

# WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSIS MAY 2021

**NOTICE:** Due to the COVID-19 pandemic, oral arguments during May will be conducted via video/audio conferencing. The Supreme Court Hearing Room will not be open to the public. The media and public may view the proceedings live on [WisconsinEye](#) or on [www.wicourts.gov](http://www.wicourts.gov).

The case listed below arose from a controversy that originated in Washington County:

## **TUESDAY, MAY 4, 2021**

9:45 a.m.      21AP265-CQ      St. Augustine School v. Carolyn Stanford Taylor

**Note:** The Supreme Court calendar may change between the time you receive this calendar and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. The synopses provided are not complete analyses of the issues.

WISCONSIN SUPREME COURT

May 4, 2021

9:45 a.m.

2021AP265-CQ

St. Augustine School v. Carolyn Stanford Taylor

*This matter is before the Wisconsin Supreme Court via a certified question posed by the United States Court of Appeals for the Seventh Circuit in a case brought by St. Augustine School and Joseph and Amy Forro against the Wisconsin Superintendent of Public Instruction and the Friess Lake School District (the District) regarding the District's refusal to provide public transportation to the Forros' children because the District and the Superintendent concluded that the children lived outside of St. Augustine School's "attendance area."*

Prior to 1967, children who attended private schools in Wisconsin were not entitled to public transportation. Due to safety concerns, in 1967 the people of this state adopted an amendment to the Wisconsin Constitution that provides that "[n]othing in this constitution shall prohibit the legislature from providing for the public safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning." Wis. Const. Art. I, § 23. The legislature promptly passed legislation requiring each public school district to provide such transportation on a basis that was reasonably uniform with the transportation services provided by the district for students who attend district schools.

The Wisconsin statutes continue to require public school districts to provide transportation services to private school students in one of three ways: (1) transport the children in district-owned buses; (2) contract with a third party to transport the children; or (3) reimburse the parents for transporting their own children to the private school through a parent contract. Wis. Stat. § 121.55. Under Wis. Stat. § 121.54(2)(b)1., the obligation of a district to provide transportation benefits to a private school student is dependent upon the student living within the approved attendance area for that particular school.

"Attendance area" is defined in Wis. Stat. § 121.51(1) (2017-18) as follows, with the language that is at the core of this case in bold:

*"Attendance area" is the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon request of the private school and the board, make a final determination of the attendance area. **The attendance areas of private schools affiliated with the same religious denomination shall not overlap** unless one school limits its enrollment to pupils of the same sex and the other school limits its enrollment to pupils of the opposite sex or admits pupils of both sexes.*

This case began in the Washington County circuit court in April 2016. The plaintiffs were St. Augustine School, which has a rural Hartford mailing address and is located within the Friess Lake School District, and Joseph and Amy Forro, who lived within the Friess Lake School

District and at the time had three children who attended St. Augustine School. The defendants were then State Superintendent Tony Evers<sup>1</sup> and the Friess Lake School District.

The District determined that St. Augustine School was affiliated with the same religious denomination (the Roman Catholic Church) as St. Gabriel School. Because the Forros lived within the attendance area for St. Gabriel School, the District denied the request of the Forros and St. Augustine School to provide bus transportation to St. Augustine School for the Forros' children. Then-Superintendent Evers upheld the District's decision. The plaintiffs disputed that St. Augustine School is affiliated with the Roman Catholic Church and therefore contended that there could be no prohibited overlap with the attendance area for St. Gabriel School. The plaintiffs' complaint alleged that the decisions by the District and Superintendent Evers violated their rights under the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S. Constitution, as well as the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs also alleged that the decisions by the defendants violated their statutory rights under Wis. Stat. §§ 121.51-121.55.

The defendants removed the action to the U.S. District Court for the Eastern District of Wisconsin. The district court granted summary judgment in favor of the defendants on the federal claims and remanded the state law claims back to the state circuit court. The plaintiffs appealed that decision to the Seventh Circuit. The Seventh Circuit initially affirmed the dismissal of the plaintiffs' federal claims, but the United States Supreme Court vacated that decision and remanded the case to the Seventh Circuit for further consideration in light of the U.S. Supreme Court's decision in Espinoza v. Montana Dept. of Revenue, \_\_\_ U.S. \_\_\_, 140 S. Ct. 2246 (2020).

Following remand, the Seventh Circuit certified the following question to the Wisconsin Supreme Court:

*For purposes of determining whether two or more schools are “private schools affiliated with the same religious denomination” for purposes of Wis. Stat. 121.51, must the state superintendent rely exclusively on neutral criteria such as ownership, control, and articles of incorporation, or may the superintendent also take into account the school’s self-identification in sources such as its website or filings with the state[?]*

The Seventh Circuit asks the Wisconsin Supreme Court to provide guidance on the nature of the analysis that should be conducted under Wis. Stat. § 121.51(4) regarding when private schools are “affiliated with the same religious denomination” so that it can then apply that analysis to the facts of the appeal pending before it.

The Wisconsin Supreme Court accepted the Seventh Circuit's certification and directed the parties to address the following additional issue:

*The Free Exercise Clause and the Establishment Clause of the First Amendment may bear upon our interpretation of Wis. Stat. § 121.51 and its inclusion of “private schools affiliated with the same religious denomination.” In meeting the query of the certified question, should we*

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<sup>1</sup> The current State Superintendent, Carolyn Stanford Taylor, was substituted as a defendant after Mr. Evers was elected Governor.

*revisit this court's decisions in State ex rel. Vanko v. Kahl, 52 Wis. 2d 206, 188 N.W.2d 210 (1971) and Holy Trinity Community School, Inc. v. Kahl, 82 Wis. 2d 139, 262 N.W.2d 210 (1978)?*