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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns whether the choice school statutes permit "virtual" make-up-time instruction. To determine if they do, the Court should examine the statutes in context and give every provision effect. That means this Court, like DPI, must give effect to the different statutory mandates for public and choice schools. While the Legislature states in Wis. Stat. § 118.001 that public schools have broad discretion when meeting standards unless prohibited by law, it has not vested the same discretion in private choice schools. DPI gives effect to that statutory difference, while SCWA does not.

SCWA also continues with a rulemaking argument that remains unworkable. It agrees that this Court should decide what the statutes mean but, at the same time, it argues that the Court should somehow "invalidate" a letter. That request does not make sense and, likewise, is not contemplated by the statutes.

ARGUMENT

I. The rulemaking challenge lacks a practical or legal basis.

A. The correspondence from DPI was not rulemaking for multiple reasons.

SCWA continues to take the position that, by responding to its letter, DPI engaged in unlawful rulemaking. There are multiple reasons why that is incorrect.

First, it is unreasonable. Government cannot function coherently if it cannot respond to letters asking questions of it at the risk of engaging in rulemaking. SCWA's view would encourage agencies to ignore the public's inquiries. That unreasonable interpretation cannot be correct. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (holding that statutes must be interpreted "reasonably, to avoid absurd or unreasonable results").

Second, SCWA contradicts itself. It first asked DPI to adopt its view of virtual learning in choice schools. It was only after DPI explained that it lacked

authority that SCWA argued DPI was rulemaking. However, rulemaking obligations cannot turn on whether SCWA liked the answer it received. Further, SCWA's position essentially would require rulemaking in the negative. DPI's response to SCWA said it "does not have authority under statute or rule." (R. 19:6.) Agencies promulgate rules to carry out their affirmative duties, not to list the various ways in which they lack authority.

Third, there are other statutory reasons why SCWA's view is unworkable, which DPI discussed in its first brief. (DPI Br. 12–17.) Most simply, to even begin a rulemaking analysis, an agency must have "issued" a standard with "the force of law." Wis. Stat. § 227.01(13) (defining "rule"). A response to a question is not a standard "issued" to have the "force of law" and, indeed, does not have the force of law.[1] Likewise, a letter is not amenable to being "declared invalid," as SCWA would have it. (SCWA Br. 9.) With or without a letter, DPI is required to continue operating under its statutory authority and mandates.[2]

---

[1] SCWA points out that the first DPI correspondence went to a group (SCWA Br. 5), but that does not change the nature of it. Rather, as the message states, multiple choice schools asked the same question, and the distribution was simply a way to ensure the response was received by anyone interested. (R. 5:19 (Brown Aff. Ex. A).)

[2] The topic also is irrelevant. The parties ultimately agree that this Court should decide what the statutes mean, and that its interpretation is what matters to what DPI may do: "[C]ourts, rather than administrative agencies, will decide questions of law." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 93, 382 Wis. 2d 496, 914 N.W.2d 21.

B. SCWA's arguments do not show otherwise.

SCWA's arguments do not account for these larger considerations. For example, it quotes part of a statute that says an agency "shall promulgate as a rule . . . each interpretation of statute which it specifically adopts." (SCWA Br. 3 (quoting Wis. Stat. § 227.10(1)).) However, that statutory language does not exist in isolation. Rather, the term "rule" used in that sentence is defined as pertaining only to "a regulation, standard, statement of policy, or general order . . . *that has the effect of law* and that is issued by an agency to implement . . . legislation." Wis. Stat. § 227.01(13). Thus, only standards "issued by an agency" to implement legislation that have "the effect of law" must be "promulgate[d] as a rule." Wis. Stat. §§ 227.01(13), 227.10(1). The letter here is none of those things.[3]

SCWA argues that the exception to rulemaking for decisions in a "particular matter" should not apply here. (SCWA Br. 6 (citing Wis. Stat. § 227.10(1)).) But that exception does not even come into play because, as a threshold matter, the letters do not fit the definition of a "rule" in Wis. Stat. § 227.01(13). No exception is required when that threshold is missing.

[3] Other aspects of SCWA's argument also are flawed. For example, it asserts that DPI issued an interpretation of "direct pupil instruction" with its letters (SCWA Br. 8), but those letters do not use the term, much less do they state a definitive interpretation of it.

And, in any event, SCWA misreads the particular-matter exception. SCWA asserts that only "contested cases" or the like are covered by it (SCWA Br. 6), but the exception contains a list connected by "or": "A statement of policy or an interpretation of a statute made in the decision of a contested case . . . *or* in an agency decision upon or disposition of a particular matter as applied to a specific set of facts . . . ." Wis. Stat. § 227.10(1). Here, DPI was asked to address a specific set of circumstances and responded.

SCWA also argues that the *Schoolway* case supports its position, but that argument is flawed, too. *Schoolway* states a common law rule that would come into play only if the chapter 227 statutes did not resolve the issue. Here, as discussed, the DPI letters do not fit the statutory definition of a rule. *Schoolway* cannot change that. Further, *Schoolway* supports DPI, anyway. The case sensibly recognizes that agencies need not promulgate rules to simply carry out a statute. Rather, agencies just "administer the statute according to its plain terms" without needing to promulgate rules. *Schoolway Transp. Co. v. DMV*, 72 Wis. 2d 223, 236, 240 N.W.2d 403 (1976). Here, the choice school statutes say nothing about virtual learning. And *Schoolway* of course does not require an agency to promulgate rules stating what authority it *lacks*.

Finally, SCWA more generally asserts that this Court needs to "hold agencies accountable." (SCWA Br. 4.) This argument also is misplaced. Rather, the Court will be holding everyone accountable when interpreting the school

choice law and declaring what it means. *See Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 93, 382 Wis. 2d 496, 914 N.W.2d 21.

In the course of its argument, SCWA hypothesizes that DPI could "withhold funds from a Choice School." (SCWA Br. 5.) However, DPI's letters do not threaten that—again, they do not have the force of law. And, if DPI actually did issue a decision withholding funds from a particular school, and arguably did so incorrectly, then the school would be free to challenge *that decision*. (SCWA Br. 7.) Notably, the statutes have a *separate* mechanism to challenge particular agency decisions: under Wis. Stat. §§ 227.52–.53, which governs judicial review of final agency decisions.

Where, as here, a plaintiff wishes to adjudicate the meaning of a statute, then it simply brings an ordinary declaratory action about the meaning of the statute. That is what SCWA has done in Claim II of this lawsuit, and that is the only bona fide claim. For these reasons and those discussed in DPI's first brief, the rulemaking challenge should be rejected.

II. DPI's interpretation properly applies the statutes in context and gives effect to every provision, as required by the rules of construction.

This case turns on statutory construction, and SCWA's argument violates two cardinal rules of it. First, "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, second,

"[s]tatutory language is read where possible to give reasonable effect to every word." *Kalal*, 271 Wis. 2d 633, ¶ 46.

DPI's approach does both, while SCWA's does neither.

A. DPI's approach to "direct pupil instruction" applies the statutory flexibility mandated for public schools.

As discussed in DPI's first brief, the hours of instruction provisions in the public and choice school statutes do not exist in isolation but rather as part of comprehensive—and separate—statutory schemes. That different context must be taken into account, as must the mandate in Wis. Stat. § 118.001 that applies only to public schools: "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 if the action is not prohibited by the laws of the federal government or this state."

Thus, DPI *must* provide public schools discretion to meet their statutory requirements through "any school board action" that achieves the "comprehensive" aims of the code. The limit is when the action is "prohibited" by state or federal law. Wis. Stat. § 118.001. Here, there is no statutory prohibition on using virtual learning in public schools to address make-up days.

Because DPI must provide public schools that discretion, it has promulgated public-school-specific rules. Wisconsin Admin. Code PI

§ 8.001(6g) is one such example. It allows public schools to use "[i]nnovative instructional design," which is a general term that allows for "an instructional program aligned to school district standards" that may include instruction "virtually, or in an alternative setting." In turn, the regulation governing hours of instruction reflects this statutory and regulatory flexibility. Wisconsin Admin. Code PI § 8.01(2)(f) allows public schools to use "innovative instructional designs" to, for example, virtually make up time when school is cancelled due to "inclement weather."

This also makes sense in the bigger statutory context. As discussed in DPI's first brief, public schools are regulated and audited by public bodies, and they are run by publicly-elected officials. They must conform to benchmarks for licensing, curriculum, course requirements, and instruction. Wis. Stat. §§ 118.01(1), 121.02(1). Those requirements are subject to state oversight. Wis. Stat. § 121.02(2). When a public school engages in virtual learning, it remains accountable in all these ways. The same is not true of private choice schools, which are accredited by outside entities and overseen in fewer ways by public entities. *E.g.*, Wis. Stat. § 118.60(1)(ab), (2)(a)5–6; *see generally* Wis. Stat. §§ 118.60, 119.23, 121.02.

Because the statutory mandate in Wis. Stat. § 118.001 requires it, and context further supports it, DPI correctly applies the "direct pupil instruction" language differently for public schools—allowing flexibility—than for private

choice schools—which are not subject to Wis. Stat. § 118.001. That is why DPI has promulgated different public-school-specific rules; the statutes require it.

B. SCWA's arguments do not come to terms with the statutory differences between public and choice schools.

SCWA argues that DPI has not provided an interpretation of the relevant statutory language "direct pupil instruction." (SCWA Br. 9.) However, that ignores the nature of the statutes here. They grant discretion to public school boards that might take various forms, one of which is "innovative" instruction like virtual learning. *That* is DPI's interpretation: its rules for public schools recognize the statutory leeway, within the bounds of public schools' everyday standards and requirements.

SCWA does not come to terms with this. Rather, its argument is general: that choice schools should be able to use virtual learning because, in other ways, choice schools "have more flexibility." (SCWA Br. 11–12, 15.)[4] That generalized premise is disconnected from the specific statutes. And courts "may not add words to the statute's text." *DWD v. LIRC*, 2017 WI App 68, ¶ 23, 378 Wis. 2d 226, 903 N.W.2d 303.

While choice schools may be less regulated in some respects, they are not given the same flexibility when achieving the standards that do apply. Thus,

[4] For example, SCWA discusses a particular provision related to "work-based" learning. (SCWA Br. 15.) But that provision does not provide choice schools with global flexibility.

when SCWA argues that DPI is "interpreting identical statutory language in a way that is less favorable to private schools," it misses the point. (SCWA Br. 16.) The statutory mandate for public versus choice schools is not identical. SCWA effectively asks this Court to read into the choice school statute the general flexibility found in Wis. Stat. § 118.001, but only the Legislature can make that choice. Its intent must be expressed in the statutes. *See Kalal*, 271 Wis. 2d 633, ¶ 44 ("We assume that the legislature's intent is expressed in the statutory language.").[5]

In a related argument, SCWA contends that a statute governing a particular type of *public* school—virtual charter schools—demonstrates that "direct pupil instruction" includes virtual instruction for choice schools. (SCWA Br. 10.) However, this observation about a type of *public* school does not change the analysis. To the contrary, it confirms that DPI correctly treats public schools differently.

Virtual charter schools are a special type of *public* charter school that, when qualified, may be administered through the Internet. When describing that instruction, the statute provides that "direct pupil instruction" will include "instruction . . . provided through . . . the Internet." Wis. Stat.

[5] At one point, SCWA asserts that this Court may simply read the words "any action" into the choice school statutory framework. (SCWA Br. 16.) However, choice schools are creatures of statute, and a court may "not add words to a statute." *DWD v. LIRC*, 2017 WI App 68, ¶ 23, 378 Wis. 2d 226, 903 N.W.2d 303.

§§ 115.001(16), 118.40(8)(d)2. It specifically cross-references the public school code: virtual charter schools will provide "direct pupil instruction for at least the applicable number of hours *specified in s. 121.02(1)(f)* each school year." Wis. Stat. § 118.40(8)(d)2. Wisconsin Stat. § 121.02(1)(f) contains the "direct pupil instruction" requirement *in the public school code*.

This helps show that DPI is correct. The reference to public school "direct pupil instruction" in the virtual school provision shows that the Legislature left room for virtual learning in *public* schools. But, notably, none of this interacts with the separate choice school provisions. This reinforces, rather than rebuts, that they are treated differently.

SCWA's other arguments run into the same problem. For example, it says it may be relevant to statutory interpretation if a term is used repeatedly "within a statutory chapter." *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶ 29, 381 Wis. 2d 732, 914 N.W.2d 631; (SCWA Br. 14). However, that rule does not help SCWA here. The term in question—direct pupil instruction—is not within the same statutory framework each time it is used, and that difference is key. Rather, its use in Wis. Stat. § 121.02(1)(f), covering public schools, is governed by Wis. Stat. § 118.001's grant of discretion to public school boards. Its use when referring to choice schools is not found in chapter 121 but rather in separate chapters and frameworks. *See* Wis. Stat. §§ 118.60(2)(a)8.

(parental choice program), 119.23(2)(a)8. (Milwaukee parental choice). The "within a statutory chapter" construction rule does not apply.

More generally, SCWA asserts that DPI cannot have it both ways: either all schools may use virtual learning or none may. But this is just a variation on its same flawed premise. It also misreads Wis. Stat. § 118.001—the provision vesting discretion in public schools. (SCWA Br. 12.) Again, that provision states that "[t]he statutory duties and powers of school boards shall be broadly construed to authorize any school board action . . . *if the action is not prohibited* by the laws of the federal government or of this state." Wis. Stat. § 118.001. SCWA seems to read the words "not prohibited" as requiring *affirmative* statutory authority to use virtual learning. (SCWA Br. 12.) But that is not what the statute says. "Prohibit" means "[t]o forbid by law." *Prohibit*, Black's Law Dictionary (11th ed. 2019). SCWA points to nothing that *forbids* public schools from using virtual learning. Thus, the authority in Wis. Stat. § 118.001 remains relevant and supports treating public schools differently.

A final contention by SCWA merits clarification. At one point, SCWA appears to question the validity of the existing rule covering public schools—Wis. Admin. Code PI § 8.01(2)(f)—in the context of arguing that virtual learning should be all or nothing. (SCWA Br. 13.) However, there is no challenge to the validity of PI 8.01 in this case. SCWA may not challenge the

rule without both pleading that specific challenge and serving the Legislature's JCRAR with it. *See Liberty Homes, Inc. v. DILHR*, 136 Wis. 2d 368, 377, 401 N.W.2d 805 (1987) (holding that a petitioner in a declaratory rule challenge must clearly state the type of challenge being made in its pleadings); *Kruczek v. DWD*, 2005 WI App 12, ¶ 46, 278 Wis. 2d 563, 692 N.W.2d 286 (explaining that JCRAR must be served with a challenge to a rule "within sixty days after the filing of the complaint" or else the court lacks jurisdiction over the claim); Wis. Stat. § 227.40(5). In fact, not only was no such claim pled, but SCWA actually pled the opposite: that PI 8.01 is valid. (Compl. ¶ 26.)

In sum, a complete analysis must include context and give effect to the statutory language, including Wis. Stat. § 118.001. Only DPI's analysis does that.

III. SCWA essentially abandons its equal protection claim.

DPI argued in its first brief that an equal protection claim is subject to rational basis review, which requires the challenger to negate any possible basis for it. (DPI Br. 28 (citing *Brown v. DCF*, 2012 WI App 61, ¶ 38, 341 Wis. 2d 449, 819 N.W.2d 827).) SCWA's one-page response does not attempt to do that, meaning it has essentially abandoned its claim. Just generally asserting "[t]here is no viable distinction" is not the same thing as demonstrating it. (SCWA Br. 16–17.)

As DPI specifically explained in its first brief, public schools and private choice schools are regulated differently in many ways—they simply are not similarly situated. (DPI Br. 28–30.) Public schools must meet a host of standards that are subject to state oversight; private choice schools are not subject to the same benchmarks and oversight, but they still are regulated in other ways. Each statutory scheme has different tradeoffs, which are not amenable to an equal protection analysis. And, even if they were, it is rational to treat the different school systems differently. For example, it is rational to give more leeway to public schools in some ways when, based on other statutes, those schools always are required to meet a host of benchmarks. That dynamic creates an inherent limit on how far public schools may go with virtual learning and also creates an established system of accountability when they do use it. The same give-and-take is not present for private choice schools.

SCWA's saying it is an "impossible lift for DPI" misses the point. It is not DPI's burden to carry. *Brown*, 341 Wis. 2d 449, ¶ 38. SCWA offers no response to DPI's reasons given in the first brief (DPI Br. 30–32), much less does it affirmatively demonstrate, as it must, that there is no conceivable rational basis.

CONCLUSION

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

Dated this 4th day of October, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Anthony D. Russomanno

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2238 (ADR)
(608) 264-6365 (KZK)
(608) 267-2223 (Fax)
russomannoad@doj.state.wi.us
keckhaverkz@doj.state.wi.us

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed *Defendants' Reply In Support of Their 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 4th day of October, 2019.

Electronically signed by:

s/ Anthony D. Russomanno
ANTHONY D. RUSSOMANNO
Assistant Attorney General