

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
CIVIL DIVISION**

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|------------------------------------------|---|----------------------------|
| <b>CHRISTINA COLLINS, <i>et al.</i>,</b> | □ | <b>CASE NO. 23 CV 6611</b> |
|                                          |   |                            |
| <b>PLAINTIFFS,</b>                       | □ | <b>JUDGE HELD PHIPPS</b>   |
|                                          |   |                            |
| <b>vs.</b>                               | □ | <b>MAGISTRATE HUNT</b>     |
|                                          |   |                            |
| <b>THE STATE OF OHIO, <i>et al.</i></b>  | □ |                            |
|                                          |   |                            |
| <b>DEFENDANTS.</b>                       | □ |                            |

**MAGISTRATE’S DECISION ON PRELIMINARY INJUNCTION**

This matter was initiated by a Complaint filed on September 19, 2023 (“Original Complaint”) by Plaintiffs – Christina Collins, Teresa Fedor, Kathleen Hofmann, Tom Jackson, Meryl Johnson, Antoinette Miranda, and Michelle Newman (collectively “Original Plaintiffs”) – against Defendants State of Ohio and Mike DeWine Governor of the State of Ohio (collectively “Defendants”) wherein the Original Plaintiffs sought Declaratory Judgment and Temporary, Preliminary, and Permanent Injunctive Relief. The Original Plaintiffs sought to prevent certain provisions of H.B. 33 from going into effect. Specifically, the Original Plaintiffs sought to prevent enforcement of R.C. 3301.13, R.C. 3301.111, R.C. 3301.12, and R.C. 3301.07. In the Original Complaint, Plaintiffs sought to prevent the relevant provisions of H.B. 33 from “strip[ping]” them “of nearly all of [their] official duties and responsibilities as a member of the Board” of Education. Ms. Collins and Ms. Newman also asserted that they were proceeding with separate standing as parents of children who attend Ohio public schools. The Original Plaintiffs hired their own counsel who entered appearances.

Following a hearing on September 21, 2023, the Court granted the Original Plaintiffs' request for a TRO in part. An Order filed the same day ordered the following:

It is **ORDERED** that Defendants, as well as their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with any of them are enjoined from enforcing, implementing, complying with, or acting pursuant to R.C. 3301.13, R.C. 3301.111, R.C. 3301.12 and R.C. 3301.07 in any way or manner including by, without limitation: (1) creating the Department of Education and Workforce, as contemplated by Ohio Revised Code Section 3301.13(A); (2) appointing an individual to act as the director of the department of education and workforce, as contemplated by Ohio Revised Code Section 3301.13(A); and (3) transferring all of the Board's powers and duties regarding primary, secondary, special, and career-technical education to the director of the department of workforce and education, as contemplated by Ohio Revised Code Section 3301.13(C);

The matter was scheduled for a hearing on October 2, 2023, before this Magistrate on the Original Plaintiffs' request for a preliminary injunction.

On September 27, 2023, the Ohio Attorney General's Office ("A.G.") filed a Motion to Substitute the Ohio Attorney General's Office as Counsel for Plaintiffs, Members of the Ohio State Board of Education ("Board of Education"). In an Entry filed on September 29, 2023, the Court granted the A.G.'s motion in part and substituted the A.G.'s Chief Counsel and Ethics Officer, Bridget Coontz, as counsel for all seven Plaintiffs as it related to their claims that the relevant provisions of H.B. 33 would strip them of most of their official duties and responsibilities as elected members of the Board of Education. The Entry further stated that the Court was permitting private counsel for Ms. Collins and Ms. Newman to continue their representation as to their assertion of standing to sue as parents of children in Ohio public schools. On September 29, 2023, the A.G. filed a Civ. R. 41(A) voluntary Notice of Dismissal as to all claims filed by

Plaintiffs Christina Collins, Teresa Fedor, Kathleen Hoffman, Meryl Johnson, Antoinette Miranda, and Michelle Newman in their capacity as State Board of Education Members.

On October 1, 2023, the Verified Amended Complaint was filed in this matter which set forth the same claims as the Original Complaint. However, under the Amended Complaint Ms. Collins and Ms. Newman assert that they are proceeding solely as parents of children who attend Ohio public schools. The amended complaint added an additional plaintiff who is proceeding as a parent of children who attend Ohio public schools, Stephanie Eichenberg. (Collectively “Parent Plaintiffs”). The Amended Complaint also added the Board of Education of the Toledo City School District (“TPS”) as an additional plaintiff. TPS asserts that it is proceeding as a political subdivision of the State of Ohio whose Board is organized and operates under R.C. 3313 *et seq.* and is responsible for setting education policy for the Toledo Public Schools and voting on subjects such as curriculum, personnel, and finances. Ms. Eichenberg and TPS joined the Original Plaintiffs’ Motion for Temporary and Preliminary Injunctive Relief.

The hearing on Plaintiffs’ request for a preliminary injunction under the Amended Complaint was held on October 2, 2023, in Courtroom 2A and was recorded by electronic means. Plaintiffs were represented by attorneys Amanda Martinsek, Katherine Poldneff, Gregory Djordjevic, Madeline Gitomer and Jeffrey Dubner. Plaintiffs presented the testimony of Christina Collins, Stephanie Eichenberg and Sheena Barnes and offered Exhibits 1 through 39 which were admitted into evidence. The Magistrate notes that Plaintiffs did not present the testimony of plaintiff Michelle Newman. Defendants were represented by A.G. attorneys Julie Pfeiffer and Phillip Kelly. Defendants presented the testimony of Jessica Voltolini and offered Exhibits A through

K which were admitted into evidence. At the hearing's conclusion, counsel was ordered to file Proposed Findings of Fact and Conclusions of Law by October 4, 2023.

On October 3, 2023, the Court conducted an emergency hearing to address an email sent by Assistant Attorney General Coontz to counsel for Defendants, Julie Pfeiffer, in which the Judge's staff attorney was inadvertently copied. In the email, Attorney Coontz offered legal advice to Attorney Pfeiffer related to this matter which the Court found to be directly adverse to her clients Plaintiffs Collins and Newman. Attorney Coontz represented them as members of the State Board of Education. This resulted in an Order which: (1) extended the TRO to October 20, 2023; (2) ordered briefing on or before October 5, 2023 related to whether all counsel from the A.G. should be disqualified from continuing to represent any party in this case; and (3) extended the deadline for filing Proposed Findings of Fact and Conclusions of Law to October 16, 2023.

On October 5, 2023, Attorney Pfeiffer filed a brief which indicated that the A.G. asserted that disqualification was not warranted, but that the A.G. had already appointed outside special counsel to take over representation of Defendants "out of an abundance of caution and to eliminate distraction[.]" Accordingly, Attorney Larry Obhof Jr. filed a Notice of Appearance and Substitution of Counsel for Defendants on October 9, 2023.

The parties timely filed their Proposed Findings of Fact and Conclusions of Law. This Magistrate has reviewed all the parties' filings. Having weighed the evidence submitted during the hearing, having read and reviewed the exhibits and Verified

Amended Complaint, and having applied the required law, this Magistrate hereby renders the following decision:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Magistrate's Findings of Fact are based on the testimony of the witnesses and the exhibits introduced into evidence. This Magistrate reviewed the Verified Amended Complaint and all the exhibits and considered each as to its weight and credibility. The credibility of all the witnesses was considered. The credibility of a witness is based upon the appearance of the witness upon the stand; his/her manner of testifying; the reasonableness of the testimony; the opportunity he/she had to see, hear and know the things concerning which he/she testified; his/her accuracy of memory; frankness (or lack of it); intelligence, interest and bias (if any); together with common sense and all the facts and circumstances surrounding the testimony. Of importance in deciding the Findings of Facts, this Magistrate notes that she is free to believe all, some, or none of the testimony of each witness appearing before her. *State v. Ellis*, 8<sup>th</sup> Dist., Cuyahoga No. 98538, 2013-Ohio-1184.

#### **I. STANDARD OF REVIEW**

A preliminary injunction is an extraordinary remedy; therefore, the moving party has a substantial burden to meet in order to be entitled to the injunction. *Sinoff v. Ohio Permanente Med. Group*, 146 Ohio App. 3d 732, 2001 Ohio 4186, 767 N.E.2d 1251, citing *Ormond v. Solon* (Oct. 18, 2001), Cuyahoga App. No. 79223, 2001 Ohio App. LEXIS 4654. The moving party must establish a right to a preliminary injunction by showing clear and convincing evidence of each element of the claim. *Sinoff v. Ohio Permanente Med. Group*, 146 Ohio App. 3d 732 (8<sup>th</sup> Dist. 2001), citing *Vanguard Transp.*

*Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.*, 109 Ohio App.3d 786 (10<sup>th</sup> Dist. 1996). “Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.” *Connor Grp. v. Raney*, 2nd Dist. Montgomery, 2016-Ohio-2959, ¶ 20, 2016 Ohio App. LEXIS 1836, \*17 (May 13, 2016) (internal citations omitted).

In determining whether to grant a preliminary injunction, a court must consider:

- (1) whether there is a substantial likelihood that the plaintiff will prevail on the merits of its claims;
- (2) whether the plaintiff will suffer irreparable harm if the injunction is denied;
- (3) whether third parties will be unjustifiably harmed if the injunction is granted;
- and
- (4) whether the public interest will be served if the injunction is granted.

*Hydrofarm, Inc. v. Orendorff*, 2008-Ohio-6819, ¶18 (10<sup>th</sup> Dist.), quoting *Vanguard Transp. Systems, Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 786, 790 (10<sup>th</sup> Dist.1996); *Valco Cincinnati, Inc. v. N&D Machining Serv., Inc.*, 24 Ohio St.3d 41 (1986); *Corbett v. Ohio Building Authority*, 86 Ohio App.3d 44, 49 (10<sup>th</sup> Dist.1993). See also *Thomas J. Dyer Co. v. Franklin County Convention Facilities Authority*, 61 Ohio Misc.2d 132, 133-34 (Franklin Cty.C.P.1990). The primary goal of preliminary injunctive relief “is to preserve the status quo pending final determination of the matter.” *Ohio Urology, Inc. v. Poll*, 72 Ohio App.3d 446, 454 (10<sup>th</sup> Dist.1991).

Moreover, the party seeking injunctive relief must establish a right to the preliminary injunction by showing clear and convincing evidence of each element of the claim. *Vanguard, supra* at 790; *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 14 (10<sup>th</sup> Dist.1996). In determining whether to grant injunctive relief, no one factor is dispositive; the four factors must be balanced with the “flexibility which traditionally has characterized the law of equity.” *Id.* “When there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though a plaintiff’s case of irreparable injury may be weak. In other words, what [a] plaintiff must show as to the degree of irreparable harm varies inversely with what [a] plaintiff demonstrates as to its likelihood of success on the merits.” *Id.*

“Courts should take ‘particular caution . . . in granting injunction, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government.” *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604 (1995), citing *Leaseway Distrib. Centers, Inc. v. Dept. of Adm. Serv.*, 10<sup>th</sup> Dist. Nos. 88AP-330, 88AP-332, 88AP-370 (June 16, 1988).

## **II. LIKELIHOOD THAT PLAINTIFFS WILL PREVAIL ON THE MERITS**

Plaintiffs allege that certain provisions of H.B. 33 (“Challenged Provisions”) violate the “single subject rule” included in Article II, Section 15(D) of the Ohio Constitution, the “three-readings rule” in Article II, Section 15(C) of the Ohio Constitution, and the responsibilities of the State Board under Article VI, Section 4 of the Ohio Constitution. Ms. Voltolini, the Chief of Staff for the Ohio Department of Education, testified that the Challenged Provisions modify the responsibilities of the

State Board and the Superintendent of Public Instruction. These provisions also create a new business unit for the Board, rename the existing Department of Education as the Department of Education and Workforce (“DEW”), and make the DEW a cabinet-level agency. [Ex. K, ¶ 8].

In 1953, the Ohio Constitution was amended to establish the State Board. Article VI, Section 4 provides:

There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

The State Board consists of 19 members – 11 of whom are elected, and 8 of whom are appointed by the Governor. The elected members represent constituents and their interests from 11 separate geographic districts throughout the state. The 11 members are elected to four-year terms in even-numbered years by voters in Ohio’s 11 State Board Districts, each of which contain anywhere from 35 to 80 local school districts. Each such Board District has unique characteristics and often differing challenges in the education context.

S.B. 1, the predecessor to H.B. 33, was introduced into the Ohio Senate on January 11, 2023. [Ex. 13]. On January 17, 2023, S.B. 1 was referred to the Senate Economic Workforce and Development Committee. It passed the Senate on March 1, 2023. [Ex. 13]. S.B. 1 contemplated that the newly created DEW would be headed by the Director of the DEW (“Director”), who would be appointed by the Governor with the advice and consent of the Senate. [Ex. 9, p. 405]. S.B. 1 also sought to transfer “[a]ll powers and duties regarding primary, secondary, special, and career-technical



education granted to the state board, the superintendent, or the former department of education . . . except those prescribed for the state board of education as described in section 3301.111 of the Revised Code” to the Director. [Ex. 9, pp. 405-406].

On March 14, 2023, S.B. 1 was referred to the House Economic and Workforce Development Committee. It was never voted out of that Committee. [Ex. 13]. H.B. 12, the House’s companion bill to S.B. 1, was introduced in the Ohio House on February 15, 2023. H.B. 12 was referred to the House Primary and Secondary Education Committee on February 16, 2023, from which it never reemerged. [Ex. 12].

H.B. 33, the state’s general operating and appropriations budget for fiscal years 2024-2025, was introduced in the House on February 15, 2023. The “long title” of the bill states that it is intended, among other purposes, “to make operating appropriations for the biennium beginning July 1, 2023, and ending June 30, 2025, to levy taxes, and to provide authorization and conditions for the operation of state programs.” [Ex. 6, p. 11]. The “as-introduced” version of H.B. 33 included authorizations and conditions for the operation of many state programs. For example, the as-introduced version included provisions for the creation of the Department of Children and Youth, and transferred to it certain responsibilities of other departments or state agencies. [Ex. 6, pp. 141-142]. The as-introduced version did not include the Challenged Provisions. On April 26, 2023, the House passed H.B. 33

The next day, H.B. 33, as passed by the House, was introduced into the Senate. [Ex. 36, p. 3]. During the Senate’s consideration of H.B. 33, the Senate amended the bill to add the Challenged Provisions. On June 15, 2023, the Senate passed H.B. 33 which included the Challenged Provisions. [Ex. 8, pp. 6357-58]. On June 21, 2023, the

House voted not to concur with Senate amendments to H.B. 33, which included the Challenged Provisions. [Ex. 24, p. 497]. Consequently, at the Senate's request, the amendments were considered by a budget conference committee, made up of members of both legislative Chambers.

The conference committee held hearings on H.B. 33 on June 22, 28, and 30, 2023. The conference committee discussed the Challenged Provisions, referred to as the "[t]ransfer of state K-12 education governance," for the first time in the June 28 hearing. [Ex. 15, p. 7]. On June 30, 2023, H.B. 33, with the Challenged Provisions, reported out of committee and was read in the House for the first and only time. [Ex. 26]. The same day, the General Assembly passed H.B. 33 with a successful floor vote in each Chamber. On July 4, 2023, Governor DeWine signed H.B. 33 into law.

Plaintiffs argue that "the [Challenged Provisions do] not create a new body, separate and apart from the Board, but instead, it unconstitutionally hollows out the constitutionally mandated, independent Board by transferring all of its core responsibilities to an agency controlled by the Governor. The [Challenged Provisions] remove the Board all together from Section 3301.07, the statute that had governed its duties for 70 years, simply by striking the words 'state board of education' and replacing them with 'department of education and workforce' throughout." [Plaintiffs' Proposed Findings and Conclusions, p. 14].

It is undisputed that the Challenged Provisions transfer duties and responsibilities from the State Board to the DEW. Before enactment of the Challenged Provisions, R.C. 3301.07 stated that "[t]he state board of education shall exercise under the acts of the general assembly general supervision of the system of public education in the state."

Under the new Challenged Provisions, R.C. 3301.07 states that “[t]he director of education and workforce shall exercise under the acts of the general assembly of the system of public education in the state.” [Ex. 39, p. 4379]. The undisputed transfers include the following:

- creating the DEW, which “shall be headed by the director of education and workforce, who shall be appointed by the governor with the advice and consent of the senate,” [Ex. 39, p. 4446];
- transferring “[a] powers and duties regarding primary, secondary, special, and career-technical education granted to the state board, the state superintendent<sup>1</sup>, or the former department of education . . . except those prescribed for the state board of education as described in section 3301.111 of the Revised Code . . . to the director of education and workforce,” [Ex. 39, pp. 4446-47]; and
- Vesting the Director with the authority to “exercise under the acts of the general assembly general supervision of the system of public education in the state . . . “ including (1) the authority to “exercise policy forming, planning, and evaluative functions for the public schools of the state except as otherwise provided by law”; (2) the power to “develop the standard of financial reporting which shall be used by each school district board of education and governing board of educational service center”; (3) the authority to “administer and supervise the allocation and distribution of all state and federal funds for public school education under the provisions of law”; (4) the power to “formulate and prescribe minimum standards to be applied to all elementary and secondary schools in th[e] state for the purpose of providing children access to a general education of high quality according to the learning needs of each individual, including students with disabilities, economically disadvantaged students, English learners, and students identified as gifted” [Ex. 39, pp. 4379-80].

The Challenged Provisions also transfer the following duties and responsibilities from the Superintendent to the Director:

- “provid[ing] technical and professional assistance and advice to all school districts in reference to all aspects of education, including finance, buildings and equipment, administration, organization of school districts, curriculum and instruction, transportation of pupils, personnel problems, and the interpretation of school laws and state regulations.”;

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<sup>1</sup> Hereinafter “Superintendent”.

- “Prescrib[ing] and require[ing] the preparation and filing of such financial and other reports from school districts, officers, and employees as are necessary or proper.”;
- “Prescrib[ing] and require[ing] the installation by school districts of such standardized reporting forms and accounting procedures as are essential to the businesslike operations of the public schools of the state.”;
- “Conduct[ing] such studies and research projects as are necessary or desirable for the improvement of public school education in Ohio . . . [which] may include analysis of data contained in the education management information system established under section 3301.0714 of the Revised Code.”;
- “Prepar[ing] and submit[ting] annually a report of the activities of the department and the status, problems, and needs of education in the state.”; and
- “Supervis[ing] all agencies over which the board exercises administrative control, including schools for education of persons with disabilities.”

[Ex. 39, p. 4439].

It is uncontested that under the Challenged Provisions, the State Board will continue to govern the following:

- The adoption of requirements for educator licensure, licensee disciplinary actions, and school district territory transfer determinations. *R.C. 3301.111(A)*;
- The appointment of the superintendent of public instruction. *R.C. 3301.111(C)*;
- Teacher and school counselor evaluation systems. *R.C. 3319.112 and 3319.113*;
- Annual teacher recognition programs. *R.C. 3314.67*; and
- The Educator Standard Board. *R.C. 3319.60*.

Additionally, under the Challenged Provisions, the “state board shall make recommendations to the director of education and workforce regarding priorities for

primary and secondary education.” *R.C. 3301.111(B)*. Ms. Voltolini testified that the DEW and the Director will continue to implement state education law and policies in a similar fashion as did the State Board prior to the passage of S.B. 33, *i.e.* maintain the same public comment plans and processes in place, public transparency, public meetings, and open communication with stakeholders and partners to obtain feedback and information. The Magistrate finds this testimony credible.

### **STANDING**

A key issue is whether Plaintiffs, as (1) parents of children attending Ohio public schools (“Parent Plaintiffs”) and (2) TPS, have standing to sue. “Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue.” *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27. As stated by the Ohio Supreme Court:

The Ohio Constitution expressly requires standing for cases filed in common pleas courts. Article IV, Section 4(B) provides that the courts of common pleas “shall have such original jurisdiction over all *justiciable matters*.” (Emphasis added.) A matter is justiciable only if the complaining party has standing to sue. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41. (“It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy”). Indeed, for a cause to be justiciable, it must present issues that have a “direct and immediate” impact on the plaintiffs. *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St.2d 93, 97-98, 296 N.E.2d 261 (1973). Thus if a common pleas court proceeds in an action in which the plaintiff lacks standing, the court violates Article IV of the Ohio Constitution. Article IV requires justiciability, and justiciability requires standing. These constitutional requirements cannot be bent to accommodate *Sheward*.

*ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7.

Standing does not depend on the merits of the plaintiff's claim. *Moore v. Middletown*, 133 Ohio St3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 23. Rather, standing depends on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case. *ProgressOhio.org, Inc. v. JobsOhio*, *supra*, at ¶ 7.

Common-law standing requires a litigant to demonstrate that they suffered: (1) an injury; (2) that is fairly traceable to the defendant's allegedly unlawful conduct; and (3) that is likely to be redressed by the requested relief. *Ohioans for Concealed Carry, Inc. v. City of Columbus*, 164 Ohio St.3d 291, ¶ 12 (2020). For common-law standing, a party wishing to sue must have a "direct, personal stake" in the outcome of the case; "ideological opposition to a program or legislative enactment is not enough." *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, ¶ 18 (2016), quoting *ProgressOhio.org, Inc.*, *supra*, at ¶ 1 (2014). "The essence of the doctrine of standing is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.*, 28 Ohio St.3d 317, 321 (1986), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Plaintiffs allege that they have common-law standing and have suffered an actual injury in this matter. For clarification, they are claiming they suffered individual, actual injury as parents of children in Ohio public schools and as a local district school board. No Plaintiff claims standing as a taxpayer or "public-right"<sup>2</sup> standing.

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<sup>2</sup> The public-right doctrine applies only to original actions in mandamus and/or prohibition. It does not apply to declaratory judgment actions filed in common pleas courts. *ProgressOhio.org, Inc.*, *supra*, at ¶ 1.

Parent Plaintiffs maintain that the Challenged Provisions deprive them of local, elected representation in state education governance and strip them of their voices in their children's education. Ms. Collins testified that she has regularly communicated with her elected State Board member to address various concerns she has regarding issues germane to her children's education such as dyslexia standards, standardized testing, and academic standards. The State Board would frequently have committees address specific issues brought to them by parents such as herself. Parents such as herself were able to appear publicly before the State Board to air their concerns. She is concerned that the Challenged Provisions' transfer of core duties and responsibilities related to her issues from the State Board to the Director eliminates transparency and stifles public debate of educational issues. She acknowledges that under the Challenged Provisions, she could still bring issues to her representative, but claims that the representative would be unable to properly address them.

Similarly, Ms. Eichenberg, as a parent, has had conversations with her State Board representative to address subjects that could detrimentally affect her children such as the third grade reading guarantee. Her representative took such concerns to meetings and hearings, gathered input, and altered the application of the third grade reading guarantee. Ms. Eichenberg was herself elected to TPS's Board of Education in 2016.<sup>3</sup> During her time on the Board, she was very concerned, as a parent and a Board member, about an academic distress committee taking over control of Toledo Public Schools. As a result, TPS passed a resolution and subsequently met with its

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<sup>3</sup> She no longer serves as a member of the board.

representative and the president of the State Board in Toledo to tour TPS's schools and give them additional information for the academic distress commission to consider.

As a parent and former member of TPS, Ms. Eichenberg is concerned about the following transfer of powers and duties to the Director: assessments, funding of schools, state standards, gifted education, delivery of state standards, the state report card, advocating for children's education, social and emotional learning policies, graduation requirements, and capstone requirements. Her concerns lie in the loss of transparency and access to the State Board's open meetings. As a member of TPS, she reviewed the State Board's minutes which assisted her in advocating her position on issues or pending legislation. She stated that without all the current access, it would have been more difficult to be an advocate for her children and TPS's students and would have hurt TPS's ability to serve her children and other students in Toledo Public Schools.

TPS claims that it has standing based on the following:

[The Challenged Provisions strip] the TPS Board of its ability to engage with an accessible, transparent, and responsive State Board including its elected member with the authority to set and implement education policy, thereby diminishing the TPS Board's ability to serve the students in its communities. Indeed, the TPS Board routinely shares its local perspective and particularized needs with the State Board, giving it a direct line of communication to the body currently empowered to set educational standards, reporting requirements, and other crucial topics. The TPS Board likewise relies on its State Board member to help the TPS Board understand and implement state educational requirements, improve its schools' academic performance, and develop curricula, among many other matters. [Plaintiff's Proposed Findings and Conclusions, p. 49].

Sheena Barnes is the President of TPS. She has children in Toledo Public Schools. Like Ms. Eichenberg, Ms. Barnes stated that TPS relies on the State Board's public meetings, its publicly available meeting minutes, and its elected member's willingness to visit Toledo Public schools and attend TPS board meetings to stay



apprised of new developments in education policy and communicate the needs of TPS's schools to the State Board. She agreed that TPS relies on the transparency provided by the State Board's open meetings and recorded minutes to ensure that TPS understands and complies with state law and new statewide policies. Ms. Barnes stated that she has sought advice from the State Board on things like how to improve Toledo Public Schools' performance on the Ohio School Report Cards, whether a new voucher program would affect TPS's budget, and how to improve its programming for students with special needs. She testified about TPS's ability to elevate the needs of the Toledo Public Schools to the State Board, including, for example, successfully encouraging the State Board to adopt standards related to social-emotional learning and ensuring that the experiences of TPS's black and brown students are incorporated into a curriculum on interacting with law enforcement.

Defendants argue Plaintiffs lack standing to sue because they have not alleged an injury in fact sufficient to confer standing and that any claimed harm is speculative. Defendants cite *Ohio Democratic Party v. LaRose*, 10<sup>th</sup> Dist. Nos. 20 AP-421 and 20AP-428, 2020-Ohio-4664, which states:

To establish the first element of traditional standing, a plaintiff must demonstrate that the challenged action will cause it injury in fact, whether that injury is economic or otherwise. *League of United Latin Am. Citizens v. Kasich*, 10<sup>th</sup> Dist. No. 10AP-639, 2012-Ohio-947, ¶ 34. The injury must be concrete, not simply abstract or suspected. *State ex rel. Food & Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, ¶20, 100 N.E.3d 391. Additionally, the injury must be particularized, meaning the injury is not borne by the population in general, but affects the plaintiff in a personal and individual way. *Spokeo, Inc. v. Robbins*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1540, 1548, 194 L.Ed.2d 635 (2016); *League of United Latin Am. Citizens* at ¶ 21. Importantly, the injury need not be large, but only "palpable." *League of United Latin Am. Citizens* at ¶ 21. *Accord New York Republican State Comm. V. Secs. & Exchange Comm.*, 927 F.3d 499, 504, 441 U.S. App. D.C. 413 (D.C.Cir.2019) ("Even slight injury is sufficient to confer

standing[.]”); *Crawford v. Marion Cty Election Bd.*, 472 F.3d 949, 951 (7<sup>th</sup> Cir. 2007) (holding that standing “requires only a minimal showing of injury”).

*Id.* at ¶ 19.

Accordingly, it must first be determined whether the alleged injuries, assuming they exist, affect the Plaintiffs in a personal and individual way rather than being borne by the population in general. In *LaRose*, an individual sought to enjoin the Ohio Secretary of State from enforcing his directive that boards of election accept delivery of applications for absentee ballots only as submitted in person or by mail and not by electronic means such as email or fax. The Secretary of State argued that the individual lacked standing to sue and that the alleged injury was not particularized because it was the same sort of injury that any Ohioan seeking to vote absentee would suffer. The Tenth District rejected this argument holding as follows:

A plaintiff who complains only of an injury sustained by the general public raises a generalized grievance against the law instead of establishing a particularized injury. *Walgate*, 2016-Ohio-1176 at ¶ 19, 147 Ohio St.3d 1, 59 N.E.3d 1240. Thus, for example, in *Walgate*, the plaintiffs lacked standing to challenge the constitutionality of gambling legislation because they failed to allege any injury beyond the negative effects of gambling that applied equally to all members of the general public. *Id.* at ¶ 22. This case is not like *Walgate*. Here, [the individual] asserts an injury applicable to a subset of the general population, i.e., those Ohioans who decide to vote via absentee ballot. While many Ohioans will suffer or have suffered the same sort of injury as [the individual], “[t]he fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance.” *Spokeo, Inc.* at 1548, fn. 7. Where harm is concrete, although widely shared, courts have found injury in fact, particularly when “large number of voters suffer interference with voting rights conferred by law” as [the individual] claims here. [The individual]’s injury is concrete. Consequently, even though multiple people will or have experienced the same type of injury, [the individual]’s injury remains particular to him.

*Id.* at ¶ 23.

Defendants argue that the Plaintiffs in this case do not assert any concrete and particularized injury that is different from the impact on Ohio's parents or school districts generally. They contend that, in essence, a plaintiff who complains only of an injury sustained by the general public raises a generalized grievance against the law instead of establishing a particularized injury. *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, ¶ 19. In *Walgate*, the Court determined whether parents of public-school students had standing to pursue claims of unconstitutional diversion of lottery proceeds and casino tax proceeds from education or school funds. The parents claimed that funds that should go to schools had been redirected and that net proceeds of lotteries were being distributed to gambling interests instead of educational programs as required by the Ohio Constitution. *Id.* at ¶ 31. The Supreme Court held that the parents lacked standing because “[m]any members of the general public who are [not] parents of public-school students . . . contribute to the funding of public schools in one form or another. Appellants’ interest in ensuring that the public-school system receives the proper funds is shared by the general public.” *Id.* at ¶ 33.

The Tenth District similarly found that parents of public-school students lacked standing in *Toledo City School Dist. Bd. Of Edn. v. State Bd . of Educ.*, 2014-Ohio-3741, 18 N.E.3d 505 (10<sup>th</sup> Dist.) (reversed on other grounds.). In that case, the Court of Appeals held that parents of public-school students did not have standing where they failed to allege that their children had been denied special education opportunities caused by the Ohio Department of Education's failure to fund their district at the statutory rate. *Id.* at ¶ 57-59.

*Walgate* and *Toledo City School Dist. Bd. Of Edn.* are distinguishable from this case. Here, the Parent Plaintiffs' and TPS's claimed injuries that, if proven, amount to direct harm in the form of loss of meaningful, transparent, publicly accessible representation with elected State Board members regarding their children's specific educational needs. In addition, the claimed injuries are unique to Plaintiffs and not experienced by the general public. Applying *LaRose*, the Magistrate finds that Parent Plaintiffs and TPS, despite the fact that they constitute a large number of people or entities, assert an injury applicable to a subset of the general population. Plaintiffs presented sufficient evidence to support their claim of specific injuries that are unique and different from the general public, that could be redressed through their requested relief, and were caused by Defendants' enactment of H.B. 33. Accordingly, Parent Plaintiffs and TPS would have standing *if* they could meet their burden of proof as to their alleged injury.

In determining whether or not Plaintiffs meet their burden of proof as to their alleged injury, the Magistrate notes that the Challenged Provisions do not abolish the State Board. Statutes<sup>4</sup> establishing the State Board and election of its members are not altered by the Challenged Provisions. Plaintiffs counter that rationale with the argument that their "injuries arise not from their ability to vote for a representative in the abstract, but to engage with elected State Board members vested with the power to set and implement education policy." [Plaintiffs' Proposed Findings and Conclusions, p. 48]. However, that argument rings hollow. The State Board is not constitutionally "vested"

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<sup>4</sup> R.C. 3301.01 and 3301.02.

with the transferred powers: it has no permanent right to them. Article VI, Section 4 of the Ohio Constitution reads as follows:

There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. ***The respective powers and duties of the board and of the superintendent shall be prescribed by law.*** (Emphasis added.)

Plaintiffs argue that the legislative history is important in analyzing whether the General Assembly violated Article VI, Section 4 when it enacted H.B. 33. Plaintiffs cite as authority Chief Justice Kennedy's concurring opinion in *City of Maple Heights v. Netflix, Inc.*, 171 Ohio St.3d 53, ¶ 37 (2022):

The Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations. *Id.*, citing *Bostock v. Clayton Cty., Georgia*, \_\_\_ U.S. \_\_\_ 140 S. Ct. 1731, 1738 (2020).

Chief Justice Kennedy, in her majority opinion, in *Toledo City Sch. Dist. Bd. Of Educ. V. State Bd. Of Educ. of Ohio*, 146 Ohio St.3d 356 (2016), took the same stance. Although *Toledo City Sch. Dist. Bd. Of Educ.* precedes *City of Maple Heights*, Justice Kennedy noted:

Generally speaking, in construing the Constitution, we apply the same rules of construction that we apply in construing statutes. *Miami Cty. V. Dayton*, 92 Ohio ST. 215, 223, 110 N.E. 726 (1915). Therefore, the intent of the framers is controlling. *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 14. To determine intent, we must begin by looking at the language of the provision itself. *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 520, 1994-Ohio-496, 644 N.E.2d 369 (1994). "Where the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean." *Id.* at

520-521. Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning. *State ex. Rel. Herman v. Klopfeisch*, 72 Ohio St.3d 581, 584, 651 N.E.2d 995 (1995); *see also R.C. 1.42*. If the meaning of a provision cannot be ascertained by its plain language, a court may look to the purpose of the provision to determine its meaning. *See Castleberry v. Evatt*, 147 Ohio St. 30, 67 N.E.2d 861 (1946), paragraph one of the syllabus. *Id.* at ¶ 16.

In that case, the Court construed the Retroactively Clause of the Ohio Constitution. The Court noted that the Retroactively Clause remained unchanged from its adoption in 1851, and therefore examined whether “retroactive laws” was a term of art with an established meaning at the time of the ratification of the 1851 Constitution.

In this case, Plaintiffs do not argue and this Magistrate does not find that the provision “[t]he respective powers and duties of the board and of the superintendent shall be prescribed by law” contains any term of art or wording that would reasonably have had a different meaning in 1953 than it does today. As a result, the meaning of this constitutional provision can be ascertained from its plain language. This precludes reliance on the legislative history of Chapter VI, Section 4. Thus, as written, the Legislature has complete authority to grant, or remove, the respective powers and duties of the State Board and the Superintendent, and the State Board has no constitutional right to retain all the powers transferred under the Challenged Provisions. *See Board of Education v. State Board of Education*, 116 Ohio App. 515, 518 (12<sup>th</sup> Dist. 1962) (“the control of schools, be they public or private, providing elementary and secondary for the youth of Ohio, reposes in the Legislature of our state. When the General Assembly speaks on matters concerning education it is exercising *plenary* power and its action is subject only to the limitations contained in the Constitution. An examination of the Constitution reveals that the only prohibition in the Constitution

concerning the exercise of this power over elementary and secondary education is as to religion, *i.e.*, the release of public school funds to control by a religious group or sect is prohibited. . . the Legislature of Ohio, in passing laws concerning elementary and secondary schools, is restrained only by its own conscience, fear of the electorate, and one section of the Constitution.”)

The remaining crux of Plaintiffs’ alleged injury is simply that they rely on their ability to engage with elected State Board members, participate in the State Board’s transparent public meetings, and refer to the State Board’s minutes in order to successfully advocate for their children and others enrolled in Toledo Public Schools. The Challenged Provisions do not alter the statutes<sup>5</sup> that require the State Board have public meetings open to the public wherein audio recordings and minutes are available to the public. Plaintiffs retain the same unfettered open access to the members of the State Board to convey questions or concerns, to attend meetings, and to refer to minutes. Notably, under the Challenged Provisions, Board members are then required to take any issues or recommendations based on input from people like these Plaintiffs to the Director of the DEW: “[t]he state board ***shall*** make recommendations to the director of education and workforce regarding priorities for primary and secondary education.” (Emphasis added.) [Ex. 39, p. 4437].

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<sup>5</sup> R.C. 3301.04, 3301.041, and 3301.05.

In addition, the Challenged Provisions also guarantee open access to Plaintiffs and members of the State Board with regard to rulemaking by the DEW:

***Stakeholder<sup>6</sup> outreach and rulemaking***

The bill requires DEW to establish a stakeholder outreach process for use when it engages in rulemaking. DEW must establish a method under which stakeholders may elect to participate in the process. The process must include both a notice and an opportunity for stakeholder feedback prior to DEW initiating rulemaking and submitting a proposed rule to the Joint Committee on Agency Rule Review (JCAAR). The process also may include stakeholders (sic) meetings, questionnaires for stakeholders, or stakeholder advisory groups.

The bill expressly states that a notice under the process is not a public notice, but rather it is a courtesy for stakeholders. DEW also is not required to send draft rules out to, nor negotiate draft rule language with, stakeholders.

***Prior to initiating rulemaking***

Prior to conducting a five-year review, adopting a new rule, or amending or rescinding an existing rule, DEW must notify stakeholders of its intent to initiate rulemaking and provide an explanation of the rationale for doing so. The notice must include:

1. For a five-year review in which DEW decides not to make any changes to an existing rule, a statement that the rule is not being changed;
2. For a new rule or an amendment or rescission of an existing rule, information explaining the rationale for the new rule or rule change, including any state or federal law changes that make it necessary; and
3. A link to a webpage on DEW's website that provides an opportunity to:
  - a. Review the existing rule, if one exists;
  - b. Submit public comments for a period of time established by DEW; and

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<sup>6</sup> "Stakeholder" means those who directly affect or are affected by the educational success of a school district and school. Stakeholders may include, but are not limited to, colleges and universities, school district and school staff, employers, parents, students, and other individuals or groups in the community.  
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- c. Provide, as part of the public comment system, a chance to submit information that might aid DEW in preparing a business impact analysis, if one is required.

DEW must consider each submitted comment provided during the public comment period. However, it is not required to respond to them.

***Prior to submitting a proposed rule to JCARR***

Prior to submitting a proposed rule to JCARR, DEW must post the draft rule and a completed business impact analysis, if one is required, on DEW's website and notify stakeholders that they have been posted. The notice must include a link to a webpage on DEW's website that provides the opportunity to review the draft rule, and the business impact analysis if required, and submit public comments for a period established by DEW. DEW must consider each comment if receives and may revise the draft based on them. If the Department determines further outreach is necessary, it must hold stakeholder meetings, send questions to stakeholders, or create stakeholder advisory groups.

**Public presentation requirement**

The bill requires the Director or the Director's designee, to convene a public meeting at least every other month. DEW employees must conduct a presentation at each meeting that addresses any new information DEW has about:

1. Any of its significant new or existing initiatives, policies, or guidelines;
2. Any change to state or federal law that affects DEW or education stakeholders; and
3. Any rule the Director intends to adopt, amend, or rescind.

At the conclusion of a presentation, the Director, or designee, must provide an opportunity for public discussion on the information in the presentation or other appropriate topics, as determined by the Director or designee. DEW must make available via the internet an audio recording of each meeting within five days after its conclusion.

Under the bill, any nonemergency rule adopted after the bill's effective date is void unless the rule was included in a presentation conducted in one of these presentations.

In addition, the bill requires the Director to schedule meetings for FY 2024 in a timely manner.

[Ex. 30, pp.201-203].

Given the foregoing, the injuries *alleged* by Plaintiffs are sufficient to provide them with standing. However, the Magistrate further finds that Plaintiffs failed to meet their burden by proving clearly and convincingly that they will sustain any of their claimed injuries under the Challenged Provisions. Notwithstanding the abruptness and significance of the powers transferred under the Challenged Provisions, Plaintiffs failed to establish that they have a right to an injunction in this matter. As noted above, standing does not depend on the merits of a plaintiff's claim. *Moore, supra*, at ¶ 23. Therefore, the Magistrate finds that Plaintiffs failed to meet their burden of proving that they are likely to prevail on the merits.

### **III. WHETHER PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED**

To obtain a preliminary injunction, a plaintiff must prove that immediate and irreparable harm, loss, or damage will result to the plaintiff if the preliminary injunction is not issued, and no adequate remedy at law is available to the plaintiff. *Sommer v. Mt. Carmel Health*, 10th Dist. Case No. 94APE07-1087, 1995 Ohio App. LEXIS 1300. In their Proposed Findings of Fact and Conclusions of Law, Plaintiffs' arguments of harm under this factor mirror the harm they argued for standing to sue. As set forth above, Plaintiffs failed to prove by clear and convincing evidence that they will suffer any of their claimed injuries if injunctive relief is denied.

### **IV. HARM TO THIRD PARTIES AND PUBLIC INTEREST FACTORS**

Plaintiffs argue that no third parties will be harmed if their request for a preliminary injunction is granted and that the public interest favors an injunction in this case because the Challenged Provisions are unconstitutional. However, as this Magistrate finds that Plaintiffs are unlikely to succeed on the merits of their challenge to

H.B. 33, the presumption of constitutionality must be referenced. When a statute is challenged, it is presumed constitutional and the public interest is not served by lightly assuming otherwise.

Defendants argue that an injunction will cause confusion, unrest and chaos for Ohio's educational system. Defendants presented credible evidence that, prior to the issuance of the TPO, the State invested significant effort to implement the Challenged Provisions as the General Assembly directed. Ms. Voltolini testified at the hearing and in her affidavit (admitted as Exhibit K) that, as Chief of Staff, she has been actively involved in implementing the transition required under H.B. 33., including:

1. Searching for a new Superintendent;
2. Planning and implementing a transition plan for the State Board by coordinating with certain stakeholders, such as the Department of Administrative Services, the Ohio Department of Budget Management, the Governor's Office of Boards and Commissions, and various unions and other employee groups;
3. Creating a new executive branch entity for the State Board and transitioning the employees, assets, duties, and responsibilities between the Department and State Board; and
4. Renaming and transitioning the Ohio Department of Education to the DEW.

These factors weigh against granting an injunction.

Based on the foregoing and on an equitable balancing of all four factors for determining injunction relief, Plaintiffs' request for a preliminary injunction should be denied.

**DECISION**

Based on the Findings of Fact and Conclusions or Law set forth above, Plaintiffs' request for a Preliminary Injunction should be **DENIED**.

**A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV.R. 53(D)(3)(a)(ii), UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINDING OR LEGAL CONCLUSION AS REQUIRED BY CIV.R. 53(D)(3)(b).**

Copies electronically to all counsel of record.

Franklin County Court of Common Pleas

**Date:** 10-20-2023  
**Case Title:** CHRISTINA COLLINS ET AL -VS- STATE OF OHIO ET AL  
**Case Number:** 23CV006611  
**Type:** MAGISTRATE DECISION

So Ordered

A handwritten signature in black ink, appearing to read "J. D. Hunt", is written over a faint, circular official seal of the Franklin County Court of Common Pleas. The seal contains the text "COMMON PLEAS COURT" and "ALL THINGS SEE".

/s/ Magistrate Jennifer D. Hunt