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March 1, 2023

VIA ELECTRONIC MAIL:
Office of Legal Services
c/o Attorney Ben Jones (*benjamin.jones@dpi.wi.gov*)
Wisconsin Department of Public Instruction

Re: *New School Applications to Parental Choice Program*

Dear Attorney Jones:

We write to you jointly along with School Choice Wisconsin to bring an issue to your attention in the hope of avoiding litigation. The specific matter addressed in this letter involves the Department of Public Instruction placing obstacles in the way of new schools seeking to enter the Wisconsin parental choice programs. Based upon our review of the facts and the law, DPI is exceeding its authority by requiring new schools to complete a near impossible application process in order to participate in a parental choice program.

As new schools enter the choice programs, they offer more opportunities for families to find a school that meets their needs and values and provides a quality education for children. If new schools are denied entry into those programs, families are denied those opportunities, and the schools are being unlawfully denied their statutorily granted right to participate in those programs.

Out of the group of new school applicants for the upcoming school year, we are aware of only *one* new school which was accepted into a parental choice program. Denying approximately 9 out of 10 new schools participation in a choice program, when they have provided accurate and sufficient documentation according to statute and relevant administrative rule, reflects a pattern and problem with the application process as administered by DPI. Such denials have in turn had substantial adverse effects on the operation of these new schools.

New School Applications to Participate in a Parental Choice Program

In order to participate in a parental choice program, a new private school must comply with certain statutory and duly promulgated administrative requirements. *See* Wis. Stat. § 118.60(2)(ag); Wis. Admin. Code § PI 48.04(1)(f). We are not contesting either the statute or the rule.

Under the statute, schools must submit a budget and cash flow report by August 1 of the school year immediately preceding the school year in which the private school

intends to participate in the program. It must do so using the form provided by DPI. *See* Wis. Stat. § 118.60(2)(ag)1.b.

To administer that statute, DPI has promulgated Wis. Admin. Code § PI 48.04(1)(f). The rule provides in relevant part that a school must provide the following by the August 1 deadline:

> 1. Anticipated enrollments for all pupils enrolled in the school.
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> 2. Anticipated enrollments for choice program pupils.
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> 3. Estimated total revenues and costs.
>
> 4. Estimated amounts required under s. PI 48.10 (3) (a) [setting forth how to calculate net eligible education expenses for all pupils].
>
> 5. A schedule of anticipated beginning and ending net assets.
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> 6. A schedule of monthly cash flows.
>
> 6m. Anticipated beginning and ending reserve balance.
>
> 7. The contingent funding sources the school will use if actual enrollments are less than expected and evidence of the availability of the funding sources.
>
> 8. A statement of whether the school has any past due amounts, interest, or penalties due to the U.S. internal revenue service, the Wisconsin department of workforce development, or the Wisconsin department of revenue. An amount must be disclosed even if it is in dispute. If a school has past due amounts, interest, or penalties due to a government entity, the school shall do all of the following:
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> > a. Disclose to the department the outstanding amount owed.
> >
> > b. Submit to the department statements or other correspondence from the government entity stating the amount the government entity claims is due, the amount in dispute, and nature of the amount due.

But DPI goes beyond these requirements in evaluating a new school's application. For instance, DPI's multi-tab Excel spreadsheet Budget and Cash Flow Report form contains many instructions and requirements that are not in the relevant statute or rule. It even includes two separate pages of additional "Instructions" and an additional page requesting several "Required Attachments."

For example, the "Required Attachments" page of the Budget instructions states, in part, that:

> All required documents indicated below must be submitted with the budget. A "Yes" is indicated in Column B if the document is required. All attachments specifically identified below must be provided. The school may not provide alternative documentation or no documentation.

The requirements go on and on but these first four sentences make our point. Neither the statute nor the rule require or define any "required documents." These are additional requirements imposed by DPI without authority.

Here is an abbreviated example of how these new requirements are used to trip up a school. These next two paragraphs come from a recent DPI decision:

> The School failed to provide any written document that supported the annual campaign for $90,000 (Line 1), Fund a Student Campaign for $15,000 (Line 5), Golf Tournament for $10,000 (Line 6), Dinner Auction for $18,000 (Line 7), or Fun Run for $4,000 (Line 8). The importance of the written agreement is illustrated by the $90,000 Annual Campaign amount on Line 1. The Budget and income statement provided as Attachment 5 indicate the School only received $2,500 for the annual campaign/donations for the year ending 6/30/22. The School indicated it will receive $90,000 from the annual campaign for the year ending 6/30/24. Since the School failed to provide any support showing that it has donors available that are willing to provide the funds to the School, there is no evidence that the School will be able to receive funds that cover the substantial increase from $2,500 to $90,000.
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> * * *
>
> The School was required to provide Attachment 12. Attachment 12 must contain "All written agreements for contributions from individuals or unrelated organizations, non-government grants, or fundraising on Schedule 4-2, Lines 1-18 above $1,000. The written agreement must include the following: a) who will provide the funds, b) that the funds will be provided to the school, c) the amount that will be provided, d) when the funds will be provided, and e) an indication that the amounts do not need to be paid back." Written agreements are required for new private schools for any amount over $1,000 so the DPI can ensure the School has the ability to raise the funds for the School. As a new private school, the School does not have a history of receiving contributions that demonstrate the School will be able to raise the funds identified in the Budget. The written agreement is especially important for new private schools because they do not have a historical donor base and donors may be less willing to contribute to a new start up organization. The written agreements are required in order to show that the School has donors available that will support its operations.

In simple terms, the school provided a budget (per the statute) including its estimate of total revenue (per the rule), but DPI imposed additional requirements not contained in the statute or the rule. DPI did not believe that the school would raise the amounts that its budget and revenue estimate said that it would raise, and the school did not provide the documents that DPI said were required to satisfy DPI.

If DPI intends to enforce the requirements, it must do so through rule-making. DPI does not have the authority to decide what should be in a budget by including

additional requirements in "instructions" or a "requirements page" (which it can change at its whim and interpret and apply as it desires). And DPI may not use those additional requirements as the basis for denying applications.

We understand that state law requires that new schools use "forms provided by the department" when submitting their budget information. It does *not* allow for DPI to enforce additional requirements on those department forms. Agencies can create and approve forms but must do so by rulemaking unless the form fits within the exception in Wis. Stat. § 227.01(13)(q) which provides that forms, "the content or substantive requirements of which are prescribed by a rule or a statute," are exempt from rulemaking.

Thus, a form that complies with the requirements in Wis. Stat. § 118.60(2)(ag) and/or Wis. Admin. Code § PI 48.04(1)(f) would fit within this exception and DPI could create such a form without going through rule-making. But once DPI decides to create a form that goes beyond the requirements in the statute and the rule – like the examples discussed above – then it no longer fits within the exception in § 227.01(13)(q), and it must be done by rule.

Improper Budget Adjustments by DPI

In addition to imposing non-authorized requirements on new schools applying to participate in the choice programs, DPI also has demonstrated a pattern of making improper adjustments to the budgets that these schools submit. New schools must fill out a part of the DPI form which asks for the costs the school will incur for telephone and internet access, electricity, gas, water and other utilities, administrative and other supplies. DPI will, on occasion, however, unilaterally change these costs as submitted by the schools.

In one instance, a school did not include utility costs because its utilities were covered within the monthly rent. DPI added $11,000 to the estimated costs for this school because it did not sufficiently prove (according to DPI) that it would not have to pay for utilities separately.

As another example, DPI requires that individuals who pledge to provide money to a new school submit their bank statement. This is not required by statute or rule, and individuals seeking to donate to choice schools should not have to provide their bank information to a government agency. In one instance, a donor submitted a bank statement for the LLC she owns, and the school submitting the application clearly indicated that the LLC is owned by this individual. DPI said it was insufficient because there was no proof. After this donor submitted a letter confirming she owned the LLC, DPI *still* considered it insufficient because there was not proof that she was the *sole* owner of the LLC. None of this is required by statute or rule.

In at least two instances, DPI would not consider individual donations because the individuals did not explicitly submit statements saying the school did not have to pay them back. DPI refused to consider the amounts donated by these individuals when reviewing the budgets submitted by the schools.

Any time DPI declines to accept budget items based on its *ultra vires* requirements, it is unfairly and unlawfully reworking the submitted budgets. Oftentimes, it then incorrectly concludes schools will have a negative cash balance.

We don't mean the above examples to be an exhaustive list of the problems. We have provided these examples as illustrative of the problem so that you can see, from a practical standpoint, what we are talking about.

DPI is Exceeding Its Lawful Authority

We are aware that a number of schools complied with the statutory and administrative rule requirements when applying to participate in a parental choice program for the upcoming school year. They attended DPI trainings, consulted with professional accountants, gathered required documentation, and submitted their applications on time. But if the new schools did not comply *in precisely the manner that DPI requires*, their applications were denied. This is a problem.

Beyond this, there is often little or no collaboration between these schools and DPI throughout the application process. Schools must submit detailed information by August 1, and they are left with radio silence until the end of December, when DPI informs them about whether or not they have been accepted into the program.

Between August and December, new school applicants would welcome feedback and could easily supplement their applications if there is information that DPI would like to see, even if not required by the statute or the rule. To be clear, we are not saying that applicants need to provide additional documentation, but since DPI goes beyond what is required by statute and rule, the least it could do is communicate with applicants. Failure to do so requires new schools to essentially read the mind of DPI in order to be accepted to participate in a parental choice program.

Lack of communication also means that by the time that a school gets a denial decision from DPI and appeals it and DPI decides the appeal, it is virtually impossible to file a lawsuit and get a result that will allow the school to enroll students for the upcoming school year.

The Legal Issue

Under Wisconsin law, DPI cannot "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 this subchapter." Wis. Stat. § 227.10(2m). DPI is imposing requirements upon new schools that are neither explicitly required nor explicitly permitted by statute or rule. Since the additional requirements were not promulgated in accordance with Chapter 227 of the Wisconsin Statutes, they are unlawful.

We see no justification for the practice of DPI exceeding its lawful authority in such a way that keeps schools, and in turn families, out of the parental choice programs. This is not the directive given to DPI by our legislature. We ask that DPI immediately stop requiring new schools to submit documentation and information not required by statute or rule. For those requirements that *are* contained within statute or rule, we urge DPI to stop enforcing them in such a rigid and unreasonable manner.

From our standpoint, we have decided not to file a Chapter 227 appeal on behalf of any of the rejected applicants for the upcoming school year. Our belief is that by the time we filed the appeal and had it heard, it would be too late for the school to enroll students by the April deadline.

Instead, we would like to take some time to discuss this issue with you to see if there is a solution. One or more of the rejected applicants could potentially be included as well. If we cannot agree on a practical solution, then our intent would be to file a lawsuit challenging the requirements prospectively so that the new schools which apply next year know what the enforceable rules and requirements will be.

If you think such discussions might be productive, please let us know as soon as possible. If DPI is convinced of its position on this matter, such that discussion would not be productive, please let us know that so that we can let our prospective clients know and move on to litigation.

Open Records Request

Please also consider this letter a request for public records, made under Wisconsin's Open Records Law, Wis. Stats. §§ 19.31-19.39. This request seeks the following records from DPI:

1. All new private school applications to participate in a parental choice program for the 2023-24 school year.

2. All orders or determinations by DPI determining new private schools to be eligible to participate in a parental choice program for the 2023-24 school year.

3. All orders or determinations by DPI determining new private schools to be ineligible to participate in a parental choice program for the 2023-24 school year.

4. All appeals or requests by new private schools for an administrative hearing related to denials of applications to participate in a parental choice program for the 2023-24 school year.

5. All DPI orders or other correspondence responding to appeals or requests for an administrative hearing related to denials of applications to participate in a parental choice program for the 2023-24 school year.

6. All communications, including emails and text messages, sent or received by any representative of DPI related to new private school applications to participate in a parental choice program for the 2023-24 school year.

Please advise before processing this request if there will be a cost incurred. Wisconsin law requires that you respond to this request "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). If we can help clarify or refine this request, feel free to reach out.

Sincerely,

Cory Brewer
Associate Counsel
Wisconsin Institute for Law & Liberty, Inc.

Nicholas Kelly
President
School Choice Wisconsin