators included positions such as a chief executive officer, principal, vice principal, human resource director, financial administrator, and treasurer. The school also hired employees whose duties included the monitoring of student enrollment, and the preparation and submission of monthly attendance reports. (Memorandum in Opposition to Jurisdiction of Appellees at 3).

After a Finding of Recovery was issued by the State Auditor (against TIPS, "Hasina Shabazz, Treasurer, and the Estate of Da'ud Abdul Malik, Chairman of the Board of Trustees, jointly and severally") (Court of Appeals Opinion at 4), to the effect that TIPS had been over-funded by the Department of Education, the Attorney General filed an amended complaint adding appellees as defendants. The amended complaint identified Da'ud as Chairman of "The Governing Authority for TIPS and Hasina as the Treasurer for TIPS" (Id. at 4). Ms. Shabazz has claimed that she was not treasurer of the school but only of the corporate board. (Memorandum in Opposition to Jurisdiction at 1).

Neither the amended complaint nor the State's audit made any specific allegations of wrong doing by either appellees with regard to the over-funding TIPS received. (Court of Appeals Opinion at 4). Ms. Shabazz submitted an affidavit stating that others were responsible for the day-to-day operation of TIPS (resulting in the alleged over-payment) and that she and her husband were board members. (Id. at 5).

The Court of Appeals reversed the trial court's award of summary judgment against the individual defendants. The court found that "there is no evidence in the record that the

defendants were 'public officials' within the ordinary meaning of that term." (Id. at 12) and that the law does not support the argument that "individuals of Community schools that are required by law to be corporate entities under R.C. Chapter 1702, be deemed 'public officials' who are personally and strictly liable for the corporations improper receipt of public funds." (Id. at 13).

The Court of Appeals went on to hold, however, that the individual defendants were not insulated from personal liability "where they occupied the positions of Treasurer and Chairman of the Board; only that their personal liability is not established by this record as a matter of law." (Id. at 16). And, finding that the AOS audit report created "a genuine issue of material fact as to whether the defendants can be held personally liable for the obligations of TIPS," (Id. at 20), the Court of Appeals affirmed the denial of the individuals' cross-motion for summary judgment and remanded for further proceedings.

ARGUMENT

COMMUNITY SCHOOL OFFICIALS ARE PROTECTED FOR PURPOSES OF STRICT PERSONAL LIABILITY UNDER COMMUNITY SCHOOLS LAW

The General Assembly's plain intention in allowing community schools was to establish a system of public education that could operate with greater freedom and flexibility than could traditional state controlled public schools. In exchange for enhanced flexibility, community schools face heightened accountability to sponsors and parents. See *Ohio Congress of Parents and Teachers v. State Board of Education*, 111 Ohio St. 3d 568, 569 (Sup. Ct. 2006)

Community School Governance — Corporate Protection

Community schools are governed by private not-for profit corporations called "governing authorities". They must meet state performance standards and are funded with state money. See *Ohio Congress of Parents, supra.* They also enjoy a broad exemption from state laws and rules. R.C. 3314.04 stipulates that "except as otherwise specified in this chapter and in the contract between a community school and a sponsor, such school is

exempt from all state laws and rules pertaining to schools...except those laws and rules that grant certain rights to parents." Moreover, the statute the Attorney General seeks to apply to the Appellees in this case – R.C. 9.39 – 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). This 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.

Community schools are governed most typically by boards of trustees comprised of private individuals, serving with token compensation (R.C. 3314.025) or without any compensation at all. Private individuals who serve on community school boards are deemed to be acting as representatives of the community school in their official capacities and "no officer, director, or member of the governing authority of a community school incurs any personal liability by virtue of entering into any contract on behalf of the school" (R.C. 3314.071). The Community Schools Law thus generally protects individuals serving community schools from personal liability regarding the school's basic commitments. The law respects the individual's private status and the corporation's separate obligations.

In addition, and importantly, under R.C. 3314.03(A)(1), every community school must be "established" by a corporation formed under Chapter 1702 of the Revised Code. R.C. 1702.55(A) provides that "the members, the directors, and the officers of a corporation shall not be liable for any obligation of the corporation." There is no dispute that TIPS was organized as required under Chapter 1702 of the Revised Code; and there is no dispute that TIPS over-funding is a corporate obligation. The statutory inquiry on this appeal need go no further. Community school directors and officers are to be treated in the same way as other not-for-profit directors and officers are treated. The Revised Code does not carve out these private individuals involved in community schools from the protection of R.C. 1702 pursuant to which community schools *must* be established.

The "Designated Fiscal Officer"

The General Assembly has anticipated possible improprieties involving community schools' funding by requiring the designation of a fiscal officer, protected by a bond

payable to the state, "conditioned for the faithful performance of all official duties required of the fiscal officer." R.C. 3314.011.[1]

Under Department of Education Regulations, all sponsors of community schools are required to provide "Bonding for the fiscal officer responsible for the fiscal operations of the community school..." Ohio Admin. Code 3301-102-05 (A)(1)(e).

Again, the design of the Community School Law is apparent: the state's funds are protected not by imposing strict personal liability on officers and directors, but by adequate insurance protection payable to the State. There is no need to debate about rules of statutory construction where there is a conflict between general and special or local provisions. There is no conflict under Chapter 3314 which, by incorporating R.C. 1702.55 (A), speaks fully regarding statutory liability of community school officials.

Community School Officials' Personal Liability

There is no need to eliminate the protection afforded community school directors and officers under R.C. 1702.55(A) by holding those officials strictly liable. As the Court of Appeals held, a community school official may be held personally liable for breach of the standard of care imposed on those under R.C. 1702 in carrying out a public purpose. Community school leaders are treated the same as other not-for profit corporate officials. R.C. 1702.30(B) provides that a director shall "perform his duties as a director...in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinary prudent person in a like position would use under similar circumstances." Should they not fulfill their obligations, personal liability can be imposed. As the Court of Appeals noted, "If the State can prove that defendants breached their fiduciary duties as directors of the publicly funded non-profit by the State, then personal liability can be imposed for the result of that breach...." (Court of Appeals Opinion at 15).

[1] The record does not disclose what, if anything, was done to ensure that a bonded, designated fiscal officer was in place at TIPS.

Indemnity Agreements

Community school officers and directors are treated much differently than public officials for proposes of personal liability. R.C. 3313.203(B) expressly prohibits a school district board of education from agreeing to indemnify and hold harmless a school board member or employee from an auditor's finding for recovery. But the community school statute, R.C. 3314.03(A)(11), does not include R.C. 3313.203 among the statutes that apply to community schools. Therefore, under R.C. 3314.04, community schools are exempt from R.C. 3313.203, and a community school has the authority to agree to indemnify and hold harmless its board members, officers and employees from a finding for recovery by the State Auditor. Since the General Assembly allows a community school to indemnify its treasurer for any loss identified in an auditor's finding for recovery, it could not have intended community school treasurers to have strict personal liability for misspent funds the same as a traditional school district treasurer.

The operation of R.C. 3313.203 is absolutely consistent with R.C. 3314.011: both statutes permit (or as to R.C. 3314.011, require) community schools to protect officers and directors from strict personal liability.

Community School Over-Sight

Appellants claim that strict liability of community school officials is needed to protect against fraud and preserve public funds. (Merit Brief of Appellants at 8-9). They ignore the safeguards present in the community school regulatory scheme. Those schools are monitored closely by their sponsors and the Department of Education. See generally R.C. 3314.015(A), 3314.023, 3314.03, 3314.07. There is no need to make a private individual the virtual insurer against any misuse of state funds.

Finally, holding community school leaders strictly and personally liable as a matter of law for the improper application of public funds, would be detrimental to the purposes of the community school program. Private citizens would be unwilling to stand strictly liable for any alleged misapplication of state funds by themselves or by some other community school actor and would be reluctant to continue as board members or to establish new schools. Such a holding would have a serious chilling effect. The

innovative spirit (and excellence in education) that characterize community schools would be threatened.

Appellants' Theory of Strict Liability

Appellants contend that R.C. 1702 can be disregarded because community school directors and officers are "public officials", no different than state, county or local financial officials serving traditional public schools. They argue that a private individual, serving as a volunteer community school board member or other officer, can be held strictly and personally liable for irregularities in use of state funds occurring in their term of office. The Court of Appeals rejected this same argument here due to the protection offered by the operation of R.C. 3314.03(A)(1) and R.C. 1702.55 (Court of Appeals Opinion at 13).

Appellants' argument begins with accepting the premise they wish to prove: that a community school treasurer is a "public official" for purposes of R.C. 9.39.[2] They ignore the contention that there was no evidence that the individual defendants received any state funds (Memo in Opposition to Jurisdiction at 7).

With the "public official" door opened, appellants go to R.C. Chapter 117, "Auditor of State" and R.C. 117.01 defining "public official" as any representative or agent of a "public office" which, in turn, is "any ... political subdivision ... established by the laws of this state for the exercise of any function of government" under R.C. 117.01(D). (Merit Brief of Appellants at 10-11).

The first problem with this analysis is that it has nothing to do with officers and directors of community schools which the legislature has required to be established under R.C. 1702. A political subdivision may exercise a function of government (such as operation of public schools), but it does not follow that an officer or director of a community school exercising a function of government can be deemed a "political subdivision" for purposes of R.C. 9.39 (or R.C. 117.28) and subject to strict liability.

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[2] Appellants focus on Ms. Shabaaz as "treasurer." Her exact role is disputed but it is agreed that she and her late husband were directors (Court of Appeals Opinion at 5) and appellants contention is that that strict liability is appropriate for directors as well as officers since a director should be deemed a "public official" under R.C. 9.39.

Private and parochial schools also provide education and they are another "organization...or other entity established by the laws of this state for the exercise of any function of government" under R.C. 117.01(D). But by doing so, they do not become public entities.

There is another, more fundamental flaw in appellants' analysis: To be a "public office" under R.C. 117.01(D), an entity must be "established by the laws of this state." This unquestionably includes entities such as counties, townships, municipalities and boards of education because their existence literally is mandated by the Ohio Constitution, Art. IV, § 3, Art. X, § 1, and Art. XVIII, § 2.

In contrast, a community school is established by "any person or group of individuals" who submit a proposal to a sponsor to establish a new community school. R.C. 3314.02(C)(1). The community school's promoters must organize the school as an Ohio not-for-profit corporation. R.C. 3314.03(A)(1). The members of the school's governing authority are neither publicly-elected nor appointed by a superior public official, but are instead named as directors through the school's articles of incorporation, with successor board members chosen in the manner directed by the school's code of regulations. R.C. 1702.11. The community school is "established" once a majority of the community school's board of directors and a majority of the sponsor's governing board vote to adopt a school contract. R.C. 3314.02(D). The sponsor and the governing authority are the only two parties to the contract. R.C. 3314.02(D). Neither the Department of Education nor any other State agency needs to approve the school's contract; the sponsor simply needs to "notify" the Department of Education that the contract has been signed. Id.

The community school's sponsor may be, and in a large number of instances is, a private non-profit corporation. R.C. 3314.02(1)(f).[3] It is the sponsor's responsibility, and not the Ohio Department of Education's, to be primary monitor and enforcer of the community school's compliance with "all laws applicable to the school and with the terms

[3] Ten of the twelve community schools that amicus curiae Imagine Charter Schools manages in Ohio are sponsored by either St. Aloysius Orphanage or Ohio Council of Community Schools, both of which are 501(c)(3) non-profit corporations. See Directory of Community Schools and Sponsors, Ohio Dep't of Education, Jan. 2010, located at:
http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=1168&ContentID=9473&Content=79795,<last visited Feb. 8, 2010>.

of the contract." R.C. 3314.03(D)(1) and (5); *see also* R.C. 3314.07 through 3314.073 (identifying enforcement mechanisms a sponsor may use to address a community school's non-compliance with applicable laws or the terms of the contract).[4]

The appellants' position completely ignores the differences between the way in which a community school is established, and the direct creation of traditional political subdivisions through constitutional and statutory mandates. It is no more accurate to say that a community school is "established by the laws of this state" than it is to say that any of downtown Columbus' major law firms was established by the laws of this state. This is because a community school, like a law firm, is actually established through a private contract between consenting parties.

While the concept of State and local government may have evolved to some extent since the adoption of Ohio's Constitution in 1912, there is no reason to believe the Framers of that document would have recognized a non-profit corporation (a community school) supervised by another non-profit corporation (the school's sponsor) as wielding any part of the State's sovereign power. Accordingly, this Court should hold that a community school is not a "public office" under R.C. 117.01(D), and a community school's treasurer and directors are not "public officials" under R.C. 117.01(E), 9.38 and 9.39.

There is no incongruity in finding a community school is not a "public office" under R.C. 117.01, and, at the same time, allowing the State to fund the operation of community schools. Ohio law has long held the legislature may lawfully appropriate public funds to a private entity for a public purpose. *St. ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 151. The mere receipt of public funding does not change a private entity into public office.

Appellants in rebuttal will probably rely on the inclusion of community schools in the definition of "political subdivision" in R.C. 2744.01(F)(1). That should not be

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[4] The Attorney General's position in this case disagrees with the prior opinions of his own office. *See* 2000 Ohio Atty. Gen. Op. 2000-006, 2000 Ohio AG LEXIS 6 (Feb. 14, 2000) (a nonprofit corporation formed under Chapter 1702 "is neither established by law, nor functions as an agency of the state or local government"); 1995 Ohio Atty. Gen. Op. 1995-018, 1995 Ohio AG LEXIS 18 (Aug. 25, 1995) ("because the library you describe was created as a nonprofit corporation in accordance with either R.C. Chapter 1702 or R.C. Chapter 1713 (educational corporations), it was not created as a division of the state by authority of the state."). Until this case, it was the Attorney General's view (and properly so) that an entity created as a Chapter 1702 nonprofit corporation was not considered an arm of the government, even if it was publicly funded.

dispositive, however, since the Attorney General has also opined that an entity may be a political subdivision for some purposes and not for another. 2004 Ohio Op. Atty. Gen. 2004-014, 2004 Ohio AG LEXIS 12, pp. *35-*36 (April 15, 2004); 1992 Ohio Atty. Gen. Op. 92-061, 1992 Ohio AG LEXIS 74, n.1 (Dec. 29, 1992). That proposition especially rings true in this case. Simply because a community school's funding is immunized from tort liability does not change the fact that the community school is not governed by publicly-elected or publicly-appointed officials; does not possess any sovereign or police power authority from the State; does not possess the power to fund its own operations through taxation; does not have a territorially-defined jurisdiction; and is established by contract rather than State mandate. To the extent a community school must comply with certain obligations under R.C. 3314.03 to make the school accountable for its performance, such obligations are simply contractual conditions for the school to receive State funding, analogous to the conditions imposed on a corporation's receipt of a State research grant.

In the final analysis, nothing in Chapter 3314 establishes or creates a community school; it is private individuals who create a community school by agreeing to incorporate a school, and then agreeing to enter into a contract with an authorized sponsor that frequently is also a private, non-profit corporation. The school's board of directors is chosen by its incorporators, and not by the State, the sponsor, or the general public. If the community school operates in compliance with its contract and Chapter 3314, the State must provide operational funding for the school. R.C. 3314.08. If the community school does not comply with those requirements, it will not receive State funding, but the corporate entity will continue to exist. See R.C. 1702.04(D) (nonprofit corporation has perpetual existence). Thus, it is accurate to conclude that a community school is not "established by the laws of this state" as that expression is used in R.C. 117.01(D). The court in *Greater Heights Acad. v. Zelman,* 522 F.3d 678 (6th Cir. 2008), failed to recognize the foregoing distinctions between community schools and traditional political subdivisions, and between a statute to provide funding versus a statute that mandates the creation of a governmental entity. This Court should discount the usefulness of the *Greater Heights Academy* decision in this case.

CONCLUSION

The Court should affirm the decision remanding the case for the resolution of genuine issues of material facts.

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