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 RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case is about the unlawful regulatory actions of a state agency - the Department of Public Instruction ("DPI"). DPI has exercised its authority to interpret several of the statutes which it administers, but DPI has exercised that power without going through the statutorily mandated rule promulgation process. DPI refuses to follow the rules when it is making the rules.

DPI admits all of the following facts in its own pleadings:

1. Public schools, virtual charter schools and choice schools all have the identical statutory requirement for hours of "direct pupil instruction" (1,050 hours in grades 1 to 6 and 1,137 hours in grades 7 to 12. (DPI Br. at 4, 6.)

2. Although the same term – "direct pupil instruction" - is used in the statutes applicable to traditional public schools (Wis. Stat. § 121.02(1)(f)), virtual charter schools[1] (Wis. Stat. § 118.40(8)(d)(2)) and choice schools (Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8), nowhere in the Wisconsin Statutes is the term "direct pupil instruction" defined. (DPI Br. at 19.)

3. DPI is vested with the authority to interpret each of the statutes identified in paragraph 2 above which contain the term "direct pupil instruction." (DPI Br. at 11.)

4. DPI has promulgated an administrative rule found at PI 8.01(2)(f) interpreting the term "direct pupil instruction" to allow public schools to use virtual learning (meaning that the teacher and the pupil do not need to be in the same physical space) to satisfy the statutory hours requirement for "direct pupil instruction." (DPI Br. at 22.)

5. The Wisconsin Legislature has interpreted the term "direct pupil instruction" to include virtual learning for virtual charter schools because it promulgated a statute that allows "all or a portion of the instruction [to be] provided through the Internet, and the pupils enrolled in and instructional staff employed by the school are geographically remote from each other." Wis. Stat. § 115.001(16) (cited in DPI Br. at 4.)

6. DPI provided written notice to all private schools participating in the Wisconsin parental choice programs ("Choice Schools") that, based upon DPI's interpretation of 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 and 118.60(2)(a)8." (DPI Br. at 8.)

7. DPI's written notice to Choice Schools described in paragraph 6 above constituted an interpretation of the relevant statutes. (Complaint ¶ 29, Answer ¶ 29.)

Based on these undisputed facts, two things are abundantly clear: (1) DPI's interpretation of the statutory term "direct pupil instruction" as it applies to Choice Schools is an unpromulgated rule, and (2) DPI has interpreted those same words to mean both that "direct pupil instruction" includes virtual learning (for public schools) and that it does not include virtual learning (for Choice Schools). DPI's conduct is illegal.

[1] DPI acknowledges that virtual charter schools are also public schools. (DPI Br. at 4.)

I. DPI's February, 2019 Interpretation of "Direct Pupil Instruction" as Applied to Choice Schools is Unlawful because it was not Promulgated through the Rulemaking Process.

Wisconsin law requires that when a state agency interprets a statute within the agency's purview, the agency must do so through the rule-making process. Wis. Stat. § 227.10(1). That section of the statutes specifically states 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." (Emphasis added.) The word "shall" is mandatory, not permissive. *State ex rel. Dep't of Nat. Res. v. Wisconsin Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 13, n. 7, 380 Wis. 2d 354, 367–68, 909 N.W.2d 114 (The general rule is that the word "shall" is presumed mandatory when it appears in a statute.).

DPI admits that its February 5 and February 28, 2019, communications to Choice Schools informing them that they could not use virtual learning to satisfy the requirement for hours of "direct pupil instruction" constituted an interpretation of the relevant statutes. (Complaint ¶ 29, Answer ¶ 29.) However, DPI did not make this interpretation through the rulemaking process.

In its defense, DPI argues that: (1) the question as to whether its interpretation of the statute had to be done by rule is not a question that this Court has to answer and (2) it cannot be the case that it has to promulgate a rule every time it answers a question from the public. But DPI's arguments both miss the points as raised by the Plaintiff.

A. The Question of Whether DPI's Interpretation of Statutes which it Administers Must be Accomplished Through Rule-Making is Central to this Case.

Whether Wisconsin agencies must set forth their interpretations of state statutes by way of promulgated rules is the lead issue in this case. It is the **first** claim in the complaint. It was the **first** issue addressed in the Plaintiff's summary judgment brief. It is a **mandate** by the state legislature as the legislature attempts to rein in the administrative bureaucracy. Wis. Stat. § 227.40(4)(a)

specifically provides that, "the court **shall** declare [a] rule invalid if it finds that it . . . was promulgated without compliance with statutory rule-making procedures." (Emphasis added.).

This mandate means that courts must hold agencies accountable when they do things like the DPI did here – interpret the same statutory words to mean two different things – and attempt to avoid the consequence of that action by making one of the interpretations outside the rule-making process.

Here, DPI knew that it needed to go through the rulemaking process for an interpretation of the term "direct pupil instruction." After all, it went through that process in order to promulgate PI 8.01(2)(f) for public schools.

Why did DPI promulgate PI 8.01(2)(f) as a rule? Couldn't it have just responded to an inquiry from a public school asking the question and not gone through the rule-making process as it did in the context of Choice Schools? The answer, of course, is "no." DPI is the agency charged with administering and implementing each of the statutes involved - Wis. Stat. §§ 118.60(a)(2)8, 119.23(a)(2)8 and 121.02(1)(f). As part of its statutory duties, DPI was and is obligated to promulgate its interpretations of any part of those statutes as a rule, and it cannot avoid that duty simply by saying, "but we were just answering an inquiry from the public."

DPI could just as easily (and much more appropriately) have responded to an inquiry from a specific school by telling the school the following: "The words 'direct pupil instruction' are not defined in the statute. We do not have a rule in place for private schools so we cannot tell you what you can and cannot do on this issue. We do have a rule that interprets that term for public schools and allows them to use virtual learning. We will be happy to work with you toward a rule that clarifies this for private schools as well." This route would have been responsive, helpful and most importantly, legal.

But DPI did not go this route. Instead, after receiving inquiries from some schools and from School Choice Wisconsin Action ("SCWA") (the Plaintiff herein), DPI sent a written notice to all Choice Schools (whether they had asked a question on the subject or not) stating "Under state law, Choice schools may not count instruction provided through the Internet between students and teachers geographically remote from each other as hours of instruction for purposes of Wis. Stat. ss. 119.23(2)(a)8. or 118.60(2)(a)8." (Brown Aff. Ex. A.)

As shown below, this statement by DPI has all the attributes of an administrative rule, but DPI announced the rule without going through the statutorily mandated rulemaking process. This Court should require DPI to follow the rules mandated by the state legislature when DPI uses the authority delegated by the legislature to make rules. *See Koschkee v. Taylor*, 2019 WI 76, ¶ 39, 387 Wis.2d 552, 575, 929 N.W.2d 600, 611 ("Rulemaking is a legislative delegation to the SPI.")

B. DPI's February, 2019 Legal Interpretation of the Relevant Statutes is an Unpromulgated Rule and, Therefore, Void.

DPI set forth its legal interpretation of the statutes and did so by way of a command to all Choice Schools ("Under state law, Choice schools may not count instruction provided through the Internet between students and teachers geographically remote from each other as hours of instruction for purposes of Wis. Stat. ss. 119.23(2)(a)8. or 118.60(2)(a)8." (Brown Aff. Ex. A.)). DPI announced that under its interpretation of the statutes, Choice Schools were barred from counting virtual learning as hours of direct pupil instruction. Moreover, 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 Wis. Stat. §§ 118.60 and 119.23 respectively, including the hours of instruction requirement. Thus, this statement of policy by DPI had the force of law as it impacted Choice Schools. If they did not comply with DPI's pronouncement, DPI had the legal power to withhold money owed to them by the State of Wisconsin.

DPI now says that its legal interpretation of the statutes was not a rule based on an exception to the rulemaking requirement contained in Wis. Stat. § 227.10(1), which DPI says provides that "the 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." (DPI Br. at 15.) But DPI does not quote the entire statute.

The statute actually says "***A statement of policy or an interpretation of a statute made in the decision of a contested case, in a private letter ruling under s. 73.035 or in an agency decision upon or*** 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." (The bold and italicized language was not included in DPI's quotation of the statute in its brief.) DPI's truncated quotation of the statute is misleading. When the complete language in the statute is included the meaning of that part of the statute becomes clear.[2] When an agency is dealing with contested cases of various sorts, its decisions do not need to be promulgated as rules.

Moreover, DPI was not dealing with a specific set of facts for an individual school. It sent its February 5, 2019, statement to all Choice Schools whether they asked about the situation or not and without regard to the facts of any particular situation at any particular school. DPI's pronouncement was a statement of general policy and an interpretation of the relevant statute applicable to all Choice Schools in the State of Wisconsin.

SCWA agrees with DPI that whether DPI's notice to Choice Schools is a rule is determined by the five factor test set forth in *Cholvin v. Wisconsin Dep't of Health & Family Servs.*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 760–61, 758 N.W.2d 118, 124. (DPI Br. at 14.) Those five factors

[2] Reading the last part of the statute in light of the first part would be appropriate under both *noscitur a sociis* (associated words bear on one another's meaning) and *esjudem generis* (where general words follow as an enumeration of two or more things, they apply only to things of the same general kind or class). The English language version of these two doctrines would be "birds of a feather, flock together."

are 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.

DPI's action here easily meets each of the five factors. *First*, DPI has adopted a statement of policy. DPI stated 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. Ex. A.). There is no way to read this other than as a statement of policy.

Second, DPI's policy is one of general application. It was sent to, and is applicable to, all Choice schools in the state of Wisconsin.

Third, it has the effect of law. Agency action has the "effect of law" where criminal or civil sanctions can result from a violation; where licensure can be denied; and where the interest of individuals in a class can be legally affected through enforcement of the agency action. *See generally Wisconsin Elec. Power Co. v. DNR*, 93 Wis.2d 222, 287 N.W.2d 113 (1980). Here, 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, there is a monetary sanction that can be imposed on Choice Schools by DPI that gives the DPI interpretation of the statutes the effect of law.

Fourth, DPI is an agency of the State of Wisconsin. *See* Wis. Stat. § 15.37 ("There is created a department of public instruction under the direction and supervision of the state superintendent of public instruction."). And it is undisputed that the policy here was "issued by" DPI.

Fifth, DPI took the action to implement, interpret or make specific legislation enforced or administered by such agency. It is undisputed, both that DPI has interpreted the statutory requirement for hours of "direct pupil instruction" as used in Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8, and that those statutes are administered by DPI.

As a final point, DPI relies upon *Schoolway Transp. Co.., Inc. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 240 N.W. 2d 403 (1976), to attempt to support its position (DPI Br. 16-17), but that case actually directly undercuts DPI's argument herein. *Schoolway* involved two different issues relevant to this case. The first was whether the Department of Motor Vehicles ("DMV") could change its interpretation of a statute without passing a rule, if its previous interpretation was clearly erroneous and inconsistent with the statute. The Court held that the DMV could do so because it had the legal duty to comply with the statutes. This is the part of the decision relied upon by DPI herein but it has nothing to do with this case.

This part of *Schoolway* would only be on point if DPI were saying that its previous interpretation of "direct pupil instruction" – the one allowing public schools to use virtual learning to comply with the hours requirement – was clearly erroneous and inconsistent with the statute and, as a result, DPI was changing it. DPI, however, is not making any such argument.

The second issue in *Schoolway* was a different change in interpretation by DMV of a different statute. With respect to this second statute, DMV did not contend and the Court did not find that DMV's prior interpretation of the statute was clearly erroneous and inconsistent with the statute. Instead, DMV was administering an ambiguous statute and it changed its mind about the proper interpretation. Under these circumstances the Supreme Court held that when the agency announced its new interpretation the agency was engaging in administrative rule making and that its failure to comply with the rule-making process rendered the unpromulgated rule invalid.

Schoolway, 72 Wis. 2d at 237, 240 N.W.2d at 410. This part of *Schoolway* directly undercuts DPI's arguments herein.

DPI's position here would completely undercut the command of Wis. Stat. § 227.40(4)(a). It says, essentially, that it may interpret a statute in the guise of "answering" a question and then send that interpretation to the entire regulated community clearly communicating that it expects compliance with the interpretation and that it may do so without complying with any of the safeguards and requirements for public participation that accompany rule-making. This exception to the mandate of sec. 227.04(4)(a) would swallow the requirement that agencies make rules if they wish to adopt generally applicable interpretations of the law.

DPI's statement of policy and interpretation of the statutes in this case is a "rule." Under Wisconsin law, each agency must promulgate as a rule each interpretation of a statute which it adopts to govern its enforcement or administration of a statute. Wis. Stat. § 227.10(1). Further, under Wisconsin law, the courts shall declare a rule invalid if it is not promulgated under the Chapter 227 rulemaking process. Wis. Stat. § 227.40(4)(a).

Declaring DPI's policy a "rule" and invalidating it because it was not promulgated as required by state law is a key element of SCWA's action. It is a necessary step to reign in the administrative bureaucracy and to require agencies to follow the rules when they make the rules.

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

DPI agrees that "[t]his case turns on statutory interpretation" (DPI Br. at 18) but nowhere in its brief does DPI set forth its actual interpretation of the relevant statutes. DPI never says in its brief what "direct pupil instruction" means.

DPI does assert that "direct pupil instruction" means something different each time the identical term is used by the legislature but it is never specific about any of the actual definitions

or how it arrived at those definitions. Reading between the lines, it is DPI's position that in Wis. Stats. § 121.02(1)(f) (applicable to traditional public schools[3]) "direct pupil instruction" includes virtual learning[4], but in footnote 1 at page 2 of its brief, DPI says that virtual learning in traditional public schools is not unlimited. So, for traditional public schools, DPI's position is that "direct pupil instruction" means that the teacher and the pupil must sometimes but not always be in the same physical place.

In Wis. Stat. § 118.40(8) (which applies to virtual charter schools) the term "direct pupil instruction" also includes virtual learning because by their very nature, all learning at virtual charter schools is "virtual learning" (thus, the name *virtual* charter schools). Moreover, as DPI points out, per Wis. Stat. § 115.001(16), for virtual charter schools, all instruction may be through the internet. Thus, for virtual charter schools, DPI's position is that "direct pupil instruction" means that the teacher and the pupil never need to be in the same physical place.

But in Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8 (which apply to Choice Schools) DPI's position is that "direct pupil instruction" does not include virtual learning. Thus, for Choice Schools, DPI's position is that "direct pupil instruction" means that the teacher and the pupil must always be in the same physical space.

How can this identical term used in the identical context in identical statutes mean three different things? DPI says it is because private schools are different than public schools. Of course, that argument begs the question in multiple ways. What is so different about public and private schools that would lead to the conclusion that when the legislature imposed the identical requirement of 1,050 hours of direct pupil instruction in grades 1 to 6 and 1,137 hours in grades 7

[3] In this context "traditional public schools" means public schools that are not virtual charter schools (which are also a form of public school).
[4] See, Wis. Admin. Code § PI 8.01.

to 12 on traditional public schools, virtual charter schools and choice schools that sometimes the legislature meant that the teacher and pupil had to be in the same physical space and sometimes it meant that they did not?

DPI says that this Court should draw that conclusion from the fact that public schools are more heavily regulated than private schools but that there is also a provision in Wis. Stat. § 118.001 that "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 …." (DPI Br. at 3, 19) DPI says that this language means that public schools are actually less regulated than private schools and that a public school board can pretty much do whatever it wants.

To say that this argument by DPI goes too far would be an understatement. As DPI, itself, notes, public schools are heavily regulated in the State of Wisconsin. DPI, for example, points to Wis. Stat. § 121.02 which creates a variety of regulations and requirements on public school teachers, curriculum and standards which are not applicable to private schools. (DPI Br. at 3). Private schools have much more flexibility and discretion under state law with respect to their standards and curriculum and must only comply with the minimal criteria set forth in Wis. Stat. §118.165, i.e., provide "a sequentially progressive curricula of fundamental instruction in reading, language, arts, mathematics, social studies, science and health."

Moreover, the very nature of the choice program is premised on allowing students to attend schools that operate outside of the heavily regulated public school environment. That is, Choice Schools by their nature have more flexibility than their public school counterparts which are subject to the oversight of an elected school board.

The statutes which created the choice program expressly allow Choice Schools flexibility, and prohibit DPI from imposing burdensome regulations on those schools. For example, the

statutes require Choice Schools to achieve accreditation, but gives Choice schools the flexibility to select their accreditor. *See* Wis. Stat. § 119.23(2)(a)7. Choice Schools must have policies on certain statutorily required subjects but the substance of the policies are determined by the school. *See* Wis. Stat. § 119.23(6m). As private schools, the curriculum of Choice Schools are subject only to the minimal criteria set forth in Wis. Stat. §118.165, i.e., to provide "a sequentially progressive curricula of fundamental instruction in reading, language, arts, mathematics, social studies, science and health."

DPI wants to take this regulatory disparity in favor of private schools and flip it on its head and say that the intent of the legislature is to actually grant more flexibility and discretion to public schools and less to private schools, but DPI cites no case law to support this flip-flop and the actual language in Wis. Stat. §118.001 does not help DPI.

Once again, when DPI quotes the statute (at pages 3 and 19 of its brief) DPI fails to quote the entire Wis. Stat. §118.001 statute. The full statutory language states that "[t]he 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**, if the action is not prohibited by the laws of the federal government or by this state.**" DPI does not cite the bolded language when it quotes the statute at pages 3 and 19 of its brief, but the omitted language is important. Reading the full language of the statute leads to the conclusion that a school board's powers are broadly construed but only so long as their action is not prohibited by law. That provision does not and cannot change the meaning of "direct pupil instruction" or the legal requirement that public schools (including virtual charter schools) provide 1,050 hours of direct pupil instruction in grades 1 to 6 and 1,137 hours in grades 7 to 12. If direct pupil instruction means

that the teacher and the pupil must be in the same physical space, then a school board's action to the contrary would be prohibited by law.

The term "direct pupil instruction" is used in the identical context in each instance (whether for traditional public schools, virtual charter schools or choice school) and it either includes virtual learning or it does not. If it does not then PI 8.01 (which concludes to the contrary) is unlawful. If it does include 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. See, *Seider v. O'Connell*, 2000 WI 76, ¶ 26, 236 Wis. 2d 211, 612 N.W.2d 659, 666 (an administrative rule that conflicts with a statute is a "mere nullity").

In determining whether the term "direct pupil instruction" includes virtual learning the Court need simply apply standard methods of statutory construction. "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." *State ex rel. Kalal v. Circuit Court for Dane Cty*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110, *citing Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis.2d 633, 660 N.W.2d 656; *see also* Wis. Stat. § 990.01(1). "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.* at ¶ 46 (internal citation omitted).

The statutory interpretation doctrine of *in pari materia* is useful here. That doctrine requires that laws dealing with the same subject matter be interpreted harmoniously. "The statutory construction doctrine of *in pari materia* requires a court to read, apply, and construe statutes

relating to the same subject matter together." *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶ 30, n.6, 381 Wis. 2d 732, 744, 914 N.W.2d 631, *citing In re Jeremiah C.*, 2003 WI App 40, ¶ 17, 260 Wis. 2d 359, 659 N.W.2d 193.

"When the same term is used throughout a chapter of the statutes, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears." *Winebow*, 2018 WI 60, ¶29, *citing Bank Mut. v. S.J. Boyer Const., Inc.*, 2010 WI 74, ¶ 31, 326 Wis. 2d 521, 785 N.W.2d 462. In this case, that means that the term "direct pupil instruction" possesses the identical meaning each time it is used and the fact that it includes virtual learning for traditional public schools and for virtual charter schools leads to the inevitable conclusion that it does so for Choice Schools as well.

DPI argues that because Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8 both state that Choice schools may count no more than 140 hours of work-based learning towards their instructional hours requirement that this means the Legislature intended Choice Schools to have less flexibility than public schools with respect to direct pupil instruction (DPI Br. at 24-25) but DPI misapprehends the legislative scheme at work with respect to work-based learning.

Per Wis. Stat. § 118.56 both public schools and private schools may create a work-based learning program for pupils in grades 9 to 12, but under the language of the "direct pupil instruction" requirement statutes only Choice Schools may count any of the hours in a work-based learning program towards the hours requirement for direct pupil instruction. As DPI acknowledges, under the statute, Choice Schools may count up to 140 hours of work-based learning towards their direct pupil instruction requirement. But the statute does not explicitly provide that authority to public schools.

This can be seen by reading Wis. Stat. § 118.56(1) in conjunction with §§ 118.60(2)(a)8 and 119.23(2)(a)8. Section 118.56 provides that "[h]ours that fulfill the work requirements under this subsection shall be counted as hours of direct pupil instruction, as provided under §§ 118.60 (2)(a)8. and 119.23 (2)(a)8." As we know, §§ 118.60(2)(a)8 and 119.23(2)(a)8 apply to Choice Schools but not to public schools and allow Choice Schools to use up to 140 hours of work based learning towards the hours requirement. But there is no similar provision in §118.56 which explicitly allows public schools to count any hours of work based learning to their hours requirement under § 121.02(1)(f). Thus, again, Choice Schools, as private schools, are granted more flexibility by the legislature than public schools, not less.

Moreover, the fact that the legislature has expressly allowed Choice schools to implement work-based learning programs to meet the hours requirement of "direct pupil instruction" is additional evidence that the legislature intended that Choice Schools could meet the hours requirement for "direct pupil instruction" through methods other than the simple, traditional model of classroom instruction with a teacher and a pupil present in the same physical space.

Finally, DPI also claims that "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." (DPI. Br. at 25).[5] The introduction of this bill, DPI claims, is an acknowledgement by the legislature that this issue should be resolved by a statutory change rather than in the courts. That is an incorrect and improper interpretation of legislative intent.

First, DPI points to a bill that has been proposed by 15 (out of 99) members of the Assembly and 6 (out of 33) members of the Senate. *See* 2019-2020 Wisconsin Legislature, Assembly Bill

[5] DPI cites Brown Aff. Exs B & C as the source of this bill but neither bill was an exhibit to Mr. Brown's affidavit. However, the bill is publicly available on the Legislature's website, as noted *infra*.

129, *available at* https://docs.legis.wisconsin.gov/2019/proposals/ab129 and Senate Bill 111, *available at* https://docs.legis.wisconsin.gov/2019/proposals/sb111. Such a proposed bill is a long way from expressing the intent of the Legislature. There is no basis to know if the bill will be adopted by either house of the Legislature much less signed by the Governor to become law.

Second, as Senator Kooyenga, the lead Senate author of the bill, pointed out in his written statement in favor of the bill, it is DPI's discrimination against Choice Schools that was the reason for the bill in the first place. Senator Kooyenga pointed out that DPI is permitting public schools to use virtual instruction but denying the same opportunity to private schools. *See* Wisconsin Legislative Council, LC Bill Hearing Materials for AB 129 on 4/18/2019, *available at* https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2019/ab129/ab0129_2019_04_18.pdf. It was DPI's unfairness that led to the proposed bill in the first place. It is odd for DPI to argue that a legislative attempt to correct the injustice caused by DPI is an argument to deny a judicial resolution to correct the same injustice.

Here's the bottom line. Just like a public school board, the governing body of a private school in the choice programs certainly can take "any action" not prohibited by law. That it is not subject to as many regulatory requirements as public schools may be seen by DPI as a "bug" that it must "fix" by interpreting identical statutory language in a way that is less favorable to private schools. The legislature saw it as a "feature" that allowed greater diversity of educational opportunity and enhanced family choice. DPI may not like the legislature's policy choice. But it is bound by it.

III. DPI's Interpretation of Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8 Violated the Rights of Choice Schools to Equal Protection Under the Wisconsin Constitution.

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. 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.

DPI argues that SCWA's equal protection argument case fails because public schools and Choice Schools are not substantially similar and because DPI has a rational basis for treating them differently, but DPI is wrong on both parts of its argument.

First, DPI cannot show that there is a difference between the two types of schools that makes a difference. If anything, as pointed out *supra*, whatever differences exist cut in favor of more flexibility for private schools, not less.

Second, 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). Here, there is no legitimate government interest in denying Choice Schools the opportunity to use virtual learning in the same way as public schools. It is an impossible lift for DPI to show a legitimate state interest on its side of the argument, given that the state legislature (the source of policy-making under the Wisconsin Constitution) imposed the identical hours of operation for direct pupil instruction on both public schools and Choice Schools.

Conclusion

For the reasons set forth herein and in SCWA's Original Brief in support of its Motion for Summary Judgment, SCWA requests that this Court grant SCWA's summary judgment motion and deny Defendant's summary judgment motion. More specifically, 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 constitute an unpromulgated rule and are, therefore, 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, statements of policy.

Dated this 20th day of September, 2019.

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