

STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

WISCONSIN INSTITUTE
FOR LAW & LIBERTY, INC.,
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202,

and

LEAH BUCHMAN,
2020 Sunny Lane
Eau Claire, WI 54703,

Petitioners,

v.

EAU CLAIRE AREA SCHOOL DISTRICT,
500 Main Street
Eau Claire, WI 54701,

Respondent.

Petition for
Writ of Mandamus
Case Code: 30952
Case No. 23-CV-

PETITION FOR WRIT OF MANDAMUS

This is an action to enforce Wisconsin's Public Records Law, Wis. Stat. §§ 19.31–19.39. The law in Wisconsin provides that citizens requesting information from public officials are presumptively entitled to complete access to the records of their state and local governments.

Petitioners Wisconsin Institute for Law & Liberty and Leah Buchman hereby petition this Court for a writ of mandamus directing the Eau Claire Area School District (the “District”) to produce a record they have requested. In support of this request, Petitioners allege:

1. Petitioner Wisconsin Institute for Law & Liberty, Inc. (“WILL”) is a non-stock corporation incorporated under the laws of the State of Wisconsin. It is located at 330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202.

2. WILL advances the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society through litigation, education, and participation in public discourse.

3. In addition, WILL advocates for reforms to Wisconsin’s K-12 educational system to improve student proficiency and academic outcomes, and to empower parents of students to participate in the academic process for their children.

4. Petitioner Leah Buchman resides at 2020 Sunny Lane, Eau Claire, WI 54703. She is a parent of four children in the Eau Claire Area School District, including one in Sam Davey Elementary School, two at Northstar Middle School and one at North High School.

5. Respondent Eau Claire Area School District is a public school district organized under the laws of the State of Wisconsin. The District is headquartered at 500 Main Street, Eau Claire, WI 54701.

6. The District is a “local . . . public body corporate and politic” for purposes of Wis. Stat. § 19.32(1). The District is therefore an “Authority” as defined in that statute.

7. This Court has jurisdiction to hear this matter pursuant to Wis. Stat. § 19.37(1)(a), which provides requesters with a private right of action for writ of mandamus “to order release of the record.”

8. Venue is proper in this county under Wis. Stat. § 801.50(2) because the action arose in Eau Claire County and Respondent is located here.

9. On June 5, 2023, during the homeroom period (also referred to as resource period) at Northstar Middle School, all orchestra students were required to report to the orchestra room, where they found orchestra teacher Jacob Puccio, a school counselor, and the District's Diversity, Equity and Inclusion director, Dang Yang. Buchman's two children who attend Northstar were members of the orchestra and among the assembled students.

10. On information and belief, the students were told that Puccio was transitioning from male to female and that, going forward, they were to address the orchestra instructor as Ms. Puccio. The students were then told they could stay to listen to Puccio's story, or they could go into a practice room while the story was told. No students entered the practice room.

11. On information and belief, Puccio then told the assembled students that Puccio had felt Puccio was a girl from an early age and experienced childhood trauma because Puccio's parents and friends did not accept that Puccio was the opposite sex from that assigned at birth. The discussion also included reference to a medical procedure Puccio was to undergo.

12. Prior to this session, staff at the school were notified this discussion would take place. Parents, including Buchman, were not notified.

13. Shortly after this gathering occurred at Northstar Middle School, a scripted statement about Puccio's transition from male to female was read to multiple

classes of elementary and high school students in the district, including North High School and at least three elementary schools (Sam Davey Elementary, Locust Lane Elementary, and Northwoods Elementary).

14. Buchman has two children at the middle school and one child at North High School. Her high school child was read the script. Buchman was not notified in advance of the script being read.

15. On June 7, 2023, Buchman requested a copy of the script that was read to the high school band students. That request was denied, with the high school band instructor indicating that the district specified he was to read the script verbally only and not share the script electronically. True and correct copies of the request and response are attached as Exhibit A.

16. On June 12, 2023, Buchman submitted a public records request to the District requesting several records including a request for a copy of the script that was read. That request was denied, with the District's attorney claiming that the document could not be disclosed because an investigation was underway into whether any "employee acted improperly with respect to the June 6 [sic] events." A true and correct copy of the email chain is attached as Exhibit B.¹ This lawsuit is related solely to Buchman's request for the script.

17. The District did not disclose the start date of the investigation or who was being investigated.

¹ In addition to the scripts read, Buchman requested communications among certain school officials as reflected in Exhibit B. Those communications are not sought as part of this lawsuit.

18. On June 23, 2023, Petitioner WILL sent its own public records request to North High School Band Instructor Joseph McCausland (via the ECASD website), Principal Kurt Madsen (via the ECASD website), and DEI Director Dang Yang (via email), for a “[c]opy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob Puccio.” True and correct copies of the email to Mr. Yang and the two confirmation emails received after the website submissions, detailing the requests, are attached as Exhibit C.

19. On June 23, 2023, Associate Counsel Cory Brewer and Deputy Counsel Luke Berg of WILL also emailed a letter to the District, explaining that the exemption the District had cited in denying Buchman’s public records request (Wis. Stat. § 19.36(10)(b)) was inapplicable. True and correct copies of the email and letter are attached as Exhibit D.

20. On June 23, 2023, Attorney Brewer received an email response from Superintendent Michael Johnson indicating that he was out of the office. A true and correct copy of this email is attached as Exhibit E.

21. On June 29, 2023, Attorney Brewer sent an email to the District requesting confirmation that the request had been received and for a status update. A true and correct copy of this email is attached as Exhibit F.

22. On June 30, 2023, legal counsel for the District sent an email to Attorney Brewer confirming the District received the public records request and indicating that legal counsel was working on a response to the arguments raised in the June 23

correspondence from WILL (Exhibit D). A true and correct copy of this email is attached as Exhibit G.

23. On July 7, 2023, the District responded to WILL's letter and its request for the script and denied WILL's request, citing the same investigation rationale as referenced in paragraph 16 above. A true and correct copy of the denial correspondence is attached as Exhibit H.

24. Again, the District did not disclose when the investigation started or who was being investigated. Nor did the District disclose when the investigation would be complete.

25. Section 19.31 of the Wisconsin Statutes includes a declaration of public policy, which provides in part that, "The denial of public access [to records] generally is contrary to the public interest, and only in an exceptional case may access be denied," establishing "a presumption of complete public access [to government records], consistent with the conduct of governmental business."

26. Wis. Stat. 19.32(2) defines a record as follows:

"Record" means any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved. (Emphasis added).

27. The script that is the subject of Buchman's and WILL's public records requests to the District is a "record" within the definition of Wis. Stat. § 19.32(2).

28. The District has withheld the requested record following Buchman's and WILL's written requests. It has cited as its justification an ongoing personnel

investigation, but has refused to provide even the scantest of details concerning when the investigation started, the subject of that alleged investigation, or when the investigation will be complete.

29. The script which both Buchman and WILL requested is not an employee personnel record and, thus, is not covered by Wis. Stat. § 19.36(10).

30. The District does not deny that the record in question was read to several classes of students on or about June 5, 2023 (including Buchman's children) and, thus, the content of the letter is not and cannot be considered in any way to be confidential or to be an employee personnel record.

31. Further, the District's Superintendent has stated that he was "proud of the thoughtfulness and intentionality" behind how the information was shared with students. Thus, it was public and approved by the Superintendent.

32. Moreover, the script requested by Buchman and WILL is not "relating to" any investigation within the meaning of "relating to" in § 19.36(10)(b).

33. The exception in § 19.36(10)(b) covers "Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation."

34. The requests made by Buchman and WILL did not ask for any information about any investigation. They did not ask for any work product of any investigator. They did not ask what records the investigator was reviewing.

35. WILL simply requested a “[c]opy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob Puccio.” (Ex. C.)

36. Buchman similarly requested “the script of the statement read on or about June 6, 2023 to North High School Band Class regarding the gender transition of Jacob/Carly Puccio”; “if different,” the “script of the statement read on or about June 6, 2023 to Sam Davey, Locust Lane, and Northwoods Elementary regarding the gender transition of Jacob/Carly Puccio”; and “if different,” a “copy of the script of any other statement about the gender transition of Jacob/Carly Puccio read to any other ECASD class.” (Ex. B.)

37. The script (or scripts) may or may not be reviewed by some investigator at some point in time, but that does not mean that they are no longer subject to public disclosure.

38. For example, assume that some investigator decides to review the District’s policies (as adopted by the School Board) to determine whether an employee violated any of those policies. That would not mean that the District is entitled to deny all public records requests for copies of the District’s published policies until the investigation is complete.

39. Moreover, there are important and relevant timing issues here.

40. As alleged above, the District has not disclosed when any investigation started. If no investigation had actually been started by the time of Buchman’s request June 12th request and WILL’s June 23rd request, then the District had no

basis to attempt to use the exception in Wis. Stat. § 19.36(10)(b) for Employee Personnel Records to refuse to produce the script in response to those requests.

41. The possible existence of a future investigation is not covered by the statute.

42. In addition, if the investigation had been started prior to the time of the June 12th request and WILL's June 23rd request, then the District has had more than ample time to complete the investigation.

43. Wis. Stat. § 19.35(4)(a) requires that public entities comply with their duties "as soon as practicable and without delay."

44. By extending whatever investigation is occurring beyond a reasonable time, the District is not complying with its obligations under Wisconsin Public Records Law as soon as practicable and without delay.

45. No justification exists for withholding the record, when: (1) the record in question was undisputedly created before any investigation began and its contents made available to numerous students (but not their parents) by the District and its representatives prior to any such investigation; (2) when it does not impede the work of any investigator, reflect the work product of any investigator, interfere with any investigation, or otherwise relate to any investigation; and (3) when the District has had a reasonable time to complete any investigation.

46. Section 19.37(1) provides, "If an authority withholds a record . . . after a written request for disclosure is made, the requester may. . . . bring an action for mandamus asking a court to order release of the record." Wis. Stat. § 19.37(1).

47. The District withheld the requested record despite it not being subject to any statutory or common-law exemption to the public records law. The District is therefore required by law to produce the record.

RELIEF REQUESTED

WHEREFORE, Petitioners demand a judgment of mandamus against the District under Wis. Stat. § 19.37(1):

1. Compelling the District to immediately produce the requested records;
2. Awarding Buchman and WILL each damages of not less than \$100 and other actual costs under Wis. Stat. § 19.37(2);
3. Awarding Petitioners their attorneys' fees; and
4. Awarding such other relief as the Court deems appropriate.

Dated this 25th day of July, 2023.

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Electronically signed by Cory J. Brewer

Richard M. Esenberg (WI Bar No. 1005622)

Cory J. Brewer (WI Bar No. 1105913)

Katherine D. Spitz (WI Bar No. 1066375)

330 E. Kilbourn Avenue, Suite 725

Milwaukee, WI 53202

Telephone: (414) 727-9455

Facsimile: (414) 727-6385

Rick@will-law.org

CBrewer@will-law.org

Kate@will-law.org

Attorneys for Petitioners

From: **Joseph McCausland** <jmccausland@ecasd.us>
Date: Wed, Jun 7, 2023 at 9:29 AM
Subject: Re: [EXT] Email
To: Leah Buchman [REDACTED]

Hi Leah,

I briefly talked with and forwarded your email on to Dang Yang (the ECASD Director of Equity, Diversity and Inclusion); the district specified that the script I read on Monday needed to be a verbal presentation only and was not to be shared electronically. He should give you the info you need, but let me know if you need anything else. Thanks - [REDACTED] had a fantastic first year here in band, hope you all enjoy your summer!

Best,

Joe McCausland
Eau Claire North Director of Bands
jmccausland@ecasd.us

From: Leah Buchman [REDACTED]
Sent: Wednesday, June 7, 2023 9:16 AM
To: Joseph McCausland <jmccausland@ecasd.us>
Subject: [EXT] Email

Good morning!

I was hoping you could send me the email you read to your band students about Mr Puccio's transition. [REDACTED] couldn't remember the specifics and now I am caught in the middle of a topic that I should have been the one to first introduce to my sixth graders when they were mature enough to understand instead of the school so trying to back pedal and figure out what all was said to them so I can talk with them.

Thanks, Leah

ALERT: This email came from outside ECASD. Use caution when replying, clicking on any links, or opening attachments.



From: **Sven Strutz** <sstrutz@weldriley.com>
Date: Mon, Jun 12, 2023 at 1:17 PM
Subject: RE: [EXT] Open Records Request
To: Leah Buchman [REDACTED]

Ms. Buchman—

By way of introduction, this office represents the Eau Claire Area School District. Earlier this morning, you submitted a public records request concerning certain events occurring on June 6, 2023 in Carly Puccio's classroom. Initially, the District responded to your request by reforming you that legal counsel would be in touch with you with an estimate for the costs of complying with your request.

However, there is a more fundamental issue that needs to be addressed. My understanding is that—in addition to your public records request—Superintendent Johnson also informed you of the following in a separate e-mail this morning: “The District will be conducting an investigation to reconstruct the facts surrounding the event itself and the planning that would have taken place prior to the event (as well as determining whether any District policies may have been violated).” The fact that an investigation is pending does affect the handling of your public records request. Under Wis. Stat. § 19.36(10)(b), the following category of records are legally exempt from disclosure under the public records law: “Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.”

As stated in Superintendent Johnson's e-mail, there will be an investigation to determine whether any District employee acted improperly with respect to the June 6 events in Ms. Puccio's classroom. At the time that your public records request came in, that investigation has not concluded. Therefore, it would be inappropriate to send you any documentation about the subject matter of the investigation at this time. Please note that the District is not saying that a public records request for the materials you seek can never be fulfilled—instead, it is saying that the request cannot be honored until such time as the investigation has been concluded. If you choose to resubmit your public records request at some point in the future, the District will evaluate the request based on the status of the investigation at that time.

Pursuant to Wis. Stat. § 19.35(4)(b), I hereby notify you that, if you disagree with the District's decision to deny your request at this time, you have the right to have the determination reviewed by mandamus under Wis. Stat. § 19.37(1) or upon application to the attorney general or a district attorney.

Thank you for your attention.

Sven Strutz, Attorney
Weld Riley, S.C.
Phone: 715-839-7786
Fax: 715-839-8609
E-mail: [sstrutz@weldriley.com](mailto:ssstrutz@weldriley.com)

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CLIENTS SHOULD NOT FORWARD THIS E-MAIL TO OTHERS. DOING SO RISKS LOSS OF ATTORNEY-CLIENT PRIVILEGE FOR THESE COMMUNICATIONS.

From: Michael Johnson <mjohnson@ecasd.us>
Sent: Monday, June 12, 2023 9:47 AM
To: Leah Buchman [REDACTED]
Cc: Sven Strutz <sstrutz@weldriley.com>; Terri Grzyb <tgrzyb@ecasd.us>
Subject: RE: [EXT] Open Records Request

Ms. Buchman,

I have received your Open Records Request, and my office or the office of our legal counsel will inform you of the cost of processing the request. We will follow the requirements of the statute; your requests are not unclear, and this was sent to the appropriate office.

Sincerely,

Mike Johnson

Michael A. Johnson

Superintendent

Eau Claire Area School District

[500 Main Street](#)

[Eau Claire, WI 54701-3770](#)

P 715.852.3002 | F 715.852.3126

"Where knowledge and inspiration meet to create the future"

From: Leah Buchman [REDACTED]
Sent: Monday, June 12, 2023 9:15 AM
To: Michael Johnson <mjohnson@ecasd.us>
Subject: [EXT] Open Records Request

You don't often get email from [REDACTED] [Learn why this is important](#)

Dear Superintendent Johnson:

This is a request for public records, made under Wisconsin's Open Records Law, regarding communication by district personnel to students about the Northstar Middle School orchestra instructor who came out as transgender to students without prior parental notification that this would be happening. This request seeks the following records from ECASD:

1. The script of the statement read on or about June 6, 2023 to North High School Band Class regarding the gender transition of Jacob/Carly Puccio.
2. If different from Request No. 1, the script of the statement read on or about June 6, 2023 to Sam Davey, Locust Lane, and Northwoods Elementary regarding the gender transition of Jacob/Carly Puccio.
3. All documentation regarding whether the above-referenced script or any other statement about the gender transition of Jacob/Carly Puccio was ready to any other ECASD class.
4. If applicable and if different from Request Nos. 1 and 2, a copy of the script of any other statement about the gender transition of Jacob/Carly Puccio read to any other ECASD class.
5. A copy of all emails, texts, messages, voicemails, or other communications sent or received by Superintendent Johnson, EDI Director Dang Yang, Northstar Interim Principal Laura Nicolet, or Northstar Assistant Principal Justin Jablonske between Monday, May 29, 2023 and the date of this request, related to Jacob/Carly Puccio.

Please be aware that the Open Records Law defines “record” to include information that is maintained on paper as well as electronically, data files and unprinted emails. For requested records that are stored electronically, please provide them to me in electronic format via email to [REDACTED]

Please also be aware that the Open Records Law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest, and only in an exceptional case may access be denied.” Wis. Stat. sec. 19.32(1). If you deny my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. sec. 19.35(4)(a).

Please advise me before processing this request if there will be a cost incurred.

As you know, the law requires you to respond to this request “as soon as practicable and without delay.” Wis. Stat. sec. 19.35(4)(a). Since the events underlying this request happened only a few days ago, and the requested script has been acknowledged please see attached email a prompt response is appreciated. **If not all documents are able to be located immediately, please send me documents as they are located rather than waiting to send the response in one email.**

If you are not the records custodian for this information, please forward this request to the appropriate person.

If my requests are unclear or somehow overbroad, I am happy to clarify.

Leah Buchman

From: Cory Brewer <cbrewer@will-law.org>
Sent: Friday, June 23, 2023 2:24 PM
To: dyang1@ecasd.us
Subject: Open Records Request

Good afternoon.

This email is a request for the following record, made under Wisconsin's Public Records Law, Wis. Stats. §§19.31-19.39:

This Copy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob Puccio.

Please be aware that the Public Records Law defines "record" to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. §19.32(2).

If these records are stored electronically, please provide them to me in that electronic format via email. As you know, the law requires you to respond to this request "as soon as practicable and without delay." Wis. Stat. §19.35(4)(a).

Please also be aware that the Public Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.32(1). If you deny my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. §19.35(4)(a).

If you are not the records custodian for this information, please forward this request to the appropriate person.

Thank you,
Cory

Cory Brewer
Associate Counsel
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue
Suite 725
Milwaukee, WI 53202
(414) 727-WILL

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From: no-reply@ecasd.us <no-reply@ecasd.us>
Sent: Friday, June 23, 2023 2:23 PM
To: cbrewer@will-law.org
Subject: Confirmation of Form Submission

Cory Brewer,
Thank you for sending us a message, it has been sent to the specified person.

Your Message:

Good afternoon. This email is a request for the following record, made under Wisconsin's Public Records Law, Wis. Stats. §§19.31-19.39: This Copy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob Puccio. Please be aware that the Public Records Law defines "record" to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. §19.32(2). If these records are stored electronically, please provide them to me in that electronic format via email. As you know, the law requires you to respond to this request "as soon as practicable and without delay." Wis. Stat. §19.35(4)(a). Please also be aware that the Public Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.32(1). If you deny my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. §19.35(4)(a). If you are not the records custodian for this information, please forward this request to the appropriate person. Thank you, Cory Cory Brewer Associate Counsel Wisconsin Institute for Law & Liberty 330 East Kilbourn Avenue Suite 725 Milwaukee, WI 53202 (414) 727-WILL

From: no-reply@ecasd.us <no-reply@ecasd.us>
Sent: Friday, June 23, 2023 2:24 PM
To: cbrewer@will-law.org
Subject: Confirmation of Form Submission

Cory Brewer,
Thank you for sending us a message, it has been sent to the specified person.

Your Message:

Good afternoon. This email is a request for the following record, made under Wisconsin's Public Records Law, Wis. Stats. §§19.31-19.39: This Copy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob Puccio. Please be aware that the Public Records Law defines "record" to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. §19.32(2). If these records are stored electronically, please provide them to me in that electronic format via email. As you know, the law requires you to respond to this request "as soon as practicable and without delay." Wis. Stat. §19.35(4)(a). Please also be aware that the Public Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.32(1). If you deny my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. §19.35(4)(a). If you are not the records custodian for this information, please forward this request to the appropriate person. Thank you, Cory Cory Brewer Associate Counsel Wisconsin Institute for Law & Liberty 330 East Kilbourn Avenue Suite 725 Milwaukee, WI 53202 (414) 727-WILL

From: Cory Brewer <cbrewer@will-law.org>
Sent: Friday, June 23, 2023 2:30 PM
To: mjohnson@ecasd.us
Cc: sstrutz@weldriley.com; Luke Berg <luke@will-law.org>
Subject: Request

Good afternoon. Please see attached correspondence.

Regards,
Cory

Cory Brewer
Associate Counsel
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue
Suite 725
Milwaukee, WI 53202
(414) 727-WILL

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414-727-WILL (9455)
Fax 414-727-6385
www.will-law.org

June 23, 2023

VIA EMAIL ONLY:

Eau Claire Area School District
Superintendent Michael Johnson (*mjohnson@ecasd.us*)

Re: Inapplicability of Open Records Exception for Statement Read to Students

Superintendent Johnson:

Based on your recent email correspondence with a parent, we are aware that the Eau Claire Area School District (ECASD) is conducting an investigation related to a teacher at Northstar Middle School who came out as transgender to students during school hours. Shortly after this occurred, a statement about the teacher transitioning from male to female was read to multiple classes of elementary and high school band students in the district. The district has not told parents what their children were told; consequently, a parent submitted an open records request for a copy of the statement read to students.

In response to the open records request for a copy of the script read to students, legal counsel for the district told the parent that the request was denied because of the ongoing investigation. WILL disagrees with this decision because the cited exception to disclosure does not apply.

WILL recently sent our own open records request to North High School Band Instructor Joseph McCausland, Principal Kurt Madsen, and DEI Director Dang Yang, for the following record:

Copy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob Puccio.

ECASD Director of Equity, Diversity, and Inclusion for the district, Dang Yang was also present while the instructor told students about the transition. When parents raised concerns after the incident (since they were not given advance notice or an opportunity to opt their children out), Director Yang stated that students were told they could go into a practice room if they did not want to listen to the instructor's story. No children did so. Director Yang also shared with some parents that a "medical procedure" was discussed with the middle school orchestra students. To date, parents still do not have details about what their children were told that day.

Director Yang told parents he was responsible for “supporting and guiding” the transgender instructor, and you, Superintendent Johnson, have since stated you were “proud of the thoughtfulness and intentionality” behind how the transition was shared with students. Provided this, it is perplexing that the district is now conducting an investigation into whether any “employee acted improperly with respect to the June 6 events,” as your legal counsel described the investigation to a parent.

As authority for denying the parent’s open records request, counsel cited Wis. Stat. § 19.36(10)(b), which is titled “Employee Personnel Records.” Subsection (10)(b) exempts from public disclosure “Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.” This exception does not apply to the script of the statement read to ECASD students.

Our understanding is that the requested script was read to students in at least four classes (North High School band, fifth-grade band students at Sam Davey Elementary School, Locust Lane Elementary, and Northwoods Elementary School). This is precisely the kind of record the public should have access to.

As you likely know, our state law contains a strong presumption favoring disclosure of public records. This presumption of complete public access “reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society.” *Linzmeier v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis.2d 306, 646 N.W.2d 811. “Because the denial of public access is generally contrary to public interest, access may be denied only in exceptional cases.” *Kailin v. Rainwater*, 226 Wis.2d 134, 142, 593 N.W.2d 865 (Ct. App. 1999). Exceptions to the open records law are to be narrowly construed. *Kroeplin v. Wisconsin Dept. of Natural Resources*, 2006 WI App 227, ¶ 13, 297 Wis.2d 254, 725 N.W.2d 286 (citing *Hathaway* at 397).

Our state law has exceptions to disclosure of records in order to protect *from public disclosure* private information that is not otherwise generally shared. The parent who made the initial request is simply seeking the content of the script that was undisputedly read to dozens of students. This document is, by its very nature, a public record.


Certainly, a reasonable interpretation of subsection (10)(b) could support denial of access to information *if it were produced as part of an investigation while the investigation is ongoing*. But the district is denying access to a document that was read to students *before* any investigation had begun and unrelated to *how* the underlying announcement about the transition occurred. The requested statement does not contain anything about employee discipline. It was not created in response

to the investigation, and it does not discuss the investigation at all, since the decision to investigate came *after* parents' concerns about the events themselves.

If the law were interpreted to apply as counsel for ECASD contends, then any entity subject to open records laws could simply state it is investigating possible employee misconduct each time it seeks to exempt records from public disclosure. We strongly urge you to reconsider your position that the requested script is exempt from public disclosure. Parents deserve to know what the district told their children about this topic. And our open records law requires it.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.


Luke Berg
Deputy Counsel


Cory Brewer
Associate Counsel

cc: Attorney Sven Strutz (sstrutz@weldriley.com)

From: Michael Johnson <mjohnson@ecasd.us>

Sent: Friday, June 23, 2023 2:31 PM

To: Cory Brewer <cbrewer@will-law.org>

Subject: Automatic reply: [EXT] Request

Hello,

Thank you for your communication. I will be out of the District today through Sunday morning with limited email access. If you need immediate assistance, please contact Executive Director of Administration Kim Koller at klauterbachkoller@ecasd.us.

Sincerely,
Mike Johnson
Superintendent



From: Cory Brewer <cbrewer@will-law.org>
Date: Thursday, June 29, 2023 at 1:19 PM
To: Michael Johnson <mjohnson@ecasd.us>
Cc: sstrutz@weldriley.com <sstrutz@weldriley.com>, Luke Berg <luke@will-law.org>
Subject: Re: [EXT] Request

Good afternoon, Superintendent Johnson.

Could you please acknowledge receipt of our letter and open records request to the district (specifically sent to Joseph McCausland, Kurt Madsen and Dang Yang)? For ease of reference, the following is what was sent to those individuals on Friday, June 23:

This email is a request for the following record, made under Wisconsin's Public Records Law, Wis. Stats. §§19.31-19.39:

A Copy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob Puccio.

Please be aware that the Public Records Law defines "record" to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. §19.32(2).

If these records are stored electronically, please provide them to me in that electronic format via email. As you know, the law requires you to respond to this request "as soon as practicable and without delay." Wis. Stat. §19.35(4)(a).

Please also be aware that the Public Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.32(1). If you deny my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. §19.35(4)(a).

If you are not the records custodian for this information, please forward this request to the appropriate person.

If you could also provide a status update on when we might expect to receive the one requested record, that would be much appreciated.

Thank you,
Cory

Cory Brewer
Associate Counsel
Wisconsin Institute for Law & Liberty



From: Michael Johnson <mjohnson@ecasd.us>

Date: Friday, June 23, 2023 at 2:30 PM

To: Cory Brewer <cbrewer@will-law.org>

Subject: Automatic reply: [EXT] Request

Hello,

Thank you for your communication. I will be out of the District today through Sunday morning with limited email access. If you need immediate assistance, please contact Executive Director of Administration Kim Koller at klauterbachkoller@ecasd.us.

Sincerely,
Mike Johnson
Superintendent

From: Sven Strutz <sstrutz@weldriley.com>
Sent: Friday, June 30, 2023 1:12 PM
To: Cory Brewer <cbrewer@will-law.org>
Subject: RE: [EXT] Request

Attorney Brewer—

As you are aware, this office represents the Eau Claire Area School District.

The District did receive the public records request that you submitted on June 23. For the moment, I am simply writing to acknowledge the request and say that we are working on the District's response. For your information, my primary contacts at the District on public records matters have been out of the district office this week.

I am working on a full response to the legal arguments that you and Attorney Luke Berg made in a separate June 23 letter about the application of Wis. Stat. § 19.36(10)(b)—but I don't think I will be able to get that out to you before the extended Fourth of July weekend. That response will be relevant both to your public records request and to the separate requests made by some of the members of the public who your letter refers to.

Thank you for your attention. I hope you have a great Fourth of July weekend!

Sven Strutz, Attorney
Weld Riley, S.C.
Phone: 715-839-7786
Fax: 715-839-8609
E-mail: sstrutz@weldriley.com

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CLIENTS SHOULD NOT FORWARD THIS E-MAIL TO OTHERS. DOING SO RISKS LOSS OF ATTORNEY-CLIENT PRIVILEGE FOR THESE COMMUNICATIONS.

From: Cory Brewer <cbrewer@will-law.org>
Sent: Thursday, June 29, 2023 1:19 PM
To: Michael Johnson <mjohnson@ecasd.us>
Cc: Sven Strutz <[sstrutz@weldriley.com](mailto:ssstrutz@weldriley.com)>; Luke Berg <luke@will-law.org>
Subject: Re: [EXT] Request

Good afternoon, Superintendent Johnson.

Could you please acknowledge receipt of our letter and open records request to the district (specifically sent to Joseph McCausland, Kurt Madsen and Dang Yang)? For ease of reference, the following is what was sent to those individuals on Friday, June 23:

This email is a request for the following record, made under Wisconsin's Public Records Law, Wis. Stats. §§19.31-19.39:



A Copy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob Puccio.

Please be aware that the Public Records Law defines “record” to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. §19.32(2).

If these records are stored electronically, please provide them to me in that electronic format via email. As you know, the law requires you to respond to this request “as soon as practicable and without delay.” Wis. Stat. §19.35(4)(a).

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If you are not the records custodian for this information, please forward this request to the appropriate person.

If you could also provide a status update on when we might expect to receive the one requested record, that would be much appreciated.

Thank you,
Cory

Cory Brewer
Associate Counsel
Wisconsin Institute for Law & Liberty

From: Michael Johnson <mjohnson@ecasd.us>
Date: Friday, June 23, 2023 at 2:30 PM
To: Cory Brewer <cbrewer@will-law.org>
Subject: Automatic reply: [EXT] Request

Hello,

Thank you for your communication. I will be out of the District today through Sunday morning with limited email access. If you need immediate assistance, please contact Executive Director of Administration Kim Koller at klauterbachkoller@ecasd.us.

Sincerely,
Mike Johnson
Superintendent

From: Jessah Schnack <jschnack@weldriley.com>
Sent: Friday, July 7, 2023 1:59 PM
To: luke@will-law.org; cbrewer@will-law.org
Cc: Sven Strutz <sstrutz@weldriley.com>
Subject: Dispute Over Applicability of Public Records Exemption

Sent on behalf of Attorney Sven Strutz:
Please send replies directly to [sstrutz@weldriley.com](mailto:ssstrutz@weldriley.com)

Good Afternoon Attorneys Berg and Brewer:

Please see the attached correspondence regarding the above-mentioned matter.

Thank you,

Jessah Schnack



July 7, 2023

Luke Berg & Cory Brewer
Institute for Law & Liberty
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202-3141

BY E-MAIL

luke@will-law.org

cbrewer@will-law.org

RE: Dispute Over Applicability of Public Records Exemption
Our File No.: 31220.0011

Dear Attorneys Berg and Brewer:

I have reviewed your June 23, 2023 letter to Superintendent Michael Johnson, in which you take issue with the District's previous denial of public records requests for documentation relating to the current investigation of the meetings where Carly Puccio informed students of her gender transition.

I am not in full agreement with some of the legal assertions that your June 23 letter makes about the public records law. This letter will address those arguments. In addition, this letter will serve as a formal denial of the public records request that your office made (also on June 23) for the following: "copy of the script that Mr. McCausland read to the North High School band class on or about June 5, 2023, regarding the gender transition of Jacob [sic] Puccio." The same legal rationale for the previous denial also applies to the denial of your records request. *As of the date of this writing*, the requested documentation is exempt under Wis. Stat. § 19.36(10)(b).

Your letter attempts to distinguish between documents that are: a.) "produced as part of an investigation while the investigation is ongoing" from b.) "a document that was read to students before any investigation had begun and unrelated to how the underlying announcement about the transition occurred." However—as both categories of documents are within the broad scope of "information relating to the current investigation"—I am wholly unconvinced that yours is a distinction that the statutory exemption contemplates. If the legislature had intended that *only* documents "produced as part of an investigation" (i.e. documents created by the investigators after the investigation has begun) would be exempt, it could have used that phrase or something like it. But the statutory language is significantly broader than that. The text of the relevant exemption is found at Wis. Stat. § 19.36(10)(b), which provides:

(10) Employee personnel records. Unless access is specifically authorized or required by statute, *an authority shall not provide access* under s. 19.35(1) to records containing the following information, except to an employee or the employee's representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111:

...

(b) *Information relating to the current investigation* of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

(Emphasis added.) As the District previously informed individuals asking questions about Ms. Puccio's disclosure to orchestra students: "The District will be conducting an investigation to reconstruct the facts surrounding the event itself and the planning that would have taken place prior to the event (as well as determining whether any District policies may have been violated)." As stated by Superintendent Johnson, the investigation will probe "whether any District policies may have been violated." As such, that inquiry will implicate the question of whether any employee engaged in any "misconduct." The statutory language refers to "*information relating to the current investigation*." "Relating to" would appear to be a fairly broad framing that encompasses *both* documentation that predates the investigation (and that "relates to" the subject matter of the investigation) and documentation newly created only for purposes of the investigation. By another name, a document that "*relates to*" an investigation and *predates* that investigation would simply be called "*evidence*" of alleged misconduct (or "evidence" showing there was no misconduct). Evidence that establishes or detracts from allegations of misconduct is within the Wis. Stat. § 19.36(10)(b) exemption.

Your letter seems to suggest that Superintendent Johnson's statements indicating support for Ms. Puccio's transition (including informing students of that process) demonstrate that there could be no investigation into possible misconduct. Indeed, you characterize the fact that the District is conducting an investigation of an action that Superintendent Johnson may have supported in some fashion as being "perplexing." Your assumptions do not allow for the possibility that Superintendent Johnson's actions could be one subject of the investigation. The communication to others making inquiries about the matter openly state that possibility; Superintendent Johnson said: "Since your complaint may take issue with *my own* knowledge and involvement, I will disclose to you that I will not be personally conducting the investigation" (emphasis added).

More fundamentally, I disagree with your letter's approach to how the exemptions from the public records law work—in particular, the exemption that is most directly relevant to requests for documents about the Puccio investigation. You state: "This document is, by its very nature, a public record." I do not disagree with that uncontroversial assertion. However, all of the statutory exemptions listed in Wis. Stat. § 19.36 are exemptions that permit (and with this exemption, *require* – "shall not provide access") the withholding of documents *that are public records* in responding to a public records request. "If a record falls within this exception from disclosure, 'an authority shall not provide access' to the record, *regardless of the public interests weighing in favor of disclosure*." Local 2489, AFSCME, AFL-CIO v. Rock County, 2004 WI App 210, ¶4, 277 Wis. 2d 208, 689 N.W.2d 644 (emphasis added). There is a distinction between a document that is a statutorily *exempt* public record and a document that is *not public record at all*. The District has never claimed that the requested documents are not public records at all.

The subtext of your legal argument appears to be that the District has taken the position that the requested document will *never* be produced. The District has not taken that position. A case cited in your letter—Kroepelin v. Wisconsin Department of Natural Resources, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286—explains:

WISCONSIN STAT. § 19.36(10)(b) codifies common law standards and continues our tradition of keeping records related to misconduct investigations *closed while they are ongoing, but providing public oversight over misconduct investigations once the investigations have concluded*. Once a misconduct investigation has concluded, those records may be disclosed to the public, subject to the common law balancing test. The text of § 19.36(10)(b) is unambiguous and provides in relevant part that “[i]nformation relating to the current investigation of ... possible misconduct connected with employment by an employee prior to disposition of the investigation” shall not be disclosed, except to an employee or an employee's representative. WIS. STAT. § 19.36(10)(b). We have construed this subsection to mean that investigation records of possible employee misconduct shall not be released to the public while the investigation is underway. Local 2489, 277 Wis.2d 208, ¶ 15, 689 N.W.2d 644. Put another way, records of investigations into possible employee misconduct may be released, subject to the common law balancing test, once the investigation has concluded. An investigation has concluded or “achieves its ‘disposition’ when the authority acts to impose discipline on an employee as a result of the investigation....” Id.

(Emphasis added.) This is *not* a denial of all records requests on this subject *forever*. If another public records request is made for similar material *after* the investigation has concluded, the District will evaluate the request in light of that new status quo. However, when the investigation has concluded, it is possible that requested documentation might contain other information that may be exempt from release under a statute or the balancing test. Certainly, the District reserves the right to analyze any post-investigation public records requests when they are made. But after the investigation is concluded, that documentation would no longer be categorically exempt under Wis. Stat. § 19.36(10)(b).

Your letter concludes with an assertion that public bodies will begin phony investigations as a means of improperly insulating records from release. You state: “If the law were interpreted to apply as counsel for ECASD contends, then any entity subject to open records laws could simply state it is investigating possible employee misconduct each time it seeks to exempt records from public disclosure.” Let me assure you that the strategy that you theorize is not being employed here. The District had already internally decided that an investigation would be needed days *before* the District received any public records request on this matter. The investigation is genuine—it is not a pretext to deny access to records.

Pursuant to Wis. Stat. § 19.35(4)(b), I hereby notify you that, if you disagree with the District's decision to deny your public records request, you have the right to have the determination reviewed by mandamus under Wis. Stat. § 19.37(1) or upon application to the attorney general or a district attorney.

Thank you for your attention. Let me know if you have any questions or concerns.

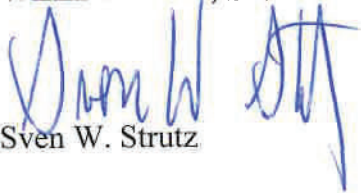
Public Records Request

July 7, 2023

Page 4

Very truly yours,

WELD RILEY, S.C.

A handwritten signature in blue ink, appearing to read "Sven W. Strutz", is written over a typed name. The signature is stylized and somewhat cursive.

Sven W. Strutz