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2022CV001714

BY THE COURT:

DATE SIGNED: February 8, 2024

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT- BRANCH 8 WAUKESHA COUNTY

School Choice Wisconsin Action, Inc., et al.,

Plaintiffs,

vs.

Case: 2022CV1714

Wisconsin Department of Public Instruction, et al.,

Defendants.

DECISION AND ORDER

BRIEF BACKGROUND

School Choice of Wisconsin Action, Inc. ("SCWA"), among others, are bringing a declaratory action against the Wisconsin Department of Public Instruction ("DPI") and now the parties mutually seek on summary judgment resolution of a handful of issues, all stemming from how DPI handles verification of applications to school choice programs. (*Doc. 18, p. 1*).

School Choice Programs allow for students to attend private schools with public funds. (*Doc. 35, p. 2*). The three landmark programs within the state, the first is the Milwaukee Parental

Choice Program ("Milwaukee Program"), the second the Racine Parental Choice Program ("Racine Program"), and the third is the statewide Wisconsin Parental Choice Program ("Statewide Program"). (*Id.*). The Milwaukee program is governed by *Wis. Stat. §* 119.23 while the Racine and Statewide Programs are both governed by *Wis. Stat. §* 118.60. (*Id.*). A parent wishing to join must submit an application through the Online Application System ("OAS") and verify their name and residency with proper documentation. (*Doc. 20, ex. 2*).

DISCUSSION

Summary judgment is a remedy that "is appropriate when there is no genuine issue of material fact and 'the moving party is entitled to judgment as a matter of law.'" *Quick Charge Kiosk LLC v. Kaul*, 2020 WI 54, ¶ 9, 392 Wis. 2d 35, 944 N.W.2d 598 (explaining that the parties did not dispute any material facts but disagreed over questions of how to interpret and apply the relevant statutes).

Both parties contest the validity of each other's interpretation of the relevant statutes. However, they are not in dispute over the material facts that are relevant to resolving this matter so summary judgment is appropriate.

To understand the basic tenets of the arguments presented by both parties, a review of basic statutory requirements of the school choice programs is necessary. Under *Wis. Stat. §* 118.60(2)(a)1.b. and *Wis. Stat. §* 119.23(2)(a)1.b., applicants to the choice program (or the school the applicant is applying to) are required to submit to DPI, among other things, the applicant's residential address. The statutes do not define "address," but DPI has promulgated rules requiring particular "residency documents" that show the residential address of an applicant. *Wis. Admin. Code §* PI 48.05(2) and *Wis. Admin. Code §* PI 35.05(2) (which are identical) require a school to obtain a residency document from an applicant's parent:

> (2) A school shall obtain one of the residency documents specified by the department from an applicant's parent that shows the applicant resides at the address on the application at the time of application. The residency document shall be dated no earlier than 3 months prior to the start of the open application period in which an applicant applies. If a school receives a lease agreement as a residency document, the lease term shall include the date the application was received. The document shall contain the parent name and match the address on the application.

"[R]esidency document" is not statutorily defined or defined by DPI's administrative rules, so DPI specifies what document constitutes a "residency document" and what document does not. DPI accomplishes this by specifying which documents they will accept by publishing an "informational bulletin" document entitled "Private School Choice Programs Allowed Residency Documents." (*Doc. 20, p. 3.*)

The statute requires that "[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." *Wis. Stat. §* 227.10(1). The word "shall" is mandatory, not permissive. *State ex rel. Dep't of Nat. Res. v. Wisconsin Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 13, n. 7, 380 Wis. 2d 354, 909 N.W.2d 114 (the general rule is that the word "shall" is presumed mandatory when it appears in a statute.). "Accordingly, agencies must comport with rulemaking procedures set forth in ch. 227 when the agency's proffered directive meets the definition of a 'rule.'" *Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, ¶17, 396 Wis. 2d 434, 957 N.W.2d 261 (plurality op.). The statutes define a "rule" as: "[A] regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." *Wis. Stat. §* 227.01(13).

Whether an agency's action meets the definition of a rule is determined by reviewing the particular action under the five-factor test set forth in *Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res., Columbia Cty.*, 90 Wis. 2d 804, 280 N.W.2d 702 (1979). Those five factors are whether the agency action is "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency." *Id.* at 814.

There are five issues brought on plaintiffs' motion for summary judgment. (*Doc. 18, p. 1*). The first and second claims stem from a policy that SCWA calls the "Application Perfection" rule. SCWA defines this rule as DPI arbitrarily deciding which abbreviations or not are acceptable. (*Doc. 19, p. 10*). The verification procedures involve DPI reviewing and ensuring proper similarities between the residency documents submitted by an applicant and the applicant's application. (Id. at pp. 5-6). This has created a point of contention with SCWA over how DPI enforces this through allegations that the rule has caused schools to waste resources helping parents correct any perceived discrepancies by DPI. (*Id. at pp. 6-9*). DPI responds that no actual "application rule" exists. (*Doc. 35, p. 10.*)

I. The process by which DPI verifies address information whether it is called a rule or just a policy is invalid as it has not been explicitly permitted by statute or properly promulgated as a rule.

The statutes require that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [Chapter 227] . . ." *Wis. Stat. §*

227.10(2m). The statutes define "license" as "any part of an agency permit, certificate, approval, registration, charter or similar form of permission required by law . . ." *Wis. Stat. §* 227.01(5).

DPI's policy of address verification is a "regulation, standard, statement of policy, or general order." It explicitly imposes requirements upon applicants, and applies to everyone who is applying to the program and every school that they apply to. DPI's policy is of general application. The Wisconsin Supreme Court has made clear that to determine whether an agency's policy is of general application courts should look to the class of individuals the policy applies to. An agency's "action is of general application if that class is described in general terms and new members can be added to the class." *Citizens for Sensible Zoning*, 90 Wis. 2d at 816. DPI's "application perfection" policy applies to all students and schools applying or participating in a choice program. This is an open class, and new members can be added to it at any time. DPI's "application perfection" policy has the effect of law. Agency action has the "effect of law" where criminal or civil sanctions can result from a violation, where licensure can be denied, and where the interest of individuals in a class can be legally affected through enforcement of agency action. *See Wisconsin Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980). The effect of failing DPI's "application perfection" policy could be to deny licensure, and thus it has the effect of law. Admission to one of Wisconsin's choice programs is clearly an "approval" or "form of permission" and thus a "license" as that term is used in the statutes. No one is allowed to participate in a program without going through the application and admission process. Because the "license" can be denied if DPI's "application perfection" policy is not strictly followed, the policy as an unpromulgated rule has the effect of law. All Defendants are "agencies" as that term is defined under Wis. Stat. § 227.01(1). DPI established the "application perfection" policy to implement, interpret or make specific legislation enforced or administered

by DPI, namely, *Wis. Stat. §§* 118.60 and 119.23."[W]hen an agency, in order to enforce or administer a statute in its purview, adopts its own understanding of that statute, it generally has interpreted the statute thereby satisfying the 'interpret' criterion of rulemaking." *Palm*, 396 Wis. 2d 434, ¶ 25 (plurality op.). All five elements of *Citizens for Sensible Zoning* have been established by the plaintiffs.

Therefore, any "standard, requirement or threshold" which is "a term or condition" of applying for one of the parental choice programs which is not explicitly permitted by statute or rule, is invalid. No state law or administrative rule, explicitly permits DPI to require the type of absolute perfection on an application as described by the plaintiffs, or to dictate to applicants which commonly used abbreviations may or may not be acceptable. Thus, DPI's exercise of authority in rejecting applications not in conformance with their "application perfection" rule is an invalid exercise of their authority pursuant to *Wis. Stat. §* 227.10(2m).

II. Although agencies may publish guidance documents that do not have the force or effect of law, DPI's "Private School Choice Programs Allowed Residency Documents" publication is an unpromulgated rule adopted without compliance with statutory rulemaking procedures and is invalid pursuant to Wis. Stat. § 227.40(4)(a).

The third issue raised by SCWA argues that DPI's publication outlining what residency documents are acceptable and what documents are not is actually an unpromulgated rule. (*Doc. 18, p. 1.*) Agencies do not solely need to publish rules as there are also guidance documents which, unlike rules, "do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions." *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶ 102, 393 Wis. 2d 38, 946 N.W.2d 35. Rather guidance documents work to "'[explain] the agency's implementation of a statute or rule[,]' or '[p]rovides guidance or advice with respect to how the

agency is likely to apply a statute or rule.'" *Id.* at ¶ 122 (*quoting 2017 Wis. Act 369, § 31 (Wis. Stat. § 227.01(3m)(a)(1)-(2)*).

Understanding and distinguishing between the two is important as "rule-making authority is attended by the procedural safeguards under the Administrative Procedure Act, ch. 227, Stats., requiring public hearings, and the validity of such rules may be challenged in the courts under sec. 227.05, Stats." *State (Dep't of Admin.) v. Department of Industry, Labor & Human Relations*, 77 Wis. 2d 126, 135, 252 N.W.2d 353 (1977); *see also Wis. Legislature v. Palm*, 2020 WI 42, ¶ 34, 391 Wis. 2d 497, 522, 942 N.W.2d 900, 913 *("When a grant of legislative power is made, there must be procedural safeguards to prevent the 'arbitrary, unreasonable or oppressive conduct of the agency.'"*) (*quoting J.F. Ahern Co. v. Wisconsin State Bldg. Com.*, 114 Wis. 2d 69, 90, 336 N.W.2d 679 (Ct. App. 1983)).

DPI's policy as outlined in the publication is a "regulation, standard, statement of policy, or general order." DPI's publication purports to only "allow" certain specifically listed documents and by inference deny all other documents. The documents in this publication must be provided in order to apply for one of Wisconsin's school choice programs. The mandatory nature of the list of documents is plainly a "regulation, standard, statement of policy, or general order." DPI's policy as outlined in the publication is of general application. DPI's policy applies to all students and schools applying or participating in a choice program. This is an open class, and new members can be added to it at any time. Therefore, the residency document publication is of "general application." DPI's residency documents publication has the effect of law. Agency action has the "effect of law" where criminal or civil sanctions can result from a violation, where licensure can be denied, and where the interest of individuals in a class can be legally affected through enforcement of agency action. *See Wisconsin Elec.*, 93 Wis. 2d 222. Failure to provide

one of DPI's listed residency documents can result in denial of the ability to participate in a choice program–which is a "license" as that term is defined in state law. All Defendants are "agencies" as that term is defined under *Wis. Stat. §* 227.01(1). DPI published the residency documents publication to implement, interpret or make specific legislation enforced or administered by DPI, namely, *Wis. Stat. §§* 118.60(2)(a)1.b. and 119.23(2)(a)1.b. "[W]hen an agency, in order to enforce or administer a statute in its purview, adopts its own understanding of that statute, it generally has interpreted the statute thereby satisfying the 'interpret' criterion of rulemaking." *Palm*, 396 Wis. 2d 434, ¶ 25 (plurality op.). With regard to the publication, all five elements of *Citizens for Sensible Zoning* have been established by the plaintiffs.

By listing which residency documents must be used and by omission from the list which cannot, DPI adopts an administrative rule. As a rule, this publication was not adopted pursuant to the statutory notice, comment, and publication process required by Chapter 227, and thus is invalid.

III. The Residency Eligibility Sections of Wis. Admin. Code PI §§ 35.05(2) and 48.05(2) are invalid because they provide DPI with the ability to establish rules related to residency documents outside the statutory rulemaking process.

The fourth issue raised by SCWA argues that the administrative rules governing residency eligibility seeks to place a portion of that process outside the purview of the rule itself and thus is invalid as not complying with the statutory rulemaking process. (*Doc. 18, p. 1.*) "Administrative rules do not create power but are made in the exercise of power." *State ex rel. Democrat Printing Co. v. Schmiege*, 18 Wis. 2d 325, 336, 118 N.W.2d 845 (1963). Although, the Wisconsin Supreme Court has allowed the legislative power to be delegated to state agencies to interpret and implement laws. *See, e.g. Watchmaking Examining Bd. v. Husar*, 49 Wis.2d 526, 182 N.W.2d 257 (1971), the Supreme Court also said that in reviewing the use of delegated power, the "paramount consideration" to determine whether or not such a delegation is lawful is

"[t]he presence of adequate procedural safeguards[.]" *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, ¶ 79 & n.29; see also Id. at ¶¶ 54–55. Those procedural safeguards are laid out in Chapter 227. *Wisconsin Realtors Ass'n v. Public Service Comm'n of Wisconsin*, 2015 WI 63, ¶ 97, 363 Wis.2d 430 ("*Chapter 227 of the Wisconsin Statutes governs agency rule-making and legislative review of agency rules, among other things. These statutes comprise a system devised by the legislature itself to govern the legislature's role in and oversight of agency rule-making.*"). "[A]gencies remain subordinate to the legislature with regard to their rulemaking authority." *Koschkee v. Taylor*, 2019 WI 76, ¶ 18, 387 Wis.2d 552.

Wis. Admin. Code PI §§ 35.05(2) and 48.05(2) are identical and provide:

> Residency eligibility. A school shall obtain one of the **residency documents specified by the department** from an applicant's parent that shows the applicant resides at the address on the application at the time of application. The residency document shall be dated no earlier than 3 months prior to the start of the open application period in which an applicant applies. If a school receives a lease agreement as a residency document, the lease term shall include the date the application was received. The document shall contain the parent name and match the address on the application. [**emphasis added.**]

The "residency documents specified by the department" are found in the 2022 Application Verification Guide which reads "[t]he list below is a complete list and includes **all** acceptable forms of residency documentation. **No other forms or documents are acceptable** residency documentation." [**emphasis added**.] (*Doc. 20, p. 10, ex. 2*). The 2023 Application Verification Guide reads "[t]he list below includes **all** acceptable forms of residency documentation." [**emphasis added**.] (*Id. at p. 52, ex. 4*). The list of documents remains largely the same except the 2023 version allows for alternative documents approved by DPI provided the parents have worked with the school in trying to obtain one of the listed documents first. (*Id. at p. 53, ex. 4*).

DPI through these two sections of their administrative code seek to adopt a regulation – namely the specification of what are mandatory residency documents by the language DPI uses – which it attempts to do outside the rulemaking process and unmoored from procedural safeguards. To the extent that *Wis. Admin. Code PI §§* 35.05(2) and 48.05(2) authorize DPI to adopt rules, namely what constitutes a residency document, outside of the statutory rulemaking process –these administrative code provisions contain requirements which were never properly promulgated as rules and are therefore invalid under *Wis. Stat. §* 227.40(4)(a).

IV. The Address Verification Sections of *Wis. Admin. Code PI §§* 35.05(3) and 48.05(3) are Within the Scope of DPI's Authority and are Valid as Enacted.

The fifth and final issue argued by SCWA involves a challenge of *Wis. Admin. Code PI §§* 35.05(3) and 48.05(3) on the basis that there is no statutory authority for DPI to require the schools themselves to verify a student's residency to participate in the program. These two pieces of administrative code deal with address verification component specifically, with *§* 35.05(3) requiring a Milwaukee address, *§* 48.05(3)(a) requiring an address within the Racine Unified School District ("RUSD"), and *§* 48.05(3)(b) requiring a showing of an address that is neither in Milwaukee nor the RUSD so as to cover the rest of the state. *Wis. Admin. Code PI §§* 35.05(3), 48.05(3).

SCWA argues that these rules exceed DPI's authority and therefore DPI acted *ultra vires* when creating them. (*Doc. 19, p. 17*). SCWA argues that this exceeds their authority because the legislation only expressly required verification of income, not any other verification requirement. (*Id.*). DPI argues that they do have the proper authority to verify these addresses, stemming from the fact that students are statutorily required to live within the respective district depending on which program they are applying for. (*Doc. 35, p. 21.*) DPI says their rules allow them to verify

the city and district of the applicant in order to ensure that the program the student applied to is the proper one. (*Id.*).

DPI relies on *Wis. Ass'n of State Prosecutors v. Wis. Empl. Rels. Comm'n*, 2018 WI 17, 380 Wis. 2d 1, 907 N.W.2d 425. In *Wis. Assn' of State Prosecutors*, the Wisconsin Supreme Court dealt with two unions, SEIU and WASP, who were challenging sections of the *Wis. Admin. Code ERC §§* 70 and 80. *Id.* at ¶ 2. The circuit court held that WERC did not have the proper authority to pass the challenged law, which required "that labor organizations file a petition for election as a condition precedent to holding a certification election." *Id.* at ¶¶ 2-3. The Wisconsin Supreme Court reversed and said that the enabling statutes gives WERC the ability to "execute any predicate acts which are necessary to carrying out its mandated duties." *Id.* at ¶ 42. Those statutes are Wis. Stat. §§ 111.70(4)(d)3.b.,c. and 111.83(3)(b) which the Court describes as providing for the following five things:

> 1. Conduct an annual election to certify the representative of a collective bargaining unit that contains an employee no later than December 1;
>
> 2. Include on the ballot the names of all labor organizations having an interest in representing the employees participating in the election;
>
> 3. Certify any representative that receives at least 51 percent of the votes of all the employees in the collective bargaining unit;
>
> 4. Decertify the current representative if no representative receives at least 51 percent of the votes of all the employees in the collective bargaining unit; and
>
> 5. Assess and collect a certification fee for each election conducted.

Id. at ¶ 41.

With these powers in mind, the Court said "[o]ne of WERC's mandated duties is to include on the ballot only those labor organizations having an interest in representation. In order to include on the ballot only those labor organizations 'having an interest,' WERC must necessarily determine which labor organizations have such an interest." *Id.* at ¶ 43.

As WERC had to necessarily determine which labor organizations had an interest, DPI has a mandated duty under Wis. Stat. §§ 118.60 and 119.23 to make sure that students attending choice schools reside in the statutorily permitted areas. DPI is acting within its boundary by promulgating a rule requiring verification of this information. Further, this is well within the legislative grant of power as both Wis. Stat. §§ 118.60(11) and 119.23(11) say that the department shall promulgate rules to promote their respective sections and DPI promulgated a rule to ensure that Milwaukee residents attend Milwaukee private schools, Racine residents to Racine schools, and everyone else. While an argument could be made that DPI should do the verification, rather than place that burden on the individual school, that is a policy consideration for the Legislature in their oversight function of the related statutes or rules. It does not translate that DPI's requirement in *Wis. Admin. Code PI §§* 35.05(3) and 48.05(3) of address verification or its choice to make schools responsible for this verification is an invalid exercise of their rule-making authority.

IT IS HEREBY ORDERED:

1) Plaintiff's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part.

   a. The process by which DPI verifies address information whether it is called a rule or just a policy is invalid as it has not been explicitly permitted by statute or properly promulgated as a rule.

   b. Although agencies may publish guidance documents that do not have the force or effect of law, DPI's "Private School Choice Programs Allowed Residency Documents" publication is an unpromulgated rule adopted without compliance with statutory rulemaking procedures and is invalid pursuant to Wis. Stat. § 227.40(4)(a).

c. The Residency Eligibility Sections of Wis. Admin. Code PI §§ 35.05(2) and 48.05(2) are invalid because they provide DPI with the ability to establish rules related to residency documents outside the statutory rulemaking process.

2) Defendant's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part.

a. The Address Verification Sections of Wis. Admin. Code PI §§ 35.05(3) and 48.05(3) are Within the Scope of DPI's Authority and are Valid as Enacted.

3) The parties shall submit Orders for Judgment consistent with this Decision.