

SCHOOL CHOICE  
WISCONSIN ACTION, INC.  
350 Bishops Way, Suite 104  
Brookfield, WI 53005,

Plaintiff,

vs.

Case Code: 30701

Case Type: Declaratory Judgment

CAROLYN STANFORD TAYLOR  
in her official capacity as Wisconsin  
Superintendent of Public Instruction  
125 S. Webster Street,  
Madison, WI 53703, and

WISCONSIN DEPARTMENT OF  
PUBLIC INSTRUCTION  
125 S. Webster Street,  
Madison, WI 53703,

Defendants.

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## COMPLAINT

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Plaintiff through its counsel, Wisconsin Institute for Law & Liberty, as and for its complaint against the Defendants, alleges as follows:

### INTRODUCTION

1. This is an action for a declaratory judgment under Wis. Stat. § 227.40, Wis. Stat. § 806.04 and Article I, Section 1 of the Wisconsin Constitution. Defendants Carolyn Stanford Taylor, in her official capacity as Superintendent of Public Instruction, and the Wisconsin Department of Public Instruction (collectively “DPI”) have informed private schools participating in the Wisconsin parental choice programs (“Choice Schools”) that they may not count the time involved in teaching and learning through the internet, or so-called “virtual

learning” to satisfy their statutory requirement for “direct pupil instruction” under Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8, even though DPI allows public schools to count that time.

2. DPI’s conduct is unlawful for three reasons: (a) DPI is attempting to enforce a rule that has not been properly promulgated under state law; (b) DPI is incorrectly interpreting Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8.; and (c) DPI’s conduct violates the right of Choice Schools to Equal Protection under the Wisconsin Constitution.

### **JURISDICTION AND VENUE**

3. This court has jurisdiction pursuant to Wis. Stat. §§ Wis. Stat. § 227.40(1) and 806.04(1) and (2).

4. Venue is proper pursuant to Wis. Stat. §§ 227.40 and 801.50(3)(b).

### **THE PARTIES**

5. Plaintiff School Choice Wisconsin Action, Inc. (“SCWA”) is a Wisconsin corporation with its principal place of business at 350 Bishops Way, Suite 104, in the City of Brookfield, the County of Waukesha, State of Wisconsin. SCWA is a membership organization whose members are private schools operating under the various Wisconsin parental choice programs (“Choice Schools”). SCWA’s purpose is to represent its member schools in matters of advocacy in the courts, the legislature, before public agencies and in public discourse. SCWA has members who operate Choice Schools in Waukesha County.

6. SCWA has associational standing to assert this claim on behalf of its members because its members have standing, the interests at stake in this litigation are germane to its purpose, and neither the claims asserted nor the relief requested requires any particular member’s participation in this lawsuit. *See Munger v. Seehafer*, 2016 WI App 89, ¶¶53-54, 372 Wis. 2d 749, 890 N.W.2d 22.

7. SCWA also has organizational standing on its own to challenge DPI's unlawful rule because it was denied the opportunity to comment on the rule during the rulemaking process.

8. Defendant Carolyn Stanford Taylor is the Wisconsin Superintendent of Public Instruction and is sued in her official capacity. Superintendent Stanford Taylor has her offices and principal place of business at the Wisconsin Department of Public Instruction, 125 South Webster Street, in the City of Madison, County of Dane, and State of Wisconsin.

9. Defendant Wisconsin Department of Public Instruction is an agency of the State of Wisconsin with its offices and principal place of business at 125 South Webster Street, in the City of Madison, County of Dane, and State of Wisconsin.

#### **STATEMENT OF CLAIM**

10. Choice Schools are regulated in Wisconsin under the provisions of Wis. Stat. §§ 118.60 and 119.23. For schools in the Wisconsin Parental Choice Program, Wis. Stat. § 118.60(2)(a)8 provides that schools participating in that program shall provide "at least 1,050 hours of **direct pupil instruction** in grades 1 to 6 and at least 1,137 hours of direct pupil instruction in grades 7 to 12." (Emphasis added.)

11. The requirement is identical for schools in the Milwaukee Parental Choice Program. Wis. Stat. § 119.23(2)(a)8 states that schools participating in that program shall provide "at least 1,050 hours of **direct pupil instruction** in grades 1 to 6 and at least 1,137 hours of direct pupil instruction in grades 7 to 12." (Emphasis added.)

12. Wis. Stat. § 121.02(1)(f) creates an identical requirement for Wisconsin public schools, stating that they must also provide "at least 1,050 hours of **direct pupil instruction** in

grades 1 to 6 and at least 1,137 hours of direct pupil instruction in grades 7 to 12.” (Emphasis added.)

13. Pursuant to Wis. Stat. §§ 118.60(10)(d) and 119.23(10)(d), DPI has the power to withhold funds from a Choice School that violates any of the provisions of §§ 118.60 and 119.23 respectively.

14. Nowhere in the Wisconsin Statutes is the term “direct pupil instruction” defined.

15. Pursuant to a lawfully promulgated administrative rule enacted by DPI, public schools are allowed to use learning through the internet or so-called “virtual learning” in order to satisfy the hours of “direct pupil instruction” required by state law.

16. Specifically, PI 8.01(2)(f) provides as follows:

*Hours of instruction.* Each school district board shall annually schedule and hold at least 437 hours of direct pupil instruction in kindergarten, at least 1,050 hours of direct pupil instruction in grades 1 through 6, and at least 1,137 hours of direct pupil instruction in grades 7 through 12. The school hours are computed as the period from the start to the close of the school's daily instructional schedule. Scheduled hours under this subdivision include recess and time for pupils to transfer between classes but do not include the lunch period. No more than 30 minutes per day may be counted for recess. *Scheduled hours may also include the hours of instructional programming offered through innovative instructional designs that apply to the entire school or grade level. In computing the minimum number of instructional hours under this subdivision, schools may not count days and parts of days on which parent and teacher conferences are held, staff development or inservice programs are held, schools are closed for inclement weather and no compensatory instruction is offered virtually, and when no direct instruction is provided.* (Emphasis added.)

17. DPI’s website (<https://dpi.wi.gov/cal/virtual-learning-time>) makes clear that this rule includes the ability of public schools to implement virtual learning to satisfy the hours requirement for “direct pupil instruction.” The DPI website states, among other things, as follows:

The state administrative rule that governs school district standards (PI 8) was modified to recognize new and emerging methods of delivering instructional programming. PI 8 spurs innovative ways to engage students and teachers outside

of the traditional day and place through virtual options for learning. Times may be used on a day when school is canceled, as a planned day, or as a makeup day when a day of school was missed. There are a variety of reasons a school would use Virtual Learning Time. These include, but are not limited to, snow or other inclement weather, professional development, widespread illness, and flooding. It is up to individual school districts to determine how many days they can effectively deliver instruction via Virtual Learning Time, including how many consecutive days.

18. In January 2019, various Choice Schools inquired of DPI as to whether they could implement learning through the internet in the same way as public schools to satisfy the hours of “direct pupil instruction” requirement.

19. In a written communication dated February 5, 2019, DPI responded by telling Choice Schools that – in contrast to public schools – they may not count instruction provided through the internet as hours of direct pupil instruction. A true and correct copy of the February 5, 2019, communication from DPI is attached hereto as Exhibit A.

20. On February 21, 2019, Plaintiff’s counsel wrote to DPI and pointed out that DPI’s position as set forth in its February 5, 2019, communication was unlawful. A true and correct copy of the February 21, 2019, communication from Plaintiff’s counsel is attached hereto as Exhibit B.

21. On February 28, 2019, DPI, through its Chief Legal Counsel, replied to Plaintiff’s Counsel’s February 21, 2019, letter, stating that DPI was not changing its legal position as set forth in its previous February 5, 2019, communication. A true and correct copy of the February 28, 2019, letter is attached hereto as Exhibit C.

22. As a result of the communications from DPI, Choice Schools, including members of SCWA, are at risk that DPI will withhold money owed to them by the State of Wisconsin if they implement virtual learning and use virtual learning to meet their requirement for hours of “direct pupil instruction.”

**Claim I – Declaration under Wis. Stat. § 227.40**

23. Plaintiff realleges and incorporates by reference the allegations set forth above.

24. The same term – “direct pupil instruction” – is used in Wis. Stat. §§ 118.60(2)(a)8, 119.23(2)(a) 8 and 121.02(1)(f). Nowhere in the Wisconsin Statutes is that term defined. The term is ambiguous as to whether virtual learning time may be used to meet the statutory hours requirement.

25. DPI has the statutory power to promulgate a rule to interpret the term “direct pupil instruction” as used in these statutes. *See*, Wis. Stat. §§ 118.60(11), 119.23(11) and 121.02(5).

26. Based upon the ambiguity that exists as to the meaning of “direct pupil instruction,” DPI has duly promulgated a rule that interpreted the term to mean that “direct pupil instruction” includes internet or virtual learning. *See* Wisconsin Administrative Rule PI 8.01(2)f.

27. DPI’s interpretation of the statute is that virtual learning does count as “direct pupil instruction” time for purposes of meeting the statutory hours requirement.

28. DPI has further clarified its interpretation on its website. *See* <https://dpi.wi.gov/cal/virtual-learning-time>.

29. However, pursuant to its February 5 and February 28, 2019, communications, DPI has issued a different interpretation of the term “direct pupil instruction” for Choice Schools -- namely, that Choice Schools may **not** count virtual learning time as “direct pupil instruction” time for purposes of meeting the statutory hours requirement.

30. This interpretation cannot be correct given the previous interpretation as set forth in PI 8.01, which says that for public schools the term direct pupil instruction means exactly the opposite. More importantly for purposes of this claim, the February 5 and February 28, 2019,

communications from DPI create an administrative rule applicable to Choice Schools, but DPI failed to follow the rulemaking process when promulgating the rule.

31. Wis. Stat. § 227.10(1) requires that “[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.”

32. DPI is the agency charged with administering and implementing Wis. Stat. §§ 118.60 and 119.23. *See* Wis. Stat. §§ 118.60(11) and 119.23(11). As part of its statutory duties, DPI was and is obligated to promulgate its interpretations of any part of §§ 118.60 and 119.23 as a rule, but it violated that statutory duty by failing to promulgate its interpretation of the term “direct pupil instruction” as that term is used in §§ 118.60(2)(a)8 and 119.23(2)(a)8 for Choice Schools.

33. DPI knew that it needed to go through the rulemaking process for its interpretation of the term “direct pupil instruction” as it relates to public schools (and, in fact, went through that process in order to promulgate PI 8.01(2)(f)), but ignored the rulemaking process for its interpretation of the term as it relates to Choice Schools. That is a violation of Wis. Stat. § 227.10.

34. Failure to comply with DPI rules could result in DPI withholding funding from Choice Schools. *See* Wis. Stat. §§ 118.60(10)(d) and 119.23(10)(d). Therefore, this unlawfully promulgated rule or its threatened application interferes with the legal rights and privileges of Choice Schools, including members of SCWA, by prohibiting them from using more cost-effective and efficient means of educating through virtual learning – means which are available to public schools in this State.

35. DPI's violation of Wis. Stat. § 227.10 is causing harm to Choice Schools, including members of SCWA, because it denies Choice Schools the option to implement virtual learning and because SCWA and its members were denied the opportunity to comment on the rule before it was created by DPI.

**Claim II - Declaration under Wis. Stat. §806.04**

36. Plaintiff realleges and incorporates by reference the allegations set forth above.

37. Pursuant to Wis. Stat. § 806.04, any person whose rights are affected by a statute may have determined any question of construction arising under the statute and obtain a declaration of rights thereunder.

38. Choice Schools, including members of SCWA, have rights affected by Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8, and there is a dispute between the Plaintiff and DPI as to the proper construction of those statutes -- specifically, whether Choice Schools may meet the hours requirement for "direct pupil instruction" through virtual learning.

39. Because DPI already interpreted "direct pupil instruction" to include virtual learning, it is erroneous to now interpret the term to mean that it does not include virtual learning. "Direct pupil instruction" cannot mean two opposite things at the same time.

40. The Plaintiff is entitled to a declaration construing the term "direct pupil instruction," as that term is used in Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8, to include virtual learning.

**Claim III – Equal Protection**

41. Plaintiff realleges and incorporates by reference the allegations set forth above.

42. Article I, Section 1 of the Wisconsin Constitution provides in part: “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness...”

43. The Wisconsin Supreme Court has declared that Article I, Section I of the Wisconsin Constitution affords Wisconsin citizens substantially the same protections as the equal protection provisions of the Fourteenth Amendment of the U.S. Constitution. *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 193, 454 N.W.2d 797 (1990).

44. The guarantees of equal protection provide a right to be free from invidious discrimination in statutory classifications as well as governmental activity.

45. By interpreting the statutory term “direct pupil instruction” one way for public schools and another way for Choice Schools, DPI is discriminating against Choice Schools and depriving Choice Schools, including members of SCWA, of their right to equal protection under the law as guaranteed by the Wisconsin Constitution.

46. The Plaintiff has suffered harm as a result of the conduct of DPI.

### **RELIEF REQUESTED**

WHEREFORE, the Plaintiff requests that this Court:

A. Enter a declaratory judgment that DPI’s February 5 and February 28, 2019, communications stating that Choice Schools may not use virtual learning to meet the hours requirement of Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8 constitute a rule, that DPI did not promulgate that rule as required by state law, and that as a result the rule is invalid and may not be enforced by DPI;

B. Enter a declaratory judgment that the term “direct pupil instruction” as used in Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a)8 includes virtual learning;

C. Enter a declaratory judgment that DPI has violated the equal protection rights of the Plaintiff, and its members, under Article I, Section 1 of the Wisconsin Constitution;

D. Enter an order enjoining DPI from enforcing its interpretation of Wis. Stat. §§ 118.60(2)(a)8 and 119.23(2)(a) 8 as set forth in its February 5 and February 28, 2019, communications;

E. Award Plaintiff such costs and attorney fees as allowed by law; and

C. Grant the Plaintiff such other and further relief as the court deems appropriate.

Dated this 27th day of March, 2019.

WISCONSIN INSTITUTE FOR LAW & LIBERTY  
Attorneys for Plaintiffs

Electronically signed by RICHARD M. ESENBERG

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