

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

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BRUCE LARSON, et al.,

Plaintiffs,

vs.

**ORDER**

Case No. 05CV000159

ELIZABETH BURMASTER, et al.,

Defendants.

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This case came before the court on the defendants' motion to dismiss. The plaintiff, Bruce Larson, appeared *pro se* on behalf of himself and his son, Peer. Assistant Attorney General Thomas Balistreri appeared for the defendant Elizabeth Burmaster. Jeffrey Schmeckpeper appeared for the Whitnall School District defendants.

***Summary of Decision***<sup>1</sup>

My decision doesn't reach the heart of the debate that the Larsons' lawsuit has touched off – whether mandatory summer homework as part of an advanced placement class is a good thing or not. Courts do not decide whether a particular educational policy or goal or program is a good one or not, or whether kids and their families deserve a break from school during the summer or not. Our job is mainly to decide whether the school board has the authority, for better or worse, to impose policies that might affect these interests. In this sense, we are referees, and our job is simply to decide whether the players have stepped out of bounds.

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<sup>1</sup> At the conclusion of the hearing in this matter, I stated that I would enter a brief order. After the hearing, the court received an inquiry from the press regarding the outcome of the motion. Anyone inquiring about the case will be invited to ask for a transcript of the decision I gave from the bench, my reasoning, and the arguments made by the parties at the hearing. In the meantime, I thought it appropriate to record a capsule of the decision as a temporary answer to such inquiries.

Thus, the question this case presents is: Was Whitnall School District out of bounds when one of its math teachers interrupted Mr. Larson's summer vacation to require him to perform three honors pre-calculus homework assignments that would count against his fall grade? The answer is clearly no.

In deciding this question, I must accept as true all the factual statements that the Larsons allege in their pleadings. Thus, I accept as true that the assignments were lengthy and took a number of days to complete and that it was a particular challenge for Peer Larson to complete them because he was working at a job he arranged before he knew he would have these assignments in a camp where he would not have internet access. The Larsons are not required to prove those allegations at this stage of the proceeding; their complaint can be dismissed only if, taking all those allegations as true, they still can't win, because the law is not on their side.

The crux of the Larsons' case is that Whitnall School District is out of bounds in demanding summer homework because WIS. STAT. § 118.045 bars public schools from opening their doors until September 1. That statute is entitled "Commencement of school term" and provides in its first subsection that "beginning in the year 2000, no public school may commence the school term until September 1."

But the line drawn by section 118.045 says nothing about homework; it mentions only the date by which the "school term" may commence. The words "school term" have a specific meaning defined by state statute, WIS. STAT. § 115.001(12): "School term" means the time "commencing with the first school day and ending with the last school day that the schools of a school district are in operation *for attendance of pupils* in a school year, other than for the operation of summer classes" (emphasis added). Thus, the reference to "school term" in section 118.045 is a limit only on the days on which schools are open for attendance. Because Peer

Larson's math teacher did not require him to *attend* during the summer – in other words, to be present at school – section 118.045 is not a limit on the assignment of homework.

The other statutory and administrative boundary lines to which the parties have referred me provide little guidance, either because they do not mention any limit on prescribing homework, *e.g.*, WIS. STAT. § 115.001(13)(defining “school year”), or because it is not clear that they apply in the circumstances of this case, *e.g.*, WIS. STAT. § 118.045(2)(c)(authorizing year-round school; Whitnall School District does not hold school year-round); Wis. Admin. Code § PI 27.03(2)(c) (authorizing “specialized programming for pupils before September 1” for, among others, “gifted and talented classes”).

The boundary lines that do govern this case, I believe, are found in WIS. STAT. §§ 120.12 and 120.13, which define the duties and powers of the Whitnall School Board. The school board, as the boss of Peer Larson's math teacher, is given broad powers by the legislature to “do all things reasonable to promote the cause of education,” WIS. STAT. § 120.13, and to “[d]etermine the school course of study,” WIS. STAT. § 120.12(14). As if that language was not broad enough, the Legislature directs me to construe these enactments as broadly as possible. WIS. STAT. § 118.001 provides: “The statutory duties and powers of school boards shall be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers, if the action is not prohibited by the laws of the federal government or of this state.”

I believe these laws set some pretty wide boundaries within which school boards and those that work for them, like Peer Larson's math teacher, can operate and determine how kids should be taught, and therefore I believe that, whether summer homework is a good idea or not, the Whitnall School District is well within its authority to require summer homework of Peer

Larson, and to make the satisfactory completion of it an element of his grade. The Larsons are unable to cite any federal or state law that expressly prohibits the giving of homework over summer vacation

The Larsons make only two other sets of claims. First, they invoke a variation of the equitable notion of estoppel. They argue that Peer Larson cannot be docked for having failed to do his summer homework because the homework was not assigned until after he had signed up for a summer job that put him in a position in which he would be unable to do the homework. The Larsons offer no law, however, that suggests that a student is generally entitled to invoke estoppel against his or her teachers. Further, the traditional theories of estoppel don't fit this case. There is no allegation that the district made any promise to Peer Larson about his summer vacation that entitled him to assume he would have no homework, or any representation about the pre-calculus course or about homework generally that entitled him to assume that homework would not be counted if he lined up a summer job before it was assigned.

The rest of the Larsons' claims are constitutional. The Larsons claim that prescribing summer homework is unconstitutional. The Larsons invoke the Due Process clause of the constitution, which protects families from interference by the government in certain family affairs. The Larsons quote some of the sweeping statements made in Due Process clause cases about "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

But the Supreme Court has not extended substantive Due Process protection to summer vacation, and the Larsons offer no reason why a student's enjoyment of summer vacation (coupled with any derivative break his or her family might also enjoy) – especially in the case of a student who has volunteered for a course that is not compulsory, but for which he or she hopes

to earn additional credit – should rank within the pantheon of family matters that are so fundamental to family life as to have earned constitutional protection. Being free from pencils, books and teachers' dirty looks simply doesn't implicate the same constitutional concern as being free to choose whether your kids go to a private school or a public school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), or whether to school them at home, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); or as being free from having your family broken apart by the state, *Santosky v. Kramer*, 455 U.S. 745 (1982), *Stanley v. Illinois*, 405 U.S. 645 (1972), or from visitation orders imposed by the State without any deference paid to the parents, *Troxel*.

The Larsons also claim that mandatory summer homework violates the Fourth Amendment's ban on unreasonable search and seizures. But summer homework involves neither an invasion of some private, defined space nor some seizure of some tangible object.

Finally the Larsons contend that because no law has been enacted specifically authorizing summer homework, then summer homework is unconstitutional. The Larsons argue that schools are part of a government of limited powers and that because no power to invade summer vacation has been expressly granted to the government, therefore, homework-free summers are reserved to the people. Had the Larsons done a bit more homework, they would have discovered that the people of our state granted to the Legislature in Article X, section 1 of the state constitution the power to establish school boards and the state superintendent and to confer upon them the powers and duties the Legislature saw fit. WIS. STAT. §§ 120.12 and 120.13, cited above, which broadly authorize a math teacher to prescribe homework over the summer to help kids learn pre-calculus, fit comfortably within this constitutional grant of power to the government.

The final portion of my decision addressed the arguments made by the defendants that I cannot grant the relief the Larsons seek because what the Larsons seek is in essence a writ of mandamus ordering school officials not to make summer pre-calculus homework mandatory. Because the Larsons can point to no clear and unequivocal prohibition on teachers giving summer homework, I cannot grant the relief they seek. Indeed, it would be an abuse of the discretion conferred upon me to compel some action by the superintendent or the school district through mandamus when no clear and unequivocal duty has been identified and when their powers and duties regarding matters such as homework involve the exercise of discretion.

***Order***

For these reasons and the reasons stated on the record at yesterday's hearing, IT IS HEREBY ORDERED THAT:

1. The motions to dismiss are GRANTED.
2. This case is DISMISSED with prejudice.
3. The court will hear any timely application for an award of fees pursuant to WIS.

STAT. § 814.025 on April 13, 2005 at 10:00 a.m.<sup>2</sup>

4. Any application for fees pursuant to WIS. STAT. § 814.025 shall be filed on or before March 21, 2005.

5. Any response to any such application shall be filed on or before April 4, 2005.

6. Any reply in support of an application for fees shall be filed on or before April 11, 2005.

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<sup>2</sup> At yesterday's hearing, the Whitnall School District defendants stated that they do not presently intend to seek an award of fees against the Larsons. The other defendant, the state superintendent, graciously offered not to pursue an award of fees if the Larsons do not intend to pursue this matter any further in the courts.

*Richard J. Sankovitz*

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Richard J. Sankovitz  
Circuit Court Judge

Dated:           MAR 8 2005