IN THE SUPREME COURT
STATE OF GEORGIA

PHILLIP EVANS,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. S15A1619
	)	
GWINNETT COUNTY PUBLIC SCHOOLS,	)	
	)	
	)	
Appellee.	)	

APPELLEE GWINNETT COUNTY SCHOOL DISTRICT'S BRIEF

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COMES NOW the Gwinnett County School District ("Appellee"), erroneously styled as the Gwinnett County Public Schools in Appellant's Complaint, and submits this, its Brief.

I. STATEMENT OF FACTS AND PROCEEDINGS BELOW

On September 2, 2014 Appellant filed a Verified Complaint in Gwinnett County Superior Court alleging that Appellee violated certain claimed rights under O.C.G.A. § 16-11-127.1 and O.C.G.A. § 16-11-173 and seeking a declaration that O.C.G.A. § 16-11-127.1 authorized Georgia Weapons License (hereinafter "GWL") holders to carry their weapons in school safety zones without exception. R-3-8. Appellant's Complaint purports to be both a Declaratory Judgment action and an independent legal action setting forth one count for an alleged violation of O.C.G.A. § 16-11-127.1 and a separate count for an alleged violation of O.C.G.A. § 16-11-173. R-6. Appellant also filed a Motion for Interlocutory Injunction seeking unspecified relief during the pendency of the underlying litigation on September 2, 2014. R-9-28. On November 10, 2014, Appellant amended his Complaint adding a claim under 42 U.S.C. § 1983. R- 156-16. Appellant's § 1983 claim alleges that Appellee's threat to have him arrested if he brought his weapon into the school safety zone when not carrying or dropping off a student violated his

right against unlawful seizure under the Fourth Amendment of the United States Constitution. R-156-161.

Appellant's claims in this case are a vehicle by which he seeks an expansion of the rights of GWL holders beyond the parameters set forth by the Georgia Legislature. Appellant does not dispute that the language found in the official published code of Georgia criminalizes the possession of weapons in a school safety zone except when a GWL holder carries or picks up a student from school. However, Appellant contends that the published code is wrong and that Appellee was required to ignore the statutory provisions published in the code and instead accept Appellant's version of the law based upon a selective reading of House Bills passed during the 2013-2014 legislative session. Appellant asserts that because Appellee failed to agree with his interpretation of the law and maintained that the published criminal statute would be enforced that the Appellee School District violated his Fourth Amendment rights under the United States Constitution as well as O.C.G.A. § 16-11-127.1 and O.C.G.A. § 16-11-173. R-6.

Appellant explains that he contacted Appellee's Executive Director of Administration and Policy, Jorge Gomez, to "point out the change in the law and inquire if as a GWL holder, Plaintiff would be recognized by Defendant as lawfully permitted to carry a firearm in Defendant's schools." R-5. The "change in law" the Appellant referenced was not one which had been recognized by the

Georgia legislature or published in the official code. Mr. Gomez responded to Appellant's inquiry based upon the official code, explaining that it remained a crime to possess a firearm in a school safety zone except when picking up or dropping off a student. R-5. There is no allegation that Appellant was confronted, arrested, charged or restricted from accessing any local school. The only action undertaken by Appellee in this case was to provide a written response to a legal question in a manner consistent with the published Georgia Code.

Appellee filed a Verified Answer to the Complaint and a Response in Opposition to Appellant's Motion for Interlocutory Injunction on October 9, 2014. R-31-41; R42-132. Appellee also filed a Motion to Dismiss Appellant's Complaint on October 9, 2014. R132-135. In support of the Motion to Dismiss Appellee argued that the constitutionally vested sovereign immunity for school districts had not been waived by the recent statutory changes to Georgia's firearms laws and that consequently, Appellant's equitable and legal claims were barred. R-136-147. Appellee further argued that the Appellant's claims under 42 U.S.C. § 1983, failed to state a claim since the legal opinion provided by Jorge Gomez did not constitute a threat of arrest sufficient to implicate Fourth Amendment protections. R-162-167. Following a hearing before Gwinnett County Superior Court Judge Warren Davis, the trial court entered an Order Granting Appellee's Motion and dismissing all claims without prejudice. R-183-187. The trial court

found that sovereign immunity barred all of Appellant's claims, that the declaratory judgment action was improper and that the claims under 42 U.S.C. § 1983 failed to state a cognizable claim. R-183-187.

Appellant filed a timely notice of Appeal on February 12, 2015 and filed his brief to this Court on August 3, 2015. R-1-2.

II. STANDARD OF REVIEW

A trial court's ruling on a motion to dismiss for failure to state a claim for which relief may be granted is reviewed *de novo*. Northway v. Allen, 291 Ga. 227, 229, 728 S.E.2d 624, 626 (2012). The Georgia appellate courts may apply the "right for any reason" rule in this case. Under the "right for any reason" rule, this Court may uphold a judgment if it is correct for any reason, even if the reason is was not a reason upon which the trial court relied. City of Gainesville v. Dodd, 275 Ga. 834, 835, 573 S.E.2d 369, 370 (2002) citing Gwinnett County Bd. of Tax Assessors v. Gwinnett I Ltd. Partnership, 265 Ga. 645, 458 S.E.2d 632 (1995).

A. Motion to Dismiss for Failure to State a Claim

Under Georgia law:

> a motion to dismiss for failure to state a claim upon which relief can be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint warranting a grant of the relief sought. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party

> who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

Mabra v. SF, Inc., 316 Ga. App. 62 (2012). "[A] motion to dismiss should not be granted unless the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." Thomas v. Lee, 286 Ga. 860, 861, 691 S.E.2d 845, 847 (2010) (citations omitted.) In considering a motion to dismiss, the Court is required to construe the allegations of a complaint in a light most favorable to the plaintiff. Bynum v. Horizon Staffing, 266 Ga. App. 337, 496 S.E.2d 648 (2004.)

B. Motion to Dismiss for a Lack of Subject Matter Jurisdiction

This Court should uphold the dismissal of Appellant's Complaint under the authority of O.C.G.A. § 9-11-12(b)(1) and upon well-established constitutional principles of sovereign immunity. In Georgia, "it is undisputed that the doctrines of sovereign immunity and official immunity are applicable to county-wide school districts and the employees of those districts." Cosby v. Lewis, 308 Ga. App. 668, 671, 708 S.E.2d 585, 587 (2011). Sovereign immunity bars claims against governmental entities in the absence of the consent and permission of the sovereign. DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 734 S.E.2d 466 (2012). As the Georgia Supreme Court recently held, in the absence of an applicable waiver, the protections of sovereign immunity are absolute and extend not only to legal claims, but also to claims for injunctive relief. Georgia Dep't of

Natural Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 755 S.E.2d 184 (2014.)

"A motion to dismiss asserting sovereign immunity . . . is based upon the trial court's lack of subject matter jurisdiction, rather than the merits of the plaintiff's claim. The party seeking to benefit from the waiver of sovereign immunity has the burden of proof to establish waiver." Upper Oconee Basin Water Auth. v. Jackson County, 305 Ga. App. 409, 699 S.E.2d 605 (2010.)

Under the Civil Practice Act, "[w]henever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." O.C.G.A. § 9-11-12 (h)(3.)

III. ARGUMENT AND CITATION OF AUTHORITY

A. Sovereign Immunity Bars Appellant's State Law Claims.

The Georgia Constitution extends sovereign immunity protection from suit to the State, its agencies and departments absent an express waiver of such immunity by the legislature. Ga. Const. Art. I, § 2, ¶ IX(e.) Local Boards of Education and Local School Districts are agencies or departments of the State for the purposes of sovereign immunity and therefore cannot be sued absent an express waiver of immunity by the Georgia Legislature. See Thigpen v. McDuffie Co. Bd. of Educ., 255 Ga. 59, 335 S.E.2d 112 (1985); Hunt v. City of Atlanta, 245 Ga. App. 229, 537 S.E.2d 110 (2000); Davis v. Dublin City Bd. of Educ., 219 Ga.

App. 121, 464 S.E.2d 251 (1995); Hennessy v. Webb, 245 Ga. 329 (1980); Sheley v. Bd. of Pub. Educ. for City of Savannah, 233 Ga. 487, 212 S.E.2d 627 (1975); DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 734 S.E.2d 466 (2012.) The Georgia Constitution's grant of sovereign immunity to Appellee in this case creates a bar to both equitable claims and remedies and legal claims and remedies. See Georgia Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 755 S.E.2d 184 (2014), Dekalb County Sch. Dis. v. Gold, 318 Ga. App. 633, 734 S.E.2d 466 (2012).

The Georgia Court of Appeals has held that "[s]tatutes providing for a waiver of sovereign immunity are in derogation of the common law and are strictly construed *against* a finding of waiver." Gwinnett Cnty. v. Sargent, 321 Ga. App. 191, 197, 738 S.E.2d 716, 720 (2013.) According to the Georgia Constitution, in order for a school district to waive its sovereign immunity, a plaintiff must affirmatively show that such a waiver of immunity was accomplished by the Georgia Legislature. Ga. Const. Art. I, § II, ¶ IX(e).

Appellant's Complaint fails to identify an applicable waiver of Appellee Gwinnett County School District's sovereign immunity regarding any of his claims. Appellant's Brief p. 19. Nevertheless, Appellant argues that the creation of an express cause of action against government entities attempting to improperly regulate the possession of firearms found in O.C.G.A. § 16-11-173(b) (1)

constitutes a waiver of the Appellee's sovereign immunity. Appellant's Brief p. 19. This contention lacks merit.

1. Georgia law at the time of Appellant's Complaint did not waive Appellee's sovereign immunity.

Appellant cites to a version of O.C.G.A. § 16-11-173(b) (1) which was not in effect until after the Complaint in this case was filed and the Order dismissing this case was entered. Appellant's Brief, p. 19. The version of O.C.G.A. § 16-11-173(b)(1) Appellant relies upon for his argument that sovereign immunity has been waived in this case includes "school districts" in the list of government entities generally restricted from regulating firearms effective July 1, 2015. Appellant's Brief, p. 19. Appellant states in his brief that the creation of a specific cause of action against "school districts" has the effect of waiving Appellee's sovereign immunity in this case and comments, "[T]he trial court failed to explain why that Code section does not constitute a waiver of immunity." Appellant's Brief, pp. 19-20. However, prior to July 1, 2015, school districts were not included in the list of entities for which a cause of action was created for improperly regulating firearms possession and the trial court therefore properly held that there had been no waiver of sovereign immunity.[1] The Legislature amended O.C.G.A. § 16-11-173(b)(1)

[1] During the trial court proceedings, in response to Appellee's Motion to Dismiss, Appellant argued that immunity was waived under the former version of the statute because school districts were an "agency or department of the state." This

during the 2014-2015 session to add "school districts" to the list of governmental entities generally prohibited from regulating firearms possession. HB 482, Act 100, Ga. L. 2015. Consequently, at the time of the alleged cause of action in this case and on the date the trial court entered the order dismissing the case there was no specific cause of action against school districts and therefore no waiver of sovereign immunity as to Appellant's claims.

The legislative change to O.C.G.A. § 16-11-173(b)(1) evidences the fact that prior to July 1, 2015 there was no specific cause of action against school districts and therefore could be no waiver of sovereign immunity. In interpreting statutory provisions "the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." Spivey v. State, 274 Ga. App. 834, 835, 619 S.E.2d 346, 348 (2005) citing OCGA § 1–3–1(a). "All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it.' [Cit.]" Inland Paperboard & Packaging v. Ga. Dept. of Revenue, 274 Ga. App. 101, 104, 616 S.E.2d 873, 876 (2005). Furthermore, "when a statute is amended, ' "(f)rom the addition of words it may be presumed that the legislature intended some change in the existing law." ' [Cit.]" Nuci Phillips Mem'l Found., Inc. v. Athens-Clarke

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argument has been abandoned by Appellant following the amendment to the statute.

Cnty. Bd. of Tax Assessors, 288 Ga. 380, 383, 703 S.E.2d 648, 650 (2010) citing Board of Assessors of Jefferson County v. McCoy Grain Exchange, 234 Ga. App. 98, 505 S.E.2d 832 (1998). If, as Appellant argued before the trial court, the previous version of O.C.G.A. § 16-11-73 (b)(1) created a cause of action against school districts and thereby waived their sovereign immunity there would be no reason for the legislature to amend the statute to add school districts.

The version of O.C.G.A. § 16-11-73 (b)(1) in place at the time of Appellant's Complaint and the order dismissing the Complaint provided:

> No county or municipal corporation…nor any agency, board, department commission, or authority of the state, other than the General Assembly…shall regulate in any manner the possession of firearms.

The Supreme Court of Georgia has previously held that statutes employing similar language do not include local educational agencies. Thornton v. Clarke Cnty. Such. Dist., 270 Ga. 633, 514 S.E.2d 11 (1999); N. Georgia Reg'l Educ. Serv. Agency v. Weaver, 272 Ga. 289, 527 S.E.2d 864 (2000.) In the case of North Georgia Regional Educational Service Agency v. Weaver, the Court held that the then applicable Georgia Whistleblower Statute (O.C.G.A. § 45-1-4) did not apply to local educational entities by the plain terms of the statute's definition of "public employer." At the time the Weaver case was filed, the Georgia Whistleblower Statute applied to "public employers," defined to include "the executive branch of the state and any other department, board, bureau,

commission, authority, or other agency of the state which employs or appoints a public employee or public employees except the office of the Governor, the judicial branch, or the legislative branch." Weaver, 272 Ga. at 290. The Court held that the plain meaning of this definition excluded any local unit of government from the Georgia Whistleblower Statute's application. Id. In addition, the Court noted that the legislature "adopted a more comprehensive definition when it wanted to include local and regional agencies" within the purview of statutes applicable to governmental entities. Weaver, 272 Ga. at 291.

The case of Thornton v. Clarke County School District similarly illustrates Appellee's position that local educational agencies were excluded from the purview of O.C.G.A. § 16-11-173 at the time the Complaint in this case was filed. 270 Ga. 633, 514 S.E.2d 11 (1999.) In Thornton, a group of taxpayers filed suit against the Clarke County School District seeking a declaratory judgment and an injunction preventing the construction of a school alleged to be in violation of the Georgia Environmental Policy Act ("GEPA.") Thornton 270 Ga. at 633. The Clarke County School District moved to dismiss the lawsuit on the grounds that local school districts were excluded from the "government agencies" to which GEPA applied. Thornton, 270 Ga. at 634. GEPA defined "government agency" as "any department, board, bureau, commission, authority, or other agency of the state." Id. In concluding that GEPA did not apply to school districts, the Court

refused to "read school districts into the definition of government agency" based on the fact that the statute indicated that it applied to "state projects," or "state agencies" in several provisions and included counties and municipalities only under certain conditions. Thornton, 270 Ga. at 635. The Court concluded by stating: "[c]onstruing all of the component parts of the statute together leads to the conclusion that the Act was not intended to apply to local school districts." Id.

Both the amendments to O.C.G.A. § 16-11-173 subsequent to the Appellant's filing of his Complaint and well settled case law lead to the conclusion that the statute in effect at the time Appellant's cause of action accrued does not apply to local school districts and that there had been no waiver of sovereign immunity for Appellant's claims.[2]

2. Changes in O.C.G.A. § 16-11-173(b)(1) creating a cause of action against school districts do not retroactively apply to waive Appellee's sovereign immunity.

To the extent that the amended version O.C.G.A. § 16-11-173(b)(1) could be read to affect a waiver of sovereign immunity, it cannot have retroactive application to this case which accrued and was decided by the trial court prior to

[2] Appellant's Fourth Enumeration of Error alleges that the trial court failed to consider his damages claims; however, these claims, along with his equitable claims, are barred by sovereign immunity and were dismissed by the trial court accordingly.

the change in law. The Georgia Constitution prohibits retroactive application of statutes:

> ***No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.***

Ga. Const. art. I, § 1, ¶ X.

A waiver of sovereign immunity occurs at the time that the action arises. Ethridge v. Price, 194 Ga. App. 82, 389 S.E.2d 784 (1989). Acts of the legislature are generally applied prospectively unless the act's language "imperatively requires retroactive application." Anthony v. Penn, 212 Ga. 292, 92 S.E.2d 14 (1956) citing Moore v. Gill, 43 Ga. 388 (1871). The sovereign immunity of government entities may not be waived retroactively absent an express statement of intent to do so from the Georgia Legislature. Donaldson v. Dep't of Transp., 262 Ga. 49, 53, 414 S.E.2d 638, 641 (1992); Deal v. Coleman, 294 Ga. 170, 751 S.E.2d 337 (2013). There is nothing in the amendment of O.C.G.A. § 16-11-173 evidencing an intent by the legislature to have the change adding "school districts" apply retroactively. Therefore, there has been no retroactive waiver of Appellee's sovereign immunity in this case. See HB 482, Act 100, Ga. L. 2015.

B. Appellant's Complaint Warranted Dismissal as O.C.G.A. § 16-11-127.1 Criminalizes Possession of Weapons in School Safety Zones by GWL Holders.

Appellant seeks a declaration that GWL holders are authorized to carry their firearms without exception in an expanded version of the school safety zone that includes any building owned or leased to any school or post-secondary school. Appellant's legal claims rely upon such a declaration and the rights that would flow to Appellant from such a declaration. Since proper statutory interpretation of the legislation during the 2013-2014 legislative session does not support Appellant's argument and because the Georgia Legislature has expressly rejected Appellant's interpretation of the law by the passage of HB 90, Act 9 (2015), Appellant's claims were properly dismissed.

Appellant's confusion in this case does not derive from a statutory interpretation of the language of O.C.G.A. § 16-11-127.1 as published. There is no dispute between the parties that under the current version of the Georgia code as it has been published, Appellant is not authorized to carry his weapons within the school safety zone except in limited circumstances and that he is not authorized to carry his weapons on the property of post-secondary colleges and universities. Appellant argues instead that changes made to the law during the 2013-2014 legislative session were improperly adopted and approved by the Code Revision Commission. However, since the time of the filing and dismissal of his action the

published code containing the criminal prohibition on carrying weapons in a school safety zone has been approved and expressly adopted by the legislature. House Bill 90, Act 9, 2015 sec. 16 (3).

During the 2013-2014 session, House Bill 60 and House Bill 826 both sought to amend portions of O.C.G.A. § 16-11-127.1 regarding the rights of GWL holders to carry firearms in a school safety zone. See House Bill 60, Act 604, Ga. L. 2014, p. 599 (hereinafter "HB 60"), House Bill 826, Act 575, Ga. L. 2014, p. 432 (hereinafter "HB 826"). HB 60 prohibits the carrying of weapons within a school safety zone except when a GWL holder is carrying or picking up a student and maintains a definition of "school safety zone." House Bill 60, Act 604, Ga. L. 2014, p. 599.

HB 826 contained provisions which expressly conflicted with HB 60 by eliminating the general prohibition on GWL holders from carrying a weapon in a school safety zone. HB 826. Under HB 826 the prohibition found in O.C.G.A. § 16-11-127.1 became a right for GWL holders; a right that allowed GWL holders to possess their weapons within a school safety zone (including "any real property or building owned or leased to any school or post secondary institution") without exception. The two bills contained conflicting versions of the same criminal statute. HB 60 criminalized possession of a weapon by a GWL holders within the school safety zone and HB 826 expressly authorized GWL holders to possess their

weapons within school safety zones (including post secondary schools) without exception.

1. Irreconcilable conflict between HB 60 and HB 826 require that the provisions of HB 60, the later passed Act, prevail.

When different acts passed during the same legislative session are "so clearly and indubitably contradictory" and "cannot reasonably stand together" the later act signed by the governor will prevail over the former. Rutter v. Rutter, 294, Ga. 1, 3, 749 S.E.2d 657 (2013); see also Keener v. MacDougall, 232 Ga. 27, 206 S.E.2d 519 (1974). Applying these principals and the similar statutory directive found in O.C.G.A. § 28-9-5(b),[3] the Code Revision Commission published a version of O.C.G.A. § 16-11-127.1 which deferred to HB 60 (signed by Governor Deal on April 23, 2014, one day after he signed HB 826) on the issues in conflict. See O.C.G.A. § 16-11-127.1, Journal of the House of Representatives of the State of Georgia, 2014, pp. 2724-2725 and 3636, 3967-68. Specifically, the version of O.C.G.A. § 16-11-127.1 adopted by the Code Revision Commission and now

[3] O.C.G.A. § 28-9-5 provides: "…legislation enacted at the same session of the General Assembly and amending the same statutory provision shall be considered in pari materia, and full effect shall be given to each if that is possible; Acts enacted during the same session shall be treated as conflicting with each other only to the extent that they cannot be given effect simultaneously; in the event of such a conflict, the latest enactment, as determined by the order in which bills became Acts with or without the approval of the Governor, shall control to the extent of the conflict unless the latest enactment contains a provision expressly ceding control in such an event…"

published as the Official Code of Georgia Annotated codified HB 60's language criminalizing the possession of weapons in the school safety zone except where a GWL holder was carrying or picking up a student from school. O.C.G.A. §16-1-127.1.

Since HB 60 and HB 826 cannot both be given effect with regard to the rights of GWL holders to possess weapons in a school safety zone, the later passed Act must be given effect on this conflict. The Code Revision Commission properly applied this principal when codifying the changes to O.C.G.A. § 16-11-127.1 made by HB 60 and HB 826. Consequently, Appellant's legal interpretation of O.C.G.A. § 16-11-127.1 is erroneous, and in turn all of his claims fail to state a claim upon which relief can be granted and were properly dismissed.

2. Appellant's claims are moot due to the Legislature's Adoption of the Code Revision Commission's version of O.C.G.A. § 16-11-127.1

The version of O.C.G.A. § 16-11-127.1 found in HB 60 and published in the Official Code of Georgia Annotated has been expressly adopted and given the force of law by the adoption of the amendments during the 2014-2015 legislative session. House Bill 90 was approved by the Governor on March 13, 2015. See House Bill 90, Act 9, Secs. 16, 54, 2015. Relevant portions of the Act note the changes to O.C.G.A.§ 16-11-127.1 by HB 60 and HB 826 and provide that "the text of Code sections…as amended by the text and numbering of Code sections as

outlined in the 2014 supplements to the Official Code of Georgia Annotated…are hereby reenacted." Id. §§. 16, 54. House Bill 90, Act 9 eliminates any confusion regarding the interplay between HB 60 and HB 826 and expressly adopts the version of the O.C.G.A. § 16-11-127.1 which was found in HB 60 and published in the Official Code of Georgia Annotated.

The procedure for the adoption of the published code is set forth in O.C.G.A. § 28-9-5 (c). That code section states:

> The Code Revision Commission shall prepare and have introduced at each regular session of the General Assembly one or more bills to reenact and make corrections in the Official Code of Georgia Annotated, portions thereof, and the laws as contained in the Code and any pocket part, supplements, and revised volumes thereof. Except as otherwise provided by law, such reenactment of the Official Code of Georgia Annotated shall have the effect of adopting and **giving force and effect of law** to all the statutory text and numbering as contained in such volumes, pocket parts, and supplements, including but not limited to provisions as published therein in accordance with subsections (a) and (b) of this Code section.

(Emphasis added)

O.C.G.A. § 28-9-5(c) was amended in 2014 to add the last sentence of the subsection and clarify that the adoption of the Code Revision Commission bill had the effect of adopting and giving force and effect to the statutory text. Ga. L. 2014, p. 866, § 28, par. (3)(D). Prior to this change this Court ruled that the publication of language by the Code Revision Commission pursuant to O.C.GA. § 28-9-5(c) played no part in determining the validity of the law. See Rutter v. Rutter, 294 Ga.

1, 749 S.E.2d 657 fn. 3 (2013). The amendment to O.C.G.A. § 28-9-5 (c) in 2014, following the Rutter decision, evidences the legislature's clear intent that the readopting of the published code pursuant to this code section be given the force of law.

Each of Appellant's claims rely on the proposition that the legislature intended that the changes to O.C.G.A. § 16-11-127.1 found in HB 826 be given effect so as to authorize GWL holders to carry their weapons into K-12 and post-secondary schools throughout Georgia without any restriction. However, the Legislature has clearly resolved any confusion regarding its intent by expressly adopting the version of O.C.G.A. § 16-11-127.1 found in HB 60. Appellant's declaratory judgment action is therefore moot and the trial court's dismissal should be affirmed.

3. Appellant's Declaratory Judgment Action Was Properly Dismissed for Lack of an Actual Controversy.

The Declaratory Judgment Act, O.C.G.A. § 9-4-1 authorizes a superior court to enter a declaratory judgment to settle actual or justiciable controversies where the ends of justice require such declaration to relieve the petitioner from uncertainty regarding a future act which is incident to an alleged right. Baker v. City of Marietta, 271 Ga. 210, 518 S.E.2d 879 (1999). To satisfy the controversy requirement found in the Declaratory Judgment Act there must be more than an abstract debate about the meaning or validity of a statute. Leitch v. Fleming, 291

Ga. 669, 732 S.E.2d 401 (2012); Pilgrim v. First Nat'l Bank, 235 Ga. 172, 219 S.E.2d 135 (1975). A petitioner seeking a declaratory judgment must also show that his rights are actually being threatened and that he is in a position of uncertainty. Baker, 271 Ga. at 214; Zitrin v. Ga. Composite State Bd. Of Med. Examiners, 288 Ga. App. 295, 298, 653 S.E.2d 758 (2007).

The trial court properly determined that Appellant's Declaratory Judgment claims seeking an interpretation of a criminal statute from Appellee were improper because such claims did not satisfy the actual controversy requirement set forth in the Act. R-183-184. The only dispute in the case arose from Appellant's own erroneous and unsupported legal theory. As set forth in detail above, the Appellant's argument that HB 826's provisions authorizing GWL holders to possess weapons in school safety zones was not consistent with the principals of statutory interpretation and has been definitively refuted by HB 90.

C. Appellant's 42 U.S.C. § 1983 Claim was Properly Dismissed for Failure to State Claim

Appellant's claim that his Fourth Amendment rights were violated when he was told that a violation of the criminal law, as such was published in the Official Code of Georgia, would not be permitted fails to state a cognizable claim under 42 U.S.C. § 1983. In order to state a claim under 42 U.S.C. § 1983 against a governmental entity a complaint must include allegations that a constitutional right was violated due to a policy practice or training. Monell v. Dep't of Soc. Servs. of

City of New York, 436 U.S. 658, 98 S. Ct. 2018 (1978). Appellant failed to allege facts in his Complaint supporting a constitutional violation; therefore, his constitutional claims were properly dismissed.

As set forth above, there was no change in the criminal law in Georgia which would allow Appellant greater rights to bring his firearms into the school safety zone. Consequently, when told that he was not authorized to carry a firearm on Appellee's properties located within school safety zones and that Appellee would seek to have him prosecuted if he did so, Appellant did not suffer any constitutional violation. Instead, he was given an accurate statement of the law and an appropriate warning in the event he chose to ignore the published criminal law. The interchange between Appellant and Appellee could just have easily been about whether Appellant would be authorized to come onto Appellee's property and murder a school district employee. The criminal law upon which the public relies indicates that both murder and bringing a weapon onto a school safety zone other than when carrying or picking up a student is a crime. Appellant's Complaint failed to set forth any set of facts by which he could prevail on his 42 U.S.C. § 1983 claim and it was therefore properly dismissed.

Finally, considering the totality of the circumstances surrounding the discourse between the Appellant and Jorge Gomez there was not a "seizure" sufficient to implicate Fourth Amendment protection and thereby state a

cognizable claim under 42 U.S.C. § 1983. The Complaint identifies Jorge Gomez as the Executive Director of Policy and Administration for the Appellee School District and never asserts any claim that Mr. Gomez possesses arrest powers or any legal authority to have Appellant arrested or charged with a crime. R-3-8. Moreover, Appellant states that he initiated the discourse with Mr. Gomez evidencing an attempt to bait the administrator into a position where he could either disregard the criminal code as it was published or disagree with Appellant and face this protracted litigation. R-5. There is no allegation of any actual confrontation, physical restraint or seizure, instead only a hypothetical and possible restraint on future conduct.

In evaluating whether a "seizure" has occurred to implicate Fourth Amendment protections the U.S. Supreme Court has held that the totality of the circumstances should be considered. Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 1182 (1991); Chandler v. Secretary of Florida Dept. of Transp., 695 F. 3d 1194 (11th Cir. 2012); Solano-Rodriguez v. State, 295 Ga. App. 896, 673 S.E.2d 351 (2009). A review of the totality of the circumstances in this case reveals that no seizure occurred. Appellant was never confronted or physically restrained nor was his liberty impaired in any concrete manner. Instead, he faced a hypothetical or theoretical restraint on his liberty if he chose to take certain future action.

In an apparent attempt to avoid addressing the applicable law disfavoring his position Appellant fabricates a new doctrine of his own that any threat of arrest for future conduct meets the "seizure" requirement under the Fourth Amendment. Appellant's Brief, p. 21. There is no support for this doctrine in the case cited by Appellant and this principal contradicts the established precedent set forth by the U.S. Supreme Court for determining when a "seizure" has occurred. Bodek v. Bunis, 2007 U.S. Dis. LEXIS 37580, 2007 WL 1526423, No. 06-CV-6022L; Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 1182 (1991). The Bodek case upon which Appellant relies held that "generally a mere threat of arrest, without more, does not give rise to a "seizure" under the Fourth Amendment" and that the totality of circumstances test should be followed in Fourth Amendment cases Id. at *9. Citing that "[t]he law is clear that verbal harassment or even threats alone are not actionable under 42 U.S.C. § 1983," the Bodek Court found that the threat of arrest by a court security officer was insufficient to implicate Fourth Amendment interests. Id. citing Cotz v. Mastroeni, 476 F.Supp.2d 332, 372 (S.D.N.Y.2007). As the Appellant points out, the Bodek Court did distinguish the cases of Bennett v. Town of Riverbed , 940 F. Supp. 481, 488 (E.D.N.Y. 1996) and Switlik v. O'Leary, 419 F. Supp. 2d 189, 190 (D. Conn. 2006), but not on the basis of future vs. past conduct as Appellant asserts in his brief. Appellant's Brief, p. 21. Instead, the cases were distinguishable because the totality of the circumstances gave rise to

a real loss of liberty at the face of imminent arrest as opposed to a mere hypothetical threat of arrest. Both Bennett and Switlik dealt with situations where law enforcement officers, persons with actual arrest powers, gave citizens an instruction that if they did not immediately comply with a request to take an affirmative action their non-compliance would lead to their immediate arrest. Id. Unlike Appellant's interaction with Jorge Gomez, the citizens in these cases faced immediate, certain arrest from a law enforcement officer who was physically present if they refused to comply with a specific directive made uniquely and specifically to them. Id. The totality of the circumstances led the courts to conclude that the threat of arrest implicated the Fourth Amendment not the fact that the threat of arrest dealt with some future conduct, as Appellant erroneously contends.

Appellant erroneously cites to the cases of Reed v. Giarusso, 463 F. 2d 706 (1972), Steffel v. Thompson, 415 U.S. 452 (1972) and GeorgiaCarry.Org v. Georgia, 687 F.3d 1244, 1251 (11th Cir. 2012) for the proposition that a threat of arrest or prosecution can give rise to a valid § 1983 case. None of those cases provide an analysis of what was required to show a "seizure" for the purposes of implicating Fourth Amendment rights. Instead, the cases addressed the question of standing, specifically under what circumstances a plaintiff could satisfy the actual injury element of the standing test. Id. What is required to meet the standing

requirements is a distinct and different question from what level of restraint is required to establish a "seizure" for the purposes of the Fourth Amendment. In Reed, the opinion of the court acknowledged a distinction between the question of standing and the question of the right of federal relief. Reed 463 F.2d at 706.

In considering whether Appellant suffered a real loss of liberty or "seizure" so as to state a claim for a Fourth Amendment violation this Court should evaluate the totality of the circumstances surrounding the threat of arrest. Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 1182 (1991); Chandler v. Secretary of Florida Dept. of Transp., 695 F. 3d 1194 (11th Cir. 2012); Solano-Rodriguez v. State, 295 Ga. App. 896, 673 S.E.2d 351 (2009). In this case Appellant initiated a legal discourse with a school administrator and was provided with a legal interpretation of the criminal law based on the express language of the official code. The totality of the circumstances do not support the conclusion that Appellant suffered a real loss of liberty and the abstract threat of arrest here does not give rise to a Fourth Amendment claim. Therefore dismissal of Appellant's constitutional claims was warranted.

IV. Conclusion

The Constitutional doctrine of sovereign immunity bars all of Appellant's claims in the absence of an applicable waiver of sovereign immunity. As Appellant has failed to carry his burden to establish a waiver of sovereign

immunity, the Complaint fails to state a claim and was properly dismissed as to all counts and requested remedies.

Further, as the Legislature has expressly adopted the Code Revision Commission's version of O.C.G.A. § 16-11-127.1 (c) by the adoption and passage of HB 90 during the 2014-2015 legislative session Appellant's claims for declaratory judgment, state law violations, and federal constitutional claims each fail to state a claim upon which relief may be granted. All of Appellant's claims rely upon the proposition that the published version of O.C.G.A. § 16-11-127.1 did not accurately reflect the Georgia Legislature's intent to expand the rights of GWL holders to possess their weapons within a school safety zone. Specifically, Appellant claimed that the Code Revision Commission's version of the statute following the passage of HB 60 and HB 826 during the 2013-2014 session failed to give effect to HB 826's changes to restrictions on bringing weapons onto a school safety zone. Since the Legislature's passage of HB 90 expressly adopted the version of O.C.G.A. § 16-11-127.1 which continues to criminalize possession of weapons in a school safety zone except when carrying or picking up students, Appellant has suffered no wrong or unwarranted restriction on his liberty to allow any of his claims to survive dismissal.

Finally, Appellant's federal constitutional claims fail to state a claim for which relief can be granted. The Complaint alleges facts which do not establish a "seizure" that would implicate Fourth Amendment Rights.

Based upon the foregoing, Appellee respectfully that the Court uphold the dismissal of all of Appellant's claims.

Respectfully submitted this 21st day of August, 2015.

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IN THE SUPREME COURT
STATE OF GEORGIA

PHILLIP EVANS,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. S15A1619
	)	
GWINNETT COUNTY PUBLIC SCHOOLS,	)	
	)	
	)	
Appellee.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of **APPELLEE'S BRIEF** upon counsel for the Appellant via United States mail with adequate postage addressed as follows:

John R. Monroe
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This 21st day of August, 2015.

s:/ Stephen D. Pereira
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