

STATE OF WISCONSIN
SUPREME COURT
CASE NOS. 2020AP001419, 2020AP001420, 2020AP001446

SARA LINDSEY JAMES,

Petitioner,

v.

JANEL HEINRICH,

Respondent.

WISCONSIN COUNCIL OF RELIGIONS AND INDEPENDENT SCHOOLS, et. al.

Petitioners,

v.

JANEL HEINRICH and PUBLIC HEALTH OF MADISON AND DANE COUNTY,

Respondents.

ST. AMBROSE ACADEMY, INC., et al.

Petitioners,

v.

JOSEPH T. PARISI and JANEL HEINRICH,

Respondents.

**MOTION TO VACATE THE TEMPORARY INJUNCTION AND DISMISS THE
ACTIONS OR IN THE ALTERNATIVE TO STAY THE INJUNCTION**

Respondents Janel Heinrich, Joseph T. Parisi, and Public Health of Madison and Dane County, respectfully move this Court to vacate the temporary injunction and dismiss these actions

or, in the alternative, to stay the injunction in light of newly discovered legislative authority empowering a local health officer to close schools. Specifically, in Wis. Stat. §§ 115.01, 120.01(27), 115.7915(8m), 118.38(4)(a), 118.60(12), and 119.23(12), the Legislature authorized local health officers to close schools, including this year in recognition of the COVID-19 pandemic which is the wellspring of this controversy. This motion is made pursuant to Wis. Stat. §§ 751.06 (discretionary reversal), 809.19 (supplemental authorities), 809.24 (reconsideration), 806.07(1)(g) & (h) (relief from judgment or order) and the interests of justice.

STANDARD OF REVIEW

Respondents seek relief pursuant to the following authorities that they collectively believe warrant this Court's reconsideration of its Order of 9/10/20.

Under Wis. Stat. § 751.06, governing discretionary reversal in an appeal in the Supreme Court, if it appears from the record that "it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from. . . ." See *State v. Schumacher*, 144 Wis.2d 388, 399-400, 424 N.W.2d 672 (1988). The Court may do so "regardless of whether the proper motion or objection appears in the record." Wis. Stat. § 751.06.

Under Wis. Stat. § 751.06, this Court should grant discretionary reversal because a clear miscarriage of justice has occurred. Neither the parties, the amici, nor the Court were aware of the authority cited in this Motion when addressing the temporary injunction because the proceedings were expedited and the focus was on the general powers of a local health officer under Wis. Stat. § 252.03 by contrast to the Wisconsin Department of Health Services (DHS). This Court's 9/10/20 Order observed, at p. 3, "[b]oth Wis. Stat. § 252.02 and Wis. Stat. § 252.03 were drafted at the same time and by the same legislature, so no historical quirk or later amendment, at least that has been revealed at this stage of the proceedings, would suggest anything other than the legislature

granted DHS and local health officers different powers.” The authorities found elsewhere in the Wisconsin Statutes and discussed in this Motion, read in conjunction with Wis. Stat. § 252.03, show the local health officer has the power to close schools. Addressing this newfound authority would avoid a clear miscarriage of justice because the local health officer did, in fact, act within her authority and made a reasonable and necessary decision to phase-in the school year with certain classes for in-person attendance. The need to address these full authorities is an urgent one, as evidenced by the very public escalation in COVID-19 cases in Madison in the past week.¹

Also, supplemental authorities may be presented to the Court under certain circumstances as authorized by Wis. Stat. § 809.19(10). That statute allows “pertinent authorities” to be brought to the attention of the court after oral argument but before a decision. While the circumstances are different here, the intention is to have the benefit of all important legal authorities presented for clear adjudication of a controversy. See, e.g., *In re T.L.E.-C.*, 392 Wis. 2d 726, 946 N.W. 2d 155, (Ct. App. May 13, 2020) (where the court accepted a supplemental letter under Wis. Stat. § 809.19(10) in this matter, regarding a decision that was issued post briefing); *State v. Cooper*, 372 Wis.2d 458, 888 N.W. 2d 247 (Ct. App. 2016) (unpublished decision) (where the court accepted a supplementation of authorities under Wis. Stat. § 809.19(10)). As stated in the notes from the Judicial Council, Wis. Stat. § 809.19(10) establishes a procedure for supplementing briefs with pertinent authorities that subsequently have come to the attention of a party. Judicial Council Note from 2001. Here, as the statute envisions, pertinent authorities have come to the attention of the Respondents and these authorities should, as respectfully submitted, be considered now rather than

¹ <https://www.jsonline.com/story/news/local/wisconsin/2020/09/14/uw-madison-considers-plan-eliminate-spring-break-due-covid-19/5791285002/> (discussing New York Times article about increasing numbers in college towns, including Wisconsin’s UW-Madison); <https://www.greenbaypressgazette.com/story/news/2020/09/13/wisconsin-coronavirus-1-582-cases-listed-positive-rate-up-20-5/5786656002/> (“State health officials reported a record number of confirmed cases of COVID-19 on Sunday, as well as a record percentage of test results to come back positive. The new 1,582 cases accounted for 20.5% of the 7,735 test results confirmed Sunday by the state, the highest percent of results that have come back positive since widespread testing began.”)

many weeks from now during merits briefing or oral argument, since these authorities implicate the temporary injunction issued against a local health officer during an ongoing pandemic.

Additional authority for this Motion can be gleaned from Wis. Stat. § 809.24, which states: “a party may file a motion for reconsideration in the court of appeals within 20 days after the date of a decision issued The decision must state with particularity the points of law or fact alleged to be erroneously decided in the decision and must include supporting argument. . . .” Although Wis. Stat. § 809.24 references the court of appeals, this Court has applied it to reconsider an order, decision or judgment or to provide other relief where appropriate. See e.g., *Reliance Inc. v. Schuh*, 127 Wis. 2d 572, 383 N.W. 2d 64 (1986) (unpublished decision) (stating “[w]e have, on our own motion, pursuant to sec. 809.24, Stats., reconsidered our decision and confirmed it.”).²

Additionally, because this court has taken original action over this matter, civil procedure provides a mechanism to obtain relief from a judgment or order, specifically under Wis. Stat. § 806.07(1)(g) & (h) which states: “On motion and upon such terms as are just, the court . . . may relieve a party . . . from judgment, order or stipulation for the following reasons: (g) it is no longer equitable that the judgment should have prospective application; or (h) any other reasons justifying relief from the operation of the judgment.” Section 806.07(1)(h) “is a ‘catch-all’ provision allowing relief from judgment for ‘any other reasons justifying relief.’” *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶ 9, 282 Wis. 2d 46, 698 N.W. 2d 610. Paragraph (1)(h) “is to be liberally construed to provide relief from a judgment whenever appropriate to accomplish justice.” *Shanee Y. v. Ronnie J.*, 2004 WI App 58, ¶ 11, 271 Wis. 2d 242, 677 N.W. 2d 684. “In short, we balance the competing values of finality and fairness in deciding the motion.” *Connor v. Connor*, 243 Wis.

² Although *Reliance Inc. v. Schuh*, 127 Wis. 2d 572 (1986) is an unpublished decision, no rule, statute, or internal operating procedure expressly bars citing to the Wisconsin Supreme Court’s unpublished resolutions. The court has on occasion itself cited to such an unpublished disposition. See *In re Disciplinary Proceedings Against Breitenbach*, 167 Wis. 2d 102, 118-19 (1992) (Wisconsin Supreme Court order attached as appendix cites an unpublished order).

2d 279, 627 N.W. 2d 182 (2001). Courts have applied Wis. Stat. § 806.07(1)(h) when new developments have warranted relief from an order or judgment. See, e.g., *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 511 N.W. 2d 868 (1994) (holding that a trial court did not abuse its discretion by vacating a paternity judgment based on new evidence that the initial blood test had been erroneous). Additionally, courts have applied Wis. Stat. § 806.07(1)(g) when a change in circumstances is specifically contemplated which makes the judgment no longer equitable. See *State ex. rel. M.L.B.*, 122 Wis. 2d 536, 543-44, 363 N.W. 2d 419 (1985) (stating “this case, unlike a permanent injunction case, does not involve a change of conditions).

Lastly, all courts in Wisconsin have inherent authority to control and manage their dockets in order to obtain finality over controversies fairly and efficiently, which is reflected in the above-quoted language from *Connor v. Connor*. “Courts have inherent power, within the limits of their discretion, to control their dockets.” *Parker v. Wisconsin Patients Compensation Fund*, 2009 WI App 42, 317 Wis. 2d 460, 767 N.W. 2d 272. See, e.g., *Hefty v. Strickhouser*, 2008 WI 96, ¶¶ 31-33, 312 Wis. 2d 530, 752 N.W.2d 820 (describing the statutory and inherent discretion of Wisconsin Circuit Courts to control and manage their dockets).

For all of these reasons, it is respectfully submitted that this Court has authority to consider this Motion at this time, to call for a response from the Petitioners and to vacate, or in the alternative, stay the injunction as requested and to take these steps now, rather than two or three months from now, at a time when the local health officer is trying to suppress a communicable disease.

ARGUMENT

To determine the extent of the power the Legislature has granted local health officials to close schools, the plain language of several statutes that specifically address schools, answers this

question in the affirmative. Courts first look to the statute’s language, and if the meaning is plain, the inquiry typically ends there. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* In determining a statute’s plain meaning, the scope, context, structure, and purpose are important. *See id.*, ¶¶ 45-46, 49. “A statute’s purpose . . . may be readily apparent from its plain language or its relationship to surround or closely-related statutes – that is, from its context or the structure of the statute as a coherent as a whole.” *Id.* The court considers “surrounding or closely-relates statutes” to reach a sound interpretation and “to avoid absurd or unreasonable results” *Id.* A reviewing court may consider the statutory history as part of the context analysis. *Id.*

As the Court is aware from this controversy, the Petitioners challenge the local health officer’s authority to close schools under Wis. Stat. § 252.03. Subsection (1) states in pertinent part that “the local health officer shall promptly take all measures necessary to prevent, suppress and control communicable diseases. . . .” Further, subsection (2) states that “local health officers may do what is reasonable and necessary for the prevention and suppression of disease. . . .” The Petitioners and the Court in its 9/10/20 Order focused on the differential power to “close schools” given to DHS in Wis. Stat. § 252.02.

However, there are a multitude of statutes governing public instruction (Ch. 115 to 121), that are closely related and specifically reference the explicit power of a local health officer to close schools. The Legislature understood a local health officer’s ability to close schools during a communicable disease when it granted such authority in all these differing sections of the chapters.

First, specifically under Wis. Stat. § 115.01(10)(b)³, the Legislature states that local health officers have the power to close schools. Subsection (b) states: “School days are days on which school is actually taught and the following days on which school is not taught: ...[d]ays 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.” (emphasis added).

In 1993, Wis. Stat. § 115.01(10)(a)(2), now Wis. Stat. § 115.01(10)(1)(b), was amended to read, “[d]ays on which school is closed by order of a local health officer, as defined in s. 250.01(5).” The 1993 amendment, added the word “local” to health officer and added the reference to such officer under Ch. 250, explicitly recognizing the fact that the local health officer has the power to close schools.

The plain language is unmistakable that a local health officer has the power to close schools. While unnecessary to unearth this statute’s legislative history, that history supports this conclusion.

The drafting records from 1993 offer an explanation regarding the inclusion of the word “local.” The Legislative Reference Bureau (LRB)⁴ stated that local health departments were

³Wis. Stat. § 115.01(10) states:

(10) School Day. School days are days on which school is actually taught and the following days on which school is not taught:

- (a) 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 5 days during the school term.
- (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.
- (c) 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, unless the school board determines that the days will not count as school days.

⁴ Wisconsin Statute § 13.92(1)(b)(2) provides that the Legislative Reference Bureau shall “prepare in plain language an analysis of each original measure, to be printed with the measure when it is introduced.” The purpose of the analysis is to clearly and objectively describe, in understandable language, the substance and effect of a legislative proposal so that legislators are adequately advised about the legal effect of the proposal. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, (C.J. Abrahamson, concurring).

required as part of the statutory and government framework in Wisconsin for counties, and further explained the powers and duties of a local health department. “Under current law, a county, city-county or multiple-county board of health is authorized to provide public health services including communicable disease control, . . . relating to public health and adopt regulations for the county health department that are consistent with state statutes and DHSS rules necessary to protect and improve public health.” Further, the LRB explained “[a] city or village board of health is authorized to perform duties similar to those of a county health commission.”⁵

After recognizing a local health officer’s power to close schools, the Legislature subsequently added the power of DHS to do so. In 2009, Wis. Stat. § 115.01(10)(a)(2), now Wis. Stat. § 115.01(10)(1)(b), stated “[d]ays 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.” The statute was amended to add “or the department of health services.” Thus, the statute first recognized that the local health officer had the power to close schools, and only later added and recognized the department of health services as also having the power.⁶

The Wisconsin Legislative Council Act Memo from 2009 Wisconsin Act 42, 2009 Assembly Bill 316, summarizes the changes made in Act 42. With regard to Wis. Stat. § 115.01, it discusses the computation of school days, and states:

This Court has acknowledged that the Legislative Reference Bureau statements carry some weight because the agency is “deeply involved in the legislative drafting process, as LRB attorneys draft all bills and resolutions that are introduced into the legislature.” *State v. Cole*, 2003 WI 112, ¶ 36 n. 12. Further, the Legislative Reference Bureau’s analysis of a bill is printed with and displayed on the bill when it is introduced in the legislature, and, as such, indicates legislative intent.

While the LRB’s memos are not dispositive, their analyses at the time of drafting certainly provides the Court with valuable corroborating information about the breadth of the plain language. Further, the legal expertise of these agencies entitles their analysis to some consideration by this court.

⁵ Drafting record, 1993 Act 27, LRB – 0279/2, Marquette University Law Library Microfiche.

⁶ 2009 Wisconsin Act 42, Assembly Bill 316, Enacted October 6, 2009, pg. 6, <https://docs.legis.wisconsin.gov/2009/related/acts/42.pdf>

Current law provides that no state may be paid to a school district that fails to hold school for at least 180 days per 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 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.⁷

In another drafting memo, from the Wisconsin Legislative Council, in reference to 2009 Assembly Bill 316, the legislative council explains that Assembly Bill 316 makes the following changes in laws dealing with computation of school days:

Assembly Bill 316 modifies statutes relating to computation of school days, to account for days on which school is closed by order of the Department of Health Services (DHS), and days on which the school is closed by order of a school district administrator because of a threat to health or safety. Assembly Amendment 1 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 administrator because of a threat to health safety.⁸

Both of these Wisconsin Legislative Council Memos state that local health officers have the ability to close schools and what will happen when a school is closed by a local health officer.

⁷ 2009 Wisconsin Act 42, 2009 Assembly Bill 316, Wisconsin Legislative Council Amendment Memo on Emergency Management, pg. 4, <https://docs.legis.wisconsin.gov/2009/related/lcactmemo/act042.pdf>

⁸ 2009 Assembly Bill 316, Wisconsin Legislative Council Amendment Memo on Assembly Amendments 1, 2, and 3, pg., 1, <https://docs.legis.wisconsin.gov/2009/related/lcamendmemo/ab316.pdf>

Second, the legislative chapter governing school district government and school board duties also reflects in plain terms that local health officers have the power to close schools. Specifically, Wis. Stat. § 120.12(27)(a) states that “[w]ithin 24 hours of a school being closed for a reason specified in s. 115.01(10)(b) or (c) or by the department of health services under s. 252.02(3), notify the department. The notice shall include the reason for the closure.”

Accordingly, § 120.12(27)(a), in conjunction with § 115.01(10)(1)(b), unambiguously authorizes local health officers to close schools. The Legislature’s allowance for local health officers to close schools falls comfortably within her powers as afforded by the plain language of Wis. Stat. § 252.03(1) & (2) (a local health officer “shall promptly take all measures necessary to prevent, suppress and control communicable diseases” and “do what is reasonable and necessary.”)

This conclusion is also corroborated by Wis. Stat. § 120.12(27)(a)’s history. The 2009 Assembly Bill 557 provides LRB analysis regarding the creation of Wis. Stat. § 120.12(27). The LRB noted:

Under current law, a school district administrator may close a school because of inclement weather or because of a threat to the health or safety of the 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.⁹

This analysis by the Legislative Reference Bureau is explicitly clear. “Under current law . . . a local health officer . . . may close a school to control outbreaks and epidemics.”

Third, the Legislature renewed a local health officer’s power to close schools in recognition of the COVID-19 pandemic. In the 2019-2020 legislative session, the Legislature explicitly recognized local health officers have the power to close schools due to the COVID-19 pandemic

⁹ 2009 Assembly Bill 557, Introduced November 10, 2009, LRB – 3182/4, pg. 1, <https://docs.legis.wisconsin.gov/2009/related/proposals/ab557.pdf>

and, therefore, addressed various implications for schools and Wisconsin when that happens. By way of example:

- Wis. Stat. § 115.7915(8m) addressed special needs programs when the local health officer closes school.¹⁰
- Wis. Stat. § 118.38(4)(a) addressed, when the local health officer closes school, waivers of school board and school district requirements throughout Ch. 115 to Ch. 121.¹¹

¹⁰ (8m) Public Health Exception. 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, in the school year during which the school is closed and the following school year, the department may not withhold payment from the private school under sub. (8) (c) or bar the private school from participating in the program under sub. (8) (a) for failing to comply with a requirement under this section or a rule promulgated under this section if all of the following occur:

- (a) The private school submits information to the department that explains how the school closure impacted the private school's ability to comply with the requirement and any action the private school took to mitigate the consequences of not complying with the requirement.
- (b) The department determines that the private school's failure to comply with the requirement was caused by the closure.

¹¹ (a) During the public health emergency declared on March 12, 2020, by executive order 72, if schools are 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, the department may do all of the following:

- (1) Waive any requirement in chs. 115 to 121 or the administrative rules promulgated by the department under the authority of those chapters related to any of the following:
 - a. A program under s. 115.7915, 118.60, or 119.23.
 - b. A private school participating in a program under s. 115.7915, 118.60, or 119.23.
 - c. A charter school under s. 118.40 (2r) or (2x), including any requirement related to an authorizer, governing board, or operator of a charter school under s. 118.40 (2r) or (2x).
- (2) Establish an alternate deadline for any requirement related to a program under s. 115.7915, 118.60, or 119.23 in chs. 115 to 121 and any requirement related to a program under s. 115.7915, 118.60, or 119.23 in the administrative rules promulgated by the department under the authority of chs. 115 to 121 if the original deadline is any of the following:
 - a. A deadline that occurs during the period beginning on the first day schools are closed by the local health officer or department of health services and ending 120 days after the last day schools are closed by the local health officer or department of health services.
 - b. A deadline for a requirement that impacts a date during the period beginning on the first day schools are closed by the local health officer or department of health services and ending 120 days after the last day schools are closed by the local health officer or department of health services.

(b)

- (1) The department shall notify the legislative reference bureau of each waiver under par. (a) 1. and alternate deadline established under par. (a) 2. The legislative reference bureau shall publish a notice in the Wisconsin Administrative Register of the waiver or alternate deadline.
- (2) The department shall post each waiver under par. (a) 1. and alternate deadline established under par. (a) 2. on the department's Internet site.

- Wis. Stat. § 118.60(12) addressed parental choice programs when the local health officer closes school.¹²
- Wis. Stat. § 119.23(12) similarly addressed the Milwaukee parental choice program when a local health officer closes school.¹³

The analysis of the 2019 bill by the Legislative Reference Bureau references the ability of local health officers to close schools multiple times.¹⁴

In reference these school laws involving waiver, the LRB noted:

Waiver of laws and rules related to parental choice programs, the Special Needs Scholarship Program, and independent charter schools; schools closed by the Department of Health Services or a local health officer.

Under the bill, during the public health emergency declared on March 12, 2020, by executive order 72, if the Department of Health Services or a local health officer closes

(c) A waiver under par. (a) 1. applies only to the school year in which schools are closed by the local health officer or the department of health services.

¹² (12) 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, in the school year during which the school is closed and the following school year, the department may not withhold payment from the private school under sub. (10) (d) or bar the private school from participating in the program under sub. (10) (a), (am), or (ar) for failing to comply with a requirement under this section or a rule promulgated under this section if all of the following occur:

(a) The private school submits information to the department that explains how the school closure impacted the private school's ability to comply with the requirement and any action the private school took to mitigate the consequences of not complying with the requirement.

(b) The department determines that the private school's failure to comply with the requirement was caused by the closure

¹³ (12) 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, in the school year during which the school is closed and the following school year, the department may not withhold payment from the private school under sub. (10) (d) or bar the private school from participating in the program under sub. (10) (a), (am), or (ar) for failing to comply with a requirement under this section or a rule promulgated under this section if all of the following occur:

(a) The private school submits information to the department that explains how the school closure impacted the private school's ability to comply with the requirement and any action the private school took to mitigate the consequences of not complying with the requirement.

(b) The department determines that the private school's failure to comply with the requirement was caused by the closure.

¹⁴ “Waiver of Laws and rules related to parental choice programs, the Special Needs Scholarship Program, and independent charter schools; schools closed by the Department of Health Services or a local health officer.”

“Under the bill, during the public health emergency declared on March 12, 2020, by executive order 72, if a participating private school is closed by DHS or a local health officer for ten or more schools days during a year; DPI may not withhold program payments or bar the private school from participating in the parental choice program . . .”

schools for ten or more days during a school year, DPI may waive state education statutes

Exceptions in parental choice programs and the Special Needs Scholarship Program; schools closed by the Department of Health Services or a local health officer.

Under the bill, during the public health emergency declared on March 12, 2020, by executive order 72, if a participating private school is closed by DHS or a local health officer for ten or more school days during a school year, DPI may not withhold program payments or bar the private school from participating in the parental choice program or the SNSP in the current or following school year¹⁵

These new amendments show that Legislature clearly has envisioned a local health officer having the power to close schools. The statement, “if schools are closed . . . by a local health officer,” envisions a local health officer having the powers to close a school because it gives the department further rules for how to act after local health officers have done so.

After reading these statutes in conjunction with one another, it is apparent the Legislature has granted the power to close schools to the local health officer where, as here, she is faced with a community disease of the magnitude of this case. The legislature, may not have included in Wis. Stat. § 252.03 the specific language that local health officers have the powers to close schools, but they did say that the local health officer can take “*all measures* necessary to prevent, suppress and control communicable diseases” and they stated that “local health officers may do what is *reasonable and necessary* for the prevention and suppression of disease.” (emphasis added). The Legislature has declared that it is reasonable and necessary for a local health officer to close schools during a communicable disease by specifically declaring as much within all the aforementioned statutes governing schools.

Additionally, the statutes must be interpreted as a whole to avoid absurd or unreasonable results, which would include reading them in harmony so that Wis. Stat. § 252.03 does not render all the other statutes meaningless. Here, if Wis. Stat. § 252.03 were read to remove the power of a

¹⁵ 2019 Assembly Bill 1038, Introduced on April 13, 2020, LRB-6089/1, pg. 5, <https://docs.legis.wisconsin.gov/2019/related/proposals/ab1038.pdf>

local health officer to close schools, then all the other statutes quoted above would be rendered “pure applesauce.” See *King v. Burwell*, 576 U.S. 473, 135 S. Ct. 2480, 192 L. Ed 2d 483 (2015) (J. Scalia Dissenting). Section 252.03’s statutory grant of authority is broad, albeit not unfettered, but limited to what is “reasonable and necessary” during a communicable disease. To read Wis. Stat. § 252.03 as excluding the power to close schools would yield absurd and unreasonable results because the above referenced statutes allow the local health officer the power to close schools and, in turn, provide the school system, DPI and Wisconsin sites how to respond once schools are closed by local health officers. The Legislature would not have granted her such power with one hand, only to take it away with the other; further, the Legislature would not have granted her such power throughout a host of statutes only for the courts to declare all those provisions are surplusage. The specific statutes should control. See *Clean Wis., Inc. v. Public Serv. Comm’n*, 2005 WI 93, ¶ 175, 282 Wis.2d 250, 700 N.W.2d 768. “[T]his is especially true where the specific statute is enacted after the general statute.” *Martineau v. State Conservation Comm’n*, 46 Wis.2d 443, 449, 175 N.W.2d 206 (1970).

In sum, given the statutory grant of power to close school, given that the local health officer believed that phasing-in classes for in-person education would assist in suppressing and controlling COVID-19 and given the rising rates of COVID-19 in the community that have been rapidly increasing since this Court’s Order of 9/10/20, it is respectfully submitted that Health Order No. 9 should not have been enjoined. While there is no doubt Petitioners have a legitimate desire for in-person education across the County, it is respectfully submitted that the balance tips in favor of Dane County, whose population of 546,000 persons has a societal interest in allowing its elected officials and the local health officer to continue their steps to suppress this pandemic. Since there is no dispute about the substantial government interest to suppress this pandemic, the temporary

injunction should be vacated and these Petitions should be dismissed or, in the alternative, the temporary injunction should be stayed.

CONCLUSION

For the above reasons, the Court should grant this Motion to Vacate the temporary injunction and dismiss the Petitions, or in the alternative, stay the injunction until further briefing on the merits.

Dated this 15th day of September 2020.

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Attorneys for Respondents, Janel Heinrich in her official capacity as Public Health Officer and Director of Public Health of Madison and Dane County, Public Health of Madison and Dane County, and Joseph T. Parisi in his Official Capacity as County Executive of Dane County

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