FILED
01-14-2020
Clerk of Circuit Court
Waukesha County
2019CV000574

BY THE COURT:

DATE SIGNED: January 14, 2020

Electronically signed by Michael O. Bohren
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT CIVIL DIVISION WAUKESHA COUNTY

School Choice Wisconsin Action, Inc.
Plaintiffs,

CASE NO. 19CV574

vs.

Carolyn Stanford Taylor
Wisconsin Department of Public Instruction
Defendants.

DECISION AND ORDER

DECISION

STATEMENT OF THE CASE

This action was commenced by School Choice of Wisconsin Action, Inc.(SCWA) seeking a declaratory judgment that Choice Schools teaching and learning through the internet or "virtual learning" will satisfy the requirement for "direct pupil instruction" under Wisconsin Law as it does for the public schools. The Department of Public Instruction (DPI) through statute mandates the number of teaching hours in a school year for public and Choice schools, "direct pupil instruction". This action centers on DPI permitting internet learning in public schools and not in Choice schools as a method of "direct pupil instruction."

There are three basis to the SCWA's challenge:

1. DPI is attempting to enforce a rule that has not been promulgated under state law;
2. DPI is incorrectly interpreting Wis. Stats. secs.118.60 (2)(a)8 and 119. 23(2)(a)8; and
3. DPI's conduct violates the rights of Choice schools to equal protection under the Wisconsin Constitution.

The Department of Public Instruction (hereafter DPI) is the state agency that oversees school instruction by setting various rules and standards. Local public school boards have broad discretion in administrating the standards. Wisconsin law recognizes two types of public schools: traditional public schools [Wis. Stat. sec. 115.01(1)] and charter schools established by contract with public schools [Wis. Stat.sec.115.001 (1) and 118.40].

Wisconsin law also recognizes three School Choice programs which permit eligible students to attend a participating private school at public expense, and are considered private schools under Wis. Stats. Sec. 118.60(2) (a). Schools in two of the options are involved in Plaintiff, and are the center of this litigation. DPI oversight of the Choice schools is more limited than public schools, but does include the instructional hour requirement referenced above and set forth below.

The two groups of Choice schools are regulated under two different statutes; section 118.60(2)(a)8. addresses Racine and Wisconsin Parental Choice Programs, and the Milwaukee Parental Choice Program is under Wis. Stat. sec. 119.23(2)(a)8. Both sections provide that schools participating in the program must have "at least 1050 hours of direct pupil instruction in grade 1-6 and at least 1137 hours of direct pupil instruction in grades 7-12".

Wisconsin public schools, non-choice schools, under Wis. Stat. sec. 121.02(1)(f) must provide the same direct pupil instruction hours in the same grades.

Plaintiff School Choice of Wisconsin Action, Inc.(SCWA) is a membership organization of Choice schools, which are effected by the statutes cited hereinafter. Defendant The Department of Public Instruction (DPI) is the state agency governing school K-12 education in Wisconsin, and Defendant Carolyn Stanford Taylor, the State Superintend of Public Instruction, is the chief officer of DPI. For purposes of this decision and order, both defendants are identified as DPI.

The parties agree that there are no disputed facts, and each party seeks a legal declaration consistent with their reading of the law. Accordingly a scheduling order was issued providing for the filing of simultaneous motions for Summary Judgment; briefs were filed, an oral argument was held on October 24, 2019, and the Circuit Court took the matter under advisement scheduling a decision for January 3, 2020, which was adjourned to January 14, 2020. The Court issues its Decision and Order today and cancels the January 14, 2019 hearing.

STATMENT OF FACTS

In January, 2019 various Choice schools sought a declaration from DPI that Choice schools employing "Virtual Learning" would satisfy the "direct pupil instruction" requirement, as it did for public schools. DPI responded on February 5, 2019 in an email that DPI would not permit Choice schools to include "virtual learning" as "direct pupil instruction" hours:

> Another question we have received is whether Choice schools may make up instructional time using virtual instruction. Under state law, Choice schools may not count instruction provided through the Internet between students and teachers geographically remote from each other as hours of instruction for purposes of Wis. Stat. ss. 119.23 (2)(a)8. Or 118.60(2)(a)8. Because Choice schools cannot count virtual instruction for this purpose, Choice schools may not do so to make up instructional time lost due to inclement weather.

(Exhibit A to the Complaint)

In a second communication, an email letter dated February 28, 2019, DPI confirmed this position:

> Thank you for your letter dated February 21, 2019, regarding virtual instruction offered by schools participating in a private school choice program (Choice schools). As previously communicated, the Department of Public Instruction (DPI) does not have authority under statue or rule to give Choice schools credit or hours of virtual instruction provided to make up instructional time lost due to inclement weather. The administrative rule you highlight in your letter – Wis. Admin. Code § PI 8.01(2)(f) – explicitly applies only to public school districts. There is no similar provision that applies to Choice schools.
>
> (Exhibit B to the Complaint)

The concept of "Direct pupil instruction" is not defined. However, DPI in an administrative rule has stated that "virtual learning" is part of "direct pupil instruction "at the discretion of the public school. This interpretation is found in two related documents; first in Wisconsin Administrative Code PI 8.01(2)(f):

> **f)** *Hours of instruction.* Each school district board shall annually schedule and hold at least 437 hours of direct pupil instruction in kindergarten, at least 1,050 hours of direct pupil instruction in grades 1 through 6, and at least 1,137 hours of direct pupil instruction in grades 7 through 12. The school hours are computed as the period from the start to the close of the school's daily instructional schedule. Scheduled hours under this subdivision include recess and time for pupils to transfer between classes but do not include the lunch period. No more than 30 minutes per day may be counted for recess. Scheduled hours may also include the hours of instructional programming offered through *innovative instructional designs* that apply to the entire school or grade level. In computing the minimum number of instructional hours under this subdivision, schools may not count days and parts of days on which parent and teacher conferences are held, staff development or in-service programs are held, schools are closed for inclement weather and no compensatory instruction is offered virtually, and when no direct instruction is provided.
> **Emphasis supplied**

The second is found at the DPI website: Wisconsin Department of Public Instruction ,*Virtual Learning Time for Public Schools*, http://dpi.wi.gov/cal/virtual-learning-time:

and states:

> The state administrative rule that governs school district standards (PI 8) was modified to *recognize new and emerging methods* of delivering instructional programming. PI 8 spurs innovative ways to engage students and teachers outside of the traditional day and place through virtual options for learning. Times may be used on a day when school is canceled, as a planned day, or as a makeup day when a day of school was missed. There are a variety of reasons a school would use *Virtual Learning Time*. These include, but are not limited to, snow or other inclement weather, professional development, widespread illness, and flooding. It is up to individual school districts to determine how many days they can effectively deliver instruction via Virtual Learning Time, including how many consecutive days.
> **Emphasis supplied**

The DPI position providing authority to use internet instruction in public schools and not in Choice schools is grounded on the DPI's thorough regulation of Public schools, and lack of regulation of Choice schools (see pp. 3-7, DPI Brief, Document 29 of Docket). The DPI approval of internet instruction and teaching for public schools is against the backdrop of the comprehensive standard/regulatory framework for public schools. DPI contends that because the Choice schools do not have that level of standard/regulation, the DPI cannot apply the same rationale to the Choice schools in meeting the requirements of "direct pupil instruction".

Choice schools express the view that Choice School funding is at risk, if Choice schools act contrary to the DPI position precluding Choice school use of "Virtual learning and teaching". Thus Choice Schools commenced this litigation

DISCUSSION

A. Summary Judgment

Both parties have moved for summary judgment, and agree that there is not a material fact dispute. The legal dispute is over the authority of DPI to preclude Choice Schools from using virtual learning. DPI did promulgate an Administrative Rule, PI 8.01(2)(f) above permitting the public schools to use internet learning, which DPI applies to public schools only. It takes the position that Choice school cannot use internet learning and teaching without approval, and it has not been given. Parties ask the Court to decide who is correct.

SCWA asserts that the existing interpretation of 'direct pupil Instruction" hours and "virtual instruction" which DPI concedes apples to Public schools should also permit Choice Schools to count "virtual Instruction" as hours of "direct pupil instruction" under both Wis. Stat. Secs.118.60(2)(a)8 and 119.23(2)(a)8. This Court's understanding for the basis of DPI's ruling is found by applying the following:

> 1)-Virtual leaning is referred to as "on line learning" which is learning "where instruction and content are primarily delivered via the internet or systems like a video enabled classroom." See: https://wi.gov.on-line-blended-learning.
>
> 2)-Wis. Admin Rule PI 8.01(2)(f)
>
> **f)** *Hours of instruction.* Each school district board shall annually schedule and hold at least 437 hours of direct pupil instruction in kindergarten, at least 1,050 hours of direct pupil instruction in grades 1 through 6, and at least 1,137 hours of direct pupil instruction in grades 7 through 12. The school hours are computed as the period from the start to the close of the school's daily instructional schedule. Scheduled hours under this subdivision include recess and time for pupils to transfer between classes but do not include the lunch period. No more than 30 minutes per day may be counted for recess. Scheduled hours may also include the hours of instructional programming offered *through innovative instructional designs* that apply to the entire school or

> grade level. In computing the minimum number of instructional hours under this subdivision, schools may not count days and parts of days on which parent and teacher conferences are held, staff development or in-service programs are held, schools are closed for inclement weather and no compensatory instruction is offered virtually, and when no direct instruction is provided. (**Emphasis supplied**)

3)-Wisconsin Department of Public Instruction, *Virtual Leaning Time for Public Schools*, http://dpi.wi.gov/cal/virtual-learning-time:

> The state administrative rule that governs school district standards (PI 8) was modified to recognize new and emerging methods of delivering instructional programming. PI 8 spurs innovative ways to engage students and teachers outside of the traditional day and place *through virtual options for learning*. Times may be used on a day when school is canceled, as a planned day, or as a makeup day when a day of school was missed. There are a variety of reasons a school would use Virtual Learning Time. These include, but are not limited to, snow or other inclement weather, professional development, widespread illness, and flooding. It is up to individual school districts to determine how many days they can effectively deliver instruction via Virtual Learning Time, including how many consecutive days. **Emphasis supplied**

B. Choice Position

In Light of DPI rules for implementing "virtual Instruction" in public schools, the DPI position precluding the use of "Virtual learning " in Choice schools violates sec. 227.10(1), because it is actually an administrative Rule which was not created according to statute.

The February, 2019 rulings precluding the use of "virtual instruction" by Choice schools to meet the instructional time requirements violates sec.227.10. The categorical preclusion of Virtual Instruction "for Choice Schools is a policy statement required to be promulgated under sec. 227.10.

The current DPI position on "virtual Instruction " being part of "direct pupil instruction" for public schools and not for Choice Schools does create a dispute in the proper construction of

the statute, and is open to a declaration of rights, as to the proper construction of the statute and the definition of "direct pupil instruction". The court should declare the DPI ruling invalid.

The third position asserted by the Choice schools is that defining teaching methods to achieve "direct pupil instruction" different for public schools and Choice Schools violates Choice schools right to equal protection of the law, and unlawfully discriminates against Choice Schools. There is not a reasonable explanation for the different applications.

C. **The DPI Position**

The applicability of sec. 227.10 is irrelevant in that the February communications are not a rule, but advisory, responding to questions asked. The circumstances surrounding the February communications do not meet the requirements for a rule as set forth in *Cholvin*, infra, which are:

1. a regulation , standard, statement of policy or general order;
2. of general application
3. having the effect of law;
4. issued by an agency;
5. to implement, to interpret or make specific legislation administered to enforced by such agency.

Cholvin v.Wis. Dept of Health and Family Services, 2008 WI App 127,¶22

DPI further contends that the Choice School statutory scheme is limited and not as broad as that governing Public schools. The DPI view is imbedded on language in Wis. Stat. sec. 118.001, which gives local school boards the authority to take any action within its powers and duties, not prohibited by law on the playing field of DPI regulations and standards. Whereas the statute establishing Choice Schools do just that without the backdrop of the DPI standards, and mechanism of the School Board to exercise discretion to "take any action" , to satisfy the standards. Choice schools are a statutory creations without the extensive legislative grant

extended to public schools in sec. 118.001. Thus DPI contends without legislative authority "to take any action…" Choice schools cannot use internet instruction.

DPI posits that the Equal Protection argument fails for 2 reasons: first, the two schools systems are not similarly situated, different statutory schemes. Second there is a rational reason for different treatment; namely the Public schools have more discretion to operate because they are more tightly regulated.

Conclusion

The propriety of using "virtual instruction " or the internet to instruct students as part of hours of "direct pupil instruction" impacts the identical language in the statutes governing each of the two types of schools regulated by Wisconsin statutes, which are involved in this proceeding: Public and Choice schools. The hours of instruction requirements are the same, and at first blush there is not a reason to limit the manner or method of teaching to fulfill the requirement.

That Public schools are more regulated than Choice schools does not create a reason to restrict Choice schools teaching methods. No reason is given for prohibiting Virtual instruction in Choice schools other that the reading of sec. 118.001 giving greater discretion to Public school Boards. Yet, Choice schools considered private schools under Wis. Stat. sec. 118.165, must be accredited separately and have a separate governance system. The Choice school governance system does not limit discretion to manage "direct pupil instruction" The Public school governance system concept does not provide a basis to interpret identical statutory wording differently.

This court is satisfied that the statutes creating the Public and Choice systems instructional time requirements two different methods of achieving the same result. The definition of "direct pupil instruction" as including "virtual instruction "has the same impact for Public and Choice schools.

Following the *Cholvin* criteria the advice on the inapplicability of "Virtual Instruction" to Choice Schools is in effect a Rule; it is a statement of policy having direct and broad impact on the nature of instruction, limiting options of Choice schools to reach the same goal as Public schools. No harm is spelled out from viewing "direct pupil instruction" the same, whereas there is harm to the Choice schools in limiting methods of instruction. DPI's asserted lack of authority to approve it is not convincing. The position removes a legitimate teaching technique from the Choice schools, available to public schools.

Second, the ruling has a general application across all choice schools, and involves potential funding revocation if a Choice School acts contrary to the advice. Further the ruling is issued by the DPI which is an education regulator, and has the effect of law limiting education opportunity for Choice students.

Finally the limiting position has the effect of legislation as the DPI position declares what is available to Choice schools to achieve a statutory compliance. DPI asserts that the method is only available through legislation to permit "virtual instruction" for Choice schools to meet the statutory instruction time requirement in Wis. Stat. Secs. 118.60(2)(a)8 and 119.23(2)(a)8.

The Court is satisfied that the February , 2019 DPI communications restricting the use of "virtual instruction" to public schools and excluding its use in Choice schools is an attempt at rule making and is invalid.

The Court declares under Wis. Stat. Sec. 806.04 that the term " direct pupil instruction " as it is used in Wis. Stats secs. 118.60(2)(a)8 and 119.23(2)(a08 include "virtual instruction."

Further the court is satisfied that the DPI's February, 2019 communications violate the equal rights under Article I, section 1 of the Wisconsin Constitution of Plaintiff and its members. There is no difference between the "hours of instruction" statutes governing each of the school types discussed herein. The statutes are worded exactly the same. There is no reasonable distinction permitting different rules to govern compliance with hours of instruction under these facts. The DPI position relates to governance of the Public and Choice, but not to specific statutes worded the same.

The Court looks to find a rationale to apply different definitions to Public and Choice schools methods of securing "direct pupil instruction "time, and cannot find any. The words are the same, and should mean the same in both settings. The DPI stretches the governance scheme unreasonably to justify the unequal treatment to the Choice schools and students situated similarly to the public schools and it students. There is not a legitimate government interest in denying Choice Schools the opportunity to use "virtual learning" as Public schools do. The denial is harmful to the Choice Schools and its students.

ORDER

The Motion for Summary Judgment filed by SCWA is granted and the Motion for Summary Judgment filled by the Defendants is denied.

This is a final order for Appeal purposes.

By the Court