

IN THE SUPREME COURT OF WISCONSIN

No. 2020AP1911-OA

SCHOOL CHOICE WISCONSIN ACTION, WISCONSIN COUNCIL OF
RELIGIOUS & INDEPENDENT SCHOOLS, EVERGREEN ACADEMY,
RACINE CHRISTIAN SCHOOL, RACINE LUTHERAN HIGH SCHOOL, ST.
JOHN'S LUTHERAN CHURCH & SCHOOL, TRINITY LUTHERAN
SCHOOL, ETHAN BICKLE, ANDREA THUNHORST, RYAN THUNHORST,
AND ELAINE WILSON,

Petitioners,

v.

DOTTIE-KAY BOWERSOX, IN HER OFFICIAL CAPACITY AS PUBLIC
HEALTH OFFICER AND PUBLIC HEALTH ADMINISTRATOR OF THE
CITY OF RACINE PUBLIC HEALTH DEPARTMENT

AND

CITY OF RACINE PUBLIC HEALTH DEPARTMENT,

Respondents.

**RESPONSE OF RESPONDENTS DOTTIE-KAY BOWERSOX AND CITY
OF RACINE PUBLIC HEALTH DEPARTMENT
IN OPPOSITION TO THE EMERGENCY PETITION
FOR AN ORIGINAL ACTION**

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COME NOW Respondents, Dottie-Kay Bowersox (hereinafter “Bowersox”) and the City of Racine Public Health Department¹ and as and for a Response to Petitioners’ Emergency Petition for an Original Action show unto this Honorable Court as follows:

INTRODUCTION

Ignoring any hyperbolic statements and asserted improper motivations, the rendition of essential facts in Petitioners’ Emergency Petition for an Original Action are accurate. As part of her continuing struggles as a statutorily-responsible local health officer to effect all within her duty to keep the City of Racine and the Villages of Elmwood Park and Wind Point as safe as possible during a historic public health crisis, Respondent Bowersox issued a lawful order temporarily closing all school buildings within her jurisdiction. Her order was limited in time and scope and specifically tailored to slow the spread of the 2019 novel coronavirus (COVID-19) based upon the rise in COVID-19 cases in schools

¹ The City of Racine Public Health Department is not actually a separate legal entity with the capacity to sue or be sued. It is a department of the City of Racine.

locally and in anticipation of a spike in COVID-19 cases that will follow large gatherings during the several holidays occurring from late November 2020 to early January 2021.

Respondent Bowersox acted within the clear legislative intent of relevant statutes and administrative code sections. Whether this Honorable Court grants Petitioners' Emergency Petition for an Original Action, Respondents therefore pray that the Court dismiss such Petition.

Respondents ask the Court to dismiss the Petition principally because Petitioners misread the law relative to a local health officer's statutory authority to order school buildings closed as an available measure when necessary to prevent, suppress, and control communicable diseases. The state legislature plainly and specifically intended local health officers to have such authority. Moreover, the state legislature explicitly intended local health officers to have such authority during the extant COVID-19 pandemic.

FACTS

This is an almost unprecedented time in American history. The world, the United States, the State of Wisconsin, and the City of Racine and two of its neighboring municipalities, the Villages of Elmwood Park and Wind Point, are in the midst of an ongoing public health crisis—the COVID-19 pandemic—the likes

of which have not existed in one hundred years.² For most of 2020, Respondents have engaged in momentous efforts to protect and defend the residents of and visitors to the Racine against COVID-19, which is a communicable disease in fact and as contemplated under relevant Wisconsin law.³ That COVID-19 is a rampant and continuing public health crisis, which contagion transmits from person to person via various means, including airborne transmission from respiratory droplets, is not subject to serious doubt.

Respondent Bowersox is the City of Racine Public Health Administrator. She was appointed to such position by the City of Racine Board of Health, and her appointment was confirmed by the City of Racine Common Council. In such capacity, she serves as the duly appointed City of Racine local health officer as defined by statute, including but not limited to, Wisconsin Statutes sections 250.01(5), 251.06, and 252.03. As local health officer her authority is established by law, including pursuant to Wisconsin Statutes chapters 250 through 257, and pursuant to Racine Ordinances chapter 2, article III, division 2, and chapter 54. By intermunicipal agreement, Respondent Bowersox also serves as the local health officer for the Villages of Wind Point and Elmwood Park. (See Affidavit of Dottie-Kay Bowersox in Opposition to the Emergency Petition for an Original

² For ease of reference, unless specifically noted, Respondents will use the word “Racine” when referring to the City of Racine and the Villages of Elmwood Park and Wind Point.

³ Wisconsin Administrative Code chapter DHS 145, Appendix A, *Communicable Diseases and Other Notifiable Conditions*, includes “Severe Acute Respiratory Syndrome–associated Coronavirus (SARS–CoV)” as a disease “of urgent public health importance.”

Action and Emergency Motion for a Temporary Injunction, ¶ 6, filed herewith.)

Respondents have engaged in a number of advisory, preventative, and directive measures since March 2020 in an effort to mitigate the effects of COVID-19. (*See generally*, Bowersox Aff.) In addition, the City of Racine government has enacted ordinances to assist Respondents in their efforts. These include Racine Ordinance section 54-33, the Safer Racine ordinance, which imposes standards for a variety of activities and entities within the City of Racine, including capacity and closure requirements, and Racine Ordinance section 54-35, a mask or face coverings ordinance.⁴ These ordinances permit flexibility, based upon changing conditions, and require regular input and response from Respondent Bowersox as the City of Racine's local health officer.

As a part of her continuing efforts, on November 12, 2020, Respondent Bowersox issued an order affecting school buildings to take effect on November 27, 2020. The substance of the order is as follows:

Public and private K-12 school buildings within the boundaries of the City of Racine and the Villages of Elmwood Park and Wind Point shall be closed from November 27, 2020, through January 15, 2021, inclusive. This closure applies to all students, faculty, staff, and administrative personnel. Schools may continue to facilitate distance learning or virtual learning. Schools may continue to be used for Essential Government Functions, emergency services, building maintenance, and food distribution.

⁴ Chapter 54, Article II, Communicable Diseases, City of Racine Code of Ordinances, https://library.municode.com/wi/racine/codes/code_of_ordinances?nodeId=PTIIMUCO_CH54HE_ARTIICODI; www.cityofracine.org; www.racinecoronavirus.org.

(Bowersox Aff., Ex. A.) The November 12, 2020, order was issued in response to the surging number of COVID-19 cases in the area generally and the increasing number of cases within the schools under Respondent Bowersox’s jurisdiction, including petitioner schools. The order was further prompted by the demonstrable evidence that that COVID-19 cases have spiked in Racine following the sort of gatherings attendant to holidays. (Bowersox Aff., ¶¶ 11-19.)

Specifically, based upon the most recent data, the latest surge in COVID-19 positive cases currently is more than double what Racine experienced in the surge at the beginning of the pandemic. The five-day rolling positivity rate is 31%. The Racine area is at a critical level of community spread. According to Respondent Bowersox, “coronavirus has taken over this jurisdiction.” Additionally, Respondent Bowersox has “received reports of noncompliance within educational facilities, both public and private: adults are not wearing masks, or maintaining physical distance.” This “[l]ack of compliance and the current prevalence of virus in our community required [Respondent Bowersox] to address the continued in-person gatherings within school buildings by virtue of this order.” (Bowersox Aff., ¶¶ 13-14.)

Notably, the November 12, 2020, order does not close schools; it closes school buildings, except for certain specific activities. It does not prevent any school from engaging in teaching.

ARGUMENT

I. It is this Honorable Court's Prerogative to Determine this is a Case Properly Postured for the Court's Exercise of Original Jurisdiction.

This Honorable Court has the discretion to determine this is a *publici juris* matter appropriate for the exercise of original jurisdiction pursuant to Wisconsin Statutes section 809.70. The Court has stated that it will exercise its original jurisdiction authority in cases that “so importantly affect the people at large as to warrant exercise of original jurisdiction.” *Petition of Heil*, 230 Wis. 428, 443, 284 N.W. 42 (1939).

Respondents do not dispute that the instant matter has important state-wide effect. However, Respondents urge the Court to determine, based upon the pleadings and the law that Respondent Bowersox acted within her authority and dismiss the Petition.

II. The State Legislature Intended for Local Health Officers to Have the Authority to Close Schools to Suppress and Prevent Communicable Disease.

A. The legislature has specifically stated that local health officers have the authority to close schools, and affirmed such authority on April 15, 2020.

Respondents shall address Respondent Bowersox's authority as a local health officer, pursuant to the law broadly related to response to communicable disease, within. However, it is vital to note that the legislature unambiguously has declared it understands local health officers to have the authority to take actions

respecting the closure of schools.

Within the context of what counts as a school day, Wisconsin Statutes section 115.01(10)(b) recognizes that schools may be “closed by order of a local health officer, as defined in s. 250.01(5),” or may be closed by the Wisconsin Department of Health Services.⁵ The unequivocal language of section 115.01(10)(b) is indisputable: a local health officer has the authority to close schools.⁶

In fact, the authority of a local health officer to close schools as demonstrated by section 115.01(10)(b) predates recognition of the authority of the Department of Health Services to close schools under such statute. By Section 43 of 2009 Wisconsin Act 42, the legislature added the words “or the department of health services” to the school closure reference.⁷ *Before* the legislature recognized any authority held by the Department of Health Services to close schools in section 115.01(10)(b), it understood that it had already granted such authority to local health officers.

⁵ Again, Respondent Bowersox is the local health office as defined in Wis. Stat. § 250.01(5).

⁶ Other statutory references to the authority of a local health officer to close schools exist. Wis. Stat. § 118.38(2)(bm) requires the Wisconsin Department of Public Instruction to promulgate certain rules in response to a school closure by a local health officer. Wis. Stat. § 120.12(27) requires the school boards of common or union high school districts to notify the Wisconsin Department of Public Instruction upon closure and reopening of schools by a local health officer. Additionally, the Wisconsin Administrative Code Chapter PI 8 demonstrates that local health officers are not limited to ordering the closure of an individual school. Wis. Adm. Code PI § 8.01(4) demonstrates that local health offices have the authority to order “the closure of one or more schools.”

⁷ 2009 Wisconsin Act 42, Assembly Bill 316, enacted November 6, 2009, <https://docs.legis.wisconsin.gov/2009/related/acts/42.pdf>

The legislature has *reaffirmed* its understanding that local health officers have the authority to close schools since the COVID-19 pandemic began. Effective April 15, 2020, the state legislature enacted 2019 Wisconsin Act 185.⁸ In that Act, the legislature created provisions explicitly to be in effect “[d]uring the public health emergency declared on March 12, 2020, by executive order 72.”⁹ See, e.g., 2019 Wis. Act 185, sec. 57. In 2019 Wisconsin Act 185, the legislature added several statutory references to the authority of local health officers to close schools, when and if school closures should occur due to the COVID-19 pandemic. Specifically, the newly-added statutory sections added relief that schools—and specifically private schools—would be afforded during periods of COVID-19 school closures. See, e.g., Wis. Stat. § 115.7915(8m) (regarding a special needs scholarship program), Wis. Stat. § 118.60(12) (regarding a parental choice program), and Wis. Stat. § 119.23(12) (regarding the Milwaukee parental choice program). Each newly-enacted statutory provision recognizes school closure authority residing within local health officers.

The Wisconsin Legislative Council Amendment Memorandum to 2019 Assembly Bill 1038, Assembly Amendment 4, which bill was enacted at 2019

⁸ 2019 Wisconsin Act 185, enacted April 15, 2020, <https://docs.legis.wisconsin.gov/2019/related/acts/185.pdf>.

⁹ Executive Order 72, Relating to a Proclamation Declaring a Health Emergency in Response to the COVID-19 Coronavirus, <https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf>.

Wisconsin Law 185, reemphasizes the point.¹⁰ In eleven separate instances, the Memorandum references the closure of schools during the COVID-19 pandemic by “the local health officer.” In stark contrast to any argument that only the Wisconsin Department of Health Services has statutory authority to close schools, in each of those eleven references, the Memorandum proclaims the closure of schools by the Department of Health Services or by a local health officer to have equal effect.

B. In context Wisconsin Statutes section 252.03 must be read to provide the authority for local health officers to close schools.

Respondents argue that the plain language of Wisconsin Statutes section 252.03 provides the authority for Respondent Bowersox to issue her November 12, 2020, school building closure order. However, there is no need to consider section 252.03 in a vacuum.

Chapter 252 of the Wisconsin Statutes addresses communicable disease.¹¹ Wisconsin Statutes section 252.03 requires local health officers, such as Respondent Bowersox, to “take all measures necessary to prevent, suppress and control communicable diseases” Further, section 252.03 authorizes local health officers to “do what is reasonable and necessary for the prevention and

¹⁰ <https://docs.legis.wisconsin.gov/2019/related/lcamendmemo/ab1038.pdf>

¹¹ Without doubt COVID-19 is a communicable disease. Further, Wisconsin Administrative Code chapter DHS 145, Appendix A, *Communicable Diseases and Other Notifiable Conditions*, includes “Severe Acute Respiratory Syndrome—associated Coronavirus (SARS–CoV)” as a disease “of urgent public health importance.”

suppression of disease.”

The language of Wisconsin Statutes section 252.03 is plain. A “court’s analysis begins with the language of the statute. If the meaning of the statute is plain, [courts] ordinarily stop the inquiry.” *Seider v. O’Connell*, 2000 WI 76, ¶ 43.

However,

“[c]ontext is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 46. The context in which section 252.03 exists underscore its applicability to permit local health officers to close schools.

Other provisions of Chapter 252 make clear a local health officer has responsibilities to schools. Section 252.03(1) authorizes local health officials 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.” Section 252.21(1) requires “a teacher, school nurse, or principal of any school or child care center [who] knows or suspects that a communicable disease is present in the school or center, [to] at once notify the local health officer.”¹² It would be illogical for local health officers to be permitted to inspect schools and to receive

¹² This requirement is reiterated in Wis. Admin. Code DHS § 145.04(1)(d).

reports of communicable disease present in schools and not have the authority to take reasonable and necessary measures to suppress and control such communicable disease within schools.

Wisconsin Administrative Code Chapter DHS 145 provides guidance for health officials, including local health officers, when responding to communicable disease. DHS section 145.06(6) authorizes local health officers to “direct persons who own or supervise real or physical property or animals and their environs, which present a threat of transmission of any communicable disease [as defined by Wisconsin Administrative Code chapter DHS 145, Appendix A], to do what is reasonable and necessary to abate the threat of transmission” of such communicable disease. Schools and school districts “own or supervise” real ... property.” It is worth noting that DHS section 145.06(6) authorizes local health officers to take such actions in response to even the “threat” of transmission of communicable disease. Respondent Bowersox’s November 12, 2020, order directs the schools in Racine close their buildings. Such ordered closure is of short duration and is reflective of the existing and fairly-anticipated conditions and reasonable and necessary to abate the both the threat and the reality of transmission of COVID-19.

Were the Court to reject considering the other provisions of Wisconsin Statutes chapter 252 regarding schools, and were the Court to reject considering a local health officer’s authority under Wisconsin Administrative Code DHS

section 145.06(6) to direct those who own and supervise real property to take directed actions to abate the threat of transmission of communicable disease, it would be curious for the Court to reject the varied references to the authority and responsibility of local health officers vis-à-vis the closure of schools specifically existing in several statutory and administrative code sections. To ignore those provisions would create the “absurd” result about which this Court cautioned in *Kalal*.

To reiterate, Wisconsin Statutes sections 115.01(10)(b),¹³ 115.7915(8m),¹⁴ 118.38(2)(bm),¹⁵ 118.60(12),¹⁶ 19.23(12),¹⁷ and 120.12(27),¹⁸ and Wis. Adm. Code PI § 8.01(4),¹⁹ *supra*, all specifically reference the authority of a local health officer—as defined by Wisconsin Statutes section 250.01(5)—to close both private and public schools across the state. *See, e.g.*, Wis. Stat. § 115.01(10)(b). These statutes need not be *interpreted* to include school closure as within the

¹³ By its own terms, Wis. Stat. § 115.01 applies to the entirety of Wis. Stats. Ch. 115 through 121.

¹⁴ By its own terms, Wis. Stat. § 115.7915(8m) applies to private schools. Pursuant to Wis. Stat. § 115.001, “‘Private school’ means an institution with a private educational program that meets all of the criteria under s. 118.165(1) or is determined to be a private school by the state superintendent under s. 118.167.” Under Wis. Stat. § 118.165(1)(a), a school is a “private school” if it meets certain criteria, including that “[t]he primary purpose of the program is to provide private or religious-based education.”

¹⁵ By its own terms, Wis. Stat. § 118.39(2)(bm) applies to school boards or school districts.

¹⁶ By its own terms, Wis. Stat. § 118.60(12) applies to private schools participating in a parental choice program. In Paragraph 19 of the Petitioners’ Emergency Petition for an Original Action, Petitioner School Choice Wisconsin Action avers that it is “a membership based association of schools enrolled in one of Wisconsin’s parental choice programs.”

¹⁷ By its own terms, Wis. Stat. § 119.23(12) applies to private school participating in the Milwaukee parental choice program.

¹⁸ By its own terms, Wis. Stat. § 120.12(27) applies to the duties of a common or union high school district board.

¹⁹ By its own terms, Wis. Admin. Code PI § 8.01(4) applies to a school district board.

panoply of a local health officer's responsibility; these statutes explicitly *declare* that include school closure is among a local health officer's responsibilities.

Wisconsin Statutes section 250.01(5), provides that, “[l]ocal health officer’ means the health officer who is in charge of a local health department.” Respondent Bowersox is the duly appointed local health officer in charge of the City of Racine Public Health Department, with public health responsibility for the City of Racine and the Villages of Elmwood Park and Wind Point. (Bowersox Aff., ¶¶ 4, 5, and 6.)

In furtherance of the contextual analysis, as a cross-reference Wisconsin Statutes chapter 252 adopts the definitions set forth in Wisconsin Statutes section 250.01. A local health officer as defined by Wisconsin Statutes section 250.01(5) for the purposes of Wisconsin Statutes section 252.03 is the same local health officer understood by the legislature to have authority to close schools as stated in Wisconsin Statutes sections 115.01(10)(b), 115.7915(8m), 118.30(2)(bm), 118.60(12), 19.23(12), and 120.12(27), and Wis. Adm. Code PI § 8.01(4).

All these sections must be read together—local health officers are statutorily understood to have the authority to close schools and local health officers are directed to take all measures reasonable and necessary to suppress and control communicable disease to appreciate the context in which they operate. Again, “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or

closely-related statutes; and reasonably, to avoid absurd or unreasonable results.”

Kalal, 2004 WI 58, ¶ 46.

Any argument that the authority granted by the legislature to enable the Department of Health Services—and only the Department of Health Services—proactively to act to close schools or school buildings would necessarily ignore the several instances in which the legislature specifically recognized the authority of local health officers to so act. Moreover, it would ignore the fact that in April 2020 the legislature added additional statutory language acknowledging the ability of local health officers to act with respect to schools and did so with intent and in recognition of the extant COVID-19 public health emergency. This Court has declared it to be “a basic precept of statutory construction that the legislature is presumed to act with full knowledge of existing laws.” *State v. Gordon*, 111 Wis. 2d 133, 145, 330 N.W.2d 564 (1983). By enacting such statutes during this moment, knowing that Wisconsin Statutes section 252.03 is in place, the legislature has declared that the school-closure authority of local health officers is necessary and reasonable.

Respondents believe that the authority of local health officers to close school buildings lies in the plain language of Wisconsin Statutes based upon the context in which each of the relevant statutes exist.

III. Administrator Bowersox’s November 12, 2020, Order was Lawful.

A. The Order was a Reasonable and Necessary Measure to Suppress and Control Communicable Disease.

Respondent Bowersox’s order was limited in time and scope. It was specifically tailored to slow the spread of COVID-19 in anticipation of a spike in COVID-19 cases that will follow large gatherings during the holidays occurring from late November 2020 to early January 2021. Plainly, there are several holidays between Thanksgiving Day and New Year’s Day for which friends and family traditionally gather and celebrate. It is this sort of gathering that has preceded spikes in COVID-19 cases. Administrator Bowersox’s order commences the day after Thanksgiving and concludes two weeks after New Year’s Day. Thus, it encompasses only the periods immediately following the various holidays, including the commonly-understood COVID-19 incubation periods. It is intended to prevent students, teachers, and staff from gathering at the sort of event that has shown to result in the spread of COVID-19 and then gathering in school buildings, with the significant potential for further transmission.

B. The Order does not Close Schools or Prevent Instruction.

By its clear terms, Administrator Bowersox’s November 12, 2020, order does not close schools. The order does not prohibit or prevent schools from engaging in virtual or other possible remote instruction. Respondent Bowersox’s “order to close buildings is not intended to stop school or educational opportunity,

but preserve community health and prevent further unmitigated spread of a highly infectious contagion.” (Bowersox Aff., ¶ 16)

Some may argue that the enactment of Wisconsin Statutes section 252.03 long predated the existence of virtual schooling. Therefore, according to such argument, it would not be sensible to interpret section 252.03 to permit a limited local health order to simply close school buildings, while allowing virtual and remote learning activities. Such argument must fail, however, in the context of 2019 Wisconsin Act 185. That law, enacted on April 15, 2020, came into being during this COVID-19 pandemic and during a time that virtual and other remote instruction is commonplace. Act 185 created a number of statutory sections—set forth more fully above—that recognize and reiterate the authority of local health officers to issue orders respecting the closure of schools.

C. The Order does not Distinguish Among Categories of Schools.

Petitioners argue that Respondent Bowersox’s November 12, 2020, order in some way infringes upon their freedom to provide their children a religious education. Respondent Bowersox’s order applies equally to all school buildings under her jurisdiction. It does not differentiate among schools, whether they are religious, private, or public. It does not affect any student in any school contrarily to any other student in any other school. Again, Administrator Bowersox’s order is limited in time and scope, and it does not prohibit or prevent schools from engaging in virtual or other possible remote instruction. “The constitutional

freedom of religion is absolute as to beliefs but not as to the conduct, which may be regulated for the protection of society.” *State v. Neumann*, 348 Wis.2d 455, 516, 832 N.W.2d 560 (2013).

CONCLUSION

Whether specific to Wisconsin Statutes section 252.03, or within the context of all the other statutory and administrative code sections outlined above, Respondent Bowersox, as the local health officer for the City of Racine and the Villages of Elmwood Park and Wind Point, had the authority to issue her November 12, 2020, order. Her order was a reasonable and necessary measure, narrowly tailored, and put in place to respond to the COVID-19 conditions extant in schools. Further, the order was effected based upon the soundly anticipated increase in cases that will undoubtedly follow the upcoming holiday season.

NOW THEREFORE, Respondents respectfully request that, if this Honorable Court exercises its discretion to assume original jurisdiction in this matter, the Court dismiss Petitioners’ Emergency Petition.

Respectfully submitted this 23rd day of November, 2020.

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