

St. Augustine School
1810 Highway CC
Harford, WI 53027,

Joseph and Amy Forro
3799 Turnwood Dr.
Richfield, WI 53076,

Plaintiffs,

v.

Money Judgment
Case Code: 30301
Case No. 16-CV-

Tony Evers, in his official capacity,
as Superintendent of Public Instruction
125 South Webster Street,
Madison, WI 53707,

Friess Lake School District
1750 Hwy 164
Hubertus, WI, 53033,

Defendants.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, Washington County Courthouse**, 432 E Washington St, West Bend, WI 53095, and to the Wisconsin Institute for Law & Liberty, Plaintiffs' attorneys, whose address is: **1139 E. Knapp Street, Milwaukee, WI 53202.**

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs

Date: 4/17/16



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COMPLAINT

Plaintiffs, by their attorneys, Wisconsin Institute for Law & Liberty, allege as follows:

1. This case involves decisions by the Friess Lake School District and Tony Evers, as Wisconsin Superintendent of Public Schools, which violate the Free Exercise Clause and the Establishment Clause of the First Amendment and the Equal Protection Clause contained in the Fourteenth Amendment to the United States Constitution. The decision by the Friess Lake School District and Superintendent Evers denied Plaintiffs the equal protection of the law based upon the fact that they operate or have their children attend a religious school, denied them the right to the Free Exercise of their religion by imposing adverse consequences on them based upon the fact that they operate or have their children attend a religious school, and their decisions result in an unconstitutional entanglement between church and state. The Friess Lake School District and Superintendent Evers have unlawfully taken it upon themselves to make an inquiry into "who or what is Catholic" - an inquiry that according to the Wisconsin Supreme Court "the

government cannot make.” *Holy Trinity Community Scholl, Inc. v. Kahl*, 82 Wis. 2d 139, 150-151 (1978).

THE PARTIES

2. The Plaintiff, St. Augustine School, is a Wisconsin corporation, with its offices and principal place of business in Washington County at 1810 Highway CC, Hartford, Wisconsin. St Augustine School is an independent religious school that teaches in the tradition of the Catholic faith. It is operated and under the control of its own board of directors under the terms of its own articles of incorporation and by-laws.

3. The Plaintiffs, Joseph and Amy Forro (the “Forros”), are Wisconsin citizens residing in Washington County at 3799 Turnwood Dr., Richfield, Wisconsin. The Forros have three children who attend St. Augustine School.

4. The defendant, Tony Evers, is sued in his official capacity as the Wisconsin Superintendent of Public Instruction. Superintendent Evers has his offices and principal place of business at the Wisconsin Department of Public Instruction, 125 S. Webster Street, Madison, WI 53707-7841. Under Wis. Stat. §121.51(1) Superintendent Evers is responsible for resolving certain disputes regarding school attendance areas for transportation purposes under Wis. Stat. §121.54, which requires Wisconsin school districts to provide bus transportation to students who attend private or religious schools.

5. The defendant, Friess Lake School District (“Friess Lake”) is a “school district” as that term is used in Chapters 115 through 121 of the Wisconsin Statutes. Friess Lake has its offices and principal place of business in Washington County at 1750 Hwy 164, Hubertus, Wisconsin.

6. Venue is proper in this Court pursuant to Wis. Stat. §801.50(2)(a) and (c).

PUBLIC TRANSPORTATION OF CHILDREN TO PRIVATE SCHOOLS IN WISCONSIN

7. Prior to 1967 children who attended private or religious schools were not entitled to public transportation to their schools. This created health and safety concerns that were eventually resolved by a constitutional amendment.

8. In 1967 the people of Wisconsin amended the Wisconsin Constitution to provide that “Nothing in this constitution shall prohibit the legislature from providing for the safety and

welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.” See Wisconsin Constitution, Art. 1, §23.

9. The amendment to the Constitution was then followed by legislation that provided for such transportation to be provided by the school districts in which these children live. Specifically, the legislature amended the existing statutes for public school transportation so as to provide for transportation for students attending private or parochial schools and to mandate that such students be transported upon a reasonably uniform basis with public school students. This enabling legislation was created by chapters 68 and 313, Laws of 1967. *Cartwright v. Sharpe*, 40 Wis. 2d 494, 501, 162 N.W.2d 5, 8 (1968).

10. “What the constitutional amendment and the enabling legislation accomplished was to provide that the same consideration of safety and welfare should apply to public and private students alike.” *Id.* at 506.

11. The enabling legislation remains in effect (although amended from time to time) and is contained in Wis. Stat. §121.54.

12. Currently, under Wis. Stat. §121.54, school districts must provide transportation to school children within their boundaries who attend private school if the child lives more than 2 miles from school, lives within the attendance area of the private school, and the private school is either within the boundaries of the school district or within 5 miles of the district’s boundaries.

THE FORRO CHILDREN

13. The Forro children meet the requirements of Wis. Stat. §121.54 for transportation.

14. The Forro children live more than 2 miles from St. Augustine School which is the private school that they currently attend.

15. St. Augustine School’s attendance area includes the entire geographic area of the Friess Lake School District.

16. The Forro children live within the Friess Lake School District.

17. St. Augustine School is within five miles of the Friess Lake District’s boundaries.

18. On April 27, 2015 St. Augustine School made a request to Friess Lake for transportation for the Forro children.

19. There are several ways a public school district can provide transportation to children attending private schools. The public school district may transport them directly in a bus owned by the school district, it may contract with a third party to transport them, or it may

have the parents transport the children and reimburse the parents through what is referred to as a parent contract.

20. In this particular instance, the most logical form of transportation would have been a parent contract. Friess Lake stated that if it offered a parent contract to the Forros, the cost to Friess Lake would be \$1,500.

21. On April 29, 2015, Friess Lake denied the request to provide transportation to the Forro children. Friess Lake asserted that: the Forro children lived in an area that was in the attendance area of St. Gabriel School; that the St. Augustine attendance area overlapped St Gabriel's attendance area; that under the relevant statutes St. Augustine School and St. Gabriel School could not have overlapping attendance areas; and that it would not approve St. Augustine's attendance area and therefore had no obligation to transport the Forro children to St. Augustine.

22. Friess Lake reaffirmed this decision on September 22, 2015.

23. The Forros suffered damages as a result of this decision by Friess Lake because they were denied the transportation benefits for their children they are entitled to under Wisconsin law.

24. St. Augustine suffered damages and will be harmed in the future by this decision because the Forros and other similarly situated students are being denied transportation benefits to which they are entitled which is likely to discourage enrollment at St. Augustine.

THE DISPUTE BETWEEN ST. AUGUSTINE SCHOOL AND FRIESS LAKE

25. Under Wisconsin law, each private school is entitled to an attendance area for transportation purposes.

26. St. Augustine School's attendance area is as follows: The northern boundary is Hwy 33. The southern boundary is Good Hope Road. The western boundary is Hwy P, and the eastern boundary is Division Road. St. Augustine's attendance area includes the entire geographic area that makes up the Friess Lake school district.

27. Friess Lake has refused to approve St. Augustine's attendance area on the basis that it overlaps with the attendance area of St. Gabriel School ("St. Gabriel")

28. St. Gabriel is a catholic school operated by the Archdiocese of Milwaukee in Hubertus, Wisconsin.

29. Under Wisconsin law, if St. Gabriel and St. Augustine School are affiliated with one another they could not have overlapping attendance areas. If they are not affiliated with one another, they may have overlapping attendance areas. See Wis. Stat §121.51(1).

30. St. Augustine School and St. Gabriel Catholic School are not affiliated with one another.

31. St. Gabriel is operated by the Archdiocese of Milwaukee. It is affiliated with the archdiocesan school system and operates under the ecclesiastic authority of the Archbishop of Milwaukee.

32. St. Augustine is not affiliated with the archdiocesan school system and does not operate under the ecclesiastic or other authority of the Archbishop. St. Augustine is operated by and under the control of its own board of directors under the terms of its own articles of incorporation and by-laws.

33. St. Augustine School holds itself out as an independent school teaching within the Catholic tradition. The Archdiocese does not review or control its curriculum, review or control its faculty, or administer or operate St. Augustine in any way.

34. The Superintendent of Schools for the Archdiocese has confirmed in writing that St. Augustine is not affiliated with the Archdiocese and the Archdiocese does not review or control its curriculum, review or control its faculty, or administer or operate St. Augustine in any way. A true and correct copy of the letter from the Archdiocese is attached hereto as Exhibit A.

35. Wis. Stat. §121.51(1) defines "attendance area" under Wisconsin law as follows: "Attendance area" is the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. **The attendance areas of private schools affiliated with the same religious denomination shall not overlap** unless one school limits its enrollment to pupils of the same sex and the other school limits its enrollment to pupils of the opposite sex or admits pupils of both sexes." (emphasis added)

36. In *Vanko v. Kaul*, 52 Wis. 2d 206 (1971) the Wisconsin Supreme Court held that the highlighted language would violate the First Amendment and therefore be unconstitutional if it were to be interpreted to apply only to religious schools.

37. To avoid that result, the Court held that the correct reading of the statute in its entirety is to forbid overlapping “attendance area boundary lines as to all private schools **affiliated or operated by a single sponsoring group**, whether such school operating agency or corporation is secular or religious.” *Id.* at 215. (emphasis added.)

38. Thus, under *Vanko*, St. Augustine School and St. Gabriel are prohibited from having overlapping attendance areas only if they were affiliated or operated by a single sponsoring group. They are not.

39. In the dispute between Friess Lake and St. Augustine, Friess Lake took the position that St. Gabriel and St. Augustine School were affiliated because they both say they are Catholic schools. But it is a violation of the First Amendment for the district to use a religious test in making this determination.

40. Friess Lake asked and answered the wrong question. It does not matter if St. Augustine and St. Gabriel both are Catholic or both say they are Catholic. The only question that matters is whether or not they are operated by a single sponsoring group.

41. In *Holy Trinity Community School v. Kahl*, 82 Wis. 2d 139, (1978), the Supreme Court issued a second critical decision regarding the interpretation of Wis. Stat. §121.51(1).

42. The Supreme Court held that in determining whether two schools that purport to be the same denomination are “affiliated,” the State must take care to avoid the excessive entanglement of church and state.

43. The Supreme Court said it would be, “repugnant to the Constitution” for the State to conduct a detailed inquiry of religious schools and to make “the determination of who and what is Catholic.” *Id.* at 150-53.

44. The constitution thus requires that the state authorities limit their review of the factors that may constitute “affiliation” to those that are purely legal and secular - i.e., a review of the applicable constituent documents such as the articles of incorporation and by-laws of the school. If there is no affiliation between the schools based upon the corporate documents, the State’s inquiry must end.

45. The decision by Friess Lake that St. Augustine is affiliated with St. Gabriel simply and only because both of them say they are Catholic schools violates the Constitution. Friess Lake cannot decide “who or what is Catholic” without engaging in the excessive entanglement with religion that is forbidden to the state. And it cannot impose an “affiliation

test” on religious schools that it does not and cannot impose on private but non-religious schools. To do so violates the equal protection clause of the Constitution.

THE DECISION BY SUPERINTENDENT EVERS

46. Pursuant to Wis. Stat. §121.51, if there is a dispute between a school district and a private school regarding an attendance area, the dispute can be referred to the Superintendent of Public Instruction.

47. The dispute between St. Augustine and Friess Lake regarding St. Augustine’s attendance area was submitted to Superintendent Evers in December, 2015.

48. Superintendent Evers, through his designee, Michael Thompson, Deputy Superintendent of Public Instruction, issued a decision upholding the Friess Lake determination that St. Gabriel and St. Augustine School were affiliated because St. Augustine said that it accepted Catholic religious tradition. A true and correct copy of the Superintendent’s decision is attached hereto as Exhibit B.

49. Like Friess Lake, the Superintendent asked and answered the wrong question. He refused to limit his inquiry to the corporate documents of St. Augustine to determine who operated and controlled the school and instead undertook an analysis of the religious beliefs of St. Augustine.

50. The Superintendent concluded, for example, that because St. Augustine said it is an “incorporation of dedicated families, who believing that all good things are of God, have joined together to provide children of our Catholic community with an exceptional classical education” and that it “loves and praises all the traditional practices of the Catholic faith,” that, as a matter of law, St. Augustine was affiliated with St. Gabriel.

51. In other words, the Superintendent took it upon himself to determine these statements of religious faith by St. Augustine meant that St. Augustine was affiliated with St. Gabriel.

52. According to the Superintendent, it could not be the case that St. Augustine could have these religious beliefs and not be affiliated with St. Gabriel.

53. The decision by the Superintendent discriminated against St. Augustine School and the Forros on the basis of religion, denied them equal protection under the law, interfered with their right to Free Exercise and violated the Establishment Clause because his decision involved an excessive entanglement between church and state.

54. The Superintendent did not limit his affiliation inquiry to legal and secular matters such as the articles of incorporation and by-laws of St. Augustine, but instead analyzed the religious faith of St. Augustine in direct violation of the Supreme Court decision in *Holy Trinity*.

55. The Superintendent thus deliberately ignored the law as set forth in *Vanko* and *Holy Trinity*, decisions of which he was certainly aware as his predecessors had been a party to both cases in the Wisconsin Supreme Court. The Superintendent may not make an inquiry into who or what is Catholic.

56. By examining the religious beliefs of St. Augustine, the Superintendent applied the affiliation test required by Wis. Stat. §121.51(1) in a manner that is not and could not be applied to private schools that are not religious.

57. Rather than determine whether St. Augustine School and St. Gabriel were affiliated or operated by a single sponsoring group such as the Archdiocese, he decided that because both purported to be “Catholic” he could deny them overlapping attendance areas.

FIRST CLAIM FOR RELIEF

(Equal Protection, Free Exercise and violation of
Establishment Clause - 42 U.S. C. §1983)

58. The Plaintiffs reallege and incorporate by reference the allegations of the Paragraphs above.

59. The conduct of the defendants violates the First Amendment as it unconstitutionally interferes with the Plaintiffs’ free exercise of their religion and impermissibly entangles state authority with religion in violation of the Establishment Clause of the First Amendment. The Superintendent’s examination of the similarity in religious belief and practice between St. Augustine and St. Gabriel, and his subsequent decision that the schools are “affiliated” represent an excessive entanglement of the State in religion, in violation of the Establishment Clause. The effect of the Superintendent’s decision to deny a transportation attendance area to St. Augustine is to violate the Plaintiffs’ Free Exercise of religion by restricting the funding and practice of their religion based on the Plaintiffs’ religious beliefs, in a way not permitted by statute or the Constitution.

60. The conduct of the defendants also denies the Plaintiffs Equal Protection under the law.

61. The Fourteenth Amendment to the United States Constitution states that, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, §1. The United States Supreme Court has held that the First Amendment applies to the States through the Fourteenth Amendment. *See Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940).

62. The Fourteenth Amendment provides a right to be free from invidious discrimination in statutory classifications as well as by governmental authorities. *See Harris v. McRae*, 448 U.S. 297, 322 (1980).

63. Wisconsin courts have held that this prohibition applies to local school districts. *See generally Jackson v. Benson*, 218 Wis.2d 835 (1988); *see also Joint School Dist. No. 1, of Town of Wabeno v. State*, 56 Wis.2d 790, 798 (1973).

64. Plaintiffs have been denied equal protection of the law because the defendants have applied to them a test of affiliation which exceeds their statutory authority and that could not, in any event, be applied to private schools that are not religious.

65. Violations of the First and Fourteenth Amendment are enforceable under 42 U.S.C. §1983 which provides that “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

66. Wisconsin courts have jurisdiction over claims brought under 42 U.S.C. §1983. *See Riedy v. Sperry*, 83 Wis.2d 158, 160 (1978).

67. Friess Lake and Superintendent Evers have violated 42 U.S.C. §1983 by acting under color of law to deny the Plaintiffs the rights, privileges and immunities secured by the Constitution and by denying them equal protection on the basis of their religion.

68. Under Section 1983, the remedies for a violation include those contained in 42 U.S.C. §1988, which includes costs and attorneys fees.

69. As the proximate result of the defendants’ unlawful conduct, the Plaintiffs have suffered damages.

SECOND CLAIM FOR RELIEF

(Alternative Claim for Declaratory Judgment/Certiorari Review)

70. The Plaintiffs reallege and incorporate by reference the allegations of the Paragraphs above.

71. The decision by Friess Lake and Superintendent Evers violates the statutory rights of St. Augustine and the Forros children under Wis. Stat. §§121.51- 121.55.

72. Under Wis. Stat. §806.04, the Plaintiffs seek review of that decision as provided by law and/or a declaration that the decisions were unlawful and should be reversed.

73. Alternatively, the Plaintiffs seek common law certiorari review of the decisions or such other review as the Court deems appropriate

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request this Court grant the following relief:

- A. A declaratory judgment stating that the decisions by Friess Lake and Superintendent Evers violate the Plaintiffs' rights under the First and Fourteenth Amendments and under Wis. Stat. Sections 121.51- 121-55.
- B. For damages and injunctive relief.
- C. Costs and attorneys' fees under 42 U.S.C. §1988.
- D. Granting Plaintiffs such other and further relief or review as the Court deems appropriate.

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Wisconsin Institute for Law & Liberty

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414-727-9455

FAX: 414-727-6385



April 5, 2016

To Whom It May Concern:

The Archdiocese of Milwaukee oversees 109 Catholic schools within its 10 county jurisdiction as an Archdiocese, which includes Washington County. As Superintendent of Schools for the Archdiocese of Milwaukee I have administrative responsibility for all Catholic schools within Archdiocesan jurisdiction.

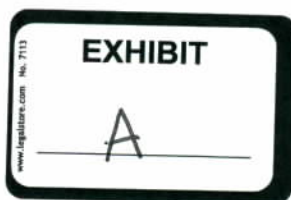
The Archdiocese is governed by Canon Law. Under Canon Law, specifically Canon 803, to be a “Catholic school” the school must be recognized by the relevant ecclesiastical authority as such through a written document of endorsement. The relevant ecclesiastical authority within the Milwaukee Archdiocese is Archbishop Jerome ListECKI.

St. Augustine School in Hartford, Wisconsin is not one of the 109 Catholic schools of the Archdiocese of Milwaukee, since it has not been recognized as a “Catholic school” by the Archbishop.

There are several local schools that hold themselves out as independent, Catholic schools teaching within the Catholic tradition. Those schools, however, including St. Augustine, are not official “Catholic schools” within the meaning of Canon 803 and are not within the authority of the Archdiocese. The Archdiocese does not review or control their curriculum, review or control their faculty, or administer or operate them in any way.

Sincerely,

Kathleen A. Cepelka, Ph.D.
Superintendent of Catholic Schools
Archdiocese of Milwaukee



STATE OF WISCONSIN
BEFORE
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

**In the Matter the Transportation of
Students from the Friess Lake
School District to St. Augustine
School, Inc.**

Decision

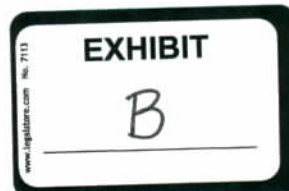
To: Tim Zignego
Chairman of the Board
St. Augustine School, Inc.
1810 Highway CC
Hartford, WI 53027

John Engstrom
District Administrator
Friess Lake School District
1750 State Road 164
Hubertus, WI 53033

INTRODUCTION

Pursuant to Wis. Stat. § 121.51(1), St. Augustine School, Inc. (“School”) and the Friess Lake School District (“District”) requested the State Superintendent of Public Instruction (“State Superintendent”) to determine whether the District must provide transportation to three of the School’s students. The District denied the School’s request for transportation. The parties have submitted various materials to the State Superintendent to assist him in making his determination. The State Superintendent has reviewed these materials, other public information, and the law to reach his determination.¹

¹ By letter dated December 21, 2015, Janet Jenkins, Chief Legal Counsel, sent a letter to the School and the District stating, among other things, that the parties could provide any additional information the parties wished to submit. By December 21, both the School and the District already had submitted their positions and the reasons therefor. The parties had also submitted other documentation. The deadline for submitting additional information, as set forth in the December 21 letter, was January 8, 2016. The District provided some supplementary information. On or about January 11, 2016, the School contacted Chief Legal Counsel for the DPI via email and stated the School had not seen the December 21 letter until then because the School was closed for the holidays. The School did not state it had additional information to provide and the State Superintendent believes it has all the information it needs to reach its decision.



RELEVANT FACTS

The District is a Wisconsin public school district within the meaning of Wis. Stat. § 115.01(3). The School is a private school within the meaning of Wis. Stat. § 115.001(3r) and is organized as a Wisconsin non-stock corporation under the provisions of Wis. Stat., ch. 181. The School is governed by a Board of Directors selected pursuant to the School's bylaws. The School has submitted to the State Superintendent a copy of its bylaws as well as an amendment to its Articles of Incorporation. The amendment only changed the name of the School from Neosho Country Christian School, Inc. to St. Augustine School, Inc. This amendment was dated May 25, 1994 and filed with the Wisconsin Secretary of State on June 14, 1994.² The District has also provided information to the State Superintendent in letter form.

In a letter from the School to the District dated April 27, 2015, the School requested the District to provide transportation for three students, all siblings, via a parent transportation contract. A parent transportation contract is one method school districts can use to provide transportation. Under a parent compensation contract, a school district pays parents to transport children to school (Wis. Stat. § 121.55(b)).

The District responded to the School's request by letter dated April 29. It denied the School's request to provide transportation for the requested students. The reasons for the District's denial that are important to a determination of this matter are:

- The School is affiliated with the Roman Catholic denomination.

² The School did not provide the complete Articles of Incorporation filed by its predecessor, Neosho Country Christian School, Inc. which, according to the online records of the Wisconsin Department of Financial Institution, were filed in 1981. These Articles are still in effect except for the amendment to change the name.

- The District already provides transportation for students attending St. Gabriel Catholic School, another Roman Catholic School within the District's attendance area.
- St. Gabriel's attendance area includes the entirety of the District's attendance area and therefore, the attendance areas of the School and St. Gabriel School overlap.³

The School responded to the District's letter by letter dated May 20, 2015 claiming the District must provide transportation to the School's students because:

- The School's Articles of Incorporation and bylaws show the School is organized as an independent Wis. Stat., ch. 181 corporation and is governed independently of any denomination.
- St. Gabriel Catholic School and the Archdiocese of Milwaukee have not managed, controlled or had any governance affiliation with the School.
- It is unconstitutional for the District to determine denominational affiliation by examining doctrine or other religious differences between schools.
- The School is an independent, private school and as such, the law permits no inquiry beyond the School's name change amendment and bylaws to determine whether the School and St. Gabriel Catholic School are private schools affiliated with the same religious denomination.⁴

³ The School does not dispute the District's allegations that it already provides transportation to students of St. Gabriel School, a Roman Catholic School whose attendance area is co-extensive with the attendance area of the District.

⁴ Additional facts will be added to the Discussions section of this Decision and Order where appropriate.

- The question of whether St. Gabriel and the School are private schools affiliated with the same religious denomination is not a factor to be considered in applying Wis. Stat. § 121.51(1).

QUESTIONS PRESENTED

1. Under the facts of this case, did the District improperly inquire into the School's religious affiliation beyond a review of the School's name change amendment to its Articles of Incorporation and bylaws?
2. Did the District properly determine that the School was affiliated with the Roman Catholic religious denomination thus permitting the the District to deny transportation to the the School's students?

DISCUSSION

Wisconsin Statutes § 121.51(1) lies at the heart of dispute between the School and the District. That statute states:

(1) "Attendance area" is the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. **The attendance areas of private schools affiliated with the same religious denomination shall not overlap unless one school limits its enrollment to pupils of the same sex and the other school limits its enrollment to pupils of the opposite sex or admits pupils of both sexes.** (emphasis supplied).

The dispute herein revolves around the portion of Wis. Stat., § 121.51(1) emphasized in the above-quoted statute.

The District contends both the School and St. Gabriel's are affiliated with the Roman Catholic denomination and that their attendance areas overlap. The School argues the District may not look beyond the School's corporate status, its name change amendment, and its bylaws

to reach the District's conclusion that the School is a religious school affiliated with the Roman Catholic denomination. To do otherwise, the School contends, results in a constitutionally impermissible entanglement of state authority in religious affairs.

In support of its argument, the School relies exclusively upon the decision in *Holy Trinity Community School, Inc. v. Kahl*, 82 Wis.2d 139, 262 N.W.2d 210 (1978) ("*Kahl*").⁵ The School's reliance is misplaced. The Supreme Court in *Kahl* did not rule it is always impermissible for a school district to look beyond the School's corporate status, Articles of Incorporation and bylaws to determine whether a school is a private religious school affiliated with a particular religious denomination. As the Supreme Court noted in *Kahl*, "**Under the facts peculiar to this case**, the attempt of the Superintendent of Public Instruction to administer the law results in excessive entanglement of state authority in religious affairs." (emphasis supplied), *Id.* 149-150. The facts in the instant case are very different from the facts in *Kahl* and lead to a different conclusion.

In *Kahl*, the court found that the bylaws of Holy Trinity, also a Wis. Stat., ch. 181 independent corporation, provided ample evidence the school was: (1) a private religious school, and (2) not affiliated with any religious denomination. Among the evidence supporting the court's conclusion were provisions in Holy Trinity's bylaws stating the corporation, i.e., the school, was to be maintained in the Judeo-Christian tradition. Moreover, the language of Article 4 of Holy Trinity's bylaws specifically disavowed any religious affiliation and encouraged students to practice the religion of their choice for which Holy Trinity provided a "released time"

⁵ In *Kahl*, the Court reviewed the decision of the Racine County Circuit Court which affirmed the decision of State Superintendent, William C. Kahl, who upheld the decision of the Racine County Unified School District denying Holy Trinity's request for transportation from the Racine County Unified School District to Holy Trinity.

program in the school. *Id.* 144. The *Kahl* court found all these facts sufficient to determine Holy Trinity was a religious school not affiliated with any religious denomination.

There are no equivalent statements in the School's bylaws. Rather, the bylaws only contain provisions frequently found in the bylaws of many non-religious public and private corporations organized and operating under Wis. Stat., chs. 180 and 181. The School's bylaws relate only to such items as the composition and powers of the corporation's board of directors and the officers of the corporation, meetings of the board of directors, indemnity and liability of the corporation, its directors and officers, and a few other provisions of the same ilk. Nothing in the School's bylaws even hints that the School is a private religious school or a private, religious non-denominational school. Similarly, there is nothing in the School's name change amendment to its Articles of Incorporation that reveals anything about the School's nature, i.e., religious or non-religious, or its affiliation with a religious denomination.⁶

In the absence of such evidence, the District must look beyond the School's name change amendment and bylaws to determine how Wis. Stat. § 121.51(1) applies to the School's request for transportation of its students. If the District cannot do this, the District cannot meet its legal obligation to comply with Wis. Stat., § 121.51(1). Therefore, under the specific facts of this case, the District has the authority to look beyond the name change amendment and bylaws to determine how to apply Wis. Stat., § 121.51(1), as long as the manner in which it does so does not create an "excessive entanglement of state authority in religious affairs. *Id.* 149-150.

The District contends the School's public website provides sufficient information from which to determine that the School is a private religious school affiliated with the Roman

⁶ The State Superintendent recognizes that the use of a saint's name is often used by religious schools, but that fact, alone, is not sufficient to show that the School is a religious School or that the School is affiliated or not affiliated with any religious denomination.

Catholic denomination. Reviewing a public website that is created and maintained by or on behalf of the School, and accepting the School's description of itself as set forth in that website, does not create an excessive entanglement of state authority in religious affairs. This is so because a public website, by its very nature, invites, and even wants persons to review it. Under this circumstance, the District's review of the website and acceptance of the School's description of itself as set forth therein simply does not create any entanglement, let alone an excessive entanglement of state authority in religious affairs.

The School's website provides ample evidence the School is a religious school affiliated with the Roman Catholic denomination. The "About Us" portion of the website states the School is, "... an independent and private traditional Roman Catholic School ... [that is] an incorporation of dedicated families, who believing that all good things are of God, have joined together to provide the children of our Catholic community with an exceptional classical education ..." The website also contains the statement, "SAS loves and praises all the traditional practices of the Catholic faith ..." These statements are but two of a number of statements in the website pages from which any reasonable person would conclude the School is a religious school affiliated with the Roman Catholic denomination.⁷ A copy of the first three pages of the website are attached to this Decision.

CONCLUSION

St. Augustine School, Inc. is a private, religious school affiliated with the Roman Catholic denomination. The District already provides transportation to students attending St. Gabriel School, another private, religious school affiliated with the Roman Catholic denomination, the attendance area of which is co-extensive with the attendance area of the

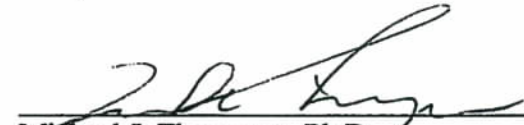
⁷ The School, in its submission to the State Superintendent did not mention the existence of its website or discuss how the website did or did not affect the decision to be made herein.

District. Therefore, the attendance area of the School overlaps the attendance area of St. Gabriel.

Pursuant to Wis. Stat. § 121.51(1), the Friess Lake School District is not required to provide

transportation to students attending St. Augustine School, Inc.

Dated this 10th day of March, 2016


Michael J. Thompson, Ph.D.
Deputy State Superintendent