

SCHOOL CHOICE WISCONSIN ACTION, INC.,
10427 West Lincoln Avenue, Suite 1800,
West Allis, WI 53227,

CATHOLIC MEMORIAL HIGH SCHOOL OF
WAUKESHA, INC.,
601 East College Avenue,
Waukesha, WI 53186, and

RONCALLI CATHOLIC SCHOOLS, INC.,
2000 Mirro Drive,
Manitowoc, WI 54220,

Plaintiffs,

Case Code: 30701

v.

Case Type: Declaratory Judgment

WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION,
125 South Webster Street,
Madison, WI 53703, and

JILL UNDERLY, in her official capacity as
Wisconsin Superintendent of Public Instruction,
125 South Webster Street,
Madison, WI 53703,

Defendants.

COMPLAINT

Plaintiffs, School Choice Wisconsin Action, Inc. (“SCWA”), Catholic Memorial High School of Waukesha, Inc. (“CMH”), and Roncalli Catholic Schools, Inc. (“RCS”) by and through their undersigned attorneys at the Wisconsin Institute for Law & Liberty, Inc., hereby state and allege their Complaint against Defendants Jill Underly and the Wisconsin Department of Public Instruction (“DPI”) as follows:

INTRODUCTION

1. This is a declaratory judgment action brought under Wis. Stat. § 227.40 to challenge several rules of the Defendants which were not promulgated in compliance with statutory rulemaking procedures, or which otherwise conflict with state law.

2. Defendants have implemented and enforced an “application perfection” rule for various school choice programs despite having never been promulgated as a rule pursuant to Wis Stat. Ch. 227.

3. Further, Defendants have used “informational bulletins” to implement and enforce their chosen policies without going through the statutory rulemaking procedures.

4. They have also promulgated rules which purport to give them the power to enforce such policies *without* complying with state law, and have further promulgated rules which exceed their authority under state law.

5. This suit seeks to have Defendants’ actions declared unlawful and to bring Defendants’ administration of the various choice programs back into compliance with state law.

PARTIES

6. Plaintiff SCWA is a Wisconsin corporation with its principal place of business located at 10427 West Lincoln Avenue, Suite 1800, West Allis, Wisconsin 53227.

7. Plaintiff SCWA is a membership-based organization of schools who participate in various school choice programs under Wisconsin law. SCWA members are located throughout the state of Wisconsin.

8. Plaintiff CMH is a private high school which participates in the Wisconsin Parental Choice Program. Plaintiff CMH maintains its principal place of business at 601 East College Avenue, Waukesha, Wisconsin 53186.

9. Plaintiff RCS is a private school with campuses for kindergarten through high school which participates in the Wisconsin Parental Choice Program. Plaintiff RCS maintains its principal place of business at 2000 Mirro Drive, Manitowoc, Wisconsin 54220.

10. Defendant DPI is an agency of the state of Wisconsin and maintains its office and principal place of business at 125 South Webster Street, Madison, Wisconsin 53703.

11. Defendant Jill Underly is sued in her official capacity only as the Wisconsin Superintendent of Public Instruction, a constitutional officer, who maintains her office and principal place of business at 125 South Webster Street, Madison, Wisconsin 53703.

12. Both Defendants meet the definition of “agency” under Wis. Stat. § 227.01(1).

JURISDICTION AND VENUE

13. This Court has jurisdiction over this matter pursuant to Wis. Stat. § 227.40.

14. Venue here is proper pursuant to Wis. Stat. §§ 227.40 and 801.50(3)(b) because Plaintiff CMH is located and maintains its principal place of business in this County.

FACTS

15. Wisconsin law provides for three separate School Choice programs available to families depending on their location: The Milwaukee Parental Choice Program for those located in the City of Milwaukee (Wis. Stat. §119.23); the Racine Parental Choice Program for those located in the Racine Unified School District and the Wisconsin Parental Choice Program for those located throughout the rest of the state (both the Racine and statewide programs are provided for by Wis. Stat. § 118.60).

16. This case challenges as unlawful certain rules adopted by Defendants which were adopted in order to administer part of the application and enrollment processes for the various choice programs.

17. Specifically, as described herein, Defendants have promulgated certain “residency documents” rules which allow them to unlawfully adopt and enforce additional rules on an ad hoc basis outside of the rulemaking process.

18. Further, Defendants have adopted and enforced an “application perfection” rule in which they are imposing substantive application requirements which have not been lawfully promulgated in accordance with statutorily mandated rulemaking procedures.

19. Finally, as part of the application process, Defendants have gone beyond their statutory authority and imposed various requirements upon schools participating in a parental choice program to “verify” certain elements of an application, imposing unlawful burdens upon those schools, and requiring those schools to spend time and resources to comply.

20. The administrative code governing the Milwaukee Parental Choice Program is Wis. Admin. Code § PI 35.

21. The administrative code governing the Racine Parental Choice Program and Wisconsin Parental Choice Program is Wis. Admin. Code § PI 48.

Defendants’ “Residency Documents” Rules

22. Pursuant to Wis. Stat. § 118.60(2)(a)1.b. for the Racine Parental Program and Wisconsin Parental Choice Program and Wis. Stat. § 119.23(2)(a)1.b. for the Milwaukee Parental Choice Program, an applicant (or the school the applicant is applying to) is required to submit certain information to Defendants, which includes the applicant’s residential address.

23. Under both Wis. Admin. Code § PI 48.05(2) and Wis. Admin. Code § PI 35.05(2) (which are identical) a school is required to obtain a document from an applicant’s parent that shows their residential address:

(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.

24. The term “residency document” is not defined in either rule, and, instead, the rules purport to allow Defendants to “specify” what those documents are outside of the rulemaking process.

25. Pursuant to their purported authority under Wis. Admin. Code § PI 48.05(2) and Wis. Admin. Code § PI 35.05(2) rules, Defendants have “specified” certain documents via a publication they published and made available to the public entitled “Private School Choice Programs Allowed Residency Documents.”

26. A true and correct copy of Defendants’ “Private School Choice Programs Allowed Residency Documents” publication is attached hereto as **Exhibit 1**.

27. In the “Private School Choice Programs Allowed Residency Documents” publication, Defendants state it is acceptable to provide: a wage statement, tax documents, governmental correspondence, a lease agreement, certain utility bills, a letter from certain utilities, and limited other documents to meet their “residency document” application requirement. *See*, Exhibit 1.

28. Defendants’ “Private School Choice Programs Allowed Residency Documents” publication has not been promulgated in compliance with statutory rulemaking procedures.

Defendants’ “Verification” and “Application Perfection” Requirements

29. Once the “residency document” specified by Defendants’ publication has been obtained, the school is then required to “verify” the address pursuant to Wis. Admin. Code § PI

35.05(3) (for the Milwaukee program) and Wis. Admin. Code § PI 48.05(3) (for the Racine and statewide programs).

30. For the Milwaukee Parental Choice Program, once the “residency document” specified by Defendants’ publication has been obtained, the school is then required to “verify” the address pursuant to Wis. Admin. Code § PI 35.05(3):

(3) Address verification. A school shall verify that the address on a pupil’s application is in the city of Milwaukee by using the city of Milwaukee assessor website, the state of Wisconsin’s Statewide Voter Registration System or any other source permitted by the department.

31. For the Racine or statewide programs, there are different “verification” methods specified depending on which program the pupil is applying under, pursuant to Wis. Admin. Code § PI 48.05(3):

(3) Address verification. A school shall verify an applicant’s address listed on the residency documentation under sub. (2) as follows:

(a) If a pupil is applying to the Racine parental choice program, the school shall verify that the address on the application is in the Racine Unified School District by using the Racine Unified School District’s transportation information, the state of Wisconsin’s Statewide Voter Registration System or any other source permitted by the department.

(b) If a pupil is applying to the Wisconsin parental choice program, the school shall verify that the address on the application is in the Wisconsin school district listed on the application but not in the Racine Unified School District or City of Milwaukee by using the state of Wisconsin’s Statewide Voter Registration System or any other source permitted by the department.

32. Defendants have gone beyond the text of their own rules, however, and have imposed an additional “application perfection” rule upon applicants, requiring an absolute perfect match between the individual applicants’ address and parental name(s) on the application (which is contained in the “Online Application System” or “OAS”) and the address or parental name(s) on the residency document.

33. Defendants lay out their “application perfection” address requirements in a document they published on their website entitled “Private School Choice Programs Information Bulletin 04-01.”

34. A true and correct copy of Defendants’ “Private School Choice Programs Information Bulletin 04-01” publication is attached hereto as **Exhibit 2**.

35. Under Defendants’ “application perfection” address requirement they specify which aspects of an applicant’s address must “perfectly” match their residency document, and which do not. *See Exhibit 2, page 7* (providing a chart listing which aspects of an address do need to “perfectly” match and which do not).

36. For example, Defendants’ “application perfection” rule’s address requirement requires that a street number, street name, city and state all perfectly match, but allows a unit or apartment number or zip code to not match. Defendants further allow applicants to use abbreviations in their addresses, but only for street direction or street suffix.

37. Thus, an applicant who resides on North Harrison Street in the Village of North Prairie would be allowed to write they live on “ N. Harrison St.” but could not write their municipality as “N. Prairie.”

38. Failure to abide by Defendants’ perfection policy results in the student being ineligible unless the application is “corrected” in accordance with Defendants’ regulations.

39. Defendants further discuss their perfection policy in a publication entitled “Private School Choice Programs Processing and Verifying Applications Application Verification and Correction FAQ – 2022-23 School Year.”

40. A true and correct copy of Defendants' publication entitled "Private School Choice Programs Processing and Verifying Applications Application Verification and Correction FAQ – 2022-23 School Year" is attached hereto as **Exhibit 3**.

41. Defendants take the position that "misspelled" street names, street suffixes, or cities require an applicant's parent to "email[] or provide[] a signed letter to the school stating the correct address (which must match the school district verification document and OAS) and that the street name, street suffix, and/or city is misspelled on the documentation." *See* Exhibit 3, Page 21.

42. An additional requirement for residency documents is that they must include the legal name of at least one of the parents on the application. *See* Exhibit 1, page 1.

43. As part of the "application perfection" rule, Defendants have also required both that the first and last name of the parent on the residency document "perfectly" match the first and last name of the parent on the application (*see* Exhibit 2, page 8) and that the name of the applicant in the OAS "perfectly" match the legal name of the applicant (*see* Exhibit 3, page 13).

44. Defendants utilize a publication in which they specify which aspects of the parent's name on a residency document must "perfectly" match the parent's name on the application. *See id.* (providing rules for which name differences need to "perfectly" match and which do not).

45. For example, Defendants require that, except for differences due to punctuation, spacing, or capitalization, the parent's name on the residency document must "perfectly" match the parent's name on the application.

46. Thus, an applicant whose parent's legal name is "Mary Kate Wilson Jones" would be allowed to submit a residency document with the name as "Marykate Wilson Jones," but a residency document with the name as "Mary Kate Wilson" would not be acceptable.

47. Similarly, an applicant's name in the OAS must perfectly match the applicant's legal name. *See* Exhibit 3, page 13.

48. So, if an applicant whose legal name is "Maria Teresa Garcia Ramirez" appeared in the OAS and on her application as "Maria Teresa Garcia," she would be ineligible for the program unless the name were "corrected" according to Defendants' regulations. *See id.*

49. Overall, failure to perfectly provide parental name information under Defendant's application perfection policy results in the student being ineligible unless the application is "corrected" in accordance with Defendants' regulations.

50. Applicants who do not abide by the "application perfection" policy are not allowed to participate in a Parental Choice program.

CLAIM 1 – DEFENDANTS' "APPLICATION PERFECTION" RULE WAS ADOPTED WITHOUT COMPLIANCE WITH STATUTORY RULEMAKING PROCEDURES AND IS INVALID PURSUANT TO WIS. STAT. § 227.40(4)(a)

51. All of the foregoing paragraphs are incorporated as if fully re-alleged herein.

52. Defendants adopted and enforced an "application perfection" rule, which requires absolute perfection in the parental and applicant names as well as the residential address of an application, as described herein.

53. Defendants have not promulgated their "application perfection" rule in accordance with state law rulemaking procedures.

54. Since Defendants did not comply with the statutorily mandated rulemaking procedures, Plaintiffs (and Plaintiff SCWA's members) were denied the opportunity to comment on or receive notice regarding this rule.

55. Plaintiffs CMH and RCS as well as Plaintiff SCWA's member schools are required to abide by Defendants' "application perfection" rule.

56. Plaintiffs' (and Plaintiff SCWA's members') legal rights and privileges are harmed because the perfection rule was not promulgated as required by state law, they are required to comply with the rule, and were denied their legal rights to participate in the rulemaking process.

57. Plaintiffs seek a declaration pursuant to Wis. Stat. § 227.40 that Defendants' "application perfection" rule is a rule which was promulgated without complying with statutory rulemaking procedures, and that it is therefore invalid

CLAIM 2 –IN THE ALTERNATIVE, DEFENDANTS LACK EXPLICIT AUTHORITY FOR THE “APPLICATION PERFECTION” RULE AND IT IS INVALID PURSUANT TO WIS. STAT. § 227.10(2m)

58. All of the foregoing paragraphs are incorporated as if fully re-alleged herein.

59. Wis. Stat. § 227.10(2m) provides that: “No 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] . . . ”

60. Defendants may not implement or enforce their “application perfection” rule unless it is explicitly required or explicitly permitted to do so by statute or previously promulgated rule.

61. No statute or lawfully promulgated rule explicitly requires or permits Defendants' “application perfection” rule.

62. As a result, the “application” perfection rule is unlawful, and Plaintiffs seek a declaration that it is invalid.

CLAIM 3 –DEFENDANTS’ “PRIVATE SCHOOL CHOICE PROGRAMS ALLOWED RESIDENCY DOCUMENTS” PUBLICATION IS A RULE WHICH WAS ADOPTED WITHOUT COMPLIANCE WITH STATUTORY RULEMAKING PROCEDURES AND IS INVALID PURSUANT TO WIS. STAT. § 227.40(4)(a)

63. All of the foregoing paragraphs are incorporated as if fully re-alleged herein.

64. Both Wis. Admin. Code § PI 35.05(2) and Wis. Admin. Code § PI 48.05(2) purport to allow the Defendants to require an applicant to produce a residency document which is “specified by the department.”

65. Pursuant to Wis. Admin. Code § PI 35.05(2) and Wis. Admin. Code § PI 48.05(2) Defendants have “specified” which residency documents they will accept from applicants in a document entitled “Private School Choice Programs Allowed Residency Documents.” *See* Exhibit 1.

66. Defendants’ “Private School Choice Programs Allowed Residency Documents” publication imposes substantive requirements upon applicants by deciding which residency documents are allowed, and subsequently, which are not.

67. Defendants’ “Private School Choice Programs Allowed Residency Documents” publication is a “rule” as that term is defined by Wis. Stat. § 227.01(13).

68. Defendants’ “Private School Choice Programs Allowed Residency Documents” publication was not promulgated in compliance with statutorily-mandated rulemaking procedures.

69. Plaintiffs (and Plaintiff SCWA’s members) were denied the opportunity to participate in the rulemaking process, including the notice requirements therein, to determine which documents could be accepted and which would not.

70. Plaintiffs CMH and RCS as well as Plaintiff SCWA’s members are required to comply with Defendants’ “Private School Choice Programs Allowed Residency Documents” publication.

71. Plaintiffs seek a declaration pursuant to Wis. Stat. § 227.40 that Defendants’ “Private School Choice Programs Allowed Residency Documents” publication is a rule which was

promulgated without complying with statutory rulemaking procedures, and that it is therefore invalid

CLAIM 4 – WIS. ADMIN. CODE § PI 35.05(2) AND WIS. ADMIN. CODE § PI 48.05(2) ARE UNLAWFUL BECAUSE THEY ALLOW DEFENDANTS TO ESTABLISH RULES OUTSIDE OF THE RULEMAKING PROCESS

72. All of the foregoing paragraphs are incorporated as if fully re-alleged herein.

73. In promulgating both Wis. Admin. Code § PI 35.05(2) and Wis. Admin. Code § PI 48.05(2), Defendants promulgated rules which allow them to issue additional rules outside of the rulemaking process.

74. Wis. Admin. Code § PI 35.05(2) and Wis. Admin. Code § PI 48.05(2) exceed Defendants' authority under state law.

75. While rulemaking power may only be granted by the legislature, Wis. Admin. Code § PI 35.05(2) and Wis. Admin. Code § PI 48.05(2) purport to give Defendants the ability to issue rules regarding which documents may be accepted and which cannot on an *ad hoc* basis, outside of the rulemaking process.

76. Plaintiffs CMH and RCS as well as Plaintiff SCWA's members are required to abide by the requirements of Wis. Admin. Code § PI 35.05(2) and Wis. Admin. Code § PI 48.05(2).

77. Plaintiffs (and Plaintiff SCWA's members') legal rights and privileges are harmed because those requirements exceed Defendants' authority under state law.

78. Plaintiffs seek a declaration pursuant to Wis. Stat. § 227.40 that Wis. Admin. Code § PI 35.05(2) and Wis. Admin. Code § PI 48.05(2) exceed Defendants' authority as agencies under state law, and that that rule is therefore invalid.

CLAIM 5 – DEFENDANTS' "VERIFICATION" REQUIREMENTS UNDER WIS. ADMIN. CODE § PI 35.05(3) AND WIS. ADMIN. CODE § PI 48.05(3) EXCEED THEIR STATUTORY AUTHORITY

79. All of the foregoing paragraphs are incorporated as if fully re-alleged herein.

80. Within the entirety of Wis. Stat. § 118.60 there is only one reference to “verification” and that is the requirement that the Department of Revenue verify an applicant’s income to participate in the program. Wis. Stat. § 118.60(2)(a)1.b

81. Similarly, within the entirety of Wis. Stat. § 119.23 there is only one reference to “verification” and that is the requirement that the Department of Revenue verify an applicant’s income to participate in the program. Wis. Stat. § 119.23(2)(a)1.b.

82. Despite the statute plainly only requiring verification of income by the Department of Revenue, Defendants have imposed additional “verification” requirements upon schools participating in a School Choice program via Wis. Admin. Code § PI 35.05(3) and Wis. Admin. Code § PI 48.05(3), as described herein.

83. Those requirements exceed Defendants’ authority as agencies under state law and are invalid.

84. Plaintiffs CMH and RCS as well as Plaintiff SCWA’s members are required to abide by Defendants’ verification requirements.

85. Plaintiffs’ (and Plaintiff SCWA’s members’) legal rights and privileges are harmed because those requirements exceed Defendants’ authority under state law.

86. Plaintiffs seek a declaration pursuant to Wis. Stat. § 227.40 that Defendants’ verification requirements exceed their authority as agencies under state law, and that those rules are therefore invalid.

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that Defendants’ “application perfection” rule, as challenged herein, was adopted without compliance with statutory rulemaking procedures, and is invalid;

B. In the alternative, declare Defendants lack explicit authority for their “application perfection” rule, and that it is unlawful and invalid pursuant to Wis. Stat. § 227.10(2m);

C. Declare that Defendants’ “Private School Choice Programs Allowed Residency Documents” publication is a rule, was adopted without compliance with statutory rulemaking procedures, and is invalid;

D. Declare that Wis. Admin. Code § PI 48.05(2) and Wis. Admin. Code § PI 35.05(2) are unlawful and invalid because they allow Defendants to establish rules outside of the rulemaking process and therefore exceed their authority under state law;

E. Declare that Defendants’ verification requirements in Wis. Admin. Code § PI 35.05(3) and Wis. Admin. Code § PI 48.05(3) are unlawful and invalid because those rules exceed Defendants’ authority under state law and are invalid; and

F. Such other relief as the Court finds appropriate under the circumstances.

Dated this 30th day of November, 2022.

Wisconsin Institute for Law and Liberty, Inc.
Attorneys for Plaintiffs SCWA, CMH and RCS

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