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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

SCHOOL CHOICE WISCONSIN
ACTION, INC.,

Plaintiff,

v. Case No. 19-CV-0574

CAROLYN STANFORD TAYLOR,
Wisconsin Superintendent of Public
Instruction, and WISCONSIN
DEPARTMENT OF PUBLIC
INSTRUCTION,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Wisconsin's Parental Choice Program is a private school voucher program that offers students whose families meet certain income qualifications the option of attending private school at public expense. Plaintiff School Choice Wisconsin Action, Inc. (SCWA)—an organization whose members are schools enrolled in the voucher program ("choice schools")—has brought this declaratory judgment action against the Wisconsin Superintendent of Public Instruction and the Wisconsin Department of Public Instruction (DPI),

challenging DPI's interpretation of the statutory hours of instruction requirement applicable to choice schools.

In particular, SCWA asks for an interpretation of state law's allowance for "virtual" learning. SCWA seeks to use virtual learning like public schools: to make up time "when school is canceled, as a planned day, or as a makeup day when a day of school is missed."[1] (SCWA Br. 4, quoting DPI website.) SCWA believes that the statutory scheme applicable to choice schools should be read the same as that applicable to public schools, at least when it comes to that virtual learning.

This Court should reject SCWA's argument, which does not interpret the relevant statutory provisions in context, as required by the rules of statutory construction. Rather, contrary to those rules, SCWA attempts to interpret a few words in isolation and divorced from the specific statutory chapters in which they appear. That is not allowed. Therefore, summary judgment should be denied to SCWA and granted to DPI.

[1] The use of virtual learning by public schools is not unlimited. For example, in *Burmaster*, the Wisconsin Court of Appeals confirmed that purely "virtual schools" are not contemplated by the general public school statutory framework (although, as noted below, there is now a specific virtual charter school law). *Johnson v. Burmaster*, 2008 WI App 4, ¶ 25, 307 Wis. 2d 213, 744 N.W.2d 900; *see also id.* ¶ 2 (discussing laws applicable to "all public schools, including charter schools").

BACKGROUND

I. Laws applicable to education in Wisconsin.

A. Public schools.

The Wisconsin Department of Public Instruction—as its name implies—is the state agency that advances public education in Wisconsin. While DPI has certain duties related to public education and its oversight, local school boards run public schools on a day-to-day basis. Those school boards are responsible for providing curriculum, course requirements, and instruction consistent with the goals and expectations established by statute. *See* Wis. Stat. § 118.01(1). In pursuing these standards, public school boards have substantial and broad discretion: "The statutory duties and powers of school boards are to be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers . . . ." Wis. Stat. § 118.001.

While public school boards have broad discretion, they must use it to meet a host of specific standards. For example, in Wis. Stat. § 121.02 alone, there are approximately 20 requirements imposed on public school boards that address licensing, professional development, pupil services and interventions, programming, curriculum and instructional materials, health and safety, graduation standards, statewide assessments, and other educational requirements. Although not involved in day-to-day operations, DPI is vested

with general responsibility for implementing and administering these standards; and it may review complaints and also conduct independent audits regarding them. Wis. Stat. § 121.02(2), (5).

There are two main types of public schools in Wisconsin: traditional public schools, *see* Wis. Stat. § 115.01(1), and charter schools, which are established through contracts with public schools, *see* Wis. Stat. §§ 115.001(1), 118.40. Further, in 2007, the Legislature authorized certain public charter schools to be "virtual charter school[s]," if certain steps are taken and standards are met. Wis. Stat. §§ 115.001(16), 118.40(8). Those virtual charter schools are expressly authorized by statute to provide "all or a portion of the instruction . . . through means of the Internet." Wis. Stat. § 115.001(16).

Public schools must fulfill instructional hours requirements. That requirement is found in Wis. Stat. § 121.02(1)(f). Under that subsection, public schools must:

> [a]nnually, schedule at least 437 hours of direct pupil instruction in kindergarten, as 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. Scheduled hours under this paragraph include recess and time for pupils to transfer between classes but do not include the lunch period. Scheduled hours under this paragraph do not include hours of direct pupil instruction offered during an interim session. Scheduled hours under this paragraph may include hours on Saturdays. A school board operating a 4-year-old kindergarten program may use up to 87.5 of the scheduled hours for outreach activities.

Wis. Stat. § 121.02 (1)(f). Notably, this public school hours provision does not stand alone, but rather is part of the comprehensive public school standards;

thus, the teaching and services provided to fulfill the hours requirement must meet those standards. *See* Wis. Stat. § 121.02.

DPI also has promulgated rules governing public school district standards like licensure, staff development, and other requirements and services. Wis. Admin. Code § PI 8.01(2). Those rules also include standards for public school hours of instruction. Wisconsin Admin. Code § PI 8.01(2)(f) reads:

> *Hours of instruction.* Each school district board shall annually schedule and hold at least 437 hours of direct pupil instruction in kindergarten, as 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 or 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.

Wisconsin Admin. Code § PI 8.01(2)(f)

DPI has further defined the term "innovative instructional design" for purposes of public schools:

> "Innovative instructional design" means an instructional program aligned to school district standards and used to improve student academic achievement through instruction offered outside of the normal school day, virtually, or in an alternative setting.

Wis. Admin. Code § PI 8.001(6g).

B. Choice schools.

Apart from public schools, Wisconsin has three programs that allow eligible students to attend a participating *private* school at public expense. These private school choice programs include the Milwaukee Parental Choice Program, which is governed by Wis. Stat. § 119.23, and the Racine and Wisconsin Parental Choice Programs, which are governed by Wis. Stat. § 118.60. Schools in the private school choice program generally are not subject to the same public school district standards in the statutes and rules noted above. Rather, they are "private school[s]." *E.g.*, Wis. Stat. § 118.60(2)(a). Thus, only in limited ways are public school standards and requirements applicable. For example, choice schools must meet "all health and safety codes or laws that apply to public schools." Wis. Stat. § 118.60(2)(a)5.[2]

Unlike that safety provision—which expressly adopts certain public school standards—the choice school instructional hours requirement does not adopt the public schools' instructional requirement. Rather, the choice schools have their own provisions in their separate code sections, found in Wis. Stat. §§ 118.60(2)(a)8. and 119.23(2)(a)8. Under those subsections, choice schools must:

> annually 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

[2] For the sake of brevity, this brief does not always cite both choice program statutes when discussing choice schools, but the discussions here apply equally to both.

> grades 7 to 12. Hours provided under this subdivision include recess and time for pupils to transfer between classes but do not include the lunch periods. Annually, no more than 140 hours of work under s. 118.56 may be counted as hours of direct pupil instruction.

Wis. Stat. §§ 118.60(2)(a)8. and 119.23(2)(a)8.

Of note, members of the Legislature recently introduced a bill that would amend the existing choice school statutes to provide a mechanism similar to what SCWA seeks in this lawsuit—where private choice schools could use virtual learning for certain purposes. *See* 2019 Assembly Bill 129, *available at* http://docs.legis.wisconsin.gov/2019/related/proposals/ab129.pdf; *see also* 2018 SB 111. (Brown Aff. Exs. B & C.) As summarized by the Legislative Reference Bureau, the bill would require "the Department of Public Instruction to count hours of instruction that are offered virtually when a private school participating in a parental choice program is closed because of an emergency or inclement weather." *Id.* The bill would do so by adding language to Wis. Stat. §§ 118.60(2)(a)8. and 119.23(2)(a)8. that does not currently exist: that "[h]ours provided under this subdivision may include hours of instructional programming provided virtually." *Id.*

II. Inquiries to DPI and DPI's responses.

In late January and early February 2019, after a particularly cold stretch requiring school closures, DPI received numerous inquiries about the statutory requirements for hours of direct pupil instruction and whether choice schools

were permitted to make up instructional time using virtual instruction. (Brown Aff. ¶ 8, Ex. A.) On February 5, 2019, DPI responded via email that it did not have authority to waive hours of instruction statewide and that "[u]nder 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." (Brown Aff. ¶ 8, Ex. A.)

On February 21, 2019, SWCA's counsel sent DPI a letter concerning DPI's "interpretation of state law that private schools in the parental choice program [ ] are unable to implement virtual instruction" and arguing that DPI's February 5, 2019 email was an unpromulgated rule. (Brown Aff. ¶ 9, Ex. B.) SCWA's counsel suggested that DPI "has chosen to interpret the statute to mean that 'direct pupil instruction time' includes virtual learning (at least for public schools)." (Brown Aff. ¶ 9, Ex. B.) In support, counsel cited the public school hours-of-instruction rule, Wis. Admin. Code § PI 8.01(2)(f), quoted above. SWCA's counsel asked DPI to "address the issues raised [in the letter] and provide a written response within 7 days so that we can advise our clients as to whether litigation should be commenced." (Brown Aff. ¶ 9, Ex. B.)

On February 28, 2019, DPI Chief Legal Counsel Benjamin Jones responded to SCWA's counsel. Jones reiterated that DPI "does not have authority under statute or rule to give Choice schools credit for hours of virtual

instruction provided to make up instructional time lost due to inclement weather" and that, "[a]bsent a change in law, the DPI may only credit virtual instruction for public schools." (Brown Aff. ¶ 10, Ex. C.) Jones noted that a "bill is currently being circulated that would provide the DPI with this missing authority." (Brown Aff. ¶ 10, Ex. C.) Jones further noted that the "administrative rule you highlight in your letter—Wis. Admin. Code § PI 8.01(2)(f)—explicitly applies only to public school districts." (Brown Aff. ¶ 10, Ex. C.)

III. SCWA's declaratory judgment action.

On March 27, 2019, SCWA filed the present declaratory judgment action, raising three claims. First, SCWA claims that DPI's interpretation of the term "direct pupil instruction" in its communications dated February 5 and 28, 2019, is an unpromulgated rule under Wis. Stat. § 227.10(1). (Compl. ¶¶ 23–35.) Second, SCWA claims that DPI's 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., is erroneous. (Compl. ¶¶ 36–40.) And finally, SCWA claims that DPI, in interpreting the term "direct pupil instruction" one way for public schools and another way for choice schools, has violated their right to equal protection as guaranteed by the Wisconsin Constitution. (Compl. ¶¶ 41–46.)

SCWA seeks a declaration that (1) DPI's "rule" is invalid and may not be enforced; (2) the term "direct pupil instruction," as it is used in Wis. Stat.

§§ 118.60(2)(a)8. and 119.23(2)(a)8., includes some use of virtual instruction; and (3) DPI has violated the equal protection rights of SCWA and its members. SCWA also seeks to enjoin 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 28, 2019, communications. (Compl. 11–12.)

SWCA filed a motion for summary judgment and supporting materials on June 19, 2019. DPI now responds to that motion and files a cross-motion for summary judgment. As set forth below, there are no material facts in dispute, and DPI is entitled to judgment as a matter of law.

SUMMARY JUDGMENT STANDARD AND STANDARD OF REVIEW

Wisconsin courts employ a well-established methodology for deciding a motion for summary judgment. *Water Well Sols. Serv. Grp. v. Consol. Ins. Co.*, 2016 WI 54, ¶ 11, 369 Wis. 2d 607, 881 N.W.2d 285. Under this methodology, courts first determine whether the pleadings state a claim. *Green Springs Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). If the court determines that the plaintiff has stated a viable claim, and the pleadings show the existence of factual issues, the court examines the pleadings, affidavits, depositions, or other proofs to determine whether there exist any disputed, material facts that would require a trial. *See id.* If there exists no dispute of material fact, summary judgment shall be granted. *See* Wis. Stat. § 802.08(2).

When reviewing an agency's application of a statute, which is the issue here, DPI's view is entitled to respect. No "deference" applies to administrative interpretations of statutes. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21. However, where an agency interprets a specialized or technical statute it administers, its interpretation is entitled to "due weight" respect. Wis. Stat. § 227.57(10); *Tetra Tech*, 382 Wis. 2d 496, ¶¶ 77–78, 108. Here, DPI is the agency vested with authority to administer the school-related statutes at issue, and it has longstanding expertise in doing so. *See*, *e.g.*, Wis. Stat. §§ 115.28 (superintendent's general duties); 121.02(2) (oversight of public school standards); 118.60(11) (parental choice program). For example, provisions with language similar to the current public school instructional hours provision in Wis. Stat. § 121.02(1)(f) have been in force since at least 1985, together with DPI enforcement provisions, *see* Wis. Stat. § 121.02(1)(f)2., (2)–(3) (1985–86). Its view of the statutes is therefore entitled to due respect.

ARGUMENT

SCWA makes three claims—about rulemaking, statutory interpretation, and equal protection—but only one presents a bona fide issue: what the statutes mean. For example, as SCWA ultimately explains, its argument about rulemaking is irrelevant to the merits: "regardless of its ruling on this question, this Court must also determine the actual correct interpretation."

(SCWA Br. 7.) The following addresses all three claims and explains why DPI's statutory interpretation is correct.

I. SCWA's rulemaking argument is irrelevant; in any event, DPI's response to these inquiries is not a "rule" that had to be promulgated.

SCWA argues that DPI's response to a public inquiry is an "unpromulgated rule" and should be invalidated. This line of argument is misplaced and fails for multiple reasons. Most to the point, and as essentially conceded by SCWA, the rulemaking topic is irrelevant: this case turns on statutory interpretation, not on whether a letter is an "unpromulgated rule." (*See* SWCA Br. 7.) Put differently, it remains the case that the Court must resolve the statutory dispute discussed below in Part II and rule accordingly. There is no separate rulemaking question that needs to be addressed or that could make any difference to the outcome.

A. The letter in question does not stand in for a rule and is not amenable to being "voided."

SCWA argues that simply responding to public inquiries—as opposed to ignoring them—means DPI issued an "unpromulgated rule." In turn, SCWA contends that the responsive letters should be "void." However, these proposals make little sense. Responding to a question is not rulemaking and, in any event, courts do not "void" letters. Letters like these do not have the force of

law, and voiding them would change nothing about the meaning of the statutes.

"Rule" means "a regulation, standard, statement of policy, or general order of general application that *has the force of law and that is issued by an agency* to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Wis. Stat. § 227.01(13).

As the Court of Appeals recently explained, meeting the criteria in that definition is a prerequisite to even beginning to state an "unpromulgated rule" challenge. *Papa v. DHS*, No. 2016AP2082, 2019 WL 3432512, at ¶ 15 (Wis. Ct. App. July 31, 2019) (judge-authored; not recommended for publication). Thus, for example, "advice and guidelines" do not count, but rather the alleged rule must "set[ ] forth law-like pronouncements" in a way "intended to have the effect of law." *Id.* ¶ 16. Courts additionally look to "the use of the disputed provision to determine whether the agency has intended for it to have the force of law." *Id.* ¶ 16. Likewise, where something "reads like a summary, not a legal directive," it is not a rule. *Id.* ¶ 17.

As can be seen, the letters here meet none of these criteria. Most simply, they do not have the "force of law." The letters are answers to questions; they are not rule-like provisions "issued" by DPI, and they lack the "force of law." *See id.* ¶ 16. DPI just answered a question. Put differently, a letter answering

a question does not lend itself to an analysis that turns on a "disputed provision"; DPI has issued no "provision." *See id.* Likewise, the letters purport to be nothing more than a "summary" of the state of the law. *See id.* ¶ 17.

All of this is outside rulemaking, and for good reason. If it were otherwise, any time an agency responded to a citizen's question, it would run the risk of creating a "rule." Potential plaintiffs could bait an agency into making a "rule" by posing a question to the agency. But if instead the agency simply did not respond to the inquiry, no "rule" would be created. This scenario—and the perverse incentives it would create for state government officials to ignore the public's questions—cannot be right.

The fact that SCWA disagrees with DPI's understanding of the statutes does not transform DPI's letters into rules. Rather, that disagreement properly takes the form of a declaratory action (i.e., Claim II here).

B. Alternatively, an agency's disposition of a matter as applied to a specific set of facts is not a "rule," and it also is not rulemaking to simply apply a statute.

The foregoing explains why, as a general matter, it makes no sense to treat the letters as potential rules. For the sake of completeness, there also are other reasons the letters are not rules.

Courts evaluate whether agency action amounts to a "rule" based on five elements derived from the statute. *See Cholvin v. Wis. Dep't of Health and Family Servs.*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118. Courts

examine whether the agency action is "(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, interpret or make specific legislation enforced or administered by such agency." *Id.* (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)). If an agency action fails to satisfy any one of the elements, it is not a "rule" for purposes of stating a claim under Wis. Stat. § 227.40. *See Schoolway Transp. Co., Inc. v. Div. of Motor Vehicles, Dep't of Transp.*, 72 Wis. 2d 223, 236, 240 N.W.2d 403 (1976) (holding that an agency need not have complied with formal rulemaking procedures, after concluding that an alleged rule was not a "regulation, standard, [or] statement of policy"). Under this framework, there are at least two additional reasons the letters are not rules.

First, Wis. Stat. § 227.10(1) provides that an agency's disposition "of a particular matter as applied to a specific set of facts does not render it a rule or constitute specific adoption of a rule and is not required to be promulgated as a rule." Wis. Stat. § 227.10(1).

That exception would apply here. DPI's February 5 and 28, 2019, communications were addressing particular questions sent to it. In its February 5, 2019 email, DPI answered an inquiry from several choice schools about whether they were permitted to make up instructional time using virtual instruction. (Brown Aff. ¶ 8, Ex. A.) DPI's response simply answered the

question based on its understanding of state law: "[u]nder 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 the purposes of Wis. Stat. ss. 119.23(2)(a)8. or 118.60(2)(a)8." (Brown Aff. ¶ 8, Ex. A.) In its February 28, 2019 letter, DPI responded to a follow-up letter from SCWA's lawyers threatening a lawsuit if DPI did not respond within seven days. DPI responded that it "does not have authority under statute or rule to give Choice schools credit for hours of virtual instruction provided to make up instructional time lost due to inclement weather" and that "[a]bsent a change in law, the DPI may only credit virtual instruction for public schools." (Brown Aff. ¶ 10, Ex. C.)

It would be absurd to label this responsiveness to a particular inquiry as "rulemaking," as the last sentence of Wis. Stat. § 227.10(1) recognizes. Indeed, far from announcing a rule, DPI's letter said it did "*not* have authority under statute or rule." (Brown Aff. ¶ 10, Ex. C (emphasis added).)

Second, DPI's letters also would not be rules under the *Schoolway* case. In *Schoolway*, the supreme court examined whether the Department of Transportation's practice of disallowing "dual registration" of buses amounted to a rule, focusing on whether the challenged practice was itself a "regulation, standard, statement of policy or general order." 72 Wis. 2d at 235–36. Despite the impact that the practice had on regulated entities, the court declined to

find that it amounted to a rule for which formal rulemaking was required. Because the practice "in no way modifie[d] the duty of the Department to administer the statute according to its plain terms and to correct its error," the court held that the change itself was "not a regulation, standard, statement of policy or general order." *Schoolway*, 72 Wis. 2d at 236; *see also Wis. Tel. Co. v. ILHR Dep't*, 68 Wis. 2d 345, 366, 228 N.W.2d 649 (1975) (agency's failure to file guidelines as a rule held not to have deprived agency of authority to decide case, since same result could be reached under the applicable statute regardless of the rule).

The same analysis applies here. DPI's position that Wis. Stat. §§ 118.60(2)(a)8. and 119.23(2)(a)8. do not permit choice schools to count "virtual learning" as hours of "direct pupil instruction" is, as discussed in Part II below, simply an application of the statutes. An agency need not promulgate a rule if its "application of [a] statute[ ] serves to bring its practices in conformity with the plain meaning of the statute." *Schoolway*, 72 Wis. 2d at 236. Just as in *Schoolway*, DPI's interpretation of the relevant statues "in no way modifies" its duty to administer the law. 72 Wis. 2d at 236. For this additional reason, DPI's letters are not "rules" subject to challenge under Wis. Stat. § 227.40.

Indeed, DPI does not even mention in either correspondence the term "direct pupil instruction," which SCWA now claims DPI is improperly

interpreting. SCWA's real quarrel is with the meaning of the statutes themselves, which is addressed next.

II. Unlike the public school statutory scheme, the choice school statutes leave no room to count "virtual learning" toward their instructional hours requirement.

This case turns on statutory interpretation. However, unlike SCWA's proposal that conflates public and choice schools, DPI's interpretation puts the instructional hour provisions in their respective contexts. The statutes do not treat public schools and choice schools the same.

Statutory interpretation begins with the language of the statute. If the language is plain, the inquiry stops. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* (citation omitted) "Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46.

The term "direct pupil instruction" is used in three statutes relating to the instructional hours requirements for schools: Wis. Stat. §§ 118.60(2)(a)8.,

119.23(2)(a)8., and 121.02(1)(f). The term is not defined in the statutes or in case law. But given the context and structure of the statutes in which the term appears, "direct pupil instruction" clearly means something different for public schools than it does for choice schools.

Public schools and choice schools are different at a basic level: public schools are subject to the full panoply of state regulations and are governed by public school boards. Key here, those boards are statutorily vested with "duties and powers" that must be "broadly construed to authorize *any* school board action that is within the comprehensive meaning of the terms of the duties and powers . . . ." Wis. Stat. § 118.001. It is a type of tradeoff: the public schools must meet many explicit standards, but they are given broad discretion ("any . . . action") when seeking to satisfy those standards.

Choice schools are different. They are neither subject to the full panoply of state regulation nor are they governed by bodies vested with broad statutory discretion: there is no "any . . . action" provision applicable to choice schools.

For these basic reasons, DPI correctly interprets the instructional hour provisions applicable to choice schools differently. Read in context, "direct pupil instruction" must mean something different for public schools than it does for choice schools because public schools are authorized to meet their standards by "any . . . action" whereas choice schools are not. Thus, DPI faithfully carries out the statutes by authorizing public schools to use virtual

learning, up to a point, because that is "any . . . action" employed to meet a public school standard. On the other hand, it does not have a rule authorizing choice schools to do so because DPI lacks statutory authority for such a rule; choice schools are not authorized to take "any . . . action" when meeting their standards.

That straightforward analysis resolves the statutory interpretation question here. Unlike SCWA's proposal, DPI's fully accounts for the separate context of the separate statutory schemes, as is required. *Kalal*, 271 Wis. 2d 633, ¶¶ 45–46.

For the sake of completeness, the following sections explain the basis for this analysis in more detail.

A. Public schools' "direct pupil instruction" must be read in the context of the public school statutes, which vest broad authority in schools to meet various statutory standards.

For public schools, the term "direct pupil instruction" is found in Wis. Stat. § 121.02(1)(f). That paragraph is part of a larger regime of public school district standards. Indeed, Wis. Stat. § 121.02(1) alone imposes approximately 20 requirements on public schools—everything from curriculum plans to graduation standards to statewide testing.

Public schools must meet those standards, but may do so by taking "any . . . action" within their broad discretion, so long as it remains within the "comprehensive meaning" of their "duties and powers." That, again, is the

statutory tradeoff: there are many requirements, but the Legislature has vested school boards with broad discretion in how to reach them, including when it comes to the "direct pupil instruction" requirement in Wis. Stat. § 121.02(1)(f).

For that requirement, and the others, Wis. Stat. § 118.001 provides:

> **Duties and powers of school boards; construction of statutes.** The statutory duties and powers of school boards shall be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers, if the action is not prohibited by the laws of the federal government or this state.

And pursuant to Wis. Stat. § 120.13, public school boards "may do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils."

The language of these statues is clear. The Legislature expects public schools to comply with many benchmarks, but affords public school boards broad powers and wide discretion in exercising its powers. *See Madison Metro. Sch. Dist. v. Burmaster*, 2006 WI App 17, ¶ 18, 288 Wis. 2d 771, 709 N.W.2d 73. This extends to statutory construction, as well. Any school board action that is within the "comprehensive" meaning of the statutes is allowed. Wis. Stat. § 118.001.

At issue here is the instructional hours requirement for public schools and it, too, must be broadly construed. The vesting of broad authority in Wis.

Stat. § 118.001 and 120.13 must be given effect when interpreting the hours requirement in Wis. Stat. § 121.02(1)(f) because the statutes require it.

That is what DPI has done. DPI interprets the statutes as permitting public schools to use virtual learning in certain situations to implement nontraditional methods of instruction, which they are entitled to do under their broad statutory grants of authority. *See* Wis. Stat. §§ 118.001, 120.13. For example, for public schools, the administrative code includes an appropriately flexible concept of "innovative instructional design."

> "Innovative instructional design" means an instructional program aligned to school district standards and used to improve student academic achievement through instruction offered outside of the normal school day, virtually, or in an alternative setting.

Wis. Admin. Code § PI 8.001(6g). In turn, hours of "innovative instructional design" may count towards public school instruction hours under certain circumstances:

> 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 or 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.

Wis. Admin. Code § PI 8.01(2)(f).

"Innovative instructional design" offered by public school districts is not unlimited. All teaching and learning provided through "innovative

instructional design"—including virtual learning—must still "align[] to school district standards." *See* Wis. Admin. Code § PI 8.001(6g). And, unless they qualify under a special charter school statute, schools may not be purely virtual.[3] *See Johnson v. Burmaster*, 2008 WI App 4, ¶ 25, 307 Wis. 2d 213, 744 N.W.2d 900. Rather, as pointed out in SCWA's submissions, public schools typically use virtual learning "when school is canceled, as a planned day, or as a makeup day when a day of school is missed." (SCWA Br. 4, quoting DPI website.) *See also* Wis. Admin. Code § PI 8.01(1)(f).

The rules of statutory interpretation require reading statutory language in context. As can be seen, that is precisely what DPI does when interpreting the public school hours statute. Its reading, which stems from its expertise, is entitled to due weight respect. It also simply makes sense when the statutes are read as a whole.

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[3] The Legislature expressly encourages virtual learning for public schools in certain situations. For example, "virtual charter schools"—a type of public school subject to very specific requirements—are permitted to provide all instruction virtually. Wis. Stat. § 118.40(8). And the Superintendent of Public Instruction is required to "[p]romote the delivery of digital content and collaborative instruction among [public schools], including through online courses." Wis. Stat. § 115.28(54). Importantly, though, any virtual instruction provided in public schools—including virtual charter schools—is subject to special limitations, requirements, and standards. *See* Wis. Stat. §§ 118.40(8), 121.02.

B. Choice schools' "direct pupil instruction" must be read in the context of the choice school statutes, which do not vest broad authority in those schools to meet various statutory standards, as the Legislature itself has recognized.

The contextual analysis is much different when it comes to choice schools. They are subject to different code sections, none of which vest choice schools with the same broad powers and discretion as public schools. SCWA ignores this. It cites the rule that, "[w]hen the same term is used repeatedly in a *single* statutory section, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears," but that concept does not apply here. *Coutts v. Wis. Ret. Bd.*, 209 Wis. 2d 655, 668–69, 562 N.W.2d 917 (1997) (emphasis added). (SCWA Br. 9.) The terms at issue do not appear in the same statutory section.

Rather, for choice schools, the term "direct pupil instruction" is found in Wis. Stat. §§ 118.60(2)(a)8. and 119.23(2)(a)8. These paragraphs are part of the two specific statutes addressing choice school programs, Wis. Stat. §§ 118.60 and 119.23. These statues do not mention virtual learning, nor do they afford choice schools broad powers and discretion to implement its instruction. *See* Wis. Stat. §§ 118.60 and 119.23.

Far from granting choice schools broad discretion, the Legislature has explicitly limited choice schools' instructional hours in a way that it has not limited public schools. For example, choice schools may count no more than

140 hours of work-based learning towards their instructional hours requirement. Wis. Stat. §§ 118.60(2)(a)8. and 119.23(2)(a)8. This goes to show that the Legislature does not intend to treat public schools and choices schools the same when it comes to counting instructional hours.

Because the statutes do not authorize broad, discretionary authority for choice schools to reach their standards, it follows that DPI lacks the power to promulgate a rule vesting choice schools with that broad discretion. That stands in contrast to its rule sections governing public schools: those reflect the many statutory requirements, but also the statutory discretion vested in public school boards. Indeed, SCWA agrees that DPI has the authority when it comes to public schools and "duly promulgated" those rules. (Compl. ¶ 26.)

What SCWA seeks, rather, is properly the subject of legislation, not court action. Indeed, members of the Legislature have recognized as much. A bill was introduced that would amend the existing statutory language to provide something similar to what SCWA seeks in this lawsuit: allowing private choice schools to use virtual learning for certain purposes. *See* 2019 Assembly Bill 129; 2018 SB 111. (Brown Aff. Exs. B & C.) The fact that members of the Legislature have proposed an *amendment* that allows choice schools "to count hours of instruction that are offered virtually when a private school participating in a parental choice program is closed because of an emergency or inclement weather" helps demonstrate that the current statutes contain no

such authority. *Id.* Put differently, if SCWA's interpretation were correct, that amendment would be wholly unnecessary.

SCWA's argument fails to apply the statutory terms in their respective contexts. Its challenge to DPI's application of Wis. Stat. §§ 118.60(2)(a)8. and 119.23(2)(a)8. fails as a matter of law.

III. Under an equal protection analysis, public schools and choice schools are not similarly situated, and it is reasonable to treat them differently.

SCWA argues that "[b]y 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." (SWCA Br. 10.)

This is not a bona fide equal protection argument, but rather a restatement of SCWA's statutory interpretation argument. SCWA presents no serious argument that it would violate the federal or state constitutions for the Legislature to allow public schools to use virtual learning, while not allowing choice schools to do so. As the separate statutory schemes themselves reflect, public schools and choice schools are not the same thing, and there is no requirement that state laws treat them identically.

Both the Fourteenth Amendment to the United States Constitution and article I, section 1 of the Wisconsin Constitution guarantee equal protection of the laws and afford substantially the same protections. *Group Health Co-op. v.*

Wis. Dep't of Revenue, 229 Wis. 2d 846, 855, 601 N.W.2d 1 (Ct. App. 1999). The purpose of the equal protection clause "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1009 (7th Cir. 2004) (citations omitted).

However, an equal protection claim is not easily stated. A plaintiff must show that it is similarly situated to the alleged class that is treated differently. *Telemark Dev., Inc. v. Dep't of Revenue,* 218 Wis. 2d 809, 826, 581 N.W.2d 585 (Ct. App. 1998). Further, in cases where a classification does not involve a suspect class or a fundamental interest, as is the case here, the classification will be upheld if there is any rational basis to support it.[4] *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Servs.,* 130 Wis. 2d 79, 98, 387 N.W.2d 254 (1986). Thus, "[t]he basic test is not whether some inequality results from the classification but whether there exists a rational basis to justify the inequality of the classification." *Id.* at 99.[5]

[4] SCWA concedes that rational basis review applies. (*See*, *e.g.*, SCWA Br. 11 (relying on "rational relationship" test).)

[5] The rational basis test sometimes is framed in terms of a five-factor test. *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Servs.*, 130 Wis. 2d 79, 97, 387 N.W.2d 254 (1986). This five-factor test is simply a reframing of the rational-basis inquiry. *Id.* at 98. And while the five-factor test "provides a useful analytical tool, it is not per se determinative. The basic question is whether there is a reasonable basis to justify the classification." *Id.*

A plaintiff making this kind of claim faces significant hurdles. Under rational basis review, "perfection 'is neither possible nor necessary.'" *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 57, 237 Wis. 2d 99, 613 N.W.2d 849 (citation omitted). This recognizes "that classifications often are imperfect and can produce inequities." *Id.* Such classifications are nonetheless upheld if they conceivably advance a governmental objective, even if the court must construct that rationale. *Id.* Put differently, *the challenger* must "negate every conceivable basis which might support" the classifications. *Brown v. DCF*, 2012 WI App 61, ¶ 38, 341 Wis. 2d 449, 819 N.W.2d 827 (citation and alteration marks omitted).

SCWA's challenge fails for either of two reasons: (1) choice schools are not, as a basic matter, similarly situated to public schools; and (2) in any event, SCWA cannot show there is no conceivable rational reason to treat choice schools differently than public schools.

First, public schools and choice schools are not similarly situated. The Legislature—which created the public school and choice school systems—treats them differently in most material respects. That is for a reason. Private schools are not subject to the same panoply of state regulation that public schools are.

By statute, public schools must conform to certain licensing, "curriculum, course requirements, and instruction." Wis. Stat. § 118.01(1). Thus, "every

teacher, supervisor, administrator and professional staff member" must hold "a certificate, license or permit to teach issued by the department." Wis. Stat. § 121.02(1)(a)1. And, for example, the public schools must "[p]rovide interventions or remedial reading services," "[m]aintain a written, sequential curriculum plan," "[d]evelop a plan for children at risk," "[e]valuate . . . the performance of all certified school personnel," and the list goes on. Wis. Stat. § 121.02(1)(c), (k), (n), (q). These requirements are all subject to direct state oversight—for example, "the department shall conduct an inquiry into compliance with the standards upon receipt of a complaint and may, on its own initiative, conduct an audit of a school district." Wis. Stat. § 121.02(2).

Private choice schools, by contrast, are accredited by outside entities, like the "Independent Schools Association of the Central States." Wis. Stat. § 118.60(1)(ab). And, while those private schools must meet "health and safety laws" applicable to public schools, they are not subject to the same comprehensive state oversight and regulation. Wis. Stat. § 118.60(2)(a)5; *see generally* Wis. Stat. §§ 118.60, 119.23, 121.02. For example, their teachers may be licensed *or* may simply have a bachelor's degree. Wis. Stat. § 118.60(2)(a)6.

In turn, the Legislature, having imposed a comprehensive regulatory scheme on public schools, grants those public schools discretion in meeting the many requirements. On the other hand, private choice schools, which are

primarily overseen by outside accreditors, are not subject to the same tradeoff under state law. *See* Wis. Stat. §§ 118.001, 120.13 (intro).

Thus, on a basic level, public schools and choice schools are not similarly situated in a way that would even allow for a coherent equal protection analysis. They are, by definition, different.

Second, and in any event, the difference in treatment is, at a minimum, "conceivably" rational, meaning SCWA can state no equal protection claim. *See Aicher ex rel. LaBarge*, 237 Wis. 2d 99, ¶ 57. That is true for reasons similar to those discussed above: they are different types of schools subject to different regulatory regimes and tradeoffs.

For example, it is conceivably rational for the Legislature to decide that public schools, subject to many specific requirements, should have leeway in meeting them. It is a rational tradeoff: much is explicitly required of public schools but, in exchange, schools boards are given broad discretion in meeting those benchmarks. *See* Wis. Stat. § 118.001. There is no requirement to create the same tradeoff for private schools; indeed, by their very nature, private schools are not subject to the same panoply of regulation as public institutions. It follows that the Legislature need not provide them the same leeway in meeting the requirements.

In addition, it is rational to provide that broader discretion to public schools because of the state oversight of them. For example, DPI reviews

complaints or may independently audit a public school to ensure it is meeting the statutory standards, and the superintendent generally may "[s]upervise and inspect the public schools." Wis. Stat. § 115.28(3) (superintendent); Wis. Stat. § 121.02(2) (department). But DPI lacks the same broad oversight powers over private schools and, thus, lacks the same ability to ensure that private schools are meeting certain benchmarks when providing virtual learning.

And, of course, at an even more basic level, public school boards are subject to another kind of oversight: the voters, who elect the board members. In contrast, private school boards are not elected public positions. This different oversight is yet another rational reason for treating the types of entities differently.

Further, and relatedly, the different public school statutory scheme has built-in mechanisms that limit what public schools may do. For example, public schools must meet the 20 standards in Wis. Stat. § 121.02, regardless whether a school day is held "virtually." Those standards are inherently limiting: public schools must meet them, and so cannot use "virtual" learning in boundless ways. However, that would be less true of choice schools because those schools are not subject to the same statutory constraints. By virtue of the different statutory regimes, it is rational to conclude that choice schools' use of virtual learning runs the risk of being less constrained because it is subject to fewer state regulations.

These examples—any one of which is sufficient under rational basis—go to show that the equal protection claim has no substance. Much less can SCWA meet its burden to "negate every conceivable basis which might support" the classifications. *Brown*, 341 Wis. 2d 449, ¶ 38. It does not even attempt to. Because public schools have a panoply of state-overseen standards, and are statutorily entitled to flexibility in meeting their standards, it makes sense that administrative rules reflect that. The fact that SCWA disagrees with that analysis is not an equal protection issue but rather a statutory interpretation one.

This Court should reject SCWA's constitutional challenge and enter summary judgment for DPI.

CONCLUSION

This Court should grant DPI's motion for summary judgment on all claims, and deny SCWA's motion.

Dated this 23rd day of August, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the above *Response to Motion for Summary Judgment and Brief In Support of Motion for Summary Judgment* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of August, 2019.

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