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Nos. 2020AP1419-OA, 2020AP1420-OA, 2020AP1446-OA

In the Supreme Court of Wisconsin

WISCONSIN COUNCIL OF RELIGIOUS AND INDEPENDENT SCHOOLS, SCHOOL CHOICE WISCONSIN ACTION, ABUNDANT LIFE CHRISTIAN SCHOOL, HIGH POINT CHRISTIAN SCHOOL, LIGHTHOUSE CHRISTIAN SCHOOL, PEACE LUTHERAN SCHOOL, WESTSIDE CHRISTIAN SCHOOL, CRAIG BARRETT, SARAH BARRETT, ERIN HAROLDSON, KENT HAROLDSON, KIMBERLY HARRISON, SHERI HOLZMAN, ANDREW HOLZMAN, MYRIAH MEDINA, LAURA STEINHAUER, ALAN STEINHAUER, JENNIFER STEMPSKI, BRYANT STEMPSKI, CHRISTOPHER TRUITT and HOLLY TRUITT, *PETITIONERS*,

v.

JANEL HEINRICH, in her official capacity as Public Health Officer and Director of Public Health of Madison and Dane County, and PUBLIC HEALTH OF MADISON AND DANE COUNTY, *RESPONDENTS*.

ST. AMBROSE ACADEMY, INC., ANGELA HINELINE, JEFFERY HELLER, ELIZABETH IDZI, JAMES CARRANO, LAURA MCBAIN, SARAH GONNERING, ST. MARIA GORETTI CONGREGATION, NORA STATSICK, ST. PETER'S CONGREGATION, ANNE KRUCHTEN, BLESSED SACRAMENT CONGREGATION, AMY CHILDS, BLESSED TRINITY CONGREGATION, COLUMBIA/DANE COUNTY, WI INC., LORETTA HELLENBRAND, IMMACULATE HEART OF MARY CONGREGATION, LORIANNE AUBUT, ST. FRANCIS XAVIER'S CONGREGATION, MARY SCOTT, SAINT DENNIS CONGREGATION and RUTH WEIGEL-STERR, *PETITIONERS*,

v.

JOSEPH T. PARISI, in his official capacity as County Executive of Dane County and JANEL HEINRICH, in her official capacity as Director, Public Health, Madison & Dane County, *RESPONDENTS*.

SARA LINDSEY JAMES, *PETITIONER*,

v.

JANEL HEINRICH, in her capacity as Public Health Officer of Madison and Dane County, *RESPONDENT*.

Original Actions

NONPARTY BRIEF ON BEHALF OF STATE SUPERINTENDENT OF PUBLIC INSTRUCTION CAROLYN STANFORD TAYLOR AND WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTRODUCTION

State Superintendent of Public Instruction Carolyn Stanford Taylor and the Wisconsin Department of Public Instruction (DPI) submit this amicus brief in support of Respondents. State Superintendent Stanford Taylor and DPI are charged with the supervision of public instruction and have a significant interest in ensuring safe public instruction during the current pandemic.

The Legislature assigned local health officers a mandatory obligation to take all measures necessary to control communicable diseases. During the current pandemic – the most severe and deadly outbreak of communicable disease to occur in Wisconsin in the last century – it is vital that local health officers utilize their public health expertise and community knowledge to fulfill this obligation. This includes closing schools when necessary, a measure the Legislature repeatedly recognizes as within the authority of local health officers in statutes governing public instruction. See Wis. Stat. §§ 115.01(10)(b), 115.7915(8m), 118.60(12), 119.23(12).

ARGUMENT

I. Chapter 252 Authorizes a Local Health Officer to Close Schools To Combat a Pandemic.

Local health officers may close schools¹ to prevent virus spread in a pandemic under each of several grants of statutory authority. Local health officers have explicit authority to “take all measures necessary to prevent, suppress and control communicable diseases,” Wis. Stat. § 252.03(1), to “do what is reasonable and necessary for the prevention and suppression of disease” and to “forbid public gatherings when deemed necessary to control outbreaks or epidemics,” Wis. Stat. § 252.03(2).

This responsibility for preventing, suppressing and controlling communicable diseases is a legal duty: “Every local health officer, upon the appearance of any communicable disease in his or her territory, shall immediately investigate all the circumstances.... The local health officer shall promptly take all measures necessary to prevent, suppress and control communicable

¹ In this brief, DPI uses the phrase “close schools” to refer to a local health officer’s authority to prohibit in-person instruction or other gatherings in schools and to take any lesser action to restrict in-person activities in schools.

diseases....” Wis. Stat. § 252.03(1) (emphasis added). Chapter 252 assigns local health officers the primary responsibility for preventing, suppressing and controlling communicable diseases in their localities: “If the local authorities fail to enforce the communicable disease statutes and rules, the department shall take charge...” Wis. Stat. § 252.03(3).

In contrast to the requirements imposed on local health officers, DHS “has general supervision throughout the state of the health of citizens.” Wis. Stat. § 250.04(1). The authority of DHS is permissive, not mandatory. See Wis. Stat. § 252.02(3) (“The department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics”) (emphasis added); Wis. Stat. § 252.02(4) (“the department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases”) (emphasis added); Wis. Stat. § 252.02(6) (“The department may authorize and implement all emergency measures necessary to control communicable diseases.”) (emphasis added).

The public health statutes contemplate that local boards of health may create more stringent health standards than required by state law. See, e.g., Wis. Stat. § 251.04(3); Wis. Stat. § 252.02(4). Thus, the statutes anticipate that a local health officer may take actions to protect the public health in her locality that are more protective of public health than those taken by the state health agency. This is by design, and does not support a conclusion that a local health officer acting to control a pandemic by ordering restrictions on in-person instruction at schools has exceeded her authority, even when the state has not imposed such restrictions statewide.

Petitioners' description of the broader statutory context of Chapter 252 is not convincing. Petitioners ignore the statute's requirement that local health officers "promptly take all measures necessary." Instead, Petitioners point to local health officers' authority to "inspect schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition." Wis. Stat. § 252.03(1). This language does not refer to outbreaks or epidemics and does not limit the

authority of local health officers during a pandemic with respect to schools. Instead, this provision allows local health officers to inspect schools and other public buildings on a routine basis and in the absence of a known public health concern such as a pandemic. In a pandemic, “[l]ocal health officers may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics.” Wis. Stat. § 252.03(2). A local health officer may forbid public gatherings wherever they occur, including in schools, when the health officer deems it necessary to control a pandemic. Because Wis. Stat. § 252.02(3) allows DHS to “forbid public gatherings in schools,” it is clear “public gatherings” may occur in schools.

Contrary to Petitioners’ contention, Chapter 252 contains no state-local division of authority over schools during pandemics. Indeed, Chapter 252 contains no specific language at all regarding local health officers’ ability to close schools. As discussed below, it is clear that local health officers have such authority because the public instruction statutes explicitly recognize that local health officers may close schools to control the current pandemic. The

expressio unius est exclusio alterius canon of statutory construction does not apply because Wis. Stat. § 252.03 contains no expressed limit on local health officers' authority to combat communicable disease, in schools or anywhere else; instead, the statute provides a broad grant of authority. There is no conflict between Wis. Stat. § 252.02(3) and Wis. Stat. § 252.03, and there is no ambiguity to be resolved. Similarly, no specific statutory provision regarding local health officers leads in a direction other than the general statutory provisions.

Petitioners suggest that the Legislature did not want to leave the decision to close schools to local control because schools are a matter of statewide concern. To the contrary, state authority to close schools is an exception to the usual rule that decisions affecting schools are made locally. See, e.g., Kukor v. Grover, 148 Wis. 2d 469, 499, 436 N.W.2d 568, 580–81 (1989) (noting that “[t]he principle of local control [over school systems] in Wisconsin, therefore, is not merely a theoretical notion, but rather is a constitutionally based and protected precept as to which the framers of our constitution were firmly committed.”); Fortney v. Sch. Dist.

of W. Salem, 108 Wis. 2d 167, 181, 321 N.W.2d 225, 233 (1982). (recognizing “that public policy militates in favor of maintaining a high degree of local control over educational decisions.”). Thus, the Legislature’s choice to be explicit with respect to DHS’ concurrent authority to close schools can be explained because that state authority is a break from the norm. The public instruction statutes’ more favorable treatment until 2009 of school closures by local health officers compared to closures by DHS also supports the explanation that school closures were typically made by local health officers, not DHS.

II. Public Instruction Statutes Recognize a Local Health Officer’s Authority to Close Schools.

Several statutes governing public instruction refer to local health officers closing schools, and prescribe consequences for those closures. A statute is read “to give reasonable effect to every word, in order to avoid surplusage.” State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110. If Petitioners are correct that local health officers do not have authority to close schools, then statutory references to such authority are meaningless.

Pursuant to Wis. Stat. § 115.01(10), “School days are days on which school is actually taught and the following days on which school is not taught: ... (b) Days on which school is closed by order of a local health officer, as defined in s. 250.01(5), or the department of health services.” If Petitioners are correct, and local health officers simply cannot order a school closed, then that language serves no purpose. In creating Wis. Stat. § 115.01(10), the Legislature confirmed its intent that local health officers have authority to close schools. Similarly, DPI rules recognize that local health officers may close schools. See Wis. Admin. Code §§ PI 8.01(4)(a) (including closures under Wis. Stat. § 115.01(10)(b) in the definition of “school closure”); PI 8.01(4)(b)3 (requiring submission of “a copy of the order to close the school under s. 115.01(10)(b) or (c), Stats., if applicable.”).

This spring, the Legislature reiterated its understanding and intent that local health officers have authority to close schools during the current pandemic. The Legislature excused private schools participating in parental choice programs that had been closed by order of a local health officer or DHS from certain consequences that

may result from that closure. See 2019 Wis. Act 185, 2019 Assembly Bill 1038 §§ 57, 64, 66; Wis. Stat. §§ 115.7915(8m) (“During the public health emergency declared on March 12, 2020, by executive order 72, if a private school participating in the program under this section is closed for at least 10 school days in a school year by a local health officer, as defined in s. 250.01(5), or the department of health services...”); 118.60(12) (same); 119.23(12) (same). This statutory language leaves no room for any interpretation other than that the Legislature anticipated that local health officers might close schools for more than 10 school days to combat the current pandemic.

Petitioners suggest that the statutory changes to the parental choice programs - enacted specifically to address the consequences of the current pandemic - should be disregarded because the relief applies only for school closures that occur “[d]uring the public health emergency declared on March 12, 2020, by executive order 72” and that emergency ended before Emergency Order #9 was issued. The effective period of this statute is irrelevant. What is relevant is that the Legislature recognized that local health officers

already possess the authority to close schools during the public health crisis. DPI agrees that the new provisions are not a “sub silencio [sic] amendment to Section 252.03, giving local health officers a power that they previously lacked.” Combined Opening Br. of Pet’rs at 35. To the contrary, they are confirmation by the Legislature that local health officers already held that power, a conclusion the Legislature confirmed previously in Wis. Stat. § 115.01(10)(b).

A. Legislative History Supports a Local Health Officer’s Authority to Close Schools.

1. 1993 Wisconsin Act 27

Section 115.01(10) was amended by 1993 Wisconsin Act 27.

This Act primarily addressed issues of public health, updating the provision describing “school day” because the provision related to public health. The language “[d]ays on which school is closed by order of a health officer” was changed to “[d]ays on which school is closed by order of a local health officer, as defined in s. 250.01(5).”

1993 Wis. Act 27, 1993 Assembly Bill 585 § 150,

<https://docs.legis.wisconsin.gov/1993/related/acts/27.pdf>. In the

same Act, Wis. Stat. § 250.01(5) was created to define “local health

officer.” Id. § 449. Days on which school is closed by an order of DHS were not included as school days under Wis. Stat. § 115.01(10) until 2009. See 2009 Wis. Act 42, 2009 Assembly Bill 316 § 43, <https://docs.legis.wisconsin.gov/2009/related/acts/42.pdf>.

The language in Wis. Stat. § 252.02(3) and Wis. Stat. § 252.03 was the same in 1993 as in the current statutes. The 1993 version of Wis. Stat. § 115.01(10) explicitly recognized that local health officers may close schools and updated the statutory language from the previous “order of a health officer” to incorporate the newly-defined term “local health officer.” Again, this statutory language has meaning only if local health officers do, in fact, have authority to close schools when necessary to prevent, suppress or control communicable disease.

2. 2009 Wisconsin Act 42

The Wisconsin Legislative Council Act Memo for 2009 Wisconsin Act 42 described the Act’s changes to the computation of school days:

Current law provides that no state aid may be paid to a school district that fails to hold school for at least 180 days each year, with the days to be computed in accordance with s. 115.01(10), Stats. That latter statute provides that school days are days on which school is actually taught and also include the following:

(1) days on which school is closed by order of the school district administrator because of inclement weather and days on which parent-teacher conferences are held, not to exceed five days during the school term; and (2) days on which school is closed by order of a local health officer.

Act 42 also includes days on which school is closed by order of the state DHS. In addition, it includes days on which school is closed by order of the school district administrator because of a threat to the health or safety of pupils or school personnel (but not including inclement weather, which already is covered by the law) unless the school board determines that the days will not count as school days.

The Act also requires the Department of Public Instruction (DPI) to promulgate rules establishing criteria for waiving the requirement to schedule at least the number of hours of direct pupil instruction specified by statute if school is closed by order of the local health officer or DHS, or is closed by order of the school district administrator because of a threat to health or safety.

Wis. Legis. Council Act Memo, 2009 Wis. Act 42, at 4 (Oct. 13, 2009),

<https://docs.legis.wisconsin.gov/2009/related/lcactmemo/act042.pdf>

(emphasis added).

To satisfy the final requirement, DPI promulgated Wis.

Admin. Code § PI 8.01(4). DPI's report to the Legislature regarding the rule contained the following explanation of agency authority:

Section 118.38(2)(bm), Stats., requires the department to promulgate rules establishing criteria for waiving the requirement to schedule at least the number of hours of direct pupil instruction specified under s. 121.02(1)(f)2., Stats., if school is closed by order of a local health officer, department of health services, or school district administrator under s. 115.01(10)(a)2. or 3., Stats.

Final Report Clearinghouse Rule 09-117 at 1,

https://docs.legis.wisconsin.gov/code/misc/chr/lc_ruletext/cr_09_11_7_agency_report_to_legislature_part_1.pdf (emphasis added).

During the public hearing about the rule, a comment was received that further confirms the common understanding that local health officers possessed authority to close schools:

One person testified he was pleased that the rule allows the district administrator of a school district (in addition to the health department) to close a school due to health reasons. This provision provides the school district with some flexibility in determining whether or not a school should be closed due to health issues. Some school districts are located in 4 or 5 different counties. Under the former law, the district would have to work with 4 or 5 county health departments to make such determinations.

Id. at 3. The law change and the comment on the rule suggest that historically school closures for health reasons were made by local health officers, and not by DHS. Thus, even though DHS had authority to close schools to control outbreaks and epidemics prior to the enactment of 2009 Wisconsin Act 42, it was apparently such a rare occurrence that such closures were not counted as school days for purposes of public instruction requirements.

3. 2009 Wisconsin Act 305

Through 2009 Wisconsin Act 305, the Legislature created Wis. Stat. § 120.12(27), which requires school boards to notify DPI when schools are closed for health reasons. 2009 Wis. Act 305, 2009 Senate Bill 379 § 2, <https://docs.legis.wisconsin.gov/2009/related/acts/305.pdf>. The Wisconsin Legislative Council and the Wisconsin Legislative Reference Bureau's discussions of the law support the conclusion that local health officers may close schools to control a pandemic. The Wisconsin Legislative Council Act Memo recognized that "Current law provides that a school district administrator may close a school because of inclement weather or because of a threat to the health or safety of pupils or school personnel. In addition, a local health officer and the Department of Health Services (DHS) may close a school to control outbreaks and epidemics." Wis. Legis. Council Act Memo, 2009 Wis. Act 305 (May 18, 2010), <https://docs.legis.wisconsin.gov/2009/related/lcactmemo/act305.pdf> (emphasis added). The Legislative Reference Bureau's analysis of 2009 Senate Bill 379 similarly recognized that "a local health officer

and the Department of Health Services (DHS) may close a school to control outbreaks and epidemics.” 2009 Senate Bill 305, Introduced Nov. 3, 2009, LRB – 3694/1, pg. 1,

<https://docs.legis.wisconsin.gov/2009/related/proposals/sb379.pdf>.

B. A Local Health Officer’s Authority to Close Schools is Not Limited to Situations Other than Communicable Diseases or Pandemics.

Petitioners suggest that a local health officer may close schools for certain health hazards, but when the hazard to health is the spread of communicable disease, the local health officer has no authority to act. This position lacks any support in the statutes. Petitioners cite health provisions other than those related to communicable disease in an attempt to explain the public instruction statutes’ recognition of local health officers’ authority to order schools closed. Combined Opening Br. of Pet’rs at 35-38. This effort fails because the cited provisions, like Wis. Stat. § 252.03, do not state explicitly that a local health officer may close schools. In other words, Petitioners are willing to read implicit authority to close schools into some statutory language, but refuse to recognize that same authority exists in Wis. Stat. § 252.03. Petitioners’ failure to

cite a single health provision that explicitly says local health officers may close schools dooms its argument that the public instruction chapters are somehow referring to other provisions but not to the local health officers' authority to prevent, suppress and control communicable diseases in a pandemic and to forbid public gatherings when necessary to control outbreaks or epidemics. In particular, there can be no reading of the new provisions in Wis. Stat. §§ 115.7915(8m), 118.60(12) and 119.23(12) other than that the Legislature expected that local health officers may close schools to combat the current pandemic.

CONCLUSION

Local health officers have statutory authority to close schools. Therefore, Petitioners' request for an order permanently enjoining Respondents from enforcing their school-closure order should be denied.

Dated this 16th day of November 2020.



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2983 words.

Dated this 16th day of November 2020.



HEATHER CURNUTT

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of November 2020.



HEATHER CURNUTT