STATE OF WISCONSIN
SUPREME COURT

Case No. 2017AP2278

KRISTI KOSCHKEE, AMY ROSNO, CHRISTOPHER MARTINSON, and MARY CARNEY,

Petitioners,

v.

TONY EVERS, in his official capacity as Wisconsin Superintendent of Public Instruction and WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION,

Respondents.

MOTION TO INTERVENE ON BEHALF OF PEGGY COYNE, MARY BELL, MARK W. TAYLOR, COREY OTIS, MARIE STANGEL, JANE WEIDNER, AND KRISTIN A. VOSS

Proposed Intervenors, Peggy Coyne, Mary Bell, Mark W. Taylor, Corey Otis, Marie Stangel, Jane Weidner and Kristin Voss, by their attorneys, Pines Bach LLP, hereby move the Wisconsin Supreme Court pursuant to Wis. Stat. § 803.09 for an order allowing them to participate as Intervening Respondents in this original action, to file a brief in response

to the brief filed by the Petitioners and to fully participate in oral argument in this case.

As grounds for this motion the Proposed Intervenors respectfully represent as follows:

1. The Proposed Intervenors were the Plaintiffs in *Coyne v. Walker*, 2016 WI 38, in which the Wisconsin Supreme Court affirmed a permanent injunction that was issued in their favor, in relevant part, as follows:

> IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:
>
> 1. The following provisions of 2011 Wisconsin Act 21 (hereinafter "Act 21") ARE HEREBY DECLARED UNCONSTITUTIONAL AND VOID as they apply to the proposed administrative rules of the Superintendent of Public Instruction and the Department of Public Instruction:
>
> > (a) **Act 21, §§ 4, 5, 6 amending Wis. Stat. § 227.135(2), (3) and (4)**, which require that the scope of any proposed rule by the Department of Public Instruction must be approved in writing by the both Governor and the Superintendent of Public Instruction before a scope statement may be published in the Wisconsin administrative register and before a rule may be drafted.

2. In denying a motion to dismiss filed by the Defendants, a copy of which is attached hereto as Attachment 1, the circuit court ruled

that the Plaintiffs, who are now the Proposed Intervenors, had standing to challenge the constitutionality of the applicability of Act 21 to the Superintendent of Public Instruction and the Department of Public Instruction, because they are Wisconsin taxpayers and because four of them were licensed teachers and others were parents of school children who are impacted by administrative rules issued by the Superintendent and the Department of Public Instruction. The Defendants did not appeal the Circuit Court's decision that the Plaintiffs had standing.

3. Consequently, the Proposed Intervenors are the beneficiaries of and are protected by the permanent injunction issued against the Governor and the Secretary of the Department of Administration in their official capacities.

4. The Brief of the Petitioners, (pp. 46-50), has specifically requested that the Wisconsin Supreme Court overrule *Coyne v. Walker* which is a direct attack on the vested interests of the Proposed Intervenors.

5. This motion is timely. Granting it will not prejudice the Petitioners because under the current briefing schedule, the Respondent, the State Superintendent Anthony Evers, is required to file his brief on or before September 24, 2018. The Proposed Intervenors are prepared to file

their brief on or before that date so that allowing their intervention will not delay the Court's consideration of this case.

6. Additionally, the Brief of the Petitioners has, alternatively, requested that the Wisconsin Supreme Court overrule its decision in *State ex rel Thompson v. Craney,* 199 Wis. 2d 674 (1996) in which the undersigned counsel for the Proposed Intervenors represented the successful respondents in that original action.

Respectfully submitted this 14th day of September, 2018.

PINES BACH LLP

Lester A. Pines, SBN 1016543
122 West Washington Ave., Ste. 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
lpines@pinesbach.com

Christina M. Ripley, SBN 1101065
Wisconsin Education Association Council
Legal Department
33 Nob Hill Road
Post Office Box 8003
Madison, WI 53708-8003
(608) 298-2335 (telephone and facsimile)
ripleyc@weac.org

Attorneys for the Proposed Intervenors

STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DANE
BRANCH 4

PEGGY Z. COYNE, MARY BELL,
MARK W. TAYLOR, COREY OTIS,
MARIE K. STANGEL, JANE WEIDNER,
and KRISTIN A. VOSS,

Plaintiff,

Case No. 11-CV-4573
Case Code: 30701

vs.

SCOTT WALKER,
MICHAEL HUEBSCH, and
ANTHONY EVERS,

Defendants.

DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS, AND SCHEDULING ORDER

Procedural History

This case is before the Court on the Motion to Dismiss filed November 28, 2011 by Defendants Scott Walker and Michael Huebsch. Plaintiffs submitted a brief in opposition to the motion on December 16, 2011. Defendants Walker and Huebsch filed a reply brief on January 17, 2012.

For the reasons stated below, the Defendants'[1] motion is **DENIED**.

Background

Article X §1 of the Wisconsin Constitution provides that "[t] the supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct," and that the superintendent be selected through a statewide election held every four

[1] This decision refers to the "Defendants" throughout, even though the remaining Defendant, Anthony Evers, has not moved for dismissal.

Attachment 1

years. Previous litigation on the meaning of this section resulted in a Wisconsin Supreme Court ruling that "the legislature may not give equal or superior authority to any 'other officer.'" *Thompson v. Craney*, 199 Wis. 2d 674, 699, 546 N.W.2d 123 (1996).

On May 23, 2011, Governor Scott Walker signed into law 2011 Wisconsin Act 21, which requires all state agencies—including the Department of Public Instruction, headed by the State Superintendent of Public Instruction Anthony Evers—to submit proposed administrative rules to the Governor for approval. The legislation also requires administrative rules to be approved by the Secretary of Administration if the rules may lead to $20,000,000 or more in implementation and compliance costs by businesses, municipalities or individuals. In the present action, Plaintiffs seek a declaratory judgment that the statute violates Article X §1 of the Wisconsin Constitution, and an order enjoining its implementation. In his Answer filed October 21, 2011, State Superintendent Evers admitted all Plaintiffs' allegations and requested the same relief.[2]

Standard of Review/Controlling Law

In evaluating motions to dismiss for lack of standing, courts accept as true all factual allegations of the complaint, and "construe the complaint in favor of the complaining party." *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 316, 529 N.W.2d 245 (Ct. App. 1995). At the same time, a court "cannot add facts in the process of liberally construing the complaint," or "draw unreasonable inferences from the pleadings." *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 19-20, 284 Wis. 2d 307, 700 N.W.2d 180. Courts do not need to consider materials beyond the pleadings in evaluating the motion. *CTI of Northeast Wis., LLC v. Herrell*, 2003 WI App 19, ¶ 6, 259 Wis. 2d 756, 656 N.W.2d 794.

[2] The only substantive difference between the relief requested by the parties is that the Plaintiffs, but not Evers, ask the Court to enjoin the implementation of the statute by Superintendent Evers and the Department of Public Instruction.

Standing in Wisconsin courts is "a matter of judicial policy rather than...a jurisdictional prerequisite." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 40 n. 18, 333 Wis. 2d 402, 797 N.W.2d 789. The purpose of Wisconsin standing law is to "ensur[e] that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 16, 326 Wis. 2d 1, 783 N.W.2d 855. Standing "is not to be construed narrowly or restrictively, but rather should be construed liberally." *Foley-Ciccantelli*, 2011 WI 36, at ¶ 38.

Wisconsin courts have "inconsistently used a variety of terminologies as tests for standing." *Id.* at ¶ 5. However, the Wisconsin Supreme Court has recently held, in *Foley-Ciccantelli*, that the "the essence of the determination of standing" involves 1) whether the party "has a personal interest" (or stake) "in the controversy;" 2) whether the interest "will be injured, that is, adversely affected;" and 3) "whether judicial policy calls for protecting the interest of the party." *Id.* "When a statute, rule, or constitutional provision is at issue" – as in this case – "a court determines these three aspects of standing by examining the facts to determine whether an alleged injured interest exists that falls within the ambit of the statute, rule, or constitutional provision involved that judicial policy calls for protecting." *Id.* at ¶ 6. At the same time, this decision did not "necessarily eliminate" longstanding tests used to determine standing in administrative cases, constitutional challenges, and declaratory judgments. *Id.* at ¶ 55 (citing *Fox v. Wisconsin Dept. of Health & Soc. Services*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983) (administrative); *State ex rel. First Nat. Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 308, 290 N.W.2d 321 (1980) (constitutional); *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982) (declaratory judgments)).

Analysis

The parties dispute whether Plaintiffs have standing as taxpayers under taxpayer standing doctrine, whether Plaintiffs have standing as teachers or parents under the Uniform Declaratory Judgment Acts, and whether Defendant Evers would have standing as the State Superintendent of Public Instruction if he were realigned as a plaintiff.[3] The Court will examine each of these questions with the applicable caselaw, referring when appropriate to the clarifications to standing law in *Foley-Ciccantelli*.

For the reasons stated below, the Court holds that Plaintiffs have standing on all claimed grounds. The Court also holds that Defendant Evers would have standing if realigned as a plaintiff; however, the Court declines to order realignment at this time.

1. Standing as Taxpayers

Plaintiffs identify a line of cases granting litigants standing to challenge illegal government actions on the basis of their status as taxpayers.[4] In these cases, the allegation that a government entity "has spent, or proposes to spend, public funds illegally is ... sufficient to confer standing on a taxpayer." *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 360, 299 N.W.2d 259, 268 (Ct. App. 1980), overruled on other grounds by *State Dept. of Natural Res. v. City of*

[3] Of the seven Plaintiffs, all are taxpayers, four are teachers, and three are parents.

[4] *Foley-Ciccantelli* does not discuss these cases, and thus should not be construed to overrule or replace them. The parties cite nine taxpayer standing cases. *S.D. Realty Co. v. Sewerage Comm. of City of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961); *Columbia County v. Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962); *Thompson v. Kenosha County*, 64 Wis. 2d 673, 221 N.W.2d 845 (1974); *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976); *Tooley v. O'Connell*, 77 Wis. 2d 422, 253 N.W.2d 335 (1977); *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980); *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988); *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, 259 Wis. 2d 107, 655 N.W.2d 189. The only one of these cited in *Foley-Ciccantelli* is *Lake Country Racquet*, but *Lake Country Racquet* is unique in that it does not cite the other taxpayer standing cases. *Foley-Ciccantelli*, 2011 WI 36, ¶ 40 n. 17.

Waukesha, 184 Wis. 2d 178, 515 N.W.2d 888 (1994).[5] The injury to taxpayers can occur because the illegal government expenditure "results either in the governmental unit's having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure." *Id.* at 360 (citation omitted).

Defendants argue that these cases do not confer standing unless the statute at issue "directly requires, by its terms of implementation, the expenditure of tax funds." (Reply Brief, p. 4.) Because no new expenditures are required by 2011 Wisconsin Act 21, Defendants contend that Plaintiffs do not have standing as taxpayers.

However, in reviewing the taxpayer standing cases, the Court has not found an express requirement that the claimed illegal government action involves a new expenditure. In *State ex rel. Sundby v. Adamany*, the Wisconsin Supreme Court held that plaintiffs had standing as taxpayers to challenge a Governor's partial veto that had the effect of making certain local referenda mandatory rather than optional (as in the bill passed by the legislature). 71 Wis. 2d 118, 124, 237 N.W.2d 910 (1976). The *Sundby* decision gave no indication that the referenda would necessitate new expenditures, or that this is a matter of any consequence for standing.[6]

Moreover, taxpayers have standing even if "the illegal expenditures resulted in a net saving," and even if they are challenging a government action that would actually reduce government spending. *Thompson v. Kenosha County*, 64 Wis. 2d 673, 680 n. 9, 221 N.W.2d 845

[5] In terms of the three factors identified in *Foley-Ciccantelli*, it seems that courts developing this doctrine assumed that an illegal government action harms all taxpayers, that taxpayers are generally within the zone of interests protected by statutes and constitutions, and that judicial policy requires a liberal taxpayer standing doctrine because otherwise the government could act violate the law with impunity. *See City of Appleton*, 142 Wis. 2d at 878.

[6] In that case, the Supreme Court disposed of the standing issue in no more than two sentences, without mentioning expenditures: "Liberally construed, the plaintiff's petition, which stands as a complaint herein, constitutes a taxpayer's suit to adjudicate conduct of the governor alleged to be in violation of his constitutional authority. Petitioner asserts that he is a taxpayer and that he will suffer pecuniary disadvantage because the governor's actions herein are in violation of his constitutional authority." *Id.*

(1974) (citation omitted); *State ex rel. Wisconsin Senate v. Thompson*,[7] 144 Wis. 2d 429, 434, 424 N.W.2d 385, 386 (1988). A new or increased expenditure is unnecessary to allege a taxpayer injury sufficient to confer standing.

Plaintiffs argue that they have pled a pecuniary loss by alleging that public funds will be spent to implement an unconstitutional law (Response Brief, p. 14; Complaint, ¶¶ 25-26). Under the caselaw, that is sufficient. Defendants contend that "plaintiffs have not established that *any* expenditure of taxpayer funds will occur" (Reply Brief, p. 4, emphasis in original). However, when evaluating a motion to dismiss, the Court must take all factual allegations of the complaint as true. *Town of Eagle*, 191 Wis. 2d at 316.

2. Standing under the Uniform Declaratory Judgments Act

Even if Plaintiffs do not have standing as taxpayers, they have standing under the Uniform Declaratory Judgments Act (UDJA). The UDJA provides that "[a]ny person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." Wis. Stat. § 806.04(2). The statute is to be "liberally construed and administered," Wis. Stat. § 806.04(12), because "it affords relief from an uncertain infringement of a party's rights." *Town of Eagle*, 191 Wis. 2d at 316. To establish standing, a plaintiff 1) must allege "some threatened or actual injury"—that is, "a personal stake in the outcome of the controversy"—and 2) "the provision on which the claim rests" must be "properly understood to grant people in the plaintiff's position a right to judicial relief." *State ex rel. First Nat'l Bank of Wis. Rapids v. M&I Peoples Bank of Coloma*, 95 Wis. 2d 303, 308-09,

[7] In *Thompson*, the Court ruled in favor of standing with merely one sentence: "Additionally, we conclude that those two individuals as residents and taxpayers have met the requirements for standing to bring this declaratory judgment action." 144 Wis. 2d 429, 436.

290 N.W.2d 321 (1980). *Foley-Ciccantelli* clarified that the second requirement is best understood as asking "whether the party's asserted injury is to an interest protected by a statutory or constitutional provision," or, in other words, to "an interest within the zone of interests protected by a statute or constitution." 2011 WI 36, ¶¶ 55-56.

Four of the Plaintiffs' status as teachers confers standing under the UDJA. Article X, §1 of the Wisconsin Constitution protects the interests not only of the State Superintendent of Public Instruction, but also the interests of teachers who are subject to his or her authority. Defendants argue that since the purpose of Article X, §1 is to establish the powers of the Superintendent, this provision protects only the interests of the Superintendent. (Brief in Support of Motion to Dismiss, p. 16.) Yet the Wisconsin Supreme Court has made clear that the framers of Article X placed great importance on the Superintendent's ability to advance education in the state, presumably in the interests of teachers as well as parents and students. *Thompson v. Craney*, 199 Wis. 2d at 687-95. For example, one of the framers saw the Superintendent as needed to arrange for the education of teachers. *Id.* at 687. Another said that the Superintendent should be "one who knows what has been done in other states and countries-what has worked well and what ill- and who has practical good sense enough to select and put in operation what has been found by experience to be the best." *Id.* at 689.

Teachers, as with practitioners of every profession, have an interest in carrying out their duties as effectively as possible. If other, non-education officials (such as the Governor) can veto the Superintendent's proposals for regulating education, this could arguably injure teachers' interest in educating students successfully. As the Plaintiffs expressed it, Act 21 "puts the power over the Plaintiffs teachers' livelihoods and daily duties in the hands of the Governor and Secretary of Administration, rather than in the Superintendent's hands." (Plaintiffs' Response

Brief, p. 18.) The Plaintiff teachers have alleged a potential injury or a personal stake in the controversy.

Three of the Plaintiffs also have standing as parents under the UDJA. All parents sending their children to public schools have an interest in quality education for their children. Since it was apparently the judgment of the framers of Article X §1 that an elected Superintendent not subordinate to other officials would more effectively advance public education than a subordinate Superintendent, Article X §1 protects parents from any injury caused by subordinating the Superintendent to other officials. *Craney*, 199 Wis. 2d at 687-97.

Because Plaintiff parents have alleged that potential injuries could result from the enforcement of Act 21, they have demonstrated a personal stake in the controversy sufficient to confer standing. For example, Plaintiffs suggest that the changed process for approving regulations could lead to problems prompting parents to choose private over public schools. (Plaintiffs' Response Brief, p. 18.)

Defendants argue that Plaintiffs lack standing because they have failed to allege that they "have *actually* suffered an injury, or are in immediate danger of sustaining an injury." (Motion to Dismiss, p. 7.) Defendants rely on *Fox v. Wisconsin Department of Health & Social Services*, but *Fox* relates to administrative cases. *Foley-Ciccantelli*, 2011 WI 36, ¶ 55. A present or imminent injury is not required to establish standing in declaratory judgment cases, because the Uniform Declaratory Judgments Act was meant to resolve issues before "a wrong has been threatened or committed." *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982) (citation omitted). Since Act 21 has already been passed into law, and it is a "practical certainty" that the Superintendent will propose new regulations sometime in the future, the question of

whether the Governor or Secretary of Administration may constitutionally veto rules proposed by the Superintendent is "ripe for determination." *Id.* at 409, 414.

3. Standing of Superintendent Evers

Finally, the parties dispute whether Defendant Evers would have standing if realigned as a plaintiff. For a government official to have standing to challenge an unconstitutional statute, there must be co-plaintiffs who are private citizens, and an exception to the general rule against this kind of suit must apply. *Silver Lake Sanitary Dist. v. Wisconsin Dept. of Natural Res.*, 2000 WI App 19, ¶¶ 7-15, 232 Wis. 2d 217, 607 N.W.2d 50. One of these exceptions allows a government official to have standing when the issue is "of great public concern." *Id.*

In this case, the governance and regulation of public education is an issue of great public interest. First, it can be reasonably presumed that a large number of the state's residents are parents, and thus have an interest in quality public education. Second, all Wisconsin residents, whether parents or not, have an interest in the quality of education in the state, because it affects the state's general level of education, quality of life, and economic development. If the implementation of Act 21 were to prevent the Superintendent from maintaining the quality of public education, this could harm the interests of most or all of the state's residents. For these reasons, Evers would have standing if realigned as a plaintiff.

Because this court finds that the existing Plaintiffs have standing, realignment is unnecessary for the action to proceed. Although the Court "is free in a proper case to realign the parties according to their true interests," the Court declines to order realignment at this time. *Matter of Jermoo's Inc.*, 38 B.R. 197, 200 (Bankr. W.D. Wis. 1984). Plaintiffs only requested realignment if the Court accepts Defendants' arguments that Plaintiffs lack standing (Plaintiffs' Response Brief, p. 27). In addition, Defendant Evers has not moved for realignment.

Conclusion

For the reasons stated above, the Motion to Dismiss by Defendants Walker and Huebsch is **DENIED**.

SCHEDULING ORDER

The court issues this scheduling order as to further proceedings in this case:

1. Defendants Huebsch and Walker are to file Answers no later than 20 days from the issuance of this Order.
2. Upon filing of the above Answers, Defendants Huebsch and Walker are to file any Responses to Plaintiffs' Summary Judgment Motion (filed prematurely on February 3, 2012) within 30 days of filing their Answers, and any Reply by Plaintiffs is due within 15 days of the filing of the Responses.

SO ORDERED.

Dated this 6th day of April, 2012.

BY THE COURT:

Hon. Amy R. Smith
Circuit Court Judge, Branch 4

cc: Attorney Lester A. Pines
Attorney Maria S. Lazar
Attorney Janet A. Jenkins
Attorney Sheri L. Berkani