

Misha Tseytlin

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BY EMAIL

County Executive of Dane County
Joseph T. Parisi
City County Building, Room 421
210 Martin Luther
King Jr. Blvd.
Madison, WI 53703

Director of Public Health
Madison & Dane County
Janel Heinrich
210 Martin Luther King Jr. Blvd.
Room 507
Madison, WI 53703

Re: Dane County Emergency Order #9's School Closure Order

Dear County Executive Parisi and Director Heinrich:

I represent a broad coalition of Catholic schools in Dane County—St. Ambrose Academy, St. Maria Goretti Congregation, St. Peter Catholic Parish and School, Blessed Sacrament Parish and School, Blessed Trinity School, Immaculate Heart of Mary Catholic Parish, St. Francis Xavier Catholic School, and St. Dennis School—and parents who have enrolled their children at these schools for religious reasons. These parties have been unlawfully injured by your School Closure Order, which mandates the closure of private schools on the eve of the 2020–21 school year. This Order, issued after business hours last Friday, is unwarranted, given the extensive preparations undertaken by my clients to comply with your multiple previous emergency orders specifically authorizing the reopening of private schools for the 2020–21 school year, if the schools created safe, detailed reopening plans. Further, the Order treats primary and grade schools worse than even private universities and their packed dormitories, which the County has permitting to re-open, not to mention movie theatres, bowling alleys, and daycare centers. The incongruity of the Order's reach, as well as its timing, is evident.

Given the unconstitutionality and unlawfulness of the School Closure Order, and in light of the significant, irreparable harm that it inflicts, **my clients demand that the County rescind the Order by no later than Friday, August 28, 2020, at 12:00 p.m.** That provides the County with more time than the County gave to my clients, when it abruptly ordered their schools closed after businesses hours last Friday. Should the County refuse to withdraw its flagrantly unlawful Order by that time, my clients will be forced to pursue emergency relief in the Wisconsin Supreme Court.

The School Closure Order is both unconstitutional and unlawful, and deeply harms parents, children, and schools across the County. The Order is unconstitutional and unlawful as to all private schools in the County, and that unconstitutionality is even clearer for religious schools.

1. a. The Wisconsin Constitution's Freedom of Conscience Clauses provide that "[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted." Wis. Const. art. I, § 18. This is "the strongest possible language in the protection of this right," giving "expansive protections for religious liberty," even beyond the protections of the First Amendment to the U.S. Constitution. *Coulee Catholic Schs. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶¶ 59–60, 66, 320 Wis. 2d 275, 768 N.W.2d 868. These Clauses subject any law burdening religious exercise to strict scrutiny, prohibiting the government from enforcing the law unless it demonstrates that such enforcement furthers a compelling government interest in a narrowly tailored way. *Id.* ¶ 61. Further, all parents have a "fundamental liberty interest in the care and upbringing of" their children, which includes the right "to direct the upbringing and education of children under their control." *Michels v. Lyons*, 2019 WI 57, ¶15, 387 Wis. 2d 1, 927 N.W.2d 486 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)).

The Order unlawfully burdens my clients' free exercise of their religion and rights to raise their children. These provisions impose a grave burden on my client-parents' rights to educate their children in their faith, *State v. Yoder*, 49 Wis. 2d 430, 440, 182 N.W.2d 539 (1971), *aff'd*, 406 U.S. 205 (1972), and on my client-schools' rights to pursue their religious mission, see *Coulee Catholic Schs.*, 2009 WI 88, ¶ 58, given that they subject the exercise of such rights to significant financial penalties, Emergency Order #9 at p. 5 (Aug. 21, 2020); Madison Mun. Ord. § 7.05(6)–(7); see *Yoder*, 49 Wis. 2d at 437. Thus, strict scrutiny applies, *Coulee Catholic Schs.*, 2009 WI 88, ¶ 61, which the County cannot satisfy. Although Dane County has a compelling interest in reducing the spread of COVID-19, the Order plainly does not further that interest in a narrowly tailored way. The Order closes my client-schools and similar schools throughout the County, yet allows higher-education institutions—including the University of Wisconsin, which enrolled over 40,000 students in Fall 2019—to re-open, even as to their dormitories. Emergency Order #9 at p. 7. The Order also continues to allow "child care and youth settings" to open, including "all licensed, recreational, and educational camps, licensed and certified childcare providers, unregulated youth programs, licensed-exempt public school programs, and four-year old kindergarten." *Id.* at p. 4. Remarkably, the Order even allows my client-schools to use their buildings "as child care and youth settings," but just not as schools. *Id.* at p. 5. Finally, the Order allows scores of businesses to conduct in-person operations, such as bars, salons, barber shops, gyms, fitness centers, water parks, pools, bowling alleys, and movie theaters. *Id.* at pp. 7–14.

b. The Order also exceeds the County's statutory authority. "A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided." *Jackson Cty. v. State Dep't of Nat. Res.*, 2006 WI 96, ¶16, 293 Wis. 2d 497, 717 N.W.2d 713. Section 252.03 provides that "upon the appearance of any communicable disease in his or her territory . . . [t]he local health officer shall promptly take all measures necessary to prevent, suppress and

control communicable diseases,” Wis. Stat. § 252.03(1), including by “forbid[ing] public gatherings,” Wis. Stat. § 252.03(2). The same statute also permits the County to “inspect schools,” with no mention of closing schools. Wis. Stat. § 252.03(1). In direct contrast, Section 252.02—the *immediately preceding section*—gives the State Department of Health Services a grant of authority, but then explicitly provides that it “*may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.*” Wis. Stat. § 252.02(3) (emphasis added). Under bedrock statutory-interpretation principles, “[i]f a word or words are used in one []section but are not used in another []section, [the Court] must conclude that the legislature specifically intended a different meaning.” *Responsible Use of Rural & Agr. Land v. Pub. Serv. Comm’n*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 688, 619 N.W.2d 888, 904. Thus, unlike the Department of Health Services, the County has no power to order schools closed. This difference in authorities over school closures is consistent with Wisconsin’s primacy of a state-wide policy toward the education of Wisconsin’s children. Wis. Const. art. X, § 1.

2. The Order inflicts grave harms on my client-parents and client-schools. All of my client-parents are devout, practicing Catholics, whose faith compels them to seek religious education for their children. Only in-person education satisfies that solemn obligation, as only in person may these students receive Holy Communion at Mass, confess their sins to a priest through the Sacrament of Reconciliation, or pray together in the community of fellow students and teachers. Further, many client-parents are of limited financial means who receive scholarships and/or make deep financial sacrifices to secure this essential religious education for their children. Yet, the Order now places this in-person religious education out of their reach. The Order also harms religious schools by prohibiting them from fulfilling their religious organizations’ mission: to educate students in their Catholic faith, including through in-person religious worship, reception of the Sacraments, prayer, and role-modeling. Further, it is the height of inequity for the County to tell private schools *for months* that they may reopen, so long as they expend valuable resources developing detailed reopening plans, only to abruptly reverse course on the eve of reopening.

In short, I urge you to withdraw your unconstitutional and unlawful order immediately.

Sincerely,

A handwritten signature in blue ink, appearing to read "Misha Tseytlin".

Misha Tseytlin