

**STATE OF MICHIGAN
IN THE SUPREME COURT**

APPEAL FROM MICHIGAN COURT OF APPEALS' (PUBLISHED OPINION) REVERSING
THE GENESEE COUNTY CIRCUIT COURT ORDER GRANTING DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF
JUDGE ARCHIE L. HAYMAN

MICHIGAN OPEN CARRY [MOC], INC; and
KENNETH HERMAN,
Plaintiffs-Appellants,

Supreme Court Case No. 155204
Court of Appeals Case No. 329418
Lower Court Case No. 2015-104373-CZ
Genesee County Circuit Court

CLIO AREA SCHOOL DISTRICT [CASD]; and
FLETCHER SPEARS, III; and,
KATRINA MITCHELL,
Defendants-Appellees.

PLAINTIFFS-APPELLANTS' REPLY BRIEF (Corrected)

**** This appeal involves interpretation of a constitutional or statutory provision ****

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

SUPPLEMENTAL INDEX OF AUTHORITIES ii

COUNTER - ARGUMENT..... 1

 1. Not a case of statutory interpretation1

 2. Direct contravention.....2

 3. School districts not a fourth branch of government.....4

 4. School districts exceed statutory authority5

 5. No counter argument to Court of Appeals’ violation of court rules7

 6. Public policy arguments not germane to issues raised.....8

 7. Origins of weapons in schools statute misunderstood9

REQUEST FOR RELIEF 10

INDEX TO APPENDICES..... following Request for Relief

SUPPLEMENTAL INDEX OF AUTHORITIES

Cases

<i>Capital Area Dist Library v Michigan Open Carry, Inc</i> , 298 Mich App 220; 826 NW2d 736 (2012).....	2, 7
<i>In re Haley</i> 476 Mich. 180; 720 NW2d 246 (2006).....	6
<i>Mich Gun Owners, Inc. v Ann Arbor Pub Sch</i> , 318 Mich App 338, 897 NW2d 768 (2016); ___Mich ___; 904 NW2d 422 (2017).....	1
<i>Slater v. Ann Arbor Pub. Schools Bd. of Educ.</i> 250 Mich. App. 419; 648 NW2d 205 (2002).....	6

Constitutions, Statutes and other Authorities

Const 1963, art 3, § 2.....	4
MCL 28.421(1)(h).....	3
MCL 28.425c.....	5, 6
MCL 28.425o.....	2, 4, 5, 6, 7
MCL 28.425o(5).....	3
MCL 28.425o(5)(d).....	3
MCL 28.425o(5)(h)(i).....	3
MCL 28.425o(5)(h)(ii).....	3
MCL 28.602.....	3
MCL 28.602(f).....	4
MCL 123.1101.....	1, 4, 8, 9
MCL 123.1101(a).....	2
MCL 123.1102.....	6
MCL 380.11a(3).....	5, 6
MCL 750.234d.....	8, 9
MCL 750.237a.....	5, 6, 7
Public Act 321 of 1990.....	8, 9
Public Act 218 of 1992.....	9
Public Act 158 of 1994.....	9

Rules

MCR 7.215(C)(2).....	7
MCR 7.215(J)(1), (3).....	7
Administrative Order 2001-1.....	4, 5

Other Authorities

1990 House Revised First Analysis.....	9
1992 HB 4822 First Analysis.....	9
Breckenridge Community Schools, policy 7217.....	8
Crime Prevention Resource Center.....	8

COUNTER-ARGUMENT

1) MATTER PRESENTED IS NOT A CASE OF STATUTORY INTERPRETATION

Much ink has been consumed by Defendants-Appellees (“CASD”) in both this case and the Michigan Gun Owners, Inc. v Ann Arbor Public Schools (“MGO”) case seeking to frame this dispute as one of statutory interpretation. CASD Supplemental Brief, pp 1-7. Plaintiff-Appellants (“MOC”) have never asserted that the Firearms and Ammunition Act, MCL 123.1101, *et seq.*, (Apx 256a-257a) prohibits school districts from enacting firearms policies.

MOC concedes that the plain language of MCL §123.1101(b) (Apx 256a) does not expressly include “district libraries”, “school districts”, or other forms of governmental authority without ordinance-making authority. The definition of a “local unit of government,” contained within MCL 123.1101, however, lists all constitutionally authorized ordinance-making units of government and coincides with the stated legislative intent of the firearms preemption statute to limit a patchwork of conflicting local ordinances and to create a uniform state law regarding the regulation of firearms.

MOC Supplemental Brief at 23-24.

It is not the Firearms and Ammunition Act that preempts the ability of school districts to enact firearm regulation, but rather the pervasiveness of the state regulatory scheme in the field of firearms which informs the state’s occupation of the field of firearm regulation which preempts lower-level governmental entities’ attempts to regulate further. Indeed, even in the absence of the Firearms and Ammunition Act, this would be true. The existence of yet another firearm regulatory statute does nothing to detract from this fact. The court in CADL considered this point when it acknowledged that while cases often rise and fall on the plain language of a statute, this matter entailed regulation by a lower-level governmental entity in an area that is regulated by the state, and thus is not a statutory interpretation case.

It is a tautology to say that because the Legislature did not expressly include district libraries in its definition of local units of government as set forth in MCL 123.1101(a), it must have specifically intended not to occupy the field of gun regulation when it comes to the presence of guns in district libraries. While cases often rise and fall on the plain language of a statute, because this matter entails regulation by a lower-level governmental entity in an area that is regulated by the state, it is not a statutory-interpretation case. Such a simplistic analysis would render the doctrine of field preemption a nullity, which it is not.

CADL, 298 Mich App at 220, n 2.

This Court is presented with a relatively narrow interpretation of Michigan’s preemption jurisprudence. The opposing parties may desire to expand the issues for consideration by the Court, but doing so is unnecessary and leaves the basis for the appeal unanswered.

2) **DIRECT CONTRAVENTION TO STATE STATUTE IS ESTABLISHED**

In its Supplemental Brief on Appeal, Plaintiffs-Appellants (“MOC”) argue that the court of appeals erred in its determination that it could discern no conflict between the district policy and statute in this case. Appellants’ Supplemental Brief pp 26-30. Defendants-Appellees’ (“CASD”) Supplemental Brief addresses this point only in a footnote. CASD Supplemental Brief, n 5 at p 11. CASD claims that the “[s]chool [d]istrict’s policies track [MCL 28.425o] rather precisely, except that the [s]chool [d]istrict groups together many discreet categories of law enforcement officers into a category of ‘law enforcement enforcers.’”¹ Id.

It appears that CASD concedes that its policy does not specifically include various categories of individuals exempted from the policy, but rather it intended to lump the categories

¹ CASD’s multiple attempts to comply with MCL 28.425o are odd considering its claim that the Revised School Code grants unto it authority superior to mere legislative acts regulating the possession of firearms. See CASD Supplemental Brief, pp 8-10

in as a class of “law enforcement enforcers”². Id. The policy clearly and specifically lists some, but not all, categories of individuals exempted.

CASD now argues that its revised weapons policy (Apx 58a-59a) references “law enforcement officer” and that this reference should subsume the omitted categories of exempt individuals listed in MCL 28.425o(5). On one hand, CASD points out the acceptance of defined terms, and the “familiar principle” of *expressio unius est exclusio alterius* - when one or more things of a class are expressly mentioned others of the same class are excluded. CASD Supplemental Brief, p 3. On the other hand, CASD claims that its enumeration of over a dozen “discrete categories” and omission of others doesn’t exclude omitted categories of the same class. CASD’s argument, while logically inconsistent, does not dispute that the exemptions to the policy excludes retired corrections officers of a county sheriff’s department (MCL 28.425o(5)(d); probation officers and absconder recovery unit members of the department of corrections (MCL 28.425o(5)(h)(i)); and, retired parole, , probation, or corrections officers, or retired absconder recovery unit members, of the department of corrections (MCL 28.425o(h)(ii)). (Apx 259a-260a)

The term “law enforcement officer” is not defined in CASD’s policies (Apx 41a-42a; 58a-59a). However, the term is defined in the definitions section of the Firearms Act, MCL 28.421(1)(h) (Apx 442a) which adopts the definition found in the Michigan Commission on Law Enforcement Standards (MCOLES) Act (Public Act 203 of 1965) codified at MCL 28.602. (Apx 444a – 447a) The omitted categories of exempted individuals are not included in the statutory definition of “law enforcement officer” in MCL 28.602. (Apx 444a – 447a)

² The term “law enforcement enforcers” does not appear anywhere in CASD policy or state law.

If CASD's argument that "law enforcement officer" is enough to incorporate the omitted categories, then CASD's policy alters a statutory definition and is therefore in direct conflict with MCL 28.602(f). (Apx 444a) If the argument is rejected, then CASD's policy is in direct conflict with MCL 28.425o. (Apx 259a-260a)

3) SCHOOL DISTRICTS ARE NOT A FOURTH BRANCH OF GOVERNMENT

CASD argues that "schools are much like courts." CASD Supplemental Brief, p 10. CASD equates the authority of schools with the power of the Michigan Supreme Court's issuance of Administrative Order 2001-1. Id at 10. (Apx 449a) CASD asserts that "[s]chools share far more in common with courts than with libraries, township buildings, or counter clerk's offices." Id. The Michigan Association of School Boards ("MASB") in its amicus brief proposes the same argument. Supplemental Brief on Appeal, MASB amicus curiae, pp 7-8.

"The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in [the] constitution." Const 1963, art III, § 2. (Apx 448a) The question of the limit of the Firearms and Ammunition Act, MCL 123.1101, et.seq. (Apx 256a – 257a) on Administrative Order 2001-1 (Apx 449a) was raised previously by Defendants – Appellees with the court of appeals, in CASD's Supplemental Brief, and in MASB amicus brief. It seems that CASD would like to provocatively equate the viability of its policy with that of the policy of the court reviewing the case. However, the viability of Administrative Order 2001-1 (Apx 449a) is not questioned.

As a separate and co-equal branch of government, Michigan’s judiciary is not beholden to the acts of the legislative branch with respect to its administrative orders. Michigan’s constitution does not forbid the judiciary’s independent implementation of administrative rules.

Unlike the judiciary, CASD is not a co-equal branch of government under the constitution. CASD’s policy is not like the Administrative Order 2001-1. (Apx 449a) Finding CASD’s policy preempted does not raise a separation of powers issue.

4) **SCHOOL DISTRICTS EXCEED STATUTORY AUTHORITY**

CASD also argues that the Revised School Code, MCL 380.11a(3)(b), (Apx 450a) expressly authorizes school districts to regulate firearms.

The School Code then clarifies that a school district “may exercise a power implied or incident to a power expressly stated in this act” and “may exercise a power incidental or appropriate to the performance of a function related to operation of the school district in the interests of public elementary and secondary education in the school district.” (emphasis in original) (CASD Supplemental Brief, p 8)

CASD’s quotation is incomplete as it deletes an important exception to the statute. The full quotation reads:

A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, **except as otherwise provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interests of public elementary and secondary education in the school district**, including, but not limited to, all of the following:³ MCL 380.11(a)(3) (Apx 450a)

³ Public Act 192 of 2016 amended the Revised School Code, including Section 11a (MCL 380.11a) (Apx 450a – 451a). Subsection (3) was amended to add “otherwise” to “except as provide by law”, and “the school district” was changed to “a public school and the provision of public education services”. Appellants argue these changes can only be interpreted so as to support the interpretation that the Legislature specifically intended all powers granted in MCL 380.11a(3) (Apx 450a) to “otherwise” comply with all other state laws, such as MCL 28.425c (Apx 258a), MCL 28.425o (Apx 259a-260a), and MCL 750.237a (Apx 265a-266a) among others.

CASD has highlighted a near identical “except as otherwise provided by law” clause in MCL 123.1102 (Apx 256a-257a) at every opportunity, yet hide the now highlighted clause in MCL 380.11a(3) (Apx 450a). Anticipating an argument between the priority of the two “otherwise” clauses, Appellants argue such a determination is unnecessary as it is universally agreed that the Firearms and Ammunition Act (MCL 123.1102) (Apx 256a-257a) does not apply to CASD. Further, MCL 380.11a (Apx 450a) is subordinate to the more specific Firearms Act (MCL 28.425c and MCL 28.425o) (Apx 258a-260a) and Penal Code (MCL 750.237a) (Apx 265a-266a). Rules of statutory interpretation have a role to play in this instance. “[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls.” *In re Haley* 476 Mich. 180, 198; 720 NW2d 246, 256 (2006). See also *Slater v. Ann Arbor Pub. Schools Bd. of Educ.*, 250 Mich. App. 419, 434; 648 NW2d 205, 214 (2002) Here, the pertinent provisions in the Revised School Code are clearly more general as they discuss powers “implied” and “incidental” to the general topic of “safety and welfare”. This stands in stark contrast to the Firearms Act and Penal Code, which specifically deal with the lawful possession of firearms on school property by properly licensed individuals in specific circumstances. Therefore, the far more specific provisions in the Firearms Act and Penal Code control in so far as they apply.

Appellants do not question whether CASD has the power and duty to provide for the general safety and welfare of their pupils; however, as expressly stated in the Revised School Code, MCL 380.11a (Apx 450a), that power is limited and, like a river flowing around a boulder, said general power must give way to specific policy choices made by the legislature. The legislature has chosen to reserve the power to regulate the possession of firearms unto itself.

5) **NO COUNTER ARGUMENT TO COURT OF APPEALS' VIOLATION OF COURT RULES**

The court of appeals in *Capital Area Dist Library v Michigan Open Carry, Inc*, 298 Mich App 220; 826 NW2d 736 (2012) (“CADL”) held “the Legislature, through its statutory scheme in the field of firearm regulation, *has completely occupied* the field [of firearm regulation.]” 298 Mich App at 240 (emphasis added). The holding has precedential effect under the rule of stare decisis. MCR 7.215(C)(2) (Apx 434a).

Moreover, the court of appeals violated the requirements of MCR 7.215(J)(1) and (3), and committed clear error by not convening a special panel, nor conducting a poll of judges, as is required in cases where decisions conflict with precedential published decisions. MCR 7.215(J)(1), (3) (Apx 436a-437a).

This argument remains unanswered by CASD or amicus curiae.

6) **PUBLIC POLICY ARGUMENTS NOT GERMANE TO NARROW ISSUE PRESENTED ON APPEAL**

CASD, Ann Arbor Public Schools, and amicus curiae argue that school district policies that ban lawfully-possessed firearms by concealed pistol licensees, contrary to MCL 28.425o (Apx 259a-260a) and 750.237a (Apx 265a-266a), are necessary to prevent brandishing, assaultive or other crimes (MASB amicus, p10); and to provide a safe environment free from the prospect of confrontations between armed individuals. CASD Supplemental Brief, p 9.

Belief that security exists because CASD or AAPS simply hangs a sign banning lawfully-possessed firearms by concealed pistol licensees is delusional. Creating a so-called weapon free zone without genuine security protocols is misguided at best and, as history proves, serves as a

deliberate invitation to tragedy at worst. Every single horrific mass shooting referenced in MASB amicus occurred in yet another “weapon free school zone”. MASB amicus, n 5. These impotent policies do nothing to advance safety. Rather, they are printed invitations to unspeakable horror. Not all Michigan school districts are so myopic, many permit licensed guests and parents with lawfully-possessed firearms. E.g., see policy 7217 – Weapons, Breckenridge Community Schools. (Apx 452a – 453a) Appellees point to no tragedies arising in such districts and such a policy does not run afoul of the state statutory scheme.

From 1950 through July 10, 2016, 98.4%⁴ of all mass public shootings occurred in gun-free zones.⁵ Mass Public Shootings in Gun-free zones: 1950 through July 10, 2016, Crime Prevention Research Center, (Apx 454a - 472a).

Ultimately, the issue of how to best secure our schools is open for debate. It is a public policy issue that is not part of the narrow issue to be decided in this case. Claims that implementation of preempted school district policies somehow magically impose real school security are delusional and factually baseless.

7) **ORIGINS OF WEAPONS IN SCHOOLS STATUTE MISUNDERSTOOD**

A significant factor in this appeal – raised in Appellee’s Response Brief and amici briefs - is the intent of the Legislature and the legislative history of The Firearms and Ammunition Act (1990 PA 319, codified at MCL 123.1101 et seq) (Apx 256a-257a) and 1994 PA 158 (Apx 473a-477a), then codified in the Michigan Penal Code (MCL 750.237a) (Apx 265a-266a). We now know that the Legislature first entered the field of firearm regulation regarding possession in schools four years earlier than previously thought. In 1990, the Legislature passed a four bill

⁴ <https://crimeresearch.org/wp-content/uploads/2018/02/Mass-Public-Shooting-cases-1998-to-2015-Public-1.xlsx>

⁵ Crime Prevention Research Center <https://crimeresearch.org/2014/09/more-misleading-information-from-bloombergs-everytown-for-gun-safety-on-guns-analysis-of-recent-mass-shootings/>

omnibus tie-barred package pervasively regulating firearms. The package included both, the Firearms and Ammunition Act (MCL 123.1101 et seq.) (Apx 256a-257a)⁶, and the bill that included the regulation pertaining to schools (1990 PA 321, then codified at MCL 750.234d)⁷ (Apx 478a-484a). Both bills (HB5437 and HB6010) were sponsored by the same legislator.⁸ (See House Revised First Analysis, Apx 485a-487a) From the beginning, MCL 750.234d (Apx 478a-484a) exempted “[a] person licensed by this state or another state to carry a concealed weapon”.⁹ Two years later, the same sponsor introduced a Bill to expand two exemptions. See 1992 HB 4822 First Analysis, (Apx 492a-493a). The Bill was passed and MCL 750.234d (Apx 478a-484a) was amended by 1992 PA 218 (Apx 488a-491a) expanding two exemptions.

Contrary to Plaintiff / Appellant’s prior understanding, MCL 750.237a (Apx 265a-266a) did not create the first regulation on firearms in schools, it was just a reindexed and expanded version of an existing state statute, MCL 750.234d, (Apx 478a-484a) regulating firearms in schools created four years earlier. The reindexed statute applies to all weapons not just firearms, apply to crimes beyond weapon possession, and provides for harsher punishments for specified crimes on school property. MCL 750.237a (Apx 265a-266a) retains the exemptions from MCL 750.234d (Apx 478a-484a), including those licensed to carry a concealed weapon.

The statute regulating possession of firearms on school property was a contemporaneous legislative act and tie-barred to the state’s preemption statute. Read together, these statutes can

⁶ In December of 1990, the Legislature passed four tie-barred bills (HB 5366, 5437, 6009, and 6010) thereby enacting Public Acts 318, 319, 320, and 321 of 1990, all of which regulate firearms.

⁷ 1990 PA 321 added nearly a dozen sections to the penal code, and amended many more, all of which regulated firearms in some manner. MCL 750.234d prohibited the possession of firearms (all firearms carried in any manner), in a list of nine (9) places, which, when first passed in 1990, **included schools**.

⁸ HB 5437 ‘89 and HB 6010 ‘89 were both sponsored by Rep. Jerry C. Bartnik.

⁹ This exemption for a person licensed to carry a concealed weapon still exists in MCL 750.234d(2)(c), and in the school-related reindexed version at MCL 750.237a(5)(c).

leave no doubt remaining that the Legislature intended to create a uniform statewide multifaceted attack on the possession of firearms; **including possession in schools**. Most important to Plaintiff / Appellant's case, the exemption for those licensed to carry a concealed weapon remains.

Both Appellees and the Court of Appeals incorrectly applied the second Llewellyn factor (consideration of legislative history) when it found the legislative history did not address schools.

REQUEST FOR RELIEF

WHEREFORE, for the reasons stated in its application for leave to appeal and this supplemental brief, Plaintiff-Appellants, Michigan Open Carry and Kenneth Herman, respectfully request that this Honorable Court reverse the decision of the Michigan Court of Appeals, and affirm the judgment of the circuit court.

Respectfully Submitted,

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