

**STATE OF MICHIGAN
IN THE 7TH JUDICIAL CIRCUIT COURT FOR THE GENESSE COUNTY
CIVIL DIVISION**

**MICHIGAN OPEN CARRY, INC.; and,
KENNETH HERMAN, individually,**

Plaintiffs,

v.

DOCKET NO. 2015-104373-CZ
HON. ARCHIE L. HAMAN

**CLIO AREA SCHOOL DISTRICT;
FLETCHER SPEARS, III, individually; and,
KATRINA MITCHELL, individually;**

Defendants.

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**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY
DISPOSITION AND DECLARATORY JUDGMENT**

Plaintiffs, Michigan Open Carry, Inc. ("MOC") and Kenneth Herman, through counsel, answers Defendants, Clio Area School District ("CASD"), Fletcher Spears, III, and Katrina Mitchell's motion for summary disposition and declaratory judgment and respectfully requests that this Honorable Court deny the motion for the reasons herein:

1. Declaratory Judgment is a cause of action. Defendants' may not claim nor counterclaim a cause of action such as "declaratory judgment" by motion;

2. Defendants' motion does not allege a lack of actual controversy, nor that Plaintiffs have somehow failed to meet the requirements of MCR 2.605, rather the motion seems to affirm that Plaintiffs have satisfied MCR 2.605;
3. Defendants' motion does not satisfy the requirements of MCR 2.116
4. Defendants' motion misrepresents State Law preemption of issues relating to firearm possession;
5. Defendants' policy prohibiting weapons is preempted by State firearm law; and,
6. Defendants' are not granted such regulatory power to override State firearm law or the federal or State constitutions in their quest to enact gun control regulations.

WHEREFORE, Plaintiffs requests that this Honorable Court DENY Defendants' Motions and GRANT Plaintiffs their costs and fees associated with having to defend same and GRANT such other relief that this Court determines appropriate.

Respectfully submitted,

By: /s/ Dean G. Greenblatt
Dean G. Greenblatt (P54139)
Counsel for Plaintiffs

Dated: July 29, 2015

**BRIEF IN OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY
DISPOSITION AND MOTION FOR DECLARATORY JUDGMENT.**

Defendants’ motion does not identify the court rule under which summary relief is sought. The motion states that “Plaintiffs’ legal arguments lack merit”.¹ Therefore, for the purposes of this Response, Plaintiffs will assume that the relief is sought under MCR 2.116(C)(8). With respect to Defendants’ request for declaratory relief, such request is not appropriate as Defendants have not filed a counterclaim for such a cause of action.

BACKGROUND

Plaintiff Michigan Open Carry, Inc. [hereinafter “MOC”] is a Michigan not-for-profit advocacy organization created under the Nonprofit Corporation Act of 1982 that supports the lawful carry of handguns. MOC provides written material for the use of its members, municipalities, and law enforcement that outlines the laws associated with open carrying of handguns, and offers seminars on the topic.

Plaintiff Kenneth Herman is a local resident whose daughter attends Edgerton Elementary School within the Clio Area School District. Mr. Herman is licensed by the State to carry a concealed weapon. Mr. Herman lawfully possesses and carries a pistol.

Defendant Clio Area School District is a school district, pursuant to MCL 380.6; a local unit of government, pursuant to MCL 123.1101(a) and MCL 169.209(6) [hereafter referred to as “CASD”]. Remaining defendants are employees of CASD who are engaged in the enforcement of CASD’s weapons policy.

¹ For the purposes of this responsive pleading, it is presumed that the “legal arguments” that Defendants’ refer to in their Brief are wholly contained within Plaintiffs’ Verified Complaint for Declaratory Relief, as that has been the only pleading filed by Plaintiffs and no argument has been presented at any time.

MCL 750.237a(4) generally prohibits possession of a firearm within a “weapon free school zone”. MCL750.237a(5)(c) exempts “an individual licensed by this state or another state to carry a concealed weapon”.

MCL 28.425o(1)(a) prohibits the carrying of a “concealed weapon” at a school or school property.²

CASD has implemented a policy prohibiting Plaintiffs and others from *inter alia* possessing a weapon in any setting under the control or sponsored by CASD. As a result of this policy and the actions of Defendants, Plaintiff Herman has been prohibited from attending school functions and has been threatened with criminal prosecution for trespass by Defendants. Because of Plaintiff Herman’s political position on firearm rights in general, and CASD’s policy in particular, his daughter has been singled-out by CASD employees for public ridicule and contempt.

Plaintiffs have brought their suit for declaratory relief in an effort to conclusively establish the unlawful policy implementation by CASD as it affects lawful firearm possession.

STANDARD OF REVIEW

A court may grant summary disposition under MCR 2.116(C)(8) if “[t]he opposing party has failed to state a claim on which relief can be granted.” A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint based solely on the pleadings. *Corky v Detroit Bd of Ed*, 470 Mich. 274, 277; 681 N.W.2d 342 (2004).[1] When deciding a (C)(8) motion, this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich. 109, 119; 597 N.W.2d 817

(1999). A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions. *Patterson v Kleiman*, 447 Mich. 429, 432; 526 N.W.2d 879 (1994). Summary disposition on the basis of subrule (C)(8) should be granted only when the claim "is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich.App. 319, 324; 579 N.W.2d 101 (1998). *GM Sign, Inc. v. Auto-Owners Insurance Co.*, 301742 (2012)

A litigant must meet the requirements of MCR 2.605 in order to seek a declaratory judgment. *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich. 349, 373; 792 N.W.2d 686 (2010). ... MCR 2.605(A)(1) provides, in relevant part:

In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

Pursuant to MCR 2.605, "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Lansing Schools Educ Ass'n v Lansing Bd of Educ (On Remand)*, 293 Mich.App. 506, 515; 810 N.W.2d 95 (2011) (citation omitted). "An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Id.* at 515, citing *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich.App. 43, 55; 620 N.W.2d 546 (2000). "The essential requirement of the term 'actual controversy' under the rule is that plaintiffs plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW*, 295 Mich.App. at 495 (citation and internal quotation marks omitted). "Generally, where the injury sought to be

² MCL 28.425o(1)(a) does provide certain exceptions for carrying a concealed weapon at a "school" or on "school property" while in a vehicle on school property, if he or she is dropping the student off at the school or picking up

prevented is merely hypothetical, a case of actual controversy does not exist." Citizens for Common Sense, 243 Mich.App. at 55. Citizens United Against Corrupt Government v. Troy City Council, 313811.

Defendants' instant motion does not allege a lack of actual controversy, nor that Plaintiffs have somehow failed to meet the requirements of MCR 2.605.

ARGUMENT

A. State Law Preempts the School District's Weapon Policy which is in Direct Conflict with State Law.

CASD's weapons policy is in direct contravention with State statute at MCL 28.425o(1)(a) which specifically permits possession of concealed weapons at a school or on school property under certain circumstances.

"A state statutory scheme preempts regulation by a lower-level governmental entity when either of two conditions exist: (1) **the local regulation directly conflicts with the state statutory scheme** or (2) the state statutory scheme occupies the field of regulation that the lower-level government entity seeks to enter, " even where there is no direct conflict between the two schemes of regulation." [2] Llewellyn, 401 Mich. at 322, 257 N.W.2d 902; see also Ter Beek, 297 Mich.App. at 453, 823 N.W.2d 864; Mich. Coalition, 256 Mich.App. at 408, 662 N.W.2d 864. (emphasis added)

State Law specifically permits possession of concealed weapons at a school or on school property when carried in accordance with the requirements of MCL 28.425o(1)(a). CASD's

the student from the school.

weapons policy ignores that provision and introduces their own ban on such possession. As such, the CASD weapons policy is preempted by the state statutory scheme.

B. The School District's Weapon Policy is Field-Preempted as it Relates to Firearms.

In a case that mirrors the instant suit quite cleanly, the Court of Appeals has established that a quasi-municipal corporation, i.e., a governmental agency authorized by constitution or statute to operate for and about the business of the state, such as a school district, is preempted from instituting firearm regulations and intruding on the state statutory scheme. Capital Area Dist. Library v. Michigan Open Carry, Inc., 826 N.W.2d 736, 298 Mich.App. 220 (2012).

In Capital Area Dist. Library, (hereafter alternatively referred to as “CADL”) the court addressed “*whether district libraries established under the District Library Establishment Act (DLEA), MCL 397.171 et seq. , are subject to the same restrictions regarding firearm regulation that apply to public libraries established by local units of government. Plaintiff, the Capital Area District Library (CADL), brought this action for declaratory and injunctive relief, seeking to validate and enforce its ban on firearms on its premises. Defendant, Michigan Open Carry, Inc. (MOC), argues that CADL does not have the power to regulate firearms. Our job is not to determine who has the better moral argument regarding when and where it is appropriate to carry guns. Instead, we are obligated to interpret and apply the law, regardless of whether we personally like the outcome.*” Id. at 223.

Many of the same arguments present in CASD’s motion were addressed by the CADL court. Including the following identical points:

First, CADL argued that it properly instituted its firearm policy pursuant to its power derived from the DLEA (MCL 397.182(1))³. Similarly, CASD now argues that the Revised School Code, MCL 380.11a(3)(b)⁴ expressly authorizes the school district to implement a weapons policy to provide for the safety and welfare of pupils... The CADL court found that the library’s weapons policy was permitted under the DLEA in so far as it was not in direct conflict with state statutes. It is not likely that CASD’s weapons policy would be similarly permitted under The Revised School Code without an exception mirroring MCL 28.425o(1)(a). However, with such a carve-out for concealed carry at school in compliance with the statute, a modified CASD weapons policy might be permissible under The Revised School Code.

Second, CADL argued that district libraries were not expressly preempted by the Firearm and Ammunition Act because “in MCL 123.1101(a), the Legislature defined the phrase ‘local unit of government’ to mean ‘a city, village, township, or county.’” *Id.* at 231. CASD similarly argues that the statute does not expressly include “school district” in the above definition. The CADL court found that libraries were not *expressly* barred from imposing firearm regulations because a library is not a city, village, township or county. It is also likely that CASD would not be found to be expressly barred from imposing their firearm regulation if it did not directly conflict with state statutes.

³ The District Libraries Establishment Act (1989) precedes the Firearms and Ammunition Act (1990) by one year.

⁴ The Revised School Code (1976) predated the Firearms and Ammunition Act (1990) by fourteen years.

The CADL court did address the nature of both district libraries and school districts, finding that ...

“although district libraries have the authority to adopt bylaws and regulations and do any other thing necessary for conducting the district-library service, as stated earlier, this Court has held that a district library is a quasi-municipal corporation, i.e., a governmental agency authorized by constitution or statute to operate for and about the business of the state. *Jackson Dist. Library v. Jackson Co. # 1*, 146 Mich.App. 392, 396, 380 N.W.2d 112 (1985), citing *Attorney General ex rel. Kies v. Lowrey*, 131 Mich. 639, 643, 92 N.W. 289 (1902). " [T]he term ‘ municipal corporation’ may be used in the broad sense to include ... quasi-municipal corporations." *Huron-Clinton Metro. Auth. v. Attorney General*, 146 Mich.App. 79, 82, 379 N.W.2d 474 (1985). Quasi-municipal corporations " possess and can exercise only such powers as are granted in express words or those necessarily and fairly implied in or incident to powers expressly conferred by the Legislature." *Id.* As previously discussed, the DLEA gives CADL's board the authority to adopt regulations that govern the library, to supervise and control library property, and to do any other thing necessary to conduct the CADL district-library service. MCL 397.182(1). Nevertheless, a quasi-municipal corporation such as a district library remains subject to the Constitution and the laws of this state. **See *Detroit Sch. Dist. Bd. of Ed. v. Mich. Bell Tel. Co.*, 51 Mich.App. 488, 494-495, 215 N.W.2d 704 (1974) (explaining that a school district, a quasi-municipal corporation, is a state agency that is subject to the Constitution and laws of the state); *Lowrey*, 131 Mich. at 644, 92 N.W. 289 (" The school district is a State agency. Moreover, it is of legislative creation. It is true that it was provided for in obedience to a constitutional requirement; and whatever we may think of the right of the district to administer in a local way the affairs of the district, under the Constitution, we cannot doubt that such management must be in conformity to the provisions of such laws of a general character as [826 N.W.2d 743] may from time to time be passed....")**; see also generally *Llewellyn*, 401 Mich. at 321, 257 N.W.2d 902 (" Under Const. 1963, art. 7, § 22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is ‘ subject to the Constitution and law’ ."). Indeed, state law may preempt a regulation by any inferior level of government that attempts to regulate the same subject matter as a higher level of government. See *McNeil v. Charlevoix Co.*, 275 Mich.App. 686, 697 & n. 11, 741 N.W.2d 27 (2007). " Thus, although we deal here with a regulation promulgated by a local administrative agency, application of the principles developed in determining the validity of local ordinances in light of statutory enactments on the same or similar subject matter is appropriate." *Id.* at 697 n. 11, 741 N.W.2d 27.

Id. at 231. Emphasis added.

After determining that CADL was not expressly barred under the State’s preemption statute, and that CADL was authorized under the DLEA to implement its weapons policy, the

court's analysis continued. "A state statutory scheme preempts regulation by a lower-level governmental entity when either of two conditions exist: (1) the local regulation directly conflicts with the state statutory scheme or (2) the state statutory scheme occupies the field of regulation that the lower-level government entity seeks to enter, " even where there is no direct conflict between the two schemes of regulation." [2] Llewellyn, 401 Mich. at 322, 257 N.W.2d 902; see also Ter Beek, 297 Mich.App. at 453, 823 N.W.2d 864; Mich. Coalition, 256 Mich.App. at 408, 662 N.W.2d 864. CADL's weapons ban does not directly conflict with Michigan's statutory scheme pertaining to gun regulation because no Michigan statute expressly prohibits district libraries from regulating weapons. To determine whether field preemption applies, i.e. whether the state has occupied the field of regulation that CADL seeks to enter in this case, we must evaluate the law using the guidelines set forth by our Michigan Supreme Court in Llewellyn. Id. at 233

The four guidelines in Llewellyn are as follows:

First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.

Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.

Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption.

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

Michigan Coalition for Responsible Gun Owners v. City of Ferndale; 256 Mich.App. 401, 414 (2003); cert. den. 469 Mich. 880 (2003) (citing People v Llewellyn, 401 Mich 314, 322 (1977)).

After applying the first two Llewellyn guidelines, the CADL court turned to an analysis which directly touches upon the issues in the instant motion:

The third guideline set forth in Llewellyn requires us to examine the pervasiveness of the state regulatory scheme. In addition to the Legislature's enactment of MCL 123.1102, the Legislature's statutory scheme regarding firearm regulation addresses who may possess a firearm and how, when, and where a firearm may be possessed. Subject to exceptions for certain individuals, MCL 750.234d(1) prohibits a person from possessing a firearm on the premises of any of the following: depository financial institutions, churches or other places of religious worship, courts, theatres, sports arenas, daycare centers, hospitals, and establishments licensed under the former Michigan Liquor Control Act.

With the exception of certain individuals, MCL 750.237a(4) prohibits the possession of a weapon in a weapon-free school zone, which is defined as " school property and a vehicle used by a school to transport students to or from school property." MCL 750.237a(6)(d).

Subject to certain exceptions, MCL 28.425 o (1) prohibits a person who is licensed to carry a concealed pistol from carrying a concealed pistol on the premises of any of the following: a school or school property; a public or private child-care center, daycare center, child-caring institution, or child-placing agency; a sports arena or stadium; a bar or tavern licensed under the Michigan Liquor Control Code, MCL 436.1101 et seq.; any property or facility owned by a church or [826 N.W.2d 746] other place of worship; certain entertainment facilities falling within MCL 28.425o(1)(f); a hospital; and a dormitory or classroom of a college or university.

...

As can be gleaned from these numerous statutes included in the Legislature's statutory scheme regulating firearms, the statutory scheme includes " a broad, detailed, and multifaceted attack" on the possession of firearms. Llewellyn, 401 Mich. at 326, 257 N.W.2d 902. The extent and specificity of this statutory scheme, coupled with the Legislature's " clear policy choice [in MCL 123.1102] to remove from local units of government the authority to dictate where firearms may be taken," Mich. Coalition, 256 Mich.App. at 414, 662 N.W.2d 864, demonstrates that the Legislature has occupied the field of firearm regulation that the library's weapons policy attempts to regulate: the possession of firearms.

This conclusion is supported by consideration of the fourth Llewellyn guideline: whether the nature of the regulated subject matter demands exclusive state regulation " to achieve the uniformity necessary to serve the state's purpose or interest." Llewellyn, 401 Mich. at 324, 257 N.W.2d 902. The regulation of firearm possession undoubtedly calls for such exclusive state regulation. If the state prevents all public libraries established by a city, village, township, or county from passing their own firearms regulations but does not similarly prevent

district libraries from doing so, it would result in a " Balkanized patchwork of inconsistent local regulations." See *City of Brighton v. Hamburg Twp.*, 260 Mich.App. 345, 355, 677 N.W.2d 349 (2004). In such a case, citizens of this state would be subject to varying and possibly conflicting regulations regarding firearms and " a great deal of uncertainty and confusion would be created." *Llewellyn*, 401 Mich. at 327, 257 N.W.2d 902. It would be extremely difficult for firearm owners to know where and under what circumstances they could possess a gun and just as difficult for other members of the public to know what libraries to avoid should they wish not to be around guns. [826 N.W.2d 747] An exclusive, uniform state regulatory scheme for firearm possession is far more efficient for purposes of obedience and enforcement than a patchwork of local regulation.

Accordingly, we hold that state law preempts CADL's weapons policy because the Legislature, through its statutory scheme in the field of firearm regulation, has completely occupied the field that CADL's weapons policy attempts to regulate.[4] The trial court, therefore, erroneously granted summary disposition in favor of CADL on the basis that the weapons policy was valid as a matter of law. Furthermore, we hold that the trial court abused its discretion by granting CADL's request for permanent injunctive relief, i.e., by permanently enjoining MOC, its members, their agents, and members of the public from entering CADL's buildings and branches while openly carrying a weapon in violation of CADL's weapons policy. *Id.* at 237.

CASD's weapons policy is similarly field preempted. For how could the State occupy the field of firearm regulation when the CADL decision was reached, but not now?

C. Defendants' reference to the "preemption" exception in *Davis v Hillsdale* is grossly misleading and inapplicable.

Defendants argue at page 8 of their brief that the Court of Appeals has already rejected preemption of a school district's weapons policies in *Davis v Hillsdale Community School District*, 226 Mich.App. 375; 573 N.W.2d 77 (1997). This case, however, did not involve the Firearm and Ammunition Act, and lawfully carried firearms. Instead, in *Davis*, two students were expelled for possessing a BB gun on school grounds. The definition of "dangerous weapon" became an issue in the expulsion. It was argued that the school's definition was preempted through the school's adoption of the State's standard for suspensions or expulsions under MCL 380.1311. The *Davis* court found that MCL 380.1311 did not preempt the school's

definition of “dangerous weapon” nor implementation of its own policy for suspensions and expulsions.

Again, the Davis court ruling is not remotely related to the issues presented in this case. The Davis ruling addresses only a challenge administrative enforcement and the definition of “dangerous weapon” under a student code of conduct.

D. The U.S. Supreme Court’s decision in *District of Columbia v Heller* does not further Defendants’ case.

Defendants argue at page 5 of their brief that the Second Amendment does not prevent enactment of laws prohibiting the possession of firearms in sensitive places such as schools. Plaintiffs need not address this point. The issue is not whether restrictive laws may be enacted, but whether the Firearm and Ammunition Act preempts CASD’s attempt to do so. If the answer to both questions is yes, it does not matter what the holding in *Heller* allows. The State of Michigan does not prohibit the possession of lawfully-owned firearms on school property if they are possessed by individuals who are also licensed under MCL 28.425.

CONCLUSION

This dispute has been brought before a court of law, not the court of public opinion or at a policy conference. The Defendants’ summary opinions about the hoplophobia over the presence of firearms is not a legal argument or basis for consideration by this court. If there is a policy argument to be made, the legislature is the place to make it. Formulating local weapons policies is beyond the legal authority of the CASD and intrudes upon the lawmaking authority of the State.

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**ORDER DENYING MOTION FOR SUMMARY DISPOSITION AND
DECLARATORY JUDGMENT**

At a session of Court, held in the
City of Flint, Michigan, on the
_____ day of August, 2015.

PRESENT: THE HONORABLE _____
Circuit Court Judge. Presiding

Upon motion by the Defendants and after hearing, and the Court otherwise advised in the premises;

IT IS HEREBY ORDERED that Defendants' Motion for Summary Disposition and Declaratory Judgment is DENIED for the reasons set forth on the record.

Circuit Court Judge