



## **The 1851 Center for Constitutional Law**

January 9, 2009

Toledo-Lucas County Plan Commission  
One Government Center, Suite #1620  
Toledo, Ohio 43604

Members of the Toledo and Lucas County Plan Commission:

The proposed Minimum School Facility Requirements (MSFR) violates the Ohio Constitution, and will result in litigation.

As written, the MSFR not only dictates what type of facilities all community schools must have, but contains arbitrary mandates that are unrelated to educational performance. It would inhibit (1) the opening of Community Schools that lack these unnecessary facilities, (2) the growth of existing schools that lack these facilities; and (3) the opportunity for many children to gain sought-after admittance to community schools.

As such, if you amend Chapter 1104 to include the MSFR, the Buckeye Institute's 1851 Center will file a lawsuit on behalf of Maritime Academy, a Toledo community school that, as a direct result of your regulation, will be restricted from taking on additional children, and the Pellizari family, whose child, as a direct result of your regulation, will face reduced odds of admittance to Maritime Academy.

You should look to avoid this litigation because (1) the MSFR is blatantly unconstitutional; and (2) you will squander Toledo taxpayers' dollars and resources; and (3) we will seek to expose your misallocation of resources what it truly is-- a futile attempt to preempt choices for local parents, and opportunities for local children.

**The Ohio Community Schools Act is a comprehensive, statewide legislative enactment that precludes city-by-city regulation of community schools.**

The MSFR is an unconstitutional attempt to stretch the City of Toledo's domain to encompass matters it is not entitled to control. The Home Rule Amendment to the Ohio Constitution, Article XVIII, does not permit Toledo government to regulate whatever it pleases. Instead, it only allows municipalities "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*"<sup>1</sup>

Ohio Supreme Court's recent decision in *Ohioans for Concealed Carry, Inc., v. City of Clyde* is highly instructive, since the MSFR would create a scheme analogous to the one struck down in September. Specifically, the Ohio Supreme Court ruled that Clyde's local ordinance, which regulated locations within the city where firearms could be carried, was unconstitutional because it conflicted with Ohio's statewide law governing concealed weapons.<sup>2</sup> The regulation here is entirely analogous.

The analysis for determining whether an ordinance is an acceptable exercise of Toledo's authority is straightforward.<sup>3</sup> Simply put, if there is a "general law" that conflicts with the regulation, then the regulation is unconstitutional.

A state statute is a "general law" where it (1) is part of a statewide and comprehensive legislative enactment, (2) applies to all parts of the state alike and operate uniformly throughout the state, (3) sets forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribes a rule of conduct upon citizens generally.<sup>4</sup>

The Ohio Community Schools Act clearly does all of these things. First, it serves as a comprehensive enactment. In enacting the OCSA, the Ohio General Assembly declared the purpose of included "providing parents a choice of academic environments for their children and providing the education community with *the opportunity to establish limited experimental educational programs in a deregulated setting.*"<sup>5</sup> This is consistent with Community Schools' practice of targeting and tailoring programs for small student populations such as learning-disabled students or dropouts from traditional schools.<sup>6</sup>

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."<sup>7</sup> The statute also limits municipal authority over charters schools by enacting its own comprehensive internal controls.<sup>8</sup>

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Secondly, the Ohio Community Schools Act operates uniformly throughout the state. Again, Community Schools are public schools, independent of any school district, are part of the state's program of education,<sup>9</sup> and are state-funded.<sup>10</sup> Moreover, the Act allows any "challenged school district" to establish Community Schools, and defines that term to include any district that is in academic emergency.<sup>11</sup> Merely because every district in the state is not in academic emergency does not mean that the Act is not uniform—indeed the Ohio Supreme Court has emphasized that statute need only have the capacity to operate uniformly.<sup>12</sup>

Thirdly, the Ohio Community Schools Act is an exercise of police power. It clearly relates to the general welfare of the public, and provides a program to foster educational opportunity. The legislative declaration that the Act's purposes include "choice" for parents and students, and "opportunity" for the educational community,<sup>13</sup> display that the OCSA exists to enhance the general welfare of parents, children, and all Ohioans.

Fourthly, the Ohio Community Schools Act clearly "prescribes rules of conduct for its citizens." It provides plenary restrictions and accountability factors on community school sponsors and community school operations in general. As just a few examples, R.C. 3314.19(J) already regulates the "health and safety" of "facilities used by the school," and R.C. 3314.99 contains a series of criminal sanctions for violations of the OCSA.

Finally, and most importantly, *there is clearly a conflict between the proposed MSFR and the Ohio Community Schools Act, in that the requirement prohibits or inhibits the very phenomena that the Act seeks to create: experimentation, choice, diversity, and competition.*<sup>14</sup> The MSFR is inconsistent with the essential features of the OCSA, as the Ohio Supreme Court has aptly described them:

The Ohio Community-Schools Act was drafted with the intent that parental choice and sponsor control would hold community schools accountable, in a fashion similar to traditional school management. *In exchange for enhanced flexibility, community schools face heightened accountability to parents and sponsors.* Either can threaten shutdown, sponsors by suspending operations pursuant to R.C. 3314.072, and parents by withdrawing their children. Traditional schools, on the other hand, may not be shut down no matter how poorly they perform (although they will face decreased funding). Because community schools may serve a targeted student population, their requirements may be more narrowly tailored.<sup>15</sup>

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Further, R.C. 3314 vests the Department of Education, not municipal governments like Toledo, with the authority to oversee community schools, and establish new ones.

The only proper way to achieve the desired results would be to amend the Ohio Community Schools Act. The state has demonstrated that it has the authority and aptitude to amend the OCSA, which has been amended frequently since enacted.<sup>16</sup> The MSFR, represents an attempt to circumvent this process, and usurp the authority of the people of the state of Ohio.

### **The MSFR is a misuse of the City's zoning power.**

The MSFR is also an unconstitutional attempt to use zoning law, as a back-door mechanism, to regulate, control, and hamper statewide education policy. A zoning regulation may not be "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." This standard is not so forgiving to as to permit the MSFR.

Firstly, as chronicled throughout this letter, the General Assembly has already provided a litany of constraint to ensure that community schools advance the general welfare. Thus any further regulation must add something of substantial value to public health, safety, or general welfare that is beyond that already offered by the state's regulations.

Secondly, individuals responsible for the impending zoning regulations have already laid their cards on the table, demonstrating that their purpose is anything but public health, safety, and welfare: (1) both the Toledo City Council and the Toledo Plan Commission have expressed concern over where Community Schools open and a lack of "traditional facilities;" The Minimum School Facility Requirements are a direct outgrowth of a Toledo City Council resolution to impose equality amongst charter and public schools building (then-City Council President Michael Ashford opined that the resolution was passed to prevent "double-standards" between charter and public school facilities); and (3) City Planner Tom Lemon observed that "there are certain things that a school ought to have - at least that's the thinking behind the legislation."

Given that the forces behind the MSFR openly concede that their primary motives are not land use, but are "tradition," "equality," and other inexpert views on education policy, Ohio courts will view with suspicion any attempt to dignify the MSFR as having a substantial relationship to the public health, safety, morals, or general welfare.

If offered under the guise of "land-use planning," the Buckeye Institute promises not only to file suit, but to expose this regulation for what it really is: a back-door attempt to stem the flow of students and parents away from union-controlled government schools, and towards schools that offer greater opportunity. The MSFR has the unlawful intention an effect of dictating education policy and managing schools, rather than addressing public health, safety, or morals.

### **The MSFR is poor public policy.**

The MSFR would be counterproductive to educational opportunity, inhibitive of academic achievement, and fiscally irresponsible.

Educational opportunity is popular in Toledo. As of 1992 a majority of states allow for the creation of deregulated charter or community schools, typically allowing those schools to use a per-pupil funding stream from government sources to pay for the schools. Over 6,400 Toledo children, or 19 percent, have chosen Toledo's Community Schools. This is the 10<sup>th</sup> highest percentage in the nation, and it continues to advance higher each year.

These numbers evidence that, when faced with the "heightened accountability" standard of parents' withdrawing their children, Toledo's Community Schools, and participating parents and children, have largely succeeded. Yet the Plan Commission and Toledo City Council seek to impede this success. The notion that these officials are wiser judges of the merits of a school's facilities than participating parents and children is both conceited and misguided.

By attempting the artificially restrict the number of students that may choose community schools, the proposed MSFR thus deprives Toledo parents and children of an educational opportunity that has proven popular and successful. Secondly, the MSFR would inhibit academic achievement. The very purposes of community schools include "providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited *experimental educational programs in a deregulated setting.*"<sup>17</sup>

In refraining from imposing minimum facility requirements, the General Assemblyman acknowledged that they did not have the expertise to know whether each school building needs a computer lab, or is better off with computers in all classrooms; whether "50 square feet of play area per student" is necessary for every school's student body; whether a 3,500 square foot gymnasium is necessary for every school's student body; or whether there must be separate, instead of shared, rooms for music, science, or "media."

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It is this deregulation and experimentation that appear to be the keys to educational innovation and success. The Ohio Community Schools Act recognizes that central planning has failed our schools, and that simple choice may offer a better way-- a way unlikely to be discovered if government interferes before flowers are permitted to bloom.

The numbers support this theory. Charter Schools have, with respect to academic achievement, managed to outpace their public school rivals in the absence of these supposedly "minimal" facilities. Empirical research on the matter demonstrates that Ohio's "charter school proficiency gains are greater than traditional public school gains at a statistically significant level."<sup>18</sup> More specifically:

Charter schools are not a dismissal failure as some opponents of the program have stated. Charter schools serve more disadvantaged students, higher percentages of minorities, and students who are more mobile, making it even more difficult for them to achieve higher levels of proficiency. Yet these schools are doing exactly that. When comparing each school to their estimated level of ability, charter schools are exceeding their target more often and to a greater degree than are traditional public schools.<sup>19</sup>

Thus, charter schools have outperformed schools with the very type of facilities that the city of Toledo seeks to impose. This demonstrates (1) such facilities are not essential; and (2) freedom from such facility requirements and other top-down regulation may contribute to academic achievement.

Finally, the MSFR abridges students' opportunity to escape to Community Schools. In doing so, it ensures the imposition of higher property taxes on all Toledo citizens.<sup>20</sup>

In conclusion, the Minimum School Facility Requirement is not only unconstitutional, but counterproductive to academic achievement and fiscal responsibility. Consequently, the Buckeye Institute promises that it will receive the legal, analytical, and public scrutiny that it deserves, and that Toledo parents and children possess the choice and opportunity that they deserve.

Sincerely,



Maurice A. Thompson  
Director, Counsel

The Buckeye Institute's 1851 Center for Constitutional Law

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## Endnotes

<sup>1</sup> Section 3, Article XVIII. Emphasis added.

<sup>2</sup> *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 2008 -Ohio- 4605.

<sup>3</sup> "An ordinance created under the power of local self-government must relate 'solely to the government and administration of the internal affairs of the municipality.'" *Marich*, 116 Ohio St.3d 553, 2008-Ohio-92, 880 N.E.2d 906, quoting *Beachwood v. Cuyahoga Cty. Bd. of Elections* (1958), 167 Ohio St. 369, 5 O.O.2d 6, 148 N.E.2d 921, paragraph one of the syllabus. Police-power ordinances, however, "protect the public health, safety, or morals, or the general welfare of the public." *Id.*, citing *Downing v. Cook* (1982), 69 Ohio St.2d 149, 150, 23 O.O.3d 186, 431 N.E.2d 995.

<sup>4</sup> *Am. Fin. Servs. Assn.*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 32, quoting *Canton*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, syllabus.

<sup>5</sup> Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. (emphasis added).

<sup>6</sup> (R.C. 3314.06(B), 3314.03(A)(2), and 3314.04) .

<sup>7</sup> R.C. 3314.01(B). (Emphasis added).

<sup>8</sup> For example, each community school must be formed as either a nonprofit corporation or a public-benefit corporation. R.C. 3314.03(A)(1). Community schools cannot charge tuition, R.C. 3314.08(I), and must be nonsectarian, R.C. 3314.03(A)(11)(c), with enrollment policies that comply with R.C. 3314.06. 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). Community schools contract with sponsors, which are responsible for monitoring their performance and compliance with applicable standards and requirements. R.C. 3314.03(A)(4). In turn, sponsors are monitored and overseen by the Ohio Department of Education ("ODE"). R.C. 3314.015. Under R.C. 3314.015(A), the ODE must approve sponsors, monitor the effectiveness of their oversight of their schools, and issue reports on the effectiveness of the schools' academic programs, operations, and legal compliance and on their financial condition. Sponsors must seek ODE approval, according to criteria, procedures, and deadlines established by ODE. R.C. 3314.015(B). If a sponsor becomes unwilling or unable to complete its duties, ODE may revoke approval to act as a sponsor and assume direct sponsorship of the community school in question for up to two years. R.C. 3314.015(C).

<sup>9</sup> R.C. 3314.01(B).

<sup>10</sup> R.C. 3314.08(D).

<sup>11</sup> See R.C. 3314.016 and R.C. 3314.017, and R.C. 3314.02(A)(3), respectively.

<sup>12</sup> See, generally, *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 2008 -Ohio- 4605.

<sup>13</sup> Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043.

<sup>14</sup> See, generally, *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519, at paragraph two of the syllabus, and *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92, 880 N.E.2d 906, ¶ 30 as thorough discussions of conflict analysis under Ohio law.

<sup>15</sup> *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.* (2006), 111 Ohio St.3d 568, 857 N.E.2d 1148. Emphasis added.

<sup>16</sup> *Id.*, noting that revisions to R.C. Chapter 3314 have included Am.Sub.H.B. No. 282, 148 Ohio Laws, Part I, 1956, 2020, which changed certain features of community schools, requiring them to have fiscal officers and requiring the ODE to issue an annual report card for each school, and 2002 Sub.H.B. No. 364, which made the ODE responsible for the oversight and approval of sponsors.

<sup>17</sup> Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. Emphasis added.

<sup>18</sup> Carr, Matthew and Gray, Nathan, *Academic Achievement in Ohio's Charter Schools: 2004-2006* (a working paper), [http://www.buckeyeinstitute.org/docs/charter\\_school\\_academic\\_achievement.pdf](http://www.buckeyeinstitute.org/docs/charter_school_academic_achievement.pdf)

<sup>19</sup> *Id.*

<sup>20</sup> Lear, Beth, and Carr, Matthew, *Public Charter Schools: A Great Value for Ohio's Public Education System*. [www.buckeyeinstitute.org/charterschools.pdf](http://www.buckeyeinstitute.org/charterschools.pdf).