[Cite as *State ex rel. Rogers v. New Choices Community School*, 2009-Ohio-4608.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE, ex rel., NANCY H. ROGERS, ATTY. GEN.	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23031
v.	:	T.C. NO. 2007 CV 7624
NEW CHOICES COMMUNITY SCHOOL, et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellees	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 4th day of September, 2009.

. . . . . .

TODD R. MARTI, Atty. Reg. No. 0019280, Assistant Attorney General, Education Section, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215
Attorney for Plaintiff-Appellant

CHAD A. READLER, Atty. Reg. No. 0068394 and ERIK J. CLARK, Atty. Reg. No. 0078732, 325 John H. McConnell Blvd., Suite 600, P. O. Box 165017, Columbus, Ohio 43216
Attorneys for Defendant-Appellee New Choices Community School

JAMES S. CALLENDER, JR., Atty. Reg. No. 00597111, 1400 Fifth Third Building, 600 Superior Avenue East, Cleveland, Ohio 44114
Attorney for Amicus Curiae Ohio Association of Charter School Authorizers

ELIZABETH T. SMITH, Atty. Reg. No. 0012075 and MICHAEL J. HENDERSHOT, Atty. Reg. No. 0081842, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216
Attorneys for Amicus Curiae National Alliance for Public Charter Schools and Ohio Alliance for Public Charter Schools

ALBIN BAUER, II, Atty. Reg. No. 0061245, One SeaGate, 24th Floor, P. O. Box 10032, Toledo, Ohio 43699
Attorney for Appellee St. Aloysius Orphanage

NICOLE M. DONOVSKY, Atty. Reg. No. 0072262, 2006 Kenny Road, Columbus, Ohio 43221
Attorney for Amici Curiae Ohio School Boards Association, Buckeye Association of School Administrators and Ohio Association of School Business Officials

RACHELLE JOHNSON, Atty. Reg. No. 0069215 and LINDA FIELY, Atty. Reg. No. 0010053, Ohio Education Association, 225 East Broad Street, Columbus, Ohio 43215
Attorneys for Amicus Curiae OEA

DAVID G. LATANICK, Atty. Reg. No. 0010376 and SUE A. SALAMIDO, Atty. Reg. No. 0068043, 225 East Broad Street, Columbus, Ohio 43215
Attorneys for Amicus Curiae OEA

PETER J. RAKAY, Atty. Reg. No. 0011354 and JERRY A. SPICER, Atty. Reg. No. 0011385, 11 West Monument Bldg., Suite 307, Dayton, Ohio 45402
Attorneys for Amicus Curiae OEA

. . . . . .

FROELICH, J.

{¶ 1} The Ohio Attorney General appeals from a judgment of the Montgomery County Court of Common Pleas, which granted the motions of New Choices Community School, St. Aloysius Orphanage, and the individual members of New Choices' Governing Authority for judgment on the pleadings, pursuant to Civ.R. 12(C), and overruled all remaining pending motions.

{¶ 2} In its judgment, the trial court held that New Choices was a political subdivision and, as a matter of law, could not be a charitable trust over which the Attorney General had oversight authority pursuant to R.C. 109.23 et seq. The court further noted that, even if New Choices were a charitable trust, the Attorney General's general oversight

authority regarding charitable trusts would "give way" to the more specific provisions in Ohio's Community School Act, R.C. Chapter 3314. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} New Choices is a community school, commonly referred to as a charter school, established under R.C. Chapter 3314; the individual defendants are members of New Choice's Governing Authority. St. Aloysius became New Choices' sponsor in June 2005, when it accepted the assignment of the Ohio Department of Education's contract with New Choices.

{¶ 4} According to the Attorney General's Complaint and Amended Complaints, New Choices has failed to provide its students with a high quality education and has "exhibited consistently poor stewardship of the extensive public resources entrusted to it." The Attorney General alleges that the Auditor of State has repeatedly cited New Choices for failing to meet state and federal accounting requirements, failing to comply with federal and state withholding requirements, and failing to develop a system to manage its fixed assets. The Complaint also details New Choices' alleged history of academic failure, noting the school's failure to meet numerous academic performance standards governing all public schools.

{¶ 5} The Attorney General sought to address New Choices' alleged failures under a charitable trust theory. The Attorney General alleged that New Choices is a charitable trust within the meaning of R.C. 109.23, and that he has enforcement authority over New Choices under R.C. 109.24. Specifically, he alleged in paragraph 63 of the Second Amended

Complaint:

{¶ 6} "c. [New Choices], the members of its governing authority, and its sponsors have fiduciary duties with regard to the public moneys it has received and continues to receive. Public moneys paid for a purpose come as a trust fund, subjecting its recipients to fiduciary duties. [New Choices] has received more than $6,686,503 in public moneys during its six years of operation, it is projected to receive an additional $1,525,276 over the 2007-2008 school year, those public moneys were advanced for educational purposes, and those public moneys constituted the vast majority of [New Choices'] operating funds.

{¶ 7} "d. All parties to the [New Choices] transaction have manifested their intent to create a fiduciary relationship to the public moneys provided to [New Choices]. The arrangement between the State, [New Choices], St. Aloysius, and the public is structured as a trust: The State (settlor) provides funds to [New Choices] and St. Aloysius (the trustees) for the benefit of [New Choices'] students and the general public (the beneficiary). Further, R.C. 3314.03(A)(11)(d) and the contract between [New Choices] and St. Aloysius provide that R.C. Chapter 117, statutes conclusively construed as dealing with trust property, are applicable to [New Choices]. In addition, the act of declaring itself to be a charitable organization under the Internal Revenue Code and R.C. Chapter 1702 manifests [New Choices'] acknowledgement [sic] of the fiduciary duties inherent in those statuses. Moreover, [New Choices] has represented that the funds it receives will be used for educational purposes.

{¶ 8} "e. [New Choices] has a charitable purpose: education."

{¶ 9} The Attorney General sought (1) an order terminating New Choices' alleged

charitable/public trust and a permanent injunction restraining further operation of the school; (2) an order directing that New Choices, its governing authority, and its sponsor see that New Choices' students are able to transfer to other schools; and (3) an order, under the doctrine of cy pres, redirecting New Choices' funding to the public schools to which New Choices' students transfer. Alternatively, the Attorney General sought an order requiring New Choices, St. Aloysius, and the Governing Authority to "wind up" the alleged charitable/public trust. In its Second Amended Complaint, the Attorney General also sought, in the alternative, the removal of each member of New Choices' Governing Authority as trustees.

{¶ 10} All parties filed Answers to the Attorney General's Complaints. On December 26, 2007, New Choices moved for judgment on the pleadings, pursuant to Civ.R. 12(C), raising four arguments. First, the school asserted that the Attorney General's charitable trust powers under R.C. 109.24 do not extend to regulating public community schools. Second, it argued that, even if the Attorney General's charitable powers did apply, neither the doctrine of cy pres nor deviation "allows him to shutter a community school based solely on his own allegations of underperformance." Third, New Choices asserted that the Attorney General's "expan[sion] of his trust powers into the public education realm runs afoul of separation of powers principles articulated in the Ohio Constitution." Finally, New Choices asserted that, even if the Attorney General had the authority to close the school, New Choices is succeeding in its mission to operate a community school dedicated to dropout prevention and recovery. The individual members of New Choices' Governing Authority subsequently joined in New Choices' motion.

{¶ 11} On January 28, 2008, St. Aloysius filed its own Civ.R. 12(C) motion,

also arguing that neither New Choices nor St. Aloysius is a charitable trust and, therefore, they are not subject to the Attorney General's powers under R.C. 109.24. St. Aloysius emphasized that it had never received any funds from the Department of Education in connection with New Choices' operation as a community school and, thus, it could not be a trustee of a charitable trust. St. Aloysius further argued that it has no legal obligation to "wind up" New Choices' affairs and that the equitable remedies sought by the Attorney General are not available, because the General Assembly provided remedies for addressing academic and fiscal performance issues in the Community School Act. Finally, St. Aloysius asserted that the State failed to manifest an intent to create a trust in the language of R.C. Chapter 3314. New Choices also joined in St. Aloysius' motion.[1]

{¶ 12} On February 21, 2008, the Attorney General opposed the motions for

---

[1] The Attorney General filed his Second Amended Complaint after the Civ.R. 12(C) motions were filed. The Second Amended Complaint was substantially the same as the First Amended Complaint; it continued to rely on the Attorney General's statutory and common law authority over charitable trusts and requested the same relief as in the First Amended Complaint, as well as the removal of each member of New Choices' Governing Authority as trustees. All of the Defendants filed Answers to the Second Amended Complaint. Although the Defendants did not renew their Civ.R. 12(C) motions after the Second Amended Complaint was filed, all of parties and the trial court treated the motions as if they were directed at the Second Amended Complaint. On appeal, the parties have cited to the Second Amended Complaint. Accordingly, we will likewise treat the Civ.R. 12(C) motions as directed toward the Second Amended Complaint.

judgment on the pleadings and moved for a partial summary judgment declaring that he has standing to prosecute the case because New Choices is a charitable trust. In his joint memorandum in opposition to the Civ.R. 12(C) motions and in support of his motion, the Attorney General argued, in part, that the charitable trust arose from New Choices' (as trustee) own declarations in its Articles of Incorporation that the funds it would receive would be used for charitable purposes and from its general representations that it would use public funding for educational purposes. The Attorney General did not argue its previous allegations that the State acted as the settlor of the trust.

{¶ 13} In September 2008, the trial court granted the Defendants' motions for judgment on the pleadings and overruled all remaining motions, including the Attorney General's motion for partial summary judgment. The court noted that the Attorney General's argument that New Choices is a charitable trust was based on three points: (1) that New Choices is a non-profit corporation organized under Chapter 1702; (2) that a non-profit corporation may, based on the content of its Articles of Incorporation, create a charitable trust with the corporation acting as the trust's settlor; and (3) that New Choices' Articles of Incorporation do, in fact, create a charitable trust, with the specific purpose of the trust being education. The trial court acknowledged the existence of case law supporting the Attorney General's argument that a non-profit corporation may act to create a charitable trust. However, based on *Greater Heights Academy v. Zelman* (2008, C.A.6), 522 F.3d 678, which held that community schools are political subdivisions, the court rejected the Attorney General's argument. The trial court stated:

{¶ 14} "This court concludes, based upon the indicated statutory references [in *Greater Heights*] to community schools as political subdivisions and the state's control of community schools, that New Choices is a political subdivision. Given this conclusion, there is simply no charitable trust role for the Attorney General either by statute or at common law. This conclusion is reached because – as a matter of law – a political subdivision can not be a charitable trust, express or otherwise. It is, of course recognized, given the allowed legislative experimentation, that it can be argued that New Choices – since it is a non-profit corporation – is a hybrid between a public and private entity leaving room, given the language of New Choices' Articles of Incorporation, for the Attorney General's charitable trust oversight. This argument is rejected because, despite its status as a non-profit corporation, New Choices remains a political subdivision, and it is not tenable to label a political subdivision as a charitable trust. If New Choices is not a charitable trust, it can not [sic] be subject to the Attorney General's charitable trust oversight authority."

{¶ 15} In a footnote, the trial court also concluded that, even assuming that New Choices were a charitable trust, the Attorney General still could not exert charitable trust authority over New Choices, reasoning that "the comprehensive regulations outline by O.R.C. § 3314.01 et seq. would preclude any common law or statutory charitable trust regulation by the Attorney General."

{¶ 16} The Attorney General appeals from the trial court's granting of the motions for judgment on the pleadings.[2]

---

[2] We note that several entities have filed briefs as amicus curiae. In support of the Defendants/Appellees, the Ohio Association of Charter School Authorizer's

II

{¶ 17} Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." When considering a defendant's Civ.R. 12(C) motion for judgment on the pleadings, the court may consider only the allegations in the complaint and any written instrument attached thereto. Dismissal is appropriate under Civ.R. 12(C) when, after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would

---

brief discussed the oversight that community school sponsors provide under R.C. Chapter 3314 and how sponsors regulate, monitor, and hold their community schools accountable. The National Alliance for Public Charter Schools and the Ohio Alliance for Public Charter Schools also addressed the "comprehensive legislative scheme" concerning community schools, and they argued that the Attorney General's action is "unnecessary" and an infringement on the General Assembly's powers.

The Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials jointly filed a brief in favor of the Attorney General. They emphasized that Ohio's community schools are "not delivering academic success" and a significant number "are in a fragile financial condition." They argued that "[t]he current situation involving community schools that are failing academically and sinking financially cries for regulation," which is not being exercised by the Department of Education and could be offered by the Attorney General. The Ohio Education Association also argued in favor of the Attorney General. It stated that "[t]he egregious failures and shortcomings of some community schools, including New Choices community school, necessitates swift and decisive action in order to promote and protect the interests of taxpayer and the academic welfare of Ohio students." It argued that enforcement by the Attorney General was necessary to "prevent further squandering of educational funds through irresponsibility and neglect of duty."

entitle it to relief. *Dearth v. Stanley*, Montgomery App. No. 22180, 2008-Ohio-487, citing *State ex rel. Midwest Pride IV, Inc. v. Pontius* (1996), 75 Ohio St.3d 565, 570. Thus, a motion for judgment on the pleadings may be granted only if the moving party is entitled to judgment as a matter of law.

{¶ 18} We review the granting of a Civ.R. 12(C) motion using a de novo standard of review. *Inskeep v. Burton*, Champaign App. No. 2007 CA 11, 2008-Ohio-1982, at ¶7.

III

{¶ 19} The Attorney General raises two assignments of error, which we will address together. They state:

{¶ 20} "I. THE TRIAL COURT ERRED IN HOLDING THAT A POLITICAL SUBDIVISION CANNOT BE A CHARITABLE TRUST."

{¶ 21} "II. THE TRIAL COURT ERRED IN HOLDING THAT R.C. CHAPTER 3314 DISPLACES THE ATTORNEY GENERAL'S STATUTORY AND COMMON LAW AUTHORITY OVER CHARITABLE TRUSTS."

{¶ 22} In its first assignment of error, the Attorney General claims that the trial court erred in concluding that New Choices, as a political subdivision, could not, as a matter of law, be a charitable trust and was not subject to the Attorney General's charitable trust enforcement powers. In its second assignment of error, the Attorney General asserts that there is no conflict between R.C. 109.24 and R.C. Chapter 3314 and, therefore, R.C. Chapter 3314 does not displace his authority over charitable trusts.

{¶ 23} R.C. 109.23 to 109.33 set forth the Attorney General's oversight and enforcement authority with respect to charitable trusts. For purposes of those statutes, a charitable trust is defined as "any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, religious, or educational purpose." R.C. 109.23(A).

{¶ 24} R.C. 109.23(B) provides that the phrase "charitable trust" includes "the fiduciary relationship, the entity serving as trustee, the status as trustee, the corpus of such trust, or a combination of any or all of such meanings, regardless of the primary meaning of any use of the term, that is necessary in any circumstances to effect the purposes of such sections."

{¶ 25} On appeal, the Attorney General claims that political subdivisions may fall within the definition of a "charitable trust" under R.C. 109.23. He cites to five "textual indications" for this assertion. First, in 1975, the General Assembly removed the exclusion of "agencies of the state government or any political subdivision" from the definition of a charitable trust. Second, R.C. 109.23(A)'s definition of a charitable trust includes "any" entity that meets the description of a charitable trust. Third, R.C. 109.23(D) expressly states that the fact that an entity is a corporation or any other type of organization does not prevent it from also being a charitable trust. Fourth, R.C. 109.26(D) exempts county or independent agricultural societies, which are political subdivisions, from the registration requirement, which implies that all other political subdivisions are not exempt. Finally, Ohio Adm. Code

109:1-1-02(b)(1) exempts political subdivisions from the registration requirements, which implies that political subdivisions can be charitable trusts. As an additional argument, the Attorney General claims that it pled facts to support each of the elements of a charitable trust and facts establishing grounds for the application of cy pres and for removal of the trustees.

{¶ 26} In response, St. Aloysius argues that, while there is authority that a political subdivision can be a charitable *trustee*, "[t]here is no precedent for allowing the Attorney General to use his charitable trust powers in R.C. 109.23 et seq. to dissolve a political subdivision simply because the political subdivision holds property as a trustee under the express terms of a trust." St. Aloysius continues: "The Attorney General's lawsuit to dissolve New Choices – a statutory political subdivision – should be dismissed on this basis alone." St. Aloysius further argues that New Choices and St. Aloysius are not trustees of a charitable trust.

{¶ 27} In its own appellate brief, New Choices asserts that there was no intent to create community schools as charitable trusts. New Choices further argues that the oversight of community schools has been legislatively assigned to the Department of Education and the Auditor of State, leaving no room for enforcement by the Attorney General. Finally, New Choices claims that the doctrines of cy pres and deviation are inapplicable.

{¶ 28} As an initial matter, none of the parties disputes that New Choices is a political subdivision. We note that R.C. Chapter 2744, Ohio's political subdivision liability statute, includes community schools within its definition of "political subdivision." R.C. 2744.01(F). See, also, R.C. 4117.01(B) (including the governing

authority of a community school as a "public employer" for purposes of Ohio's public employee collective bargaining statute); *Greater Heights*, 522 F.3d at 680. In addition, neither New Choices nor St. Aloysius claims that a political subdivision cannot, as a matter of law, serve as the trustee of a charitable trust. New Choices acknowledges in its brief that "charitable trust statutes, regulations, and cases do not seem to support a categorical divide between all political subdivisions and all charitable trusts."

{¶ 29} Thus, the question before us is not whether a community school, as a political subdivision, may be the trustee of a charitable trust. Rather, the heart of the Attorney General's first assignment of error is whether or not New Choices, as a matter of law, is operated as a charitable trust, which may be monitored and potentially dissolved under the Attorney General's authority to oversee charitable trusts. We hold that it is not.

{¶ 30} We begin with a discussion of the General Assembly's charter-school legislation.

{¶ 31} "The General Assembly is the branch of state government charged by the Ohio Constitution with making educational policy choices for education of our state's children." *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St.3d 568, 2006-Ohio-5512, at ¶34; Section 2, Article VI of the Ohio Constitution (requiring the provision of a "thorough and efficient system of common schools throughout the State"). Pursuant to its constitutional authority, in 1997, the General Assembly made the decision to create community schools as part of the State's system of public education.

{¶ 32} Under R.C. Chapter 3314, the Community Schools Act, community schools are privately-governed public schools, which are independent of any school district, but part of the State's program of education. R.C. 3314.01(B). Although community schools are exempt from certain state laws and regulations, R.C. 3314.04, they must comply with many of the same statewide academic standards. R.C. 3314.03(A)(11). The schools must be nonsectarian and established as either a nonprofit corporation or a public benefit corporation under R.C. Chapter 1702. Community schools cannot charge tuition. R.C. 3314.08(I). Rather, they are funded by state revenues pursuant to a calculation set forth in R.C. 3314.08.

{¶ 33} Every community school must have a sponsor approved by the Department of Education. The governing authority of the community school and the sponsor must enter into a contract, which must be filed with the Superintendent of Public Instruction. The contract is required to specify, among other things, the school's educational program, academic goals, performance and admission standards, dismissal procedures, the ways by which it will achieve racial and ethnic balance reflective of the community it serves, requirements for financial audits, the facilities to be used and their locations, the teachers' qualifications, arrangements for providing health benefits to employees, and procedures for resolving disputes between the sponsor and the governing authority of the school. R.C. 3314.03(A). The school must also submit to the sponsor a comprehensive plan for the school. R.C. 3314.03(B).

{¶ 34} Under the contract, the sponsor's duties include monitoring the school's compliance with the contract and all applicable laws and the academic and fiscal

performance of the school. R.C. 3314.03(D). The Department of Education oversees the sponsors and provides technical assistance to schools and sponsors in their compliance with applicable laws and the terms of their contract. R.C. 3314.015; R.C. 3314.11 (requiring Department of Education to establish the State Office of Community Schools). The sponsor of a community school must give various "assurances" to the Department of Education annually. R.C. 3314.19.

{¶ 35} If problems arise in the school's overall performance, the sponsor must take steps to intervene in the school's operation in order to correct such problems. A sponsor may place a community school on probationary status, suspend operation of a school, choose not to renew a contract, or choose to terminate a contract prior to its expiration if the school fails to meet student performance standards, fails to meet fiscal management standards, violates any provision of the contract or applicable laws, or for other good cause. R.C. 3314.03(D); R.C. 3314.07(B)(1); R.C. 3314.072(C), (D); R.C. 3314.073. In enacting R.C. 3314.072, addressing the suspension of operations, the General Assembly indicated that the purposes of the provision were "to promote the public health, safety, and welfare by establishing procedures under which the governing authorities of community schools established under this chapter will be held accountable for their compliance with the terms of the contracts they enter into with their school's sponsors and the law relating to the school's operation.***" R.C. 3314.072.

{¶ 36} Schools that are in academic emergency and fail to demonstrate adequate academic growth for a specified number of years must be permanently closed. R.C. 3314.35. In addition, a community school may lose its funding if the

Auditor of State finds the school to be "unauditable."

{¶ 37} The community school may contract with an operator to manage the school; nonrenewal or termination of this contract by the community school is appealable to the sponsor or, if the sponsor has sponsored the school for less than 12 months, to the Ohio Board of Education.

{¶ 38} Turning to the Attorney General's arguments, the Attorney General asserts that New Choices, a community school, meets the definition of a charitable trust. As stated above, in order to constitute a charitable trust for purposes of R.C. 109.23, there must be (1) a fiduciary relationship with respect to property; (2) a manifestation of intent to create a trust relationship; and (3) the fiduciary relationship must "subject[ ] the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, religious, or educational purpose." R.C. 109.23(A).

{¶ 39} St. Aloysius and New Choices assert that the State, as settlor, has failed to manifest an intent that community schools amount to charitable trusts and that New Choices did not, as a settlor, create a charitable trust. On appeal, the Attorney General has abandoned its argument that the State, as settlor, intended community schools to be charitable trusts. Rather, as in the trial court, the Attorney General emphasizes that New Choices is the settlor and that it created a charitable trust through its "voluntary decision to assume the duties of running an educational institution, something it did not have to do." The Attorney General claims that New Choices' fiduciary duty arises from its "concomitant representations that it would use the funding it sought for the charitable purpose of education, representations that this

and other courts have recognized manifest the intent to assume trust duties."

{¶ 40} In support of this argument, the Attorney General cited to, among other cases, *State ex rel. Montgomery v. Vela* (Aug. 28, 2003), Licking C.P. 02 CV 1158, and *State ex rel. Montgomery v. WorkAmerica, Inc*. (Nov. 2, 1998), Meigs App. No. 97CA18.

{¶ 41} In *WorkAmerica*, the parties agreed that WorkAmerica was a charitable corporation which held its assets in trust and was subject to the Ohio Charitable Trust Act. The corporation's Articles of Incorporation provided that its primary purpose was to "provide an educational experience for underprivileged individuals through various vocational training programs resulting in enhanced job skills. ***" When WorkAmerica advanced $2,100 to a trainee for legal services after the trainee was charged with various felonies, the Attorney General determined that the loan was outside of the corporation's purposes. The Attorney General brought suit, seeking a declaration that the trustees breached their fiduciary duties, the return of charitable assets, and the removal of the trustees. The trial court granted summary judgment in favor of the Attorney General. On appeal, the Fourth District affirmed, concluding that WorkAmerica, a charitable trust, advanced money with the intent of providing legal assistance to the trainee, which was beyond the corporation's stated charitable purposes, and that the Articles of Incorporation prohibited WorkAmerica's assets from inuring to the benefit of any private person.

{¶ 42} In *Vela*, a case somewhat more similar to the one before us, the Attorney General brought suit against a private, non-custodial foster care agency and its directors, asserting that a charitable trust was created when the agency, in its

Articles of Incorporation, held themselves out as an institution created for charitable and educational purposes. The Attorney General further asserted that charitable gifts to non-profit corporations are encumbered with the duties of a charitable trust and that those which accept the gifts have a duty to maintain that trust property. The trial court agreed, concluding that the agency manifested an intention to create a charitable trust by specifying in its Articles of Incorporation that it will use funds that it receives "exclusively for charitable and educational purposes."

{¶ 43} New Choices' Articles of Incorporation state that the purposes of the corporation are:

{¶ 44} "(1) To provide alternative education to children outside of the public school system.

{¶ 45} "(2) To provide pre-vocational training to children outside of the public school system.

{¶ 46} "(3) To provide susbstance abuse and mental health counseling to children outside of the public school system.

{¶ 47} "(4) To receive and administer funds, bequests, gifts and other grants for the above purposes.

{¶ 48} "(5) To do all and everything necessary, suitable, useful and proper for the accomplishment of any of the purposes set forth above.

{¶ 49} "(6) To engage in any other lawful act or authority for which educational, charitable, religious, scientific or literary non-profit corporations may be formed under Chapter 1702 of the Ohio [R]evised Code ***."

{¶ 50} Had New Choices, upon incorporation, chosen to operate as a private

school, its Articles of Incorporation may have been able to be interpreted as manifesting an intent to operate as a charitable trust. However, upon entering into a contract with a sponsor pursuant to R.C. Chapter 3314, New Choices expressed its intent to become a political subdivision and a legislatively-created public school falling within the state's system of public education and the oversight of the Department of Education.

{¶ 51} Unlike the nonprofit corporations in *Vela* and *WorkAmerica*, New Choices, a political subdivision, has received funding from the State, pursuant to R.C. 3314.08, in order for the school to provide educational services as part of the State's system of public education. See *State ex rel. Ohio Congress of Parents & Teachers* at ¶34. Stated differently, New Choices, although privately operated, is using public funding to perform the governmental function of operating a public school. See id. at ¶68 ("Community schools were developed to further the state's public school system of education. We cannot imagine a greater public purpose than educating our state's children."); R.C. 2744.01(C)(2)(c) (governmental functions include "[t]he provision of a system of public education.").

{¶ 52} We find no authority to support the proposition that a political subdivision that receives public funds from the State and uses those funds for a governmental purpose – which includes the provision of public education – is subject to oversight by the Attorney General as a charitable trust solely by virtue of that funding; to hold that a charitable trust exists in all such circumstances would turn all political subdivisions which receive public monies into charitable trusts subject to oversight by the Attorney General. As a matter of law, New Choices, a public

community school, is not a charitable trust.

{¶ 53} Even if New Choices were deemed to be a charitable trust, the Community Schools Act, which was enacted pursuant to the General Assembly's constitutional authority to establish a public school system, demonstrates an intention by the General Assembly that oversight of community schools be conducted as set forth in R.C. Chapter 3314 and not by the Attorney General under R.C. 109.23 et seq.

{¶ 54} "In enacting R.C. Chapter 3314, the General Assembly declared that its purposes included 'providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting.' Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. Community schools are permitted to target and tailor programs for small student populations such as learning-disabled students or dropouts from traditional schools. R.C. 3314.06(B), 3314.03(A)(2), and 3314.04." *State ex rel. Ohio Congress of Parents & Teachers* at ¶6.

{¶ 55} R.C. 3314.01(B) makes clear that community schools are public schools that are part of the state's program of education, although not part of a particular school district, and are funded entirely with public funds. Thus, the purpose for community schools as identified by the General Assembly was the creation of an alternative form of public schools.

{¶ 56} At oral argument, the Attorney General asserted that oversight under R.C. 109.24 was necessary, because the Department of Education has limited

authority over community schools and it oversees only issues regarding health and safety. However, a review of R.C. Chapter 3314 reflects that the General Assembly created a comprehensive system of oversight for community schools that, in many respects, resembles the system of oversight for traditional public schools and, as with traditional public schools, places the ultimate burden of oversight on the Department of Education. As noted by the Supreme Court of Ohio:

{¶ 57} "The Ohio Community-Schools Act was drafted with the intent that parental choice and sponsor control would hold community schools accountable, in a fashion similar to traditional school management. In exchange for enhanced flexibility, community schools face heightened accountability to parents and sponsors. Either can threaten shutdown – sponsors by suspending operations pursuant to R.C. 3314.072, and parents by withdrawing their children. In fact, internet- or computer-based community schools lose their funding if they do not show expected gains for two years, and any community school will be permanently shut down if it fails to meet expected goals for three years. R.C. 3314.36." *State ex rel. Ohio Congress of Parents & Teachers* at ¶31.

{¶ 58} As detailed above, community schools sponsors must obtain approval by the Department of Education to sponsor a community school and, upon entering into a contract with a community school, their functions are similar to that of a traditional board of education. The sponsors are responsible for monitoring the community school's compliance with all laws applicable to the school and with the terms of the contract between the sponsor and the community school. R.C. 3314.03(D). They also monitor and evaluate academic and fiscal performance and

the organization and operation of the school.

{¶ 59} Sponsors are monitored and supervised by the Department of Education, the same department that oversees traditional public schools. R.C. 3314.015; *State ex rel. Ohio Congress of Parents & Teachers* at ¶30. The Department of Education provides technical assistance to governing authorities and sponsors, approves sponsors and "monitor[s] the effectiveness of those sponsors in their oversight of the schools with which they have contract." R.C. 3314.015(A). If, after a hearing, the State Board of Education finds that the sponsor is not in compliance or is unwilling to comply with its contract with any community school, the Department of Education may revoke the sponsor's approval to sponsor a community school and may assume sponsorship of that school. R.C. 3314.015(C).

{¶ 60} The Board of Education must issue an annual report card for each community school, R.C. 3314.012, and it is responsible for preparing an annual report for the Governor and the leadership of the General Assembly regarding "the effectiveness of academic programs, operations, and legal compliance and of the financial condition of all community schools established under [R.C. Chapter 3314]" and, from time to time, for making legislative recommendations designed to enhance the operation and performance of community schools, R.C. 3314.015(A). A decision by the sponsor to terminate a contract with a community school may be appealed to Department of Education, whose decision is final. R.C. 3314.07(B)(4).

{¶ 61} In short, although primary oversight over community schools is performed by school sponsors, these sponsors are monitored by the Department of Education and they can be removed and replaced by the Department of Education if

they fail to perform their functions. Nothing in this system of oversight suggests that the General Assembly intended for community schools, as part of the public school system, to be subject to the oversight of the Attorney General as charitable trusts. To the contrary, the Community Schools Act reflects the General Assembly's intention for oversight of the school's performance to be provided, ultimately, by the Department of Education.

{¶ 62} Nor is oversight by the Attorney General necessary to ensure the fiscal responsibility of community schools. It is well-established that "[i]ndividuals or entities who control public funds have a duty to account for their handling of those funds." *Oriana House, Inc. v. Montgomery*, 108 Ohio St.3d 419, 422, 2006-Ohio-132, at ¶13; *State ex rel. Smith v. Maharry* (1918), 97 Ohio St. 272, 276. This duty is to "prevent frauds against the public, to protect public funds, and to place final responsibility for public funds on the shoulders of the officials charged with the collection and care of such funds." *Oriana House* at ¶13.

{¶ 63} To achieve these purposes, however, the General Assembly has authorized the Auditor of State to audit the use of public funds. Id.; *Maharry*, 97 Ohio St. at 276; R.C. Chapter 117. Community schools must comply with R.C. Chapter 117, must maintain financial records in the same manner as school districts, and are subject to audit by the Auditor of State. See R.C. 3314.03(A).

{¶ 64} With respect to community schools, the General Assembly has manifested an intent and expressly provided that the operations and fiscal management of community schools are to be overseen by the Department of Education and the Auditor of State. Accordingly, we find no legal support for the

Attorney General's allegation that the State established and provided public funding to community schools (either directly or through a school's governing authority) with the intent and purpose of creating a charitable trust over which the Attorney General has oversight authority.

{¶ 65} The Attorney General argues that the oversight provisions in R.C. Chapter 3314 are concurrent with and do not displace his oversight authority under R.C. 109.24. He further asserts that R.C. 1.51, which provides that a specific provision governs over a general provision when the two are in conflict, does not apply because no conflict exists. The Attorney General states: "Applying R.C. 109.24 here would not prevent the operation of any of the R.C. Chapter 3314 provisions the court cites: those concerning closure for academic failure, the disposition of closed charter schools' students and property concerning fiscal management." Rather, the Attorney General argues, his use of R.C. 109.24 would seek enforcement of those sections.

{¶ 66} We disagree. In using its oversight authority under R.C. 109.24, the Attorney General is evaluating the academic performance of the school; R.C. Chapter 3314 expressly places this responsibility on the sponsors and, ultimately, on the Department of Education due to its oversight of sponsors. In addition, the Attorney General is seeking to correct perceived errors in the fiscal management of the school; R.C. 3314 requires sponsors to oversee the fiscal management of the school and makes schools subject to audit by the Auditor of State. By using R.C. 109.24, the Attorney General is asking the judiciary to evaluate whether the academic performance is satisfactory and whether the school is effectively allocating

its resources in the governing of the school. In essence, the Attorney General is seeking to replace Department of Education oversight with judicial review. We find this position untenable when the General Assembly, which has the constitutional obligation to make educational policy choices for Ohio's children, has delegated these responsibilities to sponsors, the Department of Education, and the Auditor of State. We agree with the trial court's alternative reasoning that, even if New Choices and other community schools were charitable trusts, the oversight provided in R.C. Chapter 3314 governs community schools and displaces the Attorney General's role in overseeing charitable trusts.

{¶ 67} Although the trial court erred to the extent that it held that a political subdivision cannot, as a matter of law, have any role with respect to charitable trusts, such as a trustee, it did not err in holding that New Choices, a community school, is not, as a matter of law, subject to oversight by the Attorney General as a charitable trust. The trial court, therefore, did not err in granting the Defendants' Civ.R. 12(C) motions.

{¶ 68} In reaching this conclusion, we make no judgment about whether New Choices is performing adequately academically or whether it has complied with its fiscal responsibilities and is appropriately being "held accountable" for its use of public funds. The concerns of several of the Amici may or may not be well-founded, but these are factual questions that are not before us. Moreover, we state no opinion as to whether the General Assembly acted wisely in allowing the creation of community schools, whether the provisions of R.C. Chapter 3314 provide sufficient oversight for community schools, or whether there are sufficient remedies when

community schools are failing. These are policy issues that are left to the General Assembly. Our holding is confined to the discrete legal issue of whether the Attorney General may use its authority to oversee charitable trusts to close or replace the governing authority of a community school. For the reasons set forth above, he may not.

{¶ 69} The assignments of error are overruled.

IV

{¶ 70} Having overruled the assignments of error, the judgment of the trial court will be affirmed.

. . . . . .

BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Todd R. Marti
Chad A Readler
Erik J. Clark
James S. Callender, Jr.
Elizabeth T. Smith
Michael J. Hendershot
Albin Bauer, II
Nicole M. Donovsky
Rachelle Johnson
Linda Fiely
David G. Latanick

Sue A. Salamido
Peter J. Rakay
Jerry A. Spicer
Hon. Michael L. Tucker