



February 26, 2021

Andy Waity, President
Madison Teachers, Inc.
33 Nob Hill Road
Madison, WI 53713
Via email: mti@madisonteachers.org

Dear Mr. Waity,

Liberty Justice Center (LJC) and Wisconsin Institute for Law & Liberty (WILL) are public-interest legal centers that litigate education-law cases in Wisconsin and across the country. We are deeply concerned by news reports that some MTI leaders may be organizing a work action against the Metro Madison School District next Monday.

A concerted sick-out is a form of strike and a teacher strike is illegal in the State of Wisconsin. In the event of an illegal strike, Wisconsin law authorizes students and parents, as well as the school district, to enforce the ban on teacher strikes in court. Wis. Stat. 111.70(7m)(a).

Wisconsin law is very clear on this point: teacher strikes are illegal. Wis. Stat. 111.70(4)(L) (“*Strikes prohibited*. Nothing contained in this subchapter constitutes a grant of the right to strike by any municipal employee or labor organization, and such strikes are hereby expressly prohibited.”). See *Joint Sch. Dist. v. Wis. Rapids Educ. Ass’n*, 70 Wis. 2d 292, 310 (1975) (“Strikes by municipal employees are expressly prohibited”); *Hortonville Educ. Ass’n v. Hortonville Joint Sch. Dist.*, 66 Wis. 2d 469, 481 (1975), *rev’d on other grounds*, 426 U.S. 482 (1976) (“From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike.”). See also *Kenosha Unified Sch. Dist. v. Kenosha Educ. Ass’n*, 70 Wis. 2d 325 (1975).

And teacher strikes are illegal for a reason: they negatively impact the academic achievement and emotional well-being of students. See Dylan Matthews, “How teacher strikes hurt student achievement,” *Washington Post* (Sept. 10, 2012) (detailing, in plain English, studies from professors at the University of Toronto, Wilfrid Laurer University, and the Universities of Edinburgh and Rotterdam all showing student achievement suffers from a teacher strike).¹ LJC recently represented four families suing to end an illegal strike in the largest school district in Idaho, and the affidavits in that case detailed the substantial academic disruption, emotional strain, and logistical nightmare caused by a sick-out that shut down school for two days.²

¹ Available at <https://www.washingtonpost.com/news/wonk/wp/2012/09/10/how-teacher-strikes-hurt-student-achievement/>.

² *Ratliff v. West Ada Education Ass’n*, <https://libertyjusticecenter.org/cases/ratliff-v-west-ada-education-association/>.

Given that teacher strikes are obviously illegal, a court would next have to determine whether this particular “sick out” is a strike under the Wisconsin code. A concerted effort to, for example, persuade teachers to claim that they have COVID symptoms when they do not would meet the standard set out in the Municipal Employment Relations Act: “any . . . concerted stoppage of work . . . and any concerted slowdown or other concerted interruption of operations or services by municipal employees, or any concerted refusal to work or perform their usual duties as municipal employees, for the purpose of enforcing demands upon a municipal employer.” Wis. Stat. 111.70(1)(nm). Even without the union’s explicit endorsement, a group of teachers acting together can constitute a concerted work action. *Sobczyk v. Aetna Cas. & Sur. Co.*, 140 Wis. 2d 862 (Ct. App. 1987). And a sick-out is a typical organizing tactic that disrupts normal operations, and numerous courts and administrative bodies recognize that a sick-out is the functional equivalent of or a type of strike. *See, e.g., Ky. ex rel. Beshear v. Dickerson*, Civil Action No. 3: 19-033-DCR, 2019 U.S. Dist. LEXIS 78524, at *14 (E.D. Ky. May 9, 2019); *Chi. Bd. of Educ. v. Chi. Teachers Union*, 33 2017 IL ERB LEXIS 50, *12 (Illinois Public Employee Relations Board 2017). Finally, the obvious target of the strike is the school district as it moves forward with plans to reopen in-person learning. *See* Scott Girard, “Some MMSD staff members not confident about reopening plan,” *Capital Times* (Feb. 11, 2021).³

The cases “have uniformly asserted substance over formality in considering whether or not a particular activity, such as a ‘sick out,’ constitutes a strike.” *Cal. Trucking Ass’n v. Bhd. of Teamsters & Auto Truck Drivers, Local 70*, Nos. C-70-883 AJZ and C-70-1057 AJZ., 1977 U.S. Dist. LEXIS 17179, at *27-28 (N.D. Cal. Feb. 25, 1977), *rev’d on other grounds*, 679 F.2d 1275 (9th Cir. 1981). Here there can be no doubt as to the substance: union members are planning a sick-out to disrupt the district’s normal business operations, which is the education of Madison’s children. That is both illegal and wrong.

If on Monday these activists choose to use children like pawns as a negotiating tactic or publicity stunt, we stand ready to vindicate the rights of parents to ensure students’ needs are put first.

Very truly yours,



Richard M. Esenberg
President & General Counsel
rick@will-law.org



Daniel R. Suhr
Senior Attorney
dsuhr@libertyjusticecenter.org

³ Available at https://madison.com/ct/news/local/education/local_schools/some-mmsd-staff-members-not-confident-about-reopening-plan/article_e98a13e2-f070-5489-b957-f99cc23a657d.html.