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KENDALL COUNTY ILLINOIS
9/8/2021 12:31 PM
MATTHEW G. PROCHASKA
CLERK OF THE CIRCUIT COURT

**IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS**

PARKVIEW CHRISTIAN ACADEMY, INC., an Illinois Not-For-Profit Corporation. **Plaintiff,** **v.** **ILLINOIS STATE BOARD OF EDUCATION and DR. CARMEN I. AYALA, in Her Official Capacity as State Superintendent of Education** **Defendants.**	)	**Case No.** 2021CH000043

PLAINTIFF'S EMERGENCY MOTION FOR ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOW COMES the Plaintiff, Parkview Christian Academy, Inc., an Illinois not-for-profit corporation ("Parkview"), by and through its attorney Carlo D. Colosimo, and pursuant to 735 ILCS 5/11-101 and 5/11-102, moves this Court for entry of a Temporary Restraining Order ("TRO") and Preliminary Injunction against the Defendants, Carmen I. Ayala, in her official capacity, and the Illinois State Board of Education. In support of this motion, Parkview incorporates by reference herein its Memorandum of Law in Support of a Temporary Restraining Order and Preliminary Injunction and Complaint for Declaratory Judgment and Injunctive Relief.

This motion is brought on an emergency basis and is supported by Parkview's Verified Complaint for Declaratory Judgment and Injunctive Relief. Emergency relief is warranted because Parkview has started its school year and is proceeding without recognition status, resulting in:

1. the inability of the school and eligible families to participate in the Invest in Kids Act tax scholarship program;

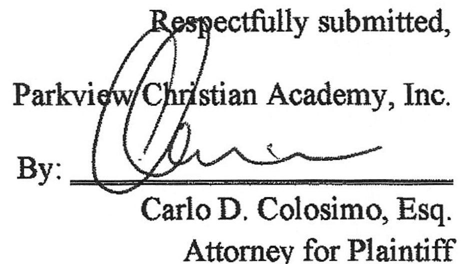
2. the ineligibility of the school to participate in Illinois High School Association ("IHSA") sanctioned sports events;
3. the inability to represent itself to prospective families as a recognized nonpublic school, thereby losing possible tuition revenue; and
4. the inability of Parkview's high school seniors to identify their school as recognized on college applications.

Parkview desires to have its rights adjudicated prior to losing access to these benefits and status.

NOW, WHEREFORE, Parkview Christian Academy, Inc., prays that this Court enter a temporary restraining order reinstating Parkview's recognition status, enjoining the Defendants, or anyone under their authority, from imposing nonrecognition status on Parkview, and staying and enjoining the administrative process under 23 Illinois Administrative Code § 425.70 and any associated timelines, effective immediately from this day until such time as this Court has held a preliminary injunction hearing and ruled on the preliminary injunction or considered and ruled upon the Complaint for Declaratory Judgment and Injunctive Relief.

Respectfully submitted,

Parkview Christian Academy, Inc.



By: ____________________

Carlo D. Colosimo, Esq.
Attorney for Plaintiff

Date: September 8, 2021

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PARKVIEW CHRISTIAN ACADEMY, INC., an Illinois Not-For-Profit Corporation.	)	
Plaintiff,	)	
v.	)	**Case No.** 2021CH000043
ILLINOIS STATE BOARD OF EDUCATION and DR. CARMEN I. AYALA, in Her Official Capacity as State Superintendent of Education	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION
FOR TEMPORARY RESTRAINING ORDER

NOW COMES the Plaintiff, Parkview Christian Academy, Inc., an Illinois not-for-profit corporation ("Parkview") by and through its attorney Carlo D. Colosimo, and pursuant to 735 ILCS 5/11-101 and 5/11-102, presents its Memorandum of Law in Support of its Emergency Motion for a Temporary Restraining Order ("TRO") against the Defendants, Carmen I. Ayala ("Dr. Ayala" or the "State Superintendent"), in her official capacity and the Illinois State Board of Education ("ISBE") (collectively, the "Defendants").

In support of its Motion and this Memorandum, Parkview incorporates by reference herein its Verified Complaint for Declaratory Judgment and Injunctive Relief.

STATEMENT OF FACTS

Parkview restates and incorporates by reference the Factual Background section of its Verified Complaint for Declaratory Judgment and Injunctive Relief, as well as the exhibits referenced therein, as its Statement of Facts.

ARGUMENT

A temporary restraining order is an emergency remedy intended to maintain the status quo, which is the "last, actual, peaceable uncontested status that preceded the pending controversy." *Makindu v. Illinois High School Ass'n.* 2015 IL App (2d) 141201 ¶ 45. A party satisfies the standard for obtaining a temporary restraining order if its motion, pleadings, and supporting affidavits establish that: (1) they possess a clear and ascertainable right that is in need of protection; (2) they will suffer irreparable injury if injunctive relief is not granted; (3) there is no adequate remedy at law for the injury they are going to suffer; and (4) they are likely to succeed on the merits of their claim. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006); *Bradford v. Wynstone Property Owners' Ass'n*, 355 Ill. App. 3d 736, 739 (2nd Dist. 2005). To obtain the injunction, the party must "raise a fair question as to each element required to obtain the injunction." *Makindu*, 2015 IL App (2d) 141201 at ¶ 31.

I. Plaintiff Possesses A Clear Right In Need Of Protection

For this element, a plaintiff is "not required to make out a case which would entitle him to relief on the merits; rather, he need only show that he raises a 'fair question' about the existence of his right and that the court should preserve the status quo until the case can be decided on the merits." *Buzz Barton & Associates, Inc. v.* Giannone, 108 Ill. 2d 373, 386 (1985). Here, the legislature made it clear that nonpublic schools, like Parkview, have a statutory right to seek recognition status through compliance with administrative guidelines and procedures as prescribed by ISBE. 105 ILCS 5/2-3.25o(c). Additionally, Parkview has a statutory right for those recognition procedures to be **no more burdensome** than those imposed on public schools. *Id.* (emphasis added). By virtue of the Defendants' violation of this right, Parkview is deprived of the status and benefits that come with nonpublic school recognition.

Furthermore, Parkview has a statutory right to first be placed on probation and exhaust the regulatory appeals process prior to loss of recognition status. *See* 23 Ill. Admin. Code § 425.60 and §425.70. The Defendants violated this right when they revoked Parkview's recognition status, effective immediately, on August 24, 2021.

II. Plaintiff and Its Community Will Suffer Irreparable Injury

Parkview and many of the students and families and prospective students and families who rely on its recognition status will be irreparably harmed if the Defendants are not enjoined from revoking nonpublic school recognition status immediately. "To demonstrate irreparable injury, the moving party need not show an injury that is beyond repair or compensation in damages, but rather need show only transgressions of a continuing nature." *Victor Township Drainage Dist. 1 v. Lundeen Family Farm P'ship*, 2014 IL App (2d) 140009 ¶ 50. The injury to a plaintiff "must be in the form of [plaintiff's] legal rights being sacrificed if [plaintiff] is forced to await a decision on the merits." *Hough v. Weber*, 202 Ill. App. 3d 674, 686 (2nd Dist. 1990).

Irreparable harm to Parkview and its students includes: (1) the inability to participate in the Invest in Kids tax scholarship program; (2) the ineligibility to participate in Illinois High School Association ("IHSA") sanctioned sports events; and (3) the inability to confer ISBE-recognized diplomas to graduates.

The loss of the ability for Parkview's families and prospective families to participate in the Invest in Kids tax scholarship program deprives students of the ability to be educated in a faith-based environment and could result in a drop in enrollment at Parkview Christian Academy. Furthermore the loss of recognition status means that student athletes are not permitted to compete in interscholastic sports events in which they would otherwise be entitled. The loss of opportunity for exposure to collegiate scouts for the purpose of attaining admission to colleges and universities

and athletic scholarships is not easily quantifiable and continues with each loss of opportunities to compete. Additionally, the loss of recognized status may deter families from applying and eventually enrolling at Parkview, leading to a loss in tuition revenue, which would lead to less resources to provide a suitable faith-based education to both current and prospective students. Most notably, the loss of recognition status means that high school seniors cannot identify their school as recognized on college applications and Parkview cannot confer ISBE recognized diplomas to graduates, an admissions requirement of many institutions of higher education, in addition to regional accreditation.

III. Plaintiff Has No Adequate Remedy At Law

There is no adequate remedy at law because the loss of the aforementioned benefits of recognition results in the continuous sacrifice of legal rights that cannot be cured retroactively once the issues are decided on the merits. *See Hough*, 202 Ill. App. at 686. An "adequate remedy at law is one which is clear, complete and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." *Cross Wood Products, Inc. v. Suter*, 97 Ill. App. 3d 282, 286 (1st Dist. 1981). Furthermore, where injuries are of a continuing nature, remedies at law are inadequate, and injunctions should be imposed. *See Fink v. Board of Trustees of Southern Illinois University*, 71 Ill. App. 2d 276, 281 (5th Dist. 1966).

No remedy available after trial will compensate Parkview or its students or its prospective students for the harm caused by the loss of recognition status. The benefits foregone due to loss of recognition status are not easily, if at all, quantifiable as a remedy at law. The loss of such benefits is particularly suited to the equitable remedy that only a Court can provide through a declaratory judgment and injunction.

IV. Plaintiff Is Likely To Succeed On The Merits Of Its Claim

When addressing this motion, the Court should not attempt to decide issues of fact or the ultimate merits required at the final hearing, but instead should consider whether Parkview has raised a "fair question" as to the likelihood of success on the merits. *See Murges v. Bowman,* 254 Ill. App. 3d 1071, 1083 (1st Dist. 1993). A plaintiff need only "raise a fair question as to the existence of the right which [it] claims and lead the court to believe that [it] will probably be entitled to the relief requested if the proof sustains [its] allegations." *Ford Motor Credit Co. v. Cornfield,* 395 Ill. App. 3d 896, 903 (2nd Dist. 2009).

A. The State Superintendent Cannot Be Given Authority to Unilaterally Revoke Nonpublic School Recognition Status

In September 2020, ISBE amended two rules regarding recognition of nonpublic schools that exceed the express limitation on powers granted to ISBE under the *School Code*, and, as a result, those regulations are invalid as a matter of law. *See* 23 Ill. Admin. Code § 425.60; 23 Ill. Admin. Code § 425.70. "An administrative agency's powers are limited to those granted by the legislature, and any action taken by an agency must be authorized by its enabling act." *Goral v. Dart*, 2020 IL 125085 ¶ 33. Because an administrative agency only has the authority granted by the legislature, "any acts or orders that are unauthorized by the enabling statute or ordinance are void." *Beyer v. Bd. of Educ. of City of Chicago*, 2019 IL App (1st) 191152 ¶ 34.

Relevant here, the legislature expressly limited ISBE's powers and authority under the *School Code* with respect to those powers ISBE may delegate to the State Superintendent of Education. Specifically, under Section 1A-4 of the *School Code* the legislature expressly prohibited ISBE from delegating to the State Superintendent authority to "make final decisions under the contested case provisions of the Illinois Administrative Procedure Act unless otherwise provided by law." 105 ILCS 5/1A-4.

In direct violation of this statutory prohibition, ISBE passed two rules that exceed ISBE's statutory powers by delegating final decision-making authority to the State Superintendent. The first rule, found at 23 Illinois Administrative Code § 425.70, governd appeals by nonpublic schools regarding a "planned status change" to the nonpublic school's recognition status. This rule purports to cloak the State Superintendent with all final decision-making authority on a planned change in recognition status including to serve as the hearing officer in an appeal that leads to a final administrative decision. *Id.* Moreover, Section 425.70 expressly delegates to the State Superintendent final decision-making power in sub-part (b). Section 425.70(b) states in relevant part that "the State Superintendent must inform the school's chief administrator of the State Superintendent's determination" and the "decision of the State Superintendent of Education is a final administrative decision, subject to the Administrative Review Law [735 ILCS 5/Art. III]."

The planned change of a nonpublic school's recognition status and the corresponding appeal procedure is a "contested case" as ISBE's own rule concedes by requiring an opportunity for a hearing and invoking the Administrative Review Law. Furthermore, Section 1-30 of the *Administrative Procedure Act* defines "contested case" as "an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing." 5 ILCS 100/1-30. Parkview's access to the privileges afforded to it by virtue of its recognition status are required by law to be determined at a hearing before the State Superintendent. *See* 23 Ill. Admin. Code § 425.70. However, under Section 1A-4 of the *School Code*, ISBE cannot delegate to the State Superintendent the authority to make this decision. 105 ILCS 5/1A-4. The plain language of Section 5/1A-4 of the School Code compared with the plain and express language of ISBE's rule found at 23 Illinois Administrative

Code § 425.70 compels the conclusion that ISBE's rule "is unauthorized by the enabling statute" and void on its face. *See Beyer v. Bd. of Educ. of City of Chicago*, 2019 IL App (1st) at ¶ 34.

Likewise, ISBE amended a second related rule, 23 Illinois Administrative Code § 425.60, that purports to delegate to the State Superintendent the power to make immediate decisions to revoke recognition status and to change a nonpublic school's recognition status at any time, subject to the provisions of Section 425.70 (*supra*). These two rules must be read together as both rules speak to the process by which a nonpublic school's recognition status may be changed by the State Superintendent as the sole and final decision maker. Because these two rules together purport to delegate all final decision making with respect to all aspects of nonpublic school recognition changes—in direct violation of ISBE's enabling statute that expressly prohibits such a delegation of power to the State Superintendent—both rules are void as a matter of law.

Furthermore, the State Superintendent does not meet the qualifications of a "hearing officer" for a contested case under 23 Illinois Administrative Code § 475.250. Section 475.250 states that a hearing officer in any contested case or formal hearing must meet the requirements of 23 Illinois Administrative Code § 475.50. Section 475.50 requires that a hearing officer be an attorney licensed to practice law in Illinois. 23 Ill. Admin. Code § 475.50(b). The State Superintendent is not an attorney licensed to practice law in Illinois, and as such does not meet the qualifications of a "hearing officer" for a contested case under the applicable regulations. For this independent reason, ISBE's rules at Sections 425.60 and 425.70 are invalid as a matter of law.

B. Parkview's Recognition Status Change Cannot Take Effect Until After the Agency Appeal Process Is Complete

Even if 23 Illinois Administrative Code § 425.70 is deemed a valid exercise of ISBE's rulemaking power, which it is not, the Defendants cannot revoke Parkview's status effective immediately because Section 425.70 speaks strictly in terms of nonpublic schools challenging a

"planned status change" or "planned recognition status change." *See* 23 Ill. Admin. Code § 425.70. Under the regulatory appeal process, the State Superintendent makes a determination of whether to make "no change in the school's recognition status" or to remove the nonpublic school's recognition status, thus implementing the "planned recognition status change" the nonpublic school is challenging. 23 Ill. Admin. Code § 425.70(b). This language indicates that prior to the final determination within this appeals process, the Defendants cannot revoke Parkview's recognition status until after there is a final determination.

Furthermore, 23 Illinois Administrative Code § 475.240 supports the fact that prior to the full appeals process playing out, the Defendants cannot fully revoke Parkview's recognition status. Section 475.240(b)(5) states that the required issuance of a Notice of Opportunity for a Hearing to a party in a contested case must contain a statement that a failure to request an appeal hearing within the regulatory timeframe "shall result in the *recommended* action immediately taking effect as provided in the Notice." 23 Ill. Admin. Code § 475.240(b)(5) (emphasis added). This language directly indicates that prior to the full exercise of a party's rights under an administrative appeal process that gives a right to a hearing, only a "recommended" action is at issue. Thus, no final action, such as the extreme action of fully revoking Parkview's recognition, may occur prior to the full exercise of Parkview's appeal rights.

Even though Parkview had a right to a hearing upon receiving notification of a recognition status change, the Defendants' letter notifying Parkview of the recognition revocation did not notify Parkview of their rights to an appeal, as required by 23 Illinois Administrative Code § 475.240. *See* Exhibit A to Verified Complaint for Declaratory Judgment and Injunctive Relief. The letter did not give Parkview notice of an opportunity for a hearing, nor did it contain the specific information required in a Notice of Opportunity for Hearing pursuant to Section 475.240.

Id. Instead, the letter only informed Parkview that its recognition status was immediately revoked, which contravenes the Defendants authority pursuant to both 23 Illinois Administrative Code § 425.70 and 23 Illinois Administrative Code § 475.240.

Taking these two sections of the Administrative Code together, the language also indicates that the emergency exception allowing immediate revocation under 23 Illinois Administrative Code § 425.60 is void, as the decision to change nonpublic school recognition status is "subject to the provisions of Section 425.70." Section 425.60's emergency exception directly contradicts Section 425.70's framework of an appeal to a "planned status change." Section 425.70's language clearly indicates that no full revocation of recognition status and its associated benefits may be implemented without first allowing Parkview to exhaust its rights to an appeal and the emergency exception in Section 425.60 violates Parkview's right to retain its recognition status until *after* it has exhausted all administrative remedies.

C. The Nonpublic Recognition Procedures Are More Burdensome Than Those Imposed on Public Schools

As discussed above, the legislature made it clear that Parkview has a statutory right for nonpublic recognition status procedures to be no more burdensome than those imposed on public schools. 105 ILCS 5/2-3.25o(c). In two distinct ways, the procedures imposed on nonpublic schools are more burdensome than those imposed on public schools.

i. 23 Illinois Administrative Code § 425.60

First, unlike that which can be done to a public school, the State Superintendent may revoke a nonpublic school's recognition status in an "emergency situation" without first placing the nonpublic school on probationary status. 23 Ill. Admin. Code § 425.60. There is no such similar exception in the public school recognition regulations. *See* 23 Ill Admin. Code § 1.20. In fact, the procedures applicable to public schools require that no matter the situation at hand, the public

school must first be placed on probationary status prior to any action fully revoking its recognition status and the associated benefits. 23 Ill. Admin. Code § 1.20(j). The procedural safeguards afforded to public schools on probationary status to prevent loss of benefits such as the opportunity to confer with the State Superintendent to discuss deficiencies, submit a corrective action plan, and otherwise prevent the loss of the benefits of recognition status are not available to Parkview in this instance. *See generally* 23 Ill. Admin. Code § 1.20.

The loss of these benefits immediately without the protection of the probationary status process impose a greater burden on nonpublic schools. Those 47 public schools recently placed on probationary status did not immediately lose all the benefits of recognition status, but their counterparts in the nonpublic realm immediately lost all benefits afforded by recognition status. Because this process is more burdensome than the process imposed on public schools, ISBE has violated its rulemaking authority granted by the legislature, rendering void the emergency exception contained in 23 Illinois Administrative Code § 425.60.

ii. <u>23 Illinois Administrative Code § 425.70</u>

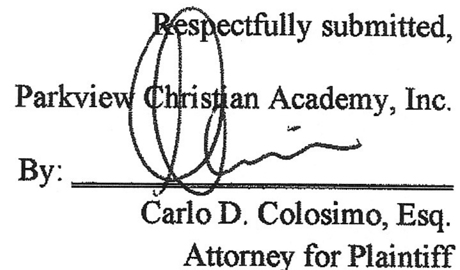
Second, the process by which Parkview and all nonpublic schools can appeal the State Superintendent's revocation of recognition is more burdensome than the process for public schools because it does not afford a nonpublic school the same opportunities to defend itself against loss of recognition. The appeals process offered to nonpublic schools is an abbreviated one during which the State Superintendent, and the State Superintendent alone, is the sole decision maker with final decision-making authority. 23 Ill. Admin. Code § 425.70. The public school appeals process, on the other hand, provides for an informal resolution opportunity, the opportunity for a hearing before an impartial committee, a robust and thorough briefing and argument process, and a decision handed down by ISBE, rather than the State Superintendent. 23 Ill. Admin. Code § 1.95.

Because nonpublic schools are not afforded these procedural safeguards in the same manner as public schools, they face a much greater burden in preventing the loss of the benefits of recognition status. As such, to the extent that 23 Illinois Administrative Code § 425.70 fails to offer nonpublic schools the same procedural safeguards as those offered to public schools, it violates the legislature's rulemaking directive and is void.

WHEREFORE, Parkview prays that this Court grant a temporary restraining order to enjoin the Defendants, or anyone under their authority, from revoking Parkview's nonpublic school recognition status and to stay the administrative process under 23 Illinois Administrative Code § 425.70 effective immediately from this day until such time as this Court has considered and ruled upon the Complaint for Declaratory Judgment.

Respectfully submitted,

Parkview Christian Academy, Inc.



By: ____________________

Carlo D. Colosimo, Esq.
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Date: September 8, 2021

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