

HERITAGE CHRISTIAN SCHOOLS, INC.
3500 South Glen Park Road,
New Berlin, WI 53151,

NOAH OLGUIN, SR., AND KATRINA OLGUIN
2050 South 108th Street
West Allis, Wisconsin,

Plaintiffs-Petitioners,

and

SCHOOL CHOICE WISCONSIN ACTION, INC.
350 Bishops Way, Suite 104
Brookfield, WI 53005,

Case Type: Declaratory Judgment,
Administrative Agency Review

Case Code: 30701, 30607

Plaintiff,

v.

CAROLYN STANFORD TAYLOR,
in her official capacity as Superintendent
of the Wisconsin Department of Public Instruction,
125 South Webster Street,
Madison, WI 53703,

and

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

Defendants-Respondents.

COMPLAINT AND PETITION FOR JUDICIAL REVIEW

1. This action is filed as both a complaint seeking declaratory and injunctive relief and, in addition or in the alternative, a Petition for Judicial Review of an administrative action. As laid out *infra*, this case seeks a declaration that a certain policy adopted by the Defendants-

Respondents is unlawful. Specifically, Defendants-Respondents have adopted a policy prohibiting parents from applying more than one time for the Wisconsin Parental Choice Program (“WPCP”) in a given application period, if the first application is deemed ineligible by the Department of Revenue, regardless of whether an applicant’s personal circumstances which affect eligibility have changed after the first application but before the application window has closed. This policy will be referred to herein as “the one and done policy.”

2. The one and done policy is applied against all applicants to the WPCP and affects all schools that participate in the WPCP which includes numerous members of the Plaintiff, School Choice Wisconsin Action, Inc.

3. The one and done policy was unlawfully applied to Plaintiffs-Petitioners Noah Olguin, Sr. and Katrina Olguin and Heritage Christian Schools, Inc.

PARTIES

4. Plaintiff-Petitioner Heritage Christian Schools, Inc. (“Heritage”), is a non-stock corporation organized under the laws of Wisconsin. Heritage operates two campuses offering classes and education to students from preschool through high school. Heritage’s main office is located at 3500 South Glen Park Road, in the City of New Berlin, Waukesha County, Wisconsin.

5. Plaintiffs-Petitioners Noah Olguin, Sr. and Katrina Olguin (“the Olguins”) are married parents of three school-aged children. Two of the Olguins’ three children were denied entry into the WPCP, a program administered by the Defendants-Respondents, and those denials are the subject of this complaint. The Olguins and their children reside at 2050 South 108th Street, in the City of West Allis, Milwaukee County, Wisconsin.

6. Plaintiff School Choice Wisconsin Action, Inc. (“SCWA”) is a non-stock corporation organized under the laws of Wisconsin with its principal place of business at 350

Bishops Way, Suite 104, in the City of Brookfield, Waukesha County, Wisconsin. SCWA is a membership organization whose members are private schools operating under the various Wisconsin parental choice programs, including the WPCP. Heritage is a member of SCWA. SCWA's purpose is to represent its member schools in matters of advocacy in the courts, the legislature, before public agencies and in public discourse.

7. The one and done policy at issue here directly impacts SCWA members throughout Wisconsin. SCWA has associational standing to assert this claim on behalf of its members because its members have standing, the interests at stake in this litigation are germane to its purpose, and neither the claims asserted nor the relief requested requires any particular member's participation in this lawsuit. See *Munger v. Seehafer*, 2016 WI App 89, ¶¶53-54, 372 Wis. 2d 749, 890 N.W.2d 22

8. SCWA also has organizational standing on its own to challenge the Defendants-Respondents' unlawful rule because it was denied the opportunity to comment on the rule during the rulemaking process.

9. Defendant-Respondent Carolyn Stanford Taylor is the Wisconsin Superintendent of Public Instruction and is sued in her official capacity. Superintendent Stanford Taylor has her offices and principal place of business at the Wisconsin Department of Public Instruction, 125 South Webster Street, in the City of Madison, Dane County, Wisconsin.

10. Defendant-Respondent Wisconsin Department of Public Instruction is an agency of the State of Wisconsin with its offices and principal place of business at 125 South Webster Street, in the City of Madison, Dane County, Wisconsin.

11. Defendant-Respondent Stanford Taylor and Defendant-Respondent Wisconsin Department of Public Instruction will be referred to collectively herein as "DPI."

JURISDICTION AND VENUE

12. This Court has jurisdiction to hear this case pursuant to Wis. Stat. §§ 227.40, 227.53, and 806.04(1)-(2).

13. Venue in this County is proper pursuant to Wis. Stat. §§ 227.40, 227.53, and 801.50(3)(b) because Plaintiff-Petitioner Heritage Christian Schools, Inc., is located in this County, as is Plaintiff School Choice Wisconsin Action, Inc.

FACTUAL BACKGROUND

The Denial of the Olguins' Application

14. The Olguins applied for the WPCP on February 3, 2020, the first day that families were permitted to apply for participation in the WPCP for the 2020-2021 school year, on behalf of two of their sons, one entering 9th grade and one entering kindergarten (k5). These children are referred to herein as the 9th grader and kindergartener, respectively. Their third son is currently in 3rd grade and is already participating in the WPCP. The Olguins also applied for their third son to continue in the WPCP but his application was accepted and that application is not the subject of this action.

15. Under Wisconsin Statute 118.60(2)(a)1.b., the Olguins' applications for their 9th grader and kindergartner were reviewed by the Wisconsin Department of Revenue ("DOR") and the Olguins' applications were deemed ineligible because the Olguins' adjusted gross income for 2019 exceeded the eligibility limit by \$47 for a family of five.

16. Applications for the WPCP are done on-line through a webpage created and administered by DPI. A screen-shot showing the denial of the applications is attached hereto as Exhibit A.

17. However, the Olguins' circumstances changed and the Olguins filed an amended tax return on or about February 29, 2020. The Olguins amended tax return was not challenged or corrected in any way by DOR.

18. Per the Olguins amended tax return their adjusted gross income was within the eligibility limit for the WPCP by \$103.

19. The Olguins then found themselves in the same situation as any other Wisconsin family who has had a change in circumstances after applying, and being deemed "ineligible" for, the WPCP: they were prohibited by DPI from applying again and obtaining a new income determination, even though the application period was still open and accepting new applications, due to DPI's one and done policy.

The Request for Review By Heritage

20. On March 18, 2020, on behalf of the Olguins, Heritage sent an email to DPI to request a review of the Olguins' situation. A true and correct copy of Heritage's March 18th email is attached hereto as Exhibit B. The March 18th email stated that Heritage was "writing to request a review with the [DPI] Legal Department on behalf of a current Wisconsin Choice family applying to add two children. The request has to do with using DOR for verifying income, being rejected, and no allowance for appeal."

21. The email from Heritage attached the Olguins' original 2019 tax return and the amended 2019 tax return but those tax returns are not being attached hereto for privacy reasons. The email pointed out that based upon the amended return, the Olguins' income made them eligible.

22. The Heritage email further pointed out that it was not reasonable to disqualify the Olguins when their circumstances changed during the enrollment window and the family was, in

fact, financially eligible to participate in the WPCP, and that DPI's interpretation of the statute that led to the adoption of its one and done policy was not correct.

23. Finally, the email stated that Heritage was "appealing to you to please reconsider on behalf of this family."

24. On April 20, 2020, via a letter from DPI's Chief Legal Counsel, Benjamin Jones, DPI interpreted Heritage's March 18th email as an appeal of the income eligibility determination of the Olguius and a request for a hearing under Wis. Stat. § 227.42 and PI 48.21, and DPI denied both the request for reconsideration and the request for a hearing. A true and correct copy of this denial letter is attached as Exhibit C.

25. Both the Olguius and Heritage have been harmed by DPI's decision. The Olguius have been harmed because two of their three children have been denied entry into the WPCP, a program for which they are legally eligible. Heritage is also harmed by DPI's decision, both financially and by making it more difficult to enroll students and operate its business.

The Olguius Attempt One More Application

26. The enrollment window for the WPCP for the 2020-2021 school year was from February 3, 2020 through April 14, 2020 and the end date was later extended to May 14, 2020 due to the coronavirus pandemic.

27. Because the enrollment window was still open, the Olguius attempted to reapply on behalf of their 9th grader and kindergartner one more time on May 12, 2020 but were not allowed to do so by DPI based on the one and done policy. Three screen shots showing the second attempted application and the rejection are attached hereto as Exhibit D.

The WPCP

28. There are three Parental Choice Programs in Wisconsin: the Milwaukee Parental Choice Program, the Racine Parental Choice Program and the Wisconsin Parental Choice Program.

29. The Defendants-Respondents are the state officer and the state agency charged with administering Wisconsin's various Parental Choice Programs, including the WPCP.

30. The WPCP allows a limited number of families in Wisconsin who live outside of Milwaukee and Racine and who have family incomes within certain thresholds to apply for a voucher that can be used to fund their children's education at a participating private school.

31. The income requirement that applies to a family is determined by a formula that takes into account that family's household size.

32. Parents in Wisconsin wishing to enter the WPCP must apply with DPI, and verify that they are within the income requirements.

33. The Olguins have three school aged children. Their oldest child will be entering ninth grade in the fall, their middle child will be entering fourth grade, and their youngest will be entering kindergarten (k5). The Olguins wish to send all three of their children to Heritage and to participate in the WPCP for that purpose.

34. By statute, the WPCP only allows new students, who are currently enrolled in a private school, to enter the program in kindergarten, first or ninth grade. Wis. Stat. § 118.60(2)(a)2.d. As a result, by refusing to allow the Olguins' child entering ninth grade, who is enrolled in a private school, to enter the program, that child is effectively denied access to the WPCP for the entirety of his high school career unless he were to instead attend public high school for ninth grade and then re-apply as a "public" school student the following year. The

kindergartener can re-apply when entering first grade next year, but is still denied access to the program for this upcoming school year.

35. When applying for the WPCP, parents must verify their income eligibility. According to DPI, “There are two ways to determine income eligibility: the Department of Revenue (DOR) Income Determination Method or the Department of Public Instruction (DPI) Income Determination Method. The parent indicates which method they would like to use in the online parent application.” See DPI, *Private School Choice Programs Informational Bulletin*, 04-02, Page 2. True and correct copies of the cover page and page 2 of this bulletin are attached hereto as Exhibit E.

36. In reality, this choice is made for parents. Parents who provide the information in their application for the DOR Income Determination method are funneled to that determination. Parents who provide less information are subject to the DPI Income Determination method. Only parents, like the Olguins, who provide the additional information requested by the application and subsequently have their income eligibility determined by the DOR Income Determination Method are subject to the one and done policy.

The One and Done Policy

37. DPI’s one and done policy is not contained in any provision in the Wisconsin Statutes or the Wisconsin Administrative Code.

38. Instead the one and done policy was promulgated and pronounced by DPI in various DPI created documents.

39. For example, DPI has published a document entitled “Private School Choice Programs DOR Income Determination Method Frequently Asked Questions” which states as follows:

Can a parent apply again for the same school year if they were determined ineligible by DOR?

No. Parents who are determined ineligible by DOR cannot apply again for the same school year.

A true and correct copy of this publication is attached hereto as Exhibit F.

40. As another example, DPI has published an on-line training guide entitled “Training 8-3: Income Requirements” which states at page 7 as follows: “Once ineligible per DOR, the student is not eligible to participate in the Choice program for the entire school year at any school.” True and correct copies of the cover page and page 7 of this publication are attached hereto as Exhibit G.

41. DPI has also published a document entitled “Private School Choice Programs Informational Bulletin 01-01 Revised November 2019 which states at page 7: “If the student has an application that was determined ineligible by DOR, any subsequent applications for the student must be marked as ineligible.” True and correct copies of the cover page and page 7 of this publication are attached hereto as Exhibit H.

42. DPI’s one and done policy prohibits any family from submitting a second application and also prohibits those families from seeking a second eligibility determination, regardless of whether the applicant’s personal circumstances have changed after the first application but before the application window has closed.

43. For example, Wisconsin law provides for a \$7,000 reduction in a married couple’s adjusted gross income in order to determine eligibility for the WPCP. Wis. Stat. § 118.60(2)(a)1.b. If a single mother applied on the first day of an application period and was denied under the DOR Income Determination method because her income was just over the limit, but then got married a few weeks later to a husband who had no income, their family’s new income with the \$7,000

statutory reduction would make their income “eligible.” However, DPI’s one and done policy would prohibit that family from submitting a second application, after the changed circumstances, and obtaining a new eligibility determination.

44. The same is true for a family’s household size that grows by birth or adoption. The income limits are based on a family’s household size. If a family that applies for a program on the first day of an application period is denied under the DOR Income Determination method because their family income was slightly over the income limitation, and that family subsequently gives birth to a new family member or adopts a new family member, the family’s income limit would be raised, meaning they may well be within the income limitations to be “eligible” for the program now. However, due to DPI’s one and done policy, that family is prohibited from submitting a second application and obtaining a new income eligibility determination.

45. The same is true for families who make an error on their income taxes or otherwise amend their tax return. A family who files their income taxes early in the calendar year, and then applies for the program but is denied because their adjusted gross income is above the income limitations for the program, but who subsequently files a valid amended tax return or has their return corrected by DOR such that they actually had a lower adjusted gross income, is still prohibited from submitting a second application and is denied a second “income eligibility determination” by DPI’s one and done policy.

46. Importantly, nothing in the Wisconsin Statutes or the Wisconsin Administrative Code authorizes, much less requires, DPI to reject a second application submitted within the application window due to a change in an applicant’s personal circumstances.

47. This action seeks a declaration that the one and done policy is invalid because it is an unlawfully adopted rule and an injunction preventing DPI from enforcing the one and done policy against any parent or school participating or seeking to participate in the WPCP.

48. This action also seeks a declaration that the Olguns be declared eligible for the WPCP for the 2020-21 school year and that their 9th grade and kindergarten aged sons are entitled to attend Heritage under the WPCP.

49. To the extent that this Court determines that DPI's treatment of Heritage's March 18th email was correct and that this is, in fact, an administrative appeal under Chapter 227 by the Plaintiffs-Petitioners, then to the extent it is necessary to grant the relief requested by Plaintiffs-Petitioners (as opposed to Plaintiff SCWA), they petition this Court for such administrative action to be reviewed and set aside and similar relief be granted, as set forth herein.

**COUNT ONE – DECLARATORY RELIEF UNDER 227.40
AND 804.06 ON BEHALF OF ALL PLAINTIFFS**

50. Plaintiffs reallege and incorporate by reference all of the allegations made above as if they were fully set forth herein.

51. Wis. Stat. § 227.10(1) 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.”

52. DPI is the state agency charged with administration of the Wisconsin Parental Choice Program statutes. DPI adopted its one and done policy as an interpretation of the “income verification” requirements under Wis. Stat. § 118.60(2)(a)1.b. in order to help it govern its enforcement or administration of that statute.

53. DPI's one and done policy is a “rule” as that term is defined by Wis. Stat. § 227.01(13).

54. DPI has not promulgated the one and done policy as a rule according to statutory rulemaking procedures, which would have allowed for notice to the public and an opportunity for comment, among other important safeguards.

55. Wis. Stat. § 227.40(4)(a) requires that, “In any proceeding pursuant to this section for judicial review of a rule ... the court shall declare the rule ... invalid if it finds that it ... was promulgated ... without compliance with statutory rule-making or adoption procedures.”

56. Plaintiff-Petitioners and Plaintiff are being harmed by Defendant’s unlawfully adopted rule, and unless this Court declares that rule invalid, Defendants-Respondents will continue to enforce it throughout the state.

57. Since the one and done policy is invalid because it was not promulgated as a rule, the Plaintiffs-Petitioners and Plaintiff request a declaration that it is unlawful, a declaration that it was unlawfully applied against the Olguins and Heritage and an injunction preventing DPI from enforcing the one and done policy against any parent or school participating or seeking to participate in the WPCP.

IN ADDITION, OR IN THE ALTERNATIVE, PLAINTIFFS-PETITIONERS SEEK JUDICIAL REVIEW OF AN ADVERSE ADMINISTRATIVE ACTION UNDER 227.52

58. Plaintiffs-Petitioners reallege and incorporate by reference all of the allegations made above as if they were fully set forth herein.

59. To the extent that this Court determines that Wis. Stat. § 227.52 is the correct path (or a correct path) for the Plaintiffs-Petitioners (as opposed to Plaintiff SCWA which was not part of the March 18th appeal and is only seeking to declare the one and done policy unlawful going forward) to review DPI’s actions and provide the relief requested, Plaintiffs-Petitioners respectfully ask this court to review that administrative decision as permitted in Chapter 227.

60. Plaintiffs-Petitioners are individuals and a school located in the State of Wisconsin.

61. DPI is an agency of the State of Wisconsin charged with processing applications for the Wisconsin Parental Choice Program.

62. As alleged above, DPI determined that Heritage's March 18th email was an appeal of the income eligibility determination of the Olguius and a request for a hearing under Wis. Stat. § 227.42 and PI 48.21. DPI denied those requests. According to DPI's denial letter, the appeal was numbered 20-CP-26. (See, Exhibit C).

63. DPI gave two grounds for the denial. The first was that "these pupils were correctly determined to be ineligible." That is, DPI contends that its denial was based on undisputed facts and was correct as a matter of law. The Plaintiffs-Petitioners challenge the legal and factual correctness of the denial. The second ground for denial was the one and done policy. In that regard, DPI stated that "[t]he law does not mandate or provide for a process for the family to repeat the income eligibility determination when a parent selects the DOR income eligibility determination method." The Plaintiffs-Petitioners challenge the one and done policy as an unlawfully adopted rule. The Plaintiffs-Petitioners also assert that application of the one and done policy, even if it is not an unpromulgated rule, was a violation of the rights of the Plaintiffs-Petitioners.

64. Further, the Plaintiffs-Petitioners contend that DPI's determination of what was requested in the March 18th email was improperly limited by DPI. In addition to being a request to reconsider the income eligibility determination, the March 18th email also included a request to switch from the DOR Income Determination Method to the DPI Income Determination Method (pointing out that "A family may choose either DOR or DPI method"). DPI ignored this request.

65. In addition, the March 18th email amounted to a second application on behalf of the Olguius with a submission of new information (the 2019 amended tax return) that showed the

Olguins to be eligible. DOR did not reject or correct the Olguins amended 2019 tax return and DPI has never disputed that given the information in the amended return, the Olguins are eligible.

66. Also, DPI stated that the law does not mandate or provide for a process for the family to repeat the income eligibility determination when a parent selects the DOR income eligibility determination method. But whether or not, the one and done policy is unlawful as an unpromulgated rule, this was not a correct interpretation or application of law and/or was an incorrect exercise of discretion and outside the range of discretion delegated to the agency by law.

67. Plaintiffs-Petitioners are aggrieved by: (1) DPI's determination that the Olguins were not eligible to participate in the WPCP; (2) DPI's refusal to reconsider their income eligibility determination; (3) DPI's refusal to permit a second application during the application period; (4) DPI's refusal to reconsider the Olguins' first application; (5) DPI's refusal to allow the Plaintiffs-Petitioners to switch from the DOR Income Determination Method to the DPI Income Determination Method; and (6) to the extent that DPI disputes the fact that the Olguins met the financial eligibility requirements during the application period as set forth in their amended tax returns, DPI's refusal to provide a hearing, and the Plaintiffs-Petitioners bring this action for judicial review of each of those decisions based on Wis. Stat. §§ 227.57, included but not limited to subsections (4), (5), (7) and (8), for the reasons stated in this petition, including:

- a. DPI's decision was based on a material error in procedure and/or a failure to follow prescribed procedure – namely that DPI failed to address all of the issues raised by the Plaintiffs-Petitioners, failed to grant a hearing (even though DPI apparently disputes the fact that the Olguins were eligible for the WPCP during the application period) and DPI based its decision on a policy, the one and done policy described herein, that had not been lawfully adopted. Wis. Stat. § 227.57(4).

- b. DPI erroneously interpreted Wis. Stat. § 118.60(2)(a)1.b. as requiring its one and done application policy and not permitting the Plaintiffs-Petitioners to seek a second income determination, to file a second application or to switch from the DOR Income Determination method to the DPI Income Determination method. Wis. Stat. § 227.57(5).
- c. DPI's decision was made without a hearing and the facts (and, in particular, the Olguius amended tax return) compel the relief requested herein, namely that the Olguius be declared eligible and allowed to participate in the WPCP. Wis. Stat. § 227.57(7).
- d. DPI's one and done application policy on which its decision was based is in violation of Wis. Stat. § 118.60(2)(a)1.b. Wis. Stat. § 227.57(8).
- e. The Olguius were, in fact, eligible for participation in the WPCP during the application period and DPI's refusal to approve their application was wrong as a matter of law and arbitrary and capricious. Wis. Stat. § 227.57(8).

WHEREFORE, Plaintiffs-Petitioners and Plaintiff respectfully request this Court:

- A. Declare DPI's one and done policy, as set forth in this complaint, constitutes a rule, that DPI did not promulgate that rule as required by state law, and that as a result, the rule is invalid and may not be enforced by DPI;
- B. Enjoin DPI from enforcing its one and done application policy as set forth in this complaint;
- C. Declare that Olguius' are "eligible" for the Wisconsin Parental Choice Program and may enroll their children at Heritage in ninth grade and kindergarten in that program for the 2020-21 school year.

D. In the alternative, or in addition to, set aside DPI's administrative decision to deny the Plaintiffs-Petitioners' appeal for the reasons stated herein and declare that the Olguins are "eligible" for the Wisconsin Parental Choice Program and may enroll their children at Heritage in ninth grade and kindergarten in that program for the 2020-21 school year; and

E. Such other relief as the Court deems appropriate.

Dated this 18th day of May, 2020.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

/s/ Electronically signed by Richard M. Esenberg

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