

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

SCHOOL CHOICE
WISCONSIN ACTION, INC.

Plaintiff,

v.

Case No: 19-CV-000574

CAROLYN STANFORD TAYLOR
in her official capacity as Wisconsin
Superintendent of Public Instruction,
and

WISCONSIN DEPARTMENT OF
PUBLIC INSTRUCTION

Defendants.

**PLAINTIFF SCHOOL CHOICE WISCONSIN ACTION’S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The Wisconsin Department of Public Instruction (“DPI”) has informed private schools participating in the Wisconsin parental choice programs¹ (“Choice Schools”) that, based upon DPI’s interpretation of the Wisconsin statutes, Choice Schools may not count the time involved in teaching and learning through the internet, or so-called “virtual learning,” to satisfy the statutory requirement for “direct pupil instruction” under Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8. DPI interpreted the words “direct pupil instruction” in this fashion even though DPI had previously interpreted the exact same words as they apply to public schools and determined that public schools may include virtual learning hours towards the requirement for hours of direct pupil instruction. That is, DPI has interpreted the same words to have two different and opposite meanings.

¹ There are three school choice programs affected here. The oldest and largest is the Milwaukee Parental Choice Program. Wisconsin also has the Racine Parental Choice Program and the Wisconsin Parental Choice Program. The Racine and the Wisconsin programs are governed by the same statute. See Wis. Stat. § 118.60. The Milwaukee Choice Program is governed by a separate statute. See Wis. Stat. § 119.23. Wisconsin’s fourth choice program – the Special Needs Scholarship Program - is not at issue here. See Wis. Stat. § 115.7915.

Moreover, in its first interpretation of the term “direct pupil instruction” (the one applying to public schools), DPI followed the legislative requirement to adopt such an interpretation through the rulemaking process. In its second, and opposite interpretation (the one applied to Choice Schools), DPI announced its interpretation without complying with any of the rulemaking requirements of Chapter 227 of the Wisconsin Statutes.

DPI’s conduct is unlawful for three reasons: (a) DPI is attempting to enforce a rule against Choice Schools that has not been properly promulgated under state law; (b) DPI has improperly interpreted the term “direct pupil instruction” as it applies to Choice Schools; and (c) DPI’s conduct violates the right of Choice Schools to Equal Protection under the Wisconsin Constitution.

STATEMENT OF UNDISPUTED FACTS

The Plaintiff, School Choice Wisconsin Action, Inc. (“SCWA”), is a membership organization whose members are Choice Schools. (Brown Aff. ¶ 2.) Choice Schools are regulated in Wisconsin under the provisions of Wis. Stat. § 118.60 (for the Racine and Wisconsin Parental Choice Programs) and § 119.23 (for the Milwaukee Parental Choice Program). For schools in the Racine and Wisconsin Choice Programs, Wis. Stat. § 118.60(2)(a)8 states that schools participating in those programs shall provide “at least 1,050 hours of **direct pupil instruction** in grades 1 to 6 and at least 1,137 hours of **direct pupil instruction** in grades 7 to 12.” (Emphases added.)

The requirement is identical for schools in the Milwaukee Choice Program. Wis. Stat. § 119.23(2)(a)8 states that schools participating in that program shall provide “at least 1,050 hours of **direct pupil instruction** in grades 1 to 6 and at least 1,137 hours of **direct pupil instruction** in grades 7 to 12.” (Emphases added.)

Moreover, Wis. Stat. § 121.02(1)(f) creates an identical requirement for Wisconsin public schools, stating that they must also provide “at least 1,050 hours of **direct pupil instruction** in grades 1 to 6 and at least 1,137 hours of **direct pupil instruction** in grades 7 to 12.” (Emphases added.)

Nowhere in the Wisconsin Statutes is the term “direct pupil instruction” defined. (Complaint ¶ 14, Answer ¶ 14.) However, in 2016, the issue was raised as to whether public schools could include so-called “virtual learning” in order to satisfy the statutory requirement for the specified hours of “direct pupil instruction.” In this context, “virtual learning” also sometimes called “on-line learning” refers to “education where instruction and content are primarily delivered via the internet or systems like a video-enabled classroom.” See, <https://dpi.wi.gov/online-blended-learning>. (last visited June 4, 2019)(Appendix A)²

DPI considered the question, and then went through the rulemaking process in Chapter 227 to promulgate an administrative rule setting forth DPI’s interpretation. (*See Standards for school district instructional design and programs*, CR 16-016 (July 25, 2016) (codified at Wis. Admin Code § PI 8); Appendix B.) As set forth below, DPI interpreted the statutory term “direct pupil instruction” to include “virtual learning” at the discretion of the public school involved. Thus, the word “direct” did not require the teacher and the student to be in the same physical space when providing pupil instruction, but instead the school could implement “innovative instructional designs” for education including providing such instruction virtually through the internet.

Specifically, Wisconsin Administrative Rule PI 8.01(2)(f), as adopted by DPI in 2016 (Appendix C), provides as follows:

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

² SCWA has filed a separate appendix herewith containing the non-case law supporting documents cited herein.

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 inservice programs are held, schools are closed for inclement weather and no compensatory instruction is offered virtually, and when no direct instruction is provided.*

(Emphasis added.)

While the language of the rule is a little hard to follow, DPI provided guidance on its new rule on its website. See Wisconsin Department of Public Instruction, *Virtual Learning Time for Public Schools*, <https://dpi.wi.gov/cal/virtual-learning-time> (last visited June 4, 2019) (Appendix D). DPI's website makes clear that this rule includes the ability of public schools to implement virtual learning to satisfy the hours requirement for "direct pupil instruction." The DPI website states, among other things, as follows:

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.

Id.

In January 2019, various Choice Schools asked DPI whether they could use virtual learning in the same way as public schools to satisfy the hours of "direct pupil instruction" requirement. (Brown Aff. ¶ 7.) In a written communication dated February 5, 2019, DPI responded by telling

the Choice Schools that – in contrast to public schools – DPI would not permit Choice Schools to count virtual learning as hours of direct pupil instruction. (*Id.* at ¶ 8, Ex. A.)

On February 21, 2019, Plaintiff’s counsel wrote to DPI and pointed out that, given the fact that it is directly contrary to its position on virtual leaning for public schools, DPI’s position on virtual learning for choice schools was unlawful. (Brown Aff. ¶ 9, Ex. B.) On February 28, 2019, DPI, through its Chief Legal Counsel, replied to Plaintiff’s Counsel’s February 21, 2019, letter, stating that DPI would not change its legal position. (*Id.* at ¶ 10, Ex. C.)

DPI’s interpretation of the statutes causes a hardship on Choice Schools. (Brown Aff. ¶ 11.) Pursuant to Wis. Stat. §§ 118.60(10)(d) and 119.23(10)(d), DPI has the power to withhold funds from a Choice School that violates any of the provisions of §§ 118.60 and 119.23 respectively, including the hours of instruction requirement. Thus, as a result of the communications from DPI, Choice Schools, including members of SCWA, are at risk that DPI would withhold money owed to them by the State of Wisconsin if they implement virtual learning and use virtual learning to meet their requirement for hours of “direct pupil instruction.”

ARGUMENT

I. DPI’s February, 2019 Interpretation of “Direct Pupil Instruction” as Applied to Choice Schools is Unlawful because it was not done through the Rulemaking Process.

Wis. Stat. § 227.10(1) requires that “[e]ach agency shall promulgate as a rule . . . each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.” Under Wis. Stat. § 227.40(4)(a), “the court **shall** declare [a] rule invalid if it finds that it . . . was promulgated without compliance with statutory rule-making procedures.” (Emphasis added.)

DPI admits that its February 5 and February 28, 2019, communications to Choice Schools constituted an interpretation of the relevant statutes. (Complaint ¶ 29, Answer ¶ 29.) However, DPI did not make this interpretation through the rulemaking process. DPI knew that it needed to go through the rulemaking process for any interpretation of the term “direct pupil instruction.” After all, it went through that process in order to promulgate PI 8.01(2)(f). But DPI ignored the rulemaking process for its interpretation of the term as it relates to Choice Schools. That is a violation of Wis. Stat. § 227.10(1). *Cholvin v. Wisconsin Dep't of Health & Family Servs.*, 2008 WI App 127, ¶¶ 32, 34, 313 Wis. 2d 749, 758 N.W.2d 118 (agency’s interpretation of law held invalid because it was not promulgated pursuant to the rulemaking process); *Schoolway Transp. Co. v. Div. of Motor Vehicles, Dep't of Transp.*, 72 Wis. 2d 223, 232, 240 N.W.2d 403 (1976) (an agency’s revised interpretation of statute constitutes an administrative rule under § 227.01(4) [now 227.10(1)] which must be done through the rule-making process).

DPI is the agency charged with administering and implementing Wis. Stat. §§ 118.60 and 119.23. *See* Wis. Stat. §§ 118.60(11) and 119.23(11). As part of its statutory duties, DPI was and is obligated to promulgate its interpretations of any part of §§ 118.60 and 119.23 as a rule, but it violated that statutory duty by failing to promulgate its interpretation of the term “direct pupil instruction” as that term is used in §§ 118.60(2)(a)8 and 119.23(2)(a)8 for Choice Schools. Pursuant to Wis. Stat. § 227.40(4)(a) this Court “shall” declare DPI’s rule to be invalid.

By not adopting its interpretation of §§ 118.60(2)(a)8 and 119.23(2)(a)8 as a rule, DPI has left Choice Schools with a dilemma. Do they use hours of virtual learning to satisfy their hours requirement for direct pupil instruction (as public schools are allowed to do), and risk having DPI withhold funding from them for violating the applicable statutes. *see* Wis. Stat. §§ 118.60(10)(d) and 119.23(10)(d)? Or do they not use hours of virtual learning, thereby foregoing an invaluable

tool, one used by their public school counterparts, which can be implemented to help schools meet their statutory requirements? To escape this dilemma, this Court should declare that DPI's February, 2019 communications to Choice Schools containing DPI's interpretation of the statutory requirement regarding hours of "direct pupil instruction" were unlawful under § 227.10(1) and may not be enforced by DPI.

And regardless of its ruling on this question, this Court must also determine the actual correct interpretation of the statutes and determine whether the term "direct pupil instruction" includes virtual learning. SCWA has specifically requested such relief in Paragraph 40 of its Complaint. A decision on the merits by the Court is necessary, because even if the Court determines that the February, 2019 communications were invalid because not promulgated as a rule, Choice Schools would still face uncertainty as to the actual correct interpretation of the statutes and such uncertainty would continue until there is an authoritative interpretation. And if this Court should determine that DPI's February, 2019 interpretation did not need to be promulgated as a rule, then Choice Schools are still entitled to a determination by this Court as to whether that interpretation of the statute by DPI was legally correct.

II. DPI has Improperly Interpreted the Term "Direct Pupil Instruction" as it applies to Choice Schools.

As an initial matter, it is undisputed that the legislature has expressly granted DPI the power to promulgate rules to interpret each of the relevant sections of the statutes. *See*, Wis. Stat. §§ 118.60(11), 119.23(11) and 121.02(5). (Complaint ¶ 25; Answer ¶ 25.) However, DPI may not promulgate a rule which conflicts with state law. *See*, Wis. Stat. § 227.10(2) ("No agency may promulgate a rule which conflicts with state law.") Thus, DPI has the power to interpret the term "direct pupil instruction" but not in a way that violates state law. *Seider v. O'Connell*, 2000 WI

76, ¶ 28, 236 Wis. 2d 211, 612 N.W.2d 659 (“An administrative rule that conflicts with an unambiguous statute exceeds the authority of the agency that promulgated it.”)

Moreover, this Court’s review of DPI’s statutory interpretation is a question of law and done on a *de novo* basis. *Tetra Tech EC, Inc. v. Wisconsin Dep’t of Revenue*, 2018 WI 75, ¶¶ 12, 54, 84, 382 Wis. 2d 496, 914 N.W.2d 21 (plurality opinion); *id.* at ¶ 135 (Ziegler, J., concurring); *id.* at ¶ 159 (Gableman, J., concurring). The issue for the Court is to determine the legislature’s intended meaning when the statute was adopted. *Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213, ¶ 11, 247 Wis. 2d 589, 634 N.W.2d 593 (“In construing statutes, our aim is to discern the intent of the legislative body.”); *Pritchard v. Madison Metro. Sch. Dist.*, 2001 WI App 62, ¶ 8, 242 Wis. 2d 301, 625 N.W.2d 613 (same).

Here, DPI has improperly interpreted the term “direct pupil instruction” as used in Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8 to mean that it does not include virtual learning. DPI’s error can be most easily seen by looking at yet another time that the Wisconsin legislature used the same term in the statutes. Specifically, it is also used in the Wisconsin statute governing virtual charter schools. *See*, Wis. Stat. § 118.40(8). Under § 118.40(8)(d)(2), virtual charter schools also have an hours requirement for hours of “direct pupil instruction.” In fact, they have the same requirement as public schools under Wis. Stats. 121.02(1)(f), i.e., at least 1,050 hours of direct pupil instruction in grades 1 to 6 and at least 1,137 hours of direct pupil instruction in grades 7 to 12. But by their very nature, all learning at virtual charter schools is “virtual learning” (thus, the name *virtual* charter schools). The only way in which such schools can meet the statutory hours requirement for “direct pupil instruction” is through virtual learning.

Thus, the legislature itself has provided a clear guide to determine its intent as to whether or not “direct pupil instruction” includes virtual learning. Obviously the Legislature has decided

that it does. By imposing an hours requirement for direct pupil instruction on virtual schools, which the legislature knew could only be satisfied by hours of virtual learning, the legislature has made it clear that “direct pupil instruction” must include virtual learning.

Under standard rules of statutory construction, when the legislature uses the same words more than once in a statute, the words should be construed to mean the same thing in each place that they are used. *Coutts v. Wisconsin Ret. Bd.*, 209 Wis. 2d 655, 668–69, 209 Wis. 2d 655, 562 N.W.2d 917 (1997). Given that virtual charter schools, by definition, must use virtual learning to satisfy the hours of direct pupil instruction, the term should mean the same thing for Choice Schools (as it already does for public schools, according to DPI). There is absolutely no reason that the same term means different things when used in precisely the same context in each statute.

Further, DPI is extremely hard-pressed to argue the contrary. Doing so puts DPI in the position of having to argue that its own administrative rule – Wisconsin Administrative Rule PI 8.01 – is unlawful. “Direct pupil instruction” either includes virtual learning or it does not. If it does not then PI 8.01 (which concludes to the contrary) is unlawful under § 227.10(2) because it necessarily conflicts with state law. *Seider*, 236 Wis. 2d 211, ¶ 26 (an administrative rule that conflicts with a statute is a “mere nullity”) If “direct pupil instruction” includes virtual learning then PI 8.01 is lawful, but any rule that Choice Schools may not use virtual learning to satisfy the hours of instruction would then be unlawful as inconsistent with state law.

Here, Choice Schools are adversely affected by DPI’s contrary interpretation of the term “direct pupil instruction,” as that term is used in Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8. (Brown Aff. ¶ 11.) Under Wis. Stat. § 806.04 they are entitled to a declaration as to the proper construction of those statutes. Section 806.04 specifically states that “any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of

construction . . . arising under the . . . statute.” Here, SCWA seeks such a declaration regarding the construction of Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8. Specifically, SCWA is entitled to a declaration that the term “direct pupil instruction” includes “virtual learning.”

III. DPI’s Interpretation of Wis. Stat. §§ 118.60(10)(d) and 119.23(10)(d) Violated the Rights of Choice Schools to Equal Protection Under the Wisconsin Constitution.

Article I, Section 1 of the Wisconsin Constitution provides in part: “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness” The Wisconsin Supreme Court has declared that Article I, Section I of the Wisconsin Constitution affords Wisconsin citizens substantially the same protections as the equal protection provisions of the Fourteenth Amendment of the U.S. Constitution. *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 193, 454 N.W.2d 797 (1990). *See also Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 35 n. 11, 235 Wis. 2d 610, 612 N.W.2d 59 (“Wisconsin courts have normally construed the state constitution consistent with the United States Supreme Court’s construction of the federal constitution.”)

Under both the federal and state constitutions, the guarantee of equal protection means that those who are similarly situated must be treated alike. *GTE Sprint*, 155 Wis. 2d at 193. Specifically, the guarantees of equal protection provide a right to be free from invidious discrimination in statutory classifications. *Omernik v. State*, 64 Wis. 2d 6, 18–19, 218 N.W.2d 734 (1974) (equal protection of the law is denied where the state has made an irrational or arbitrary classification).

By interpreting the statutory term “direct pupil instruction” one way for public schools and another way for Choice Schools, DPI is discriminating against Choice Schools and depriving Choice Schools of their right to equal protection. There is no viable distinction between public

schools and Choice Schools which would justify DPI treating them differently with respect to meeting their otherwise identical statutory requirement for hours of instruction.

The test in Wisconsin to be applied in determining whether a classification is reasonable is five-fold: (1) all classification must be based upon substantial distinctions; (2) the classification must be germane to the purpose of the law; (3) the classification must not be based on existing circumstances only; (4) the law must apply equally to each member of the class; and (5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of substantially different legislation. *Omernik*, 64 Wis. 2d at 19.

Applying this test here shows the equal protection violation. The first two elements of the test are the most relevant here. DPI's discriminatory classification is not based on a substantial distinction, nor is there a germane purpose served by the distinction. In fact, nowhere in its published rule (PI 8.01) or in its February, 2019 unpublished rule with respect to Choice Schools has DPI even suggested that there is, or could be, any distinction between public schools and Choice Schools with respect to the hours of instruction requirement (much less a substantial one) or any purpose behind the distinction made by DPI (much less a germane one). The third and fourth elements do not really apply here and, in this case, the fifth element is really a restatement of the first two elements. The characteristics of public schools and Choice Schools are not so far different that they should be treated differently with respect to the ability to use virtual learning.

To pass muster here, DPI must show that its discriminatory rules are not "patently arbitrary" but instead have a "rational relationship to a legitimate government interest." *State v. Alger*, 2015 WI 3, ¶ 39, 360 Wis. 2d 193, 858 N.W.2d 346 (quoting *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90) (internal quotation mark omitted)). This is an impossible

lift given that the state legislature imposed the identical hours of operation for direct pupil instruction on both public schools and Choice Schools.

CONCLUSION

For the reasons set forth above, SCWA requests that this Court: (1) enter a declaratory judgment that DPI's February 5 and February 28, 2019, statutory interpretations stating that Choice Schools may not use virtual learning to meet the hours requirement of Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8 are void and unenforceable; (2) enter a declaratory judgment that the term "direct pupil instruction" as used in Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8 includes virtual learning; and (3) issue a permanent injunction enjoining DPI from enforcing its interpretation of Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a) 8 as set forth in its February 5 and February 28, 2019, communications.

Dated this 19th day of June, 2019.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs

Electronically signed by RICHARD M. ESENBERG

Richard M. Esenberg, WI Bar No. 1005622

rick@will-law.org

Donald Daugherty, WI Bar. No. 1017628

don@will-law.org

Lucas Vebber, WI Bar No. 1067543

lucas@will-law.org

Libby Sobic, WI Bar No. 1103379

libby@will-law.org

1139 East Knapp Street

Milwaukee, WI 53202-2828

PHONE: 414-727-9455

FAX: 414-727-6385