STATE OF WISCONSIN CIRCUIT COURT BRANCH 4 COUNTY OF DANE

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

Plaintiffs,

v.

SCOTT WALKER, MICHAEL HUEBSCH, and ANTHONY EVERS,

Defendants.

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

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This case is before the court on dueling motions for summary judgment. Plaintiffs filed their Motion for Summary Judgment on February 3, 2012, and Defendants (other than Superintendent Evers)[1] filed their Motion for Summary Judgment on May 25, 2012. Also on May 25, 2012, Defendants submitted a response brief. Plaintiffs filed a reply brief on June 8, 2012, and Defendants filed a reply brief on June 22, 2012. On July 9, 2012, Superintendent Evers filed a brief in support of Plaintiff's motion. Defendants submitted a final reply brief on August 6, 2012. Consistent with its June 21, 2012 Scheduling Order, the court issues this Decision to address both motions.

For the reasons stated below, Plaintiffs' Motion for Summary Judgment is **GRANTED**, and Defendants' Motion for Summary Judgment is **DENIED**.

[1] As noted elsewhere in this Decision, Superintendent Evers is a named defendant in this action, and remains so aligned as a party in the case caption. However, the court concludes that Superintendent Evers is in a practical sense more aligned with Plaintiffs in this case. Therefore, where the term "Defendants" is used in this Decision, it relates to Governor Walker and Secretary Huebsch.

BACKGROUND

Article X §1 of the Wisconsin Constitution provides that "[t]he supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct." Interpreting this provision, the Wisconsin Supreme Court held 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 ("Act 21"). Act 21 requires all state agencies—including the Department of Public Instruction, headed by the State Superintendent of Public Instruction Anthony Evers—to submit scope statements and proposed administrative rules to the Governor for approval. No further rule drafting activities may occur until the Governor approves the scope statement. In addition, if proposed administrative rules may lead to $20,000,000 or more in costs for businesses, municipalities or individuals, the proposed rule requires further review and approval by the Secretary of the Department of Administration ("DOA"). In such cases, the agency may not submit the proposed rule to the Legislature for review without the DOA Secretary's approval.

Plaintiffs ask the court to declare that Act 21 violates Article X, §1 of the Wisconsin Constitution, and to enjoin its implementation. In his Answer filed October 21, 2011, State Superintendent Evers admitted Plaintiffs' allegations and requested the same relief.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2) (2010). All doubts as to the existence of a genuine issue

of material fact must be resolved against the moving party. *Kraemer Bros., Inc. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (Wis. 1979). The "inferences to be drawn from the underlying facts contained in the moving party's material must be viewed in the light most favorable to the party opposing the motion." *Id.* at 567 (citation omitted).

If the pleadings are sufficient, the court considers the moving party's proof to determine whether that party presents a *prima facie* case for summary judgment. *Id.* If the moving party so presents, the opposing party must show, by affidavit or other proof, the existence of disputed material facts, or undisputed material facts that allow for reasonable conflicting inferences. *Id.*

"Legislative acts are presumed constitutional..." *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 192, 454 N.W.2d 797, 800 (1990). The party challenging a legislative enactment "must prove it unconstitutional beyond a reasonable doubt." *Id.*

ANALYSIS

The court first looks at the pleadings in this case. The court concludes that Plaintiffs have stated a claim, and that Defendants' Answer has asserted a defense. Therefore, the court turns its attention to the summary judgment submissions by the parties.

Plaintiffs contend that Act 21 is unconstitutional because it gives superior authority over public instruction to officers other than the Superintendent. In *Thompson*, the Wisconsin Supreme Court invalidated a statute because it gave "equal or superior authority to" other officers. *Thompson*, 199 Wis. 2d at 699. Because Act 21 gives the Governor, and in some cases the Secretary of DOA, the power to block the Superintendent from pursuing the approval of administrative rules, Plaintiffs maintain that Act 21 gives superior authority over public instruction to these officers, and is thus unconstitutional.

Defendants respond by arguing that 1) since the plain language of Article X §1 provides that the Superintendent's powers and duties are to "be prescribed by law," the Legislature has ample discretion in modifying or reducing the Superintendent's role; 2) constitutional debates indicate that the framers intended the Legislature to prescribe the Superintendent's duties; 3) the first education statute passed after the constitutional provision took effect illustrates that rulemaking is not an essential component of the Superintendent's duty to supervise public instruction; 4) the Superintendent under Act 21 still plays the greatest role in the supervision of public instruction; 5) other state constitutions give the ultimate power over superintendent-like positions to their legislatures; 6) rulemaking is a form of legislative power that the Legislature may delegate to agencies and other officers in any manner of its choosing; 7) since the Legislature can constitutionally block proposed rules, the ability to block rules was already with "other officers;" 8) the Legislature has previously reduced the Superintendent's powers by taking away authority over physical education, music education, and technical schools; 9) *Thompson* is distinguishable and does not control this case; and 10) ruling Act 21 unconstitutional would overturn *Fortney v. School District of West Salem,* 108 Wis. 2d 167, 321 N.W.2d 225 (1982).

Plaintiffs' reply brief argues that "[d]espite the unambiguous holding in *Thompson v. Craney*, the Defendants try to obfuscate the issue by claiming that this case is about the legislature's power to determine how administrative rules are adopted and then reviewed by the legislature." (Reply Brief, p. 4.) In the Plaintiffs' view, "[t]he Defendants essentially claim that the legislature's authority to set the process for the adoption and review of administrative rules is unfettered, to the point where it can allow other executive branch officers to control the Superintendent's policy choices." (*Id.*, p. 4-5.)

Plaintiffs also dispute Defendants' argument that the Legislature is composed of "other officers." According to the Defendants, because these legislative "other officers" can block rules, it makes no difference whether the Legislature gives other officers (such as the Governor and the DOA Secretary) the ability to block rules too. (Response Brief, p. 27.) Plaintiffs contend that adopting this argument would overrule *Thompson*, because the *Thompson* court rejected an argument that the legislature can allocate power between the Superintendent and other executive officers however it wishes, ruling instead that the Superintendent must be superior to the other officers. (Reply Brief, p. 7.) Because the Governor via Act 21 can stop the Superintendent from "even beginning the process of adopting rules by not approving the scope statement," and can block proposed rules, Plaintiffs argue that Act 21 unconstitutionally allows the Governor to stop the Superintendent from implementing his policy choices. (*Id.*, p. 4, 7.)

In addition to reiterating some earlier arguments, Defendants' reply brief avers that "Act 21 has nothing *whatsoever* to do with the supervision of public instruction." (Reply Brief, p. 4) (italics in original). That is, "[a]dministrative rule-making is not a means by which the Superintendent supervises public instruction; it is a delegation by the Legislature of some of its legislative powers." (*Id.*) Defendants summarize their argument as follows:

> (1) the Legislature prescribes the powers and duties of the Superintendent; (2) the Superintendent does not have any inherent powers; (3) the Legislature may delegate its constitutional, legislative powers of rule-making through the state's administrative rule-making process; (4) the Superintendent has no entitlement to participate in the administrative rule-making process nor to dictate how that process is to be established; and (5) the Legislature's administrative rule-making process does not impair, impact or impede the Superintendent's ability to supervise public instruction.

(*Id.*)

For the reasons stated below, the court determines that Act 21 is unconstitutional.[2] In this Decision, the court first explains why it holds that Act 21 is unconstitutional. Next, the court responds to the various arguments advanced by the Defendants.

In the court's view, the feature that renders Act 21 unconstitutional beyond a reasonable doubt is the fact that Act 21 permits the Governor, and the DOA Secretary under certain circumstances, to stop the Superintendent from starting and/or pursuing the process of rulemaking. Under Act 21, before a scope statement can be sent to the Legislature, the Governor must approve it in writing. The Governor is thereby able to block proposed rules. Act 21 conveys similar authority to the DOA Secretary to block proposed rules under certain circumstances.

Administrative rulemaking is an important way in which a Superintendent exercises his or her constitutional authority over the supervision of public instruction. Because Act 21 allows the Governor to bar the Superintendent from proposing rules, or from even beginning the process of rulemaking by submitting a scope statement to the Legislature, Act 21 places the Governor in a position superior to the Superintendent in the supervision of public instruction. Similarly, by requiring the DOA Secretary's approval to pursue proposed rules having certain fiscal implications, Act 21 places the DOA Secretary in a position superior to the Superintendent in the supervision of public instruction for those situations. Under the analysis set forth in *Thompson*, Act 21 as applied to this case violates the Wisconsin Constitution.

The court has considered Defendants' numerous arguments, none of which the court finds to be persuasive. The court analyzes these arguments, below.

[2] This Decision is limited to Act 21 in the context of this case (*e.g.*, to the Superintendent and DPI). This Decision does not address Act 21 as applied to other agencies.

Defendants' first argument is that the plain language of Article X, §1 places the duties of the Superintendent within the discretion of the Legislature. (Response Brief, p. 8.) The plain meaning of a constitutional provision is one of the three factors courts use in determining the provision's constitutionality. *State v. Beno*, 116 Wis. 2d 122, 136-37, 341 N.W.2d 668 (1984). The first sentence of Article X, § 1 reads as follows: "The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law."

Defendants argue that because the constitutional text itself "does *not* define any specific powers or duties of the Superintendent…this can only mean that the Legislature was authorized…to prescribe the powers and duties of the Superintendent, both by adding new powers and by reducing any already given powers." (Response Brief, p. 10) (italics in original). However, the constitutional text does provide that "supervision of public instruction" is "vested" with the Superintendent. The question is thus whether proposing administrative rules, and scope statements that precede these proposed rules, are fundamental components of the supervision of public instruction.

The court believes that they are. The idea that rulemaking "has nothing *whatsoever* to do with the supervision of public instruction" is impossible for this court to accept. (Reply Brief, p. 4.) The Superintendent supervises public instruction by leading the Department of Public Instruction (hereafter "DPI"), which operates—as most state government agencies do—by proposing, then upon promulgation implementing, administrative rules.

Chapter 115 of the Wisconsin Statutes, which establishes the powers and duties of the Superintendent, is replete with requirements that the Superintendent promulgate rules in specific areas. Two of the statutes in this chapter alone, taken together, include no fewer than 16

references to rules that the Superintendent is to promulgate. Wis. Stat. §§ 115.28, 115.29.[3] This establishes beyond doubt that rulemaking is a fundamental part of what it means to supervise public instruction at the present time. As discussed below, the first statute passed after the 1902 amendment illustrates that rulemaking was a component of the supervision of public instruction at that time as well.

Second, Defendants contend that constitutional debates prove that the framers intended the Legislature to prescribe the powers and duties of the Superintendent. (Response Brief, p. 12.) Such debates are the second source examined by courts in evaluating a law's constitutionality. *Beno*, 116 Wis. 2d at 137. The court finds this argument undeveloped and unpersuasive. Courts are not required to consider undeveloped arguments. In any case, since the constitutional text itself provides that the Legislature prescribes the Superintendent's powers and duties, it is unnecessary to show that this was the framers' intent.

Third, Defendants argue that the first statute passed after the constitution was adopted illustrates the power of the Legislature to shape the Superintendent's duties and powers. (Response Brief, p. 12.) The "earliest interpretation of" a constitutional provision "by the legislature as manifested in the first law passed following the adoption of the constitution" is the third source used by courts to determine whether a statute is constitutional. *Beno*, 116 Wis. 2d at 137. The first statute gave the Superintendent various responsibilities, and also required him to "perform such other duties as the legislature or governor of this state may direct." (Laws of 1848, p. 127 (Aug. 16, 1848.)) A book published in the 1920s asserted that the statute "did not confer any real powers of control on the Superintendent," who "had absolutely no power to

[3] In addition, the Wisconsin Administrative Code provides many examples of how the Superintendent has used rulemaking to supervise public instruction. (Superintendent's Brief, p. 4.) The code includes rules relating to various matters relevant to the supervision of public instruction, such as high school equivalency diplomas, special education aid, and the Milwaukee Parental Choice Program. Wis. Admin. Code §§ PI 5, 30, 35.

enforce his views." Conrad E. Patzer, *Public Education in Wisconsin* 38, 248 (1924). According to Defendants, this illustrates that "[t]here is a difference between the supervision of public instruction (which is clearly vested in the Superintendent) and the power to create laws (a power which is just as clearly vested in the legislature.)" (Response Brief, p. 15.)

A major problem with this argument is that it contradicts the Wisconsin Supreme Court's finding in *Thompson* that the Superintendent "was not intended to be simply an advocate, but an officer with the ability to put plans into action." *Thompson*, 199 Wis. 2d at 689. Today, putting plans into action necessarily involves proposing, then implementing, administrative rules.

Moreover, the Superintendent contends that the first laws passed after the adoption of the constitution, and after the amendment in 1902, directed the Superintendent to engage in rulemaking. (Superintendent's Brief, p. 3.) As summarized by the *Thompson* court, the first law passed after the constitution's adoption required the Superintendent to "apportion school funds between townships, propose regulations for making reports and conducting proceedings under the act, and to adjudicate controversies arising under the school lands." 199 Wis. 2d at 695. The Superintendent maintains that "[a]ll of these acts require the creation and administering of rules." (Superintendent's Brief, p. 4.) In addition, the first law passed after the 1902 amendment to Article X, § 1 provided that the Superintendent "had the power to 'revise, codify, and edit the school laws,'" and to "prescribe regulations for district libraries; to resolve appeals from school district decisions; and to apportion the school fund income." *Thompson*, 199 Wis. 2d at 697.

These statutes suggest that rulemaking has always been an essential aspect of the Superintendent's duty to supervise public instruction. While it may be unclear whether the 1848 statute empowered the Superintendent to engage in rulemaking, there is no doubt that the first statute passed after the 1902 amendment required rulemaking. The statute's directives to

"revise, codify, and edit the school laws" and (as paraphrased in *Thompson*) "prescribe regulations for district libraries" necessarily entail some form of rulemaking. *Id.*

Fourth, Defendants state that under Act 21, the Superintendent still has the greatest role in the supervision of public instruction. (Response Brief, p. 12.) Plaintiffs had argued that "[a]dministrative rules are the principal legal means by which the Superintendent carries out his constitutionally vested responsibility to supervise public instruction." (Summary Judgment Brief, p. 5.) Defendants aver that this seems hard to believe, given the fact that the Administrative Procedure Act was not passed until 1943, and the Department of Public Instruction only came into being in 1971. Did Superintendents lack the means to carry out their duties before then?

Not necessarily. As noted above, Superintendents were required to engage in rulemaking in some form from at least the time of the first statute passed after the 1902 amendment. In addition, regardless of what was involved in supervising public instruction before the advent of modern rulemaking, rulemaking is surely a key component of supervising public instruction today. *See* Ch. 115, Wis. Stats.

Defendants also quote from the current Superintendent's Inaugural Address, which mentioned a number of goals for his term, but said nothing about promulgating administrative rules. (Response Brief, p. 17.) Similarly, Defendants cite a "long list" in which the Superintendent detailed his activities, "none of which involved the promulgation of administrative rules." (*Id.*, p. 18.) The court does not find these data points particularly instructive or persuasive. These statements were presumably meant for consumption by members of the general public, who would be unlikely to understand or appreciate any reference the Superintendent made to rulemaking. Moreover, it is likely that accomplishing the goals he

listed would necessitate promulgating and implementing new rules, even if that detail was not included in his public addresses or press releases.

This court finds that Defendants' general argument that the Superintendent still would have the greatest role in the supervision of public instruction post-Act 21 is unpersuasive, as it fails to answer this fundamental question: Does Act 21 impermissibly and unconstitutionally grant other officers superior authority over the Superintendent? Whether or not the Superintendent still possesses a key role in public instruction supervision after implementing Act 21 is not particularly material or responsive to this question.

Fifth, Defendants discuss other state constitutions with similar provisions, to underline the fact that other states' legislatures define the powers and duties of superintendents. (*Id.*) The court does not find the quotes from other constitutions to be helpful in deciding this case, which requires analysis and application of Wisconsin law.

Sixth, Defendants maintain that rulemaking is a form of legislative power that the Legislature may delegate to other agencies in whatever manner the Legislature sees fit. (*Id.*, p. 23-27.)[4] Yet even if the Superintendent has no inherent power to promulgate rules on his or her own, the fact remains that *pursuing* the promulgation of rules is among the Superintendent's core functions, as defined by the relevant statutes. See, *e.g.*, Wis. Stat. §§ 115.28, 115.29. Once this role has been assigned to the Superintendent as part of his or her duty to supervise public instruction, giving another officer the power to block the Superintendent from even starting the process of proposing new rules is unconstitutional, because it thereby gives superior authority over public instruction to another officer.

[4] Defendants attempt to support this contention by drawing on *E.B. v. State*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983). (Brief in Reply to Superintendent's Brief, p. 2-3.) *E.B.* dealt with the separation of powers between the judiciary and the legislature, with respect to the judiciary's ability to establish its own procedures. Since that area of the law is not closely analogous to the issues in this case, the court does not find this argument convincing.

Seventh, Defendants argue that because the Legislature can constitutionally block rules, this means that the power to veto rules was already with "other officers." (Response Brief, p. 27.) If this is the case, according to Defendants, then there could be nothing unconstitutional about the Legislature designating other officers, such as the Governor or DOA Secretary, to veto proposed rules as well. Yet it is not reasonable to consider the Legislature, or a legislative committee, to be "officers." The term "officer" refers to an individual person, not an organization or institution. Describing either the Legislature or the Joint Committee for Review of Administrative Rules as an "officer" defies common sense. Moreover, the term "officers," as it is used in Article X, §1, clearly refers to executive branch officials. As the Legislature is a separate branch of government and mentioned separately in Article X, §1, the framers must not have meant the term "officers" to encompass the Legislature or legislative committees.

In any event, the idea that the Legislature can designate anyone it chooses to veto the Superintendent's proposed rules is inconsistent with *Thompson*, which prohibited giving superior power over public instruction to other executive officers. Since the Legislature defines the Superintendent's powers and duties, it only makes sense that the Legislature could allow itself (or one of its committees) to block rules proposed by the Superintendent. What contravenes *Thompson* is granting this veto power to other executive officers, because this gives those executive officers greater authority over public instruction than the Superintendent.

Eighth, Defendants contend that since the Legislature has previously reduced the Superintendent's power—by removing authority over musical, physical and vocational education—it must be constitutional to give the Governor veto power over rulemaking. (Response Brief, p. 28.) However, music education, physical education and vocational colleges are peripheral to the core task given to the Superintendent: the supervision of public education in

grade schools and high schools. There is a difference between reducing the Superintendent's power (as in the above examples) and giving other officers superior authority over public instruction in general (as in *Thompson* and this case). *Thompson*, 199 Wis. 2d at 698-700.

Ninth, Defendants attempt to distinguish *Thompson*, arguing that it is inapplicable to this case. Defendants maintain that *Thompson* "did not concern how the powers or duties of the Superintendent were to be prescribed by law." (Response Brief, p. 31.) In addition, Defendants state that the statute struck down by Thompson "was a legislative action which directly centered upon who would be setting the policies for public instruction in Wisconsin," which is "plainly not something contemplated or even implied in Act 21." (*Id.*, p. 32.)

The court disagrees. As explained above, rulemaking is a key mechanism for setting and implementing policies. It should be noted that many of the sections of Chapter 115 directing the Superintendent to promulgate rules give the Superintendent considerable discretion on the content of these rules. For example, under Wis. Stat. § 115.28(3m)(b), the Superintendent "shall...[p]romulgate rules establishing procedures for the reorganization of cooperative educational service agencies and boundary appeals." The statute does not elaborate. Also without elaborating, another section in the same statute directs the Superintendent to "make rules for the examination and certification of school nurses." Wis. Stat. § 115.28(7m). In these and many other situations, the Superintendent enjoys a wide margin of freedom to propose rules that best fit his or her policy goals. It is not the case that rulemaking simply implements the detailed policy choices already made by the Legislature. On the contrary, the Legislature often leaves those choices for the Superintendent. Because Act 21 grants veto power over these policy choices to the Governor and in some cases the Secretary of DOA, it makes the Superintendent subordinate to the Governor and DOA Secretary in public instruction-related policymaking.

Finally, Defendants aver that declaring Act 21 unconstitutional would amount to overturning *West Salem*. (Response Brief, p. 35.) That case, which related to school boards rather than the Superintendent, included the following passage:

> Article X, section 1, explicitly provides that the powers and duties of the school superintendent and other officers charged by the legislature with governing school systems "shall be prescribed by law." Because the constitution explicitly authorized the legislature to set the powers and duties of public instruction officers, Article X, section 1 confers no more authority upon those officers than that delineated by statute. Therefore, consistent with our holding that the arbitrator's decision and award violates no statutory provision relating to the powers and duties of the Board, we hold that it does not violate the Wisconsin Constitution.

108 Wis. 2d at 182. Defendants point to this language as proof that the Superintendent has no inherent powers. Defendants suggest that ruling Act 21 unconstitutional would only be possible by holding that the Superintendent has inherent powers. (Response Brief, p. 30.)

This is not the case any more than it was in *Thompson*, and the court is not persuaded by Defendants' arguments in this regard. In *Thompson*, the Supreme Court held that "the constitutional difficulty with the education provisions of 1995 Wis. Act 27 is not that it takes power away from the office of the [Superintendent], but rather that it gives the power of supervision of public education to an 'other officer' instead of the" Superintendent. 199 Wis. 2d at 698-99 (emphasis added). The *Thompson* court then quoted the passage from *West Salem* reproduced above, and explained: "This case does not require us to decide the extent to which the [Superintendent]'s powers may be reduced by the legislature, and we reserve judgment on that issue." *Id.* at 699-700.

Act 21, like the statute in *Thompson*, involves not taking away some specific power from the Superintendent, but rather giving another officer superior authority over public instruction. Since rulemaking is one of the key ways the Superintendent supervises public instruction, giving the Governor, and in some cases the DOA Secretary, the right to veto any attempts at submitting

scope statements or proposing new rules grants these officers superior authority over the supervision of public instruction. Under *Thompson*, this is unconstitutional.

Plaintiffs have established their entitlement to summary judgment. Plaintiffs have established that Act 21, as applied to the rulemaking activities of the Superintendent of Public Instruction, is unconstitutional beyond a reasonable doubt.

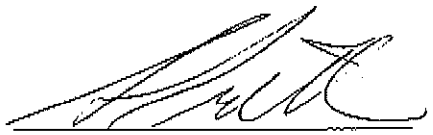
CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Summary Judgment is **GRANTED**, and Defendants' Motion for Summary Judgment is **DENIED**. This court declares Act 21 as applied to rulemaking activities of the Superintendent of Public Instruction **VOID**.

Plaintiffs are **ORDERED** to draft any Order(s) necessary to effect the intent of this Decision.

Dated this 30th day of October, 2012.

BY THE COURT:



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

cc: Attorney Lester Pines
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