STATE OF WISCONSIN | CIRCUIT COURT BRANCH: 13 | DANE COUNTY

TODD PALMER,

Plaintiff,

v.

THE STATE OF WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION and ELIZABETH BURMASTER,

Defendants.

Case No: 06CV0672
Case Code: 30920, 30701, 30607

REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Despite extensive briefing, this case remains straightforward. The parties agree that the Legislature delegated to DPI the responsibility of creating rules to implement and administer gifted education throughout Wisconsin. The parties also agree that DPI is charged with the specialized knowledge, expertise and resources to create these rules. Where the parties disagree is on whether DPI has used its expertise and promulgated these rules, or instead improperly sub-delegated its responsibilities to school boards by choosing not to act and simply repeating general statutory guidelines. Unfortunately, it is clear that the latter is the case and DPI has failed to carry out the critical duties entrusted to it by the Legislature. Yet, it is widely recognized that agencies cannot sub-delegate their responsibilities in matters such as these which involve the exercise of an agency's specialized knowledge:[1]

> The general principle governing decisions in all of these situations is that if it is reasonable to believe the legislature intended a particular function to be performed by designated persons because of their special qualifications, then a subdelegation is invalid.

Sutherland Statutory Construction, Vol. 1, p. 210 (6th Ed. 2002)

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[1] Further, an "agency cannot abdicate its responsibility to implement statutory standards under the guise of determining that inaction is the best method of implementation." *U.S. v. Mark Graf,* 736 F.2d 1179, 1183, cert. dismissed, 469 U.S. 1199 (7th Cir. 1984).

Nonetheless, Defendants argue they made a proper "policy" choice to de-centralize and delegate substantive decision making on gifted education to individual school boards. Yet, the Legislature has already made this "policy" choice for Defendants by clearly directing that DPI - not individual school boards - make these decisions through rules. See, Wis. Stat. §§ 118.35(2) and 121.02(5). These Legislative directives stem from a clear constitutional mandate that Wisconsin school districts be as "nearly uniform as practicable." This uniformity can only be achieved by DPI creating statewide rules. It defies logic to suggest that the Legislature intended a regulatory agency (DPI) to delegate its responsibility to the hundreds of entities that it regulates (school boards) so each could separately establish their own criteria by which they will abide.

I. DPI's "Rule" Does Not Meet Legislative Mandates.

Defendants strain credulity by portraying 20 lines in the Wisconsin Administrative Code—nearly all of which are copied verbatim from statutes—as meeting the Legislature's mandate to "implement and administer" gifted education.

a. DPI Has Not "By Rule Established Guidelines for the Identification of Gifted and Talented Pupils."

Defendants argue that PI 8.01(2)(t) contains "additional general guidelines" beyond those contained in statutes. First, Defendants argue that "by necessary inference" a district's gifted plan, a gifted coordinator's duties and a parent's involvement in a plan will create identification criteria. Yet, the Legislature charged DPI with creating these criteria - not a district, not its coordinator, and not its parents. Further, identification criteria must be created by rule – not by "necessary inference."

Defendants argue that their "rule" includes multiple criteria not found in statutes. However, PI 8.01(2)(t) repeats the terms "intelligence, leadership, and creativity" verbatim

from Wis. Stat. § 118.35(1) without elaboration. PI 8.01(2)(t) actually fails to mention two statutory criteria for identification—"artistic" aptitude and "specific academic" performance. *Id.* Although PI 8.01(2)(t) does add the terms "nominations" and "product evaluations," these are not identification criteria (they are procedures). In any event, DPI avoids the substantive argument that none of these "criteria" are defined, have objective (or subjective) metrics for implementation or have procedures for use by districts. Such generality does not constitute a rule.[2]

Plaintiff does not seek to mandate the specific content of these rules. Those decisions must be left to the rulemaking process as defined in Wis. Stats. ch. 227. Plaintiff has merely listed minimal areas in which DPI must create rules to meet the "implement and administer" directives (*i.e.*, identification metrics, due process procedures, etc.). Plaintiff's reference to DPI rules concerning children with disabilities simply demonstrates how DPI has interpreted other legislative directives requiring rules for the identification and education of children needing special services. There, DPI has developed objective, detailed criteria with due process procedures to ensure uniformity and fairness. Gifted children are also entitled to rules with detail, uniformity and procedural protections.

b. DPI Has Failed to Create Rules to Implement and Administer Gifted Education.

Defendants admit that the Legislature has directed DPI to promulgate rules to "implement and administer" the 20 standards in Wis. Stat. § 121.02(1). However, Defendants argue that they nonetheless have discretion to chose not to promulgate rules for at least one of these standards—that of gifted education.

[2] "A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'" *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1977).

The term "shall" is mandatory and a Legislative directive that an agency "shall" promulgate rules for 20 delineated standards affords no discretion to ignore one of them. If the Court where to accept Defendants' argument, the Legislative directives in Wis. Stat. § 121.02(5) would become effectively meaningless, as nothing would stop DPI from ignoring other standards it presumably does not like.

Defendants' reliance on *Sklar v. Franchise Tax Bd.*, 230 Cal. Rptr. 42 (Cal. Ct. App. 1986), is misplaced. In *Sklar,* plaintiffs sought rules restricting tax deductions for business related alcohol expenses arguing that "it is the clearly defined, articulated policy of the State to promote temperance in the use and consumption of alcoholic beverages." *Id.* The court refused to require rules under such a general legislative directive. However, the *Sklar* court acknowledged decisions holding that where a state's legislature and constitution have clearly directed that action be taken to ensure uniformity in a regulatory program (*i.e.*, the issue presented in this case), an agency can be compelled to create those rules through mandamus:

> Contrary to plaintiffs' strenuous arguments, our decision in *Knoff* v. *City etc. of San Francisco, supra*, 1 Cal.App.3d 184, does not call for a different result. ***Knoff* involved a county assessor who had not complied with constitutional and statutory duties to fix an assessment rate and apply it uniformly, duties which we held were enforceable by mandamus.** (*Id.*, at pp. 195-197; see *TRIM, Inc.* v. *County of Monterey* (1978) 86 Cal.App.3d 539, 545-546 [150 Cal.Rptr. 351].) *Knoff* is distinguishable because it did not involve the coerced exercise of legislative discretion.

Id at fn 6.

Defendants point to their definition of "appropriate program" in § PI 8.01(t)2 as its rule implementing gifted education. However, this single definition merely directs school boards to provide "systematic and continuous" education activities without further elaboration. Defendants also rely, again, on the unarticulated requirements in PI 8.01(t)2 for a district plan, coordinator and parent participation. This cannot seriously be characterized as "implementing and administering" the requirement in Wis. Stat. § 121.02(1)(t). As explained

above, the product of administrative rulemaking is objective guidance reflecting the reasoned exercise of agency expertise, not simple plagiarism of Legislative directives.

c. DPI Has Failed to Create Rules to Implement and Administer an Audit Program.

Defendants "ADMIT that DPI has not promulgated rules defining how it will audit school districts on its own initiative" [Answer at ¶ 17] but argue that they have discretion whether to create such rules. Defendants miss the point. DPI must create rules defining how it will exercise the discretion granted by Wis. Stat. § 121.02(2). In other words, DPI must create rules defining when (if ever) it "may" conduct self-initiated compliance audits of a school district. As documented by the Legislative Audit Bureau, DPI has historically abused its discretion because it has never audited a district on its own initiative. To the extent DPI has stopped auditing (as suggested by the record and its brief), DPI needs to articulate that exercise of discretion through the rulemaking process.

II. The Constitution Requires Districts to Be as "Nearly Uniform as Practicable."

Defendants seek to confuse the issues surrounding the uniformity clause. Article X, § 3 of the Wisconsin Constitution is clear and unequivocal – school districts must be as "nearly uniform as practicable." Plaintiff does not argue that each school district must be *identical* with respect to gifted education. Variations amongst districts may be experienced, but Article X, § 3 mandates that uniformity be achieved where practicable. The creation of statewide rules to instill some level of uniformity is certainly practicable (aside from being legislatively mandated).

Defendants' reliance on *Zweifel v. Joint Dist. No. 1, Belleville*, 76 Wis. 2d 648, 251 N.W.2d 822 (1977) is wholly inappropriate. Wisconsin's gifted education standard [Wis.

Stat. § 121.02(1)(t)] was created eight years after *Zweifel* was decided. The *Zweifel* decision did not interpret the current version of Wis. Stat. § 121.02(1) which is at issue here.

Defendants agree that the state Constitution guarantees each child a fundamental right to a basic education but disagree as to what that entails. However, the contours of a basic education were articulated by the Supreme Court as the legislatively created standards in Wis. Stat. § 121.02 (one of which is the gifted education standard): [3]

> ...Viewed in this regard, the "character" of instruction which is constitutionally compelled to be uniform is legislatively regulated by sec. 121.02, Stats., regarding, for example, minimum standards for teacher certification, minimal number of school days, and standard school curriculum.

Kukor v. Grover, 148 Wis.2d 469, 492-93, 436 N.W.2d 568 (1989).

Lacking contrary authority, Defendants characterize *Kukor* as "emphasizing" only some of the 20 minimal standards, suggesting that a basic education encompasses less than all 20 (although Defendants do not articulate which of the 20). Yet, as quoted above the Supreme Court did not distinguish between or isolate standards in *Kukor* but rather referenced § 121.02 without qualification. For more than 15 years, DPI has agreed with Plaintiff's interpretation on this issue as is memorialized in DPI guidance:[4]

> ...**The 20 standards**—one-half of them enacted in 1973 and the other half in 1985—**fulfill a state constitutional requirement**. Article X of the Wisconsin Constitution requires that the Legislature create school districts "as nearly uniform as possible....**The 20 standards are a comprehensive and integrated set of requirements intended to guarantee every Wisconsin student equal access to a quality education.**
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> The 20 standards are based on current education literature and on research about effective schools. Researchers studying schools where students learned and performed at or beyond their ability or expectation found no single component of school effectiveness, **just like no one standard, stands apart as the critical element of school success. All elements must blend together in a mosaic that provides for quality and promotes excellence. The standards are an integrated set of minimal expectations brought**

[3] Historically, DPI has shared Plaintiff's interpretation of this issue. See, Palmer, Aff., Ex. D, p. 00209. The fact that the current Superintendent apparently now disagrees as to whether the gifted education standard is subject to the constitutional uniformity clause highlights why rules are needed in this area. The state's education system should not be left to the inherent prejudices of the current Superintendent.

[4] Defendants make no attempt to reconcile the position they take in their Response Brief with the position DPI has publicly held for the 15 years leading up to this case.

together for the purpose of making schools more effective for all students." (emphasis added)

Palmer Aff. Ex. D, p. 00209.

Defendants' reliance on decisions from Pennsylvania, Connecticut and other states are unpersuasive as these other states lack the same statutory and constitutional provisions on gifted education and educational uniformity.

III. The Factual Record Supports Plaintiff's Contentions.

Defendants argue that there is insufficient evidence of gifted education programs being divergent amongst districts, [5] of gifted programs being pruned or eliminated, and of DPI failing to enforce gifted mandates. In making these arguments, Defendants call into question the following:

- Defendant Superintendent Burmaster's own representations to the Legislature in support of DPI's 2005-2007-biennium budget request. *See,* Palmer Aff. Ex. A . Ex. 7, p.6.
- Statements of DPI in its own guidance. *Id.* Ex. D.
- Statements of the United States Department of Education. *Id.* Ex. A. Ex. 8.
- Findings of the Legislative Audit Bureau. *Id.*, Ex. A. Ex. 2.
- Statements of DPI's employee, Sue Grady, that "TAG programs are eroding [because] no central [point] of contact" and that "school districts are likely cutting back on gifted and talented programming during these tight fiscal times." *Id.*
- DPI staff statements that the "parent [requirement] is met in many ways – breadth and flexibility here can result in inequality." *Id.*

Defendants demand that Plaintiff submit statistical data for all 426 school districts merely highlights the need for the requested rules. As the agency implementing and administering gifted education mandates, DPI should have this data. However, without any rules to implement or enforce the gifted standard, DPI lacks such data.

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[5] This argument is disingenuous. On one hand, DPI defends its creation of "general guidance" designed with the purpose of encouraging disparity between district programs. Yet, on the other hand, Defendants seek to avoid summary judgment by denying such disparity exists. They cannot have it both ways.

Defendants seek to avoid summary judgment by referring to DPI's "development and distribution of a *Gifted and Talented Resource Guide.*" Yet this 90 page *Resource Guide* contains over 26 pages on guidelines for the identification of gifted children and even more pages on programming—demonstrating DPI's true belief that school boards need specific (not general) guidelines in this area. *See,* Second Palmer Aff., Ex. 1. The *Resource Guide* even acknowledges that such specific guidance is necessary to "provide districts with a framework for **statewide consistency** in identification, documentation, and educational opportunities." *Id.* Of course, the *Resource Guide* is not a "rule," lacks the force and effect of law, lacks public or legislative input, and therefore cannot fulfill the directives in § 121.02.

IV. Standard of Review

This Court is responsible for interpreting the statutes at issue here and the Defendants' interpretations are entitled to no deference. As explained previously, DPI has failed to employ its expertise or specialized knowledge in forming its interpretations but rather has adopted rules which merely repeat statutory language without any interpretation whatsoever. *See, Racine Harley Davidson, Inc. v. State Div. of Hearings and Appeals*, 2006 WI 86, ¶¶ 16-19, 717 N.W.2d 184, 191-92 (2006). Further, DPI's statutory interpretations in historical documents are contrary to the positions taken in this litigation and therefore are so inconsistent as to provide no real guidance. *Id.* Also, DPI's interpretations are by design intended to avoid uniformity and consistency in application of these statutes. *Id.* Finally, DPI's interpretations in sub-delegating decision making responsibility to school boards is contrary to express statutory language.

V. Plaintiff is Entitled to the Requested Remedies.

Defendants ague that Plaintiff is not entitled to any relief for DPI's failure to follow Legislative mandates. Each argument is premised on DPI assuming that it has promulgated

adequate rules. As explained previously, DPI's has not promulgated "rules" anywhere near meeting the Legislature's mandates. Accordingly, the issue here is Defendants failure to meet a Legislative mandate.

a. Plaintiff is Entitled to Mandamus.

Defendants admit that mandamus may be granted to order Defendants to exercise their discretion. Response, p. 33. Plaintiff does request that Defendants be ordered to exercise their discretion in promulgating the rules required under §§ 118.35 and 121.02(5). Contrary to Defendants' assertions, Plaintiff has also established that he, his children and others similarly situated are substantially damaged by the lack of rules on gifted education. *See*, Palmer Aff., ¶ 2; Ex. A, Ex.2; Ex.A.6. and Ex.A. Ex.7 Given DPI's admission that 60% of districts are pruning or eliminating gifted programs (*Id.* Ex. A.Ex.7), Defendants cannot avoid summary by merely denying that the gifted children in those districts will suffer substantial damages. Rather, Defendants were obligated to produce some evidence to the contrary. *See,* Wis. Stat. § 802.08(3).

b. Plaintiff is Entitled to Declaratory Judgment.

The Supreme Court has recognized that the declaratory judgment procedure is particularly well-suited for resolving controversies as to the proper construction and application of statutory provisions.[6] Further, in *Wisconsin Hospital Ass'n. v. Natural Resources Board*, 156 Wis. 2d 688, 457 N.W.2d 879 (Ct. App. 1990), the Court allowed a declaratory judgment action to challenge the validity of a rule. Consistent with these authorities, Plaintiff is properly seeking a declaratory judgment concerning the Legislative

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[6] *See, Lister v. Board of Regents*, 72 Wis. 2d 282, 303, 240 N.W.2d 610 (1976); *Wisconsin Fertilizer Assn., v. Karns*, 39 Wis. 2d 95, 100, 158 N.W.2d 294 (1968); *Pension Mgmt., Inc., v. DuRose*, 58 Wis. 2d 122, 128-32, 205 N.W.2d 553 (1973).

mandates placed upon DPI under §§ 118.35, 121.02(2) and (5) and whether the "rules" developed by DPI fulfill those mandates.

c. Plaintiff is Entitled to Reversal of DPI's Decision Denying the Petition for Rulemaking.

Contrary to Defendants assertions, courts have allowed judicial review of an agency's denial of a petition for rulemaking.[7] Although these decisions interpret the federal Administrative Procedures Act, they recognize that these denials are final administrative decisions properly subject to judicial review. Further, as explained above the Petition at issue here requested rulemaking that is mandatory, not "discretionary," as argued by Defendants. The pragmatic impact of Defendants' arguments would be that Plaintiff, as well as the 200 other citizens who filed the Petition, would have no legal remedy for DPI's improper denial decision. Yet, the Wisconsin Constitution requires that every right have a remedy. Wis. Const. Art. I, § 9.

Dated this 20th day of December, 2006.

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[7] *See, WWHT v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914 (D.C. Cir. 1998); *American Lung Assn. v. EPA*, 134 F.3d 388 (D.C. Cir. 1998); *O'Keefe's, Inc. v. Consumer Products Safety Commission*, 92 F.3d 940 (9th Cir. 1996); *Maier v. EPA*, 114 F.3d 1032 (10th Cir. 1997); *Legal Environmental Assistance Foundation v. EPA*, 118 F.3d 1467 (11th Cir. 1997) and *Radio-Television News Directors Assn. v. FCC*, 184 F.3d 872 (D.C. Cir. 1999).