UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA ET AL	**CASE NO. 3:21-CV-04370**
VERSUS	**JUDGE TERRY A. DOUGHTY**
XAVIER BECERRA ET AL	**MAG. JUDGE KAYLA D. MCCLUSKY**

MEMORANDUM ORDER

Pending before the Court is a Motion to Order Completion of the Administrative Record [Doc. No. 68] filed by Plaintiff States[1]. An Opposition [Doc. No. 74] was filed by Government Defendants[2] on May 4, 2022. A Reply [Doc. No. 75] was filed by Plaintiff States on May 11, 2022.

At issue is whether Plaintiff States are entitled to an order for Government Defendants to complete the administrative record ("AR") by providing (1) evidence of White House involvement and/or influence in the decision to enact the Head Start Vaccine and Mask Mandate[3] ("Head Start Mandate"); and (2) evidence of outside involvement and/or influence by the National Head Start Association, the National School Boards Association, the American Federation of Teachers, the National Education Association, or other stockholder groups in the decision to enact the Head Start Mandate.

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[1] Plaintiff States are the States of Louisiana, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

[2] Government Defendants are Xavier Becerra, in his official capacity as Secretary of Health and Human Services, The U.S. Department of Health and Human Services, Administration for Children and Families, Jooyeun Chang, Principal Deputy Assistant for Children and Families, and Bernadine Futrell, Director of the Office of Head Start.

[3] 86 Fed. Rep. 68052

For the reasons set forth herein, Plaintiff States' Motion to Order Completion of the Administrative Record [Doc. No. 68] is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

This case involves the Head Start Vaccine and Mask Mandate. The Head Start Mandate requires all Head Start staff, volunteers working in classrooms or directly with children, and contractors whose activities involve contact with or providing direct services to children and families to be fully vaccinated for COVID-19 by January 31, 2022. The Head Start Mandate also requires immediate masking by all individuals two years of age or older when indoors, when outdoors during activities that involve close contact with other people, and when there are two or more people in a vehicle owned, leased, or arranged by the Head Start Program.

The Head Start Mandate was not passed by an act of Congress, but by an interim final rule of the following Executive Branch federal agencies and divisions: Office of Head Start ("OHS"); Administration of Children and Families ("ACF"); and the Department of Health and Human Services ("HHS"). Plaintiff States filed suit against Government Defendants seeking an injunction prohibiting enforcement of the Head Start Mandate.

Although this case is about the Head Start Mandate, the real issue is separation of powers under the United States Constitution. Specifically, whether Government Defendants, "i.e., government agencies" under the Executive Branch, have the authority to impose the Head Start Mandate.

After initially rejecting vaccine mandates,[4] President Joe Biden's "patience" began "wearing thin" with those "who haven't gotten vaccinated."[5] On September 9, 2021, the Biden

[4] Press Briefing by Press Secretary Jen Psaki, April 6, 2021, https://bit.ly/3rBJVoL.
[5] White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (September 9, 2021) https://bit.ly/3Ey4Zj6.

Administration announced a series of federal vaccine mandates, which included the Head Start Mandate.[6]

On November 30, 2021, eighty-two (82) days after President Biden's announcement, HHS published an interim final rule, which required (1) COVID-19 vaccinations by Head Start staff, volunteers, and contractors, and (2) masking of all Head Start individuals two years of age or older.[7] Mask requirements were to take effect immediately, and staff, workers, and contractors were required to be fully vaccinated by January 31, 2022.[8]

The vaccination requirement would require all staff who work with enrolled Head Start children, volunteers in classrooms, or volunteers working directly with children, and contractors whose activities involve contact with or providing direct services to children and families to be vaccinated by January 31, 2022.[9]

On December 21, 2021, Plaintiff States filed a Complaint [Doc. No. 1] and a Motion for Preliminary Injunction [Doc. No. 2]. On December 23, 2021, Plaintiff States additionally filed a Motion for Temporary Restraining Order [Doc. No. 6] and an Amended Motion for Temporary Restraining Order [Doc. No. 7].

Plaintiff States alleged in these motions that Government Defendants: (1) had no authority to issue the Head Start Mandate; (2) the Mandate is contrary to law; (3) the Mandate violates the Administrative Procedure Act's ("APA") notice-and-comment requirement; (4) the Mandate violates the Congressional Review Act "(CRA"); (5) the Mandate is arbitrary and capricious; (6) the Mandate violates the Treasury and General Government Appropriations Act

[6] Biden September 9, 2021, Remarks, Id.
[7] Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs, 86 Fed. Reg. 68052-01.
[8] Which means Moderna and Pfizer's firsts shots were required by January 3 and 10, and the second by January 31, 2022.
[9] 86 Fed. Reg. 68052, 68060-61.

of 1999; and (7) the Mandate violates the Non-Delegation Doctrine, the Spending Clause, the Tenth Amendment, and the Anti-Commanding Doctrine.

On January 1, 2022, this Court granted Plaintiff States' Motion for Preliminary Injunction [Doc. No. 15] prohibiting enforcement of the Head Start Mandate in the Plaintiff States.

On March 24, 2022, Government Defendants filed the AR [Doc. Nos. 55, 56]. The AR consisted of 142 separate exhibits. On March 29, 2022, Government Defendants filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment [Doc. No.65].

On April 19, 2022, Plaintiff States filed the pending Motion to Order Completion of the Administrative Record [Doc. No. 68] and a Motion for Stay Pending Completion of Administrative Record [Doc. No. 69]. An Order [Doc. No. 71] granting the Motion for Stay Pending Completion of the Administrative Record [Doc. No. 69] as to Government Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment [Doc. No. 65] was signed on April 20, 2022. Plaintiff States' Motion to Order Completion of the Administrative Record must be addressed first.

II. LAW AND ANALYSIS

In Plaintiff States' Motion to Order Completion of the Administrative Record, Plaintiff States allege that the AR is incomplete. Plaintiff States ask this Court to order Government Defendants to complete the AR by providing (1) meetings, communications, correspondence, phone calls, documents, input, approvals, or any other evidence of involvement of the White House, OSHA, CMS, GSA, OPM, OIRA, or OMB in HHS's promulgation of the Head Start Mandate; and (2) meetings, communication, documents, input, approvals, or any other evidence of involvement of the National Head Start Association, the National School Boards Association,

the American Federation of Teachers, the National Education Association, or the stakeholder groups in HHS's promulgation of the Head Start Mandate.

A. The Law as it Relates to the Administrative Record

The "whole" or "complete" AR includes all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's decision. *Williams v. Roche*, 2002 WL 31819158, *3 (E.D. La. December 12, 2012); *Exxon Corp. v. Dept. of Energy*, 91 F.R.D. 26, 34 (N.D. Texas 1981); and *Coastal Conservation Association v. Gutierrez*, 2006 WL 8445127 (S.D. Texas February 17, 2006).

Meaningful judicial review requires an agency to disclose the basis of its action. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). It does not permit an agency to obscure the actual bases for its conduct. Agencies must offer genuine justifications, including "unwritten justifications." *In re DeVos*, 2021 WL 2000277 at *6 (N.D. Cal. May 17, 2021).

Limited discovery may be permitted when it appears the agency relied on substantial materials not included in the record, or when the procedures used and factors by the decisionmaker requires further explanation for effective review. *Williams*, 2002 WL 31819158, at *3 (E.D. La. December 12, 2002).

If a court is never willing to scrutinize agency action, the gates become a cement wall, impervious even to legitimate claims of improper influence. *Sokaogon Chippewa Community v. Babbitt*, 961 F.Supp. 1276 (W.D. Wisconsin, March 19, 1997).

Judicial review is to be based on the full AR that was before the agency at the time of the decision. Matters not considered by the agency are outside the record and are legally irrelevant and not discoverable.[10]

One factor justifying expanding the AR certified by the agency is where the record submitted fails to explain the basis for administrative action, thereby frustrating judicial review.[11] The AR is inadequate if it fails to provide all the court documents, memoranda and other evidence which was considered directly or indirectly by the agency.[12] There is a strong presumption that the certified AR is adequate, and that review is limited to the certified record.[13]

In order to obtain even limited discovery, a party must make "a significant showing," described as a strong, substantial, or *prima facie* showing, that it will find material in the agency's possession indicative of bad faith or an incomplete record.[14] Supplementation of the AR is appropriate when certain unusual circumstances exist. Three circumstances where supplementation is appropriate are: (1) the agency dishonestly or negligently excluded documents that may have been adverse to its decision; (2) the district court needed to supplement the record with background information in order to determine whether the agency considered all of the relevant factors; or (3) the agency failed to explain administrative action so as to frustrate judicial review.[15]

For purposes of determining whether a party has made a strong showing that the record is incomplete, the complete AR should include all materials that might have influenced the agency's decision, and not merely those in which the agency relied on in its final decision.[16]

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[10] *Exxon Corp. v. Dept. of Energy* 91 F.R.D. 26, 33 (N.D. Tex. 1981).
[11] *Camp v. Pitts*, 411 U.S. 138, (1973).
[12] *Exxon Corp.* 91 F.R.D. at 33.
[13] *Medina Cnty. Env.'t Action Assn. v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010).
[14] *Air Transp. Assn. of Am. Inc. v. Nat'l Mediation Bd.* 663 F.3d 476, 481-88 (D.C. Cir. 2011).
[15] *Dist. Hosp. Partners, L.P. v. Burwell* 786 F.3d 46,55 (D.C. Cir. 2015).
[16] *Amfac Resorts, LLC v. U.S. Dept. of the Interior*, 143 F.Supp. 2d 7, 12 (D.D.C. 2001).

When a strong showing is made that the agency could have been influenced by political pressure, the documents indicating political pressure may become part of the AR.[17]

B. Analysis

1. The Administrative Record

The AR [Doc. Nos. 55, 56] contains the following items from the White House: White House Report[18], Path Out of the Pandemic - President Biden's COVID-19 Action Plan[19], Executive Order 14042[20] and Executive Order 14043[21]. There are no other documents from the White House despite the White House's announcement pushing for vaccine mandates on September 9, 2021.

The only items involving OSHA, GSA, OPM, OIRA, or OMB is HHS's promulgation of the Head Start Mandate appear to be publications in the Federal Register of other vaccine mandates published on November 5, 2021.[22]

There does not appear to be any items in the record from the National Head Start Association, the National School Boards Association, The American Federation of Teachers, the National Education Association, or other stakeholder groups.

The majority of the AR consists of global statistical information[23] CDC reports, reports from the popular Morbidity and Mortality Weekly Report, and many other reports and research articles. Other than those noted above, there are no items in the AR considered by Government Defendants from the groups listed. Because the "whole" record consists of all documents and

[17] *Schaghticoke Tribal Nation v. Norton* 2007 WL 867987 (D. Conn. 2007); *DCP Farms v. Yeutter*, 957 F.2d 1183 (5th Cir. 1992); and *Sokaogon Chippewa Comm. v. Babbitt*, 961 F.Supp. 1276 W.D. Wis. 1997).
[18] [Doc. No. 55-54].
[19] [Doc. No. 55-55].
[20] [Doc. No. 56-34].
[21] [Doc. No. 56-35].
[22] [Doc. No. 56-12 through 56-33].
[23] [Doc. No. 56-66 to 71].

materials directly or indirectly considered by agency decisionmakers, any correspondence or materials by any of the groups and/or agencies listed and from the White House should be part of the AR if directly or indirectly considered by the agency decisionmakers, unless privileged.

2. Deliberate Process Privilege

In opposing Plaintiff States' motion to complete the AR, Government Defendants maintain that to the extent it coordinated with other agencies of the government and the White House, it did so as part of the usual regulatory process. Therefore, Government Defendants maintain such communications are subject to the deliberate process privilege and properly excluded from the AR. Government Defendants do not seek to exclude any communications and/or materials from outside groups on the basis of the presumption of regulations of the AR. Government Defendants also maintain that any political influence is irrelevant and not required to be part of the AR.

Plaintiff States argue that White House involvement, other agencies involvement, and/or political pressure are relevant to their argument that the Head Start Mandate is arbitrary and capricious, violates the Head Start Act, and is based upon pretext. Plaintiff States also maintain the deliberate process privilege does not apply.

The deliberate process privilege rests upon the same understanding that motivated the Framers of the Constitution in Philadelphia: if agencies were to operate in a fishbowl, the frank exchange of ideas and opinions would cease, and the quality of administrative decision would consequently suffer. The deliberate process privilege reflects the position that agency officials should be judged by what they decided, not for matters they considered before making up their minds. The deliberate process privilege covers communications that are pre-decisional and deliberative; to be pre-discussed, the communication must have occurred before any final agency

decisions on the relevant matter, and the term deliberate means, in essence, the communication is intended to facilitate or assist development of the agency's final position on the relevant issue.[24]

However, in cases involving pretext claims, when there is a question on whether improper political pressure influenced the agency decision, such information should be part of the AR in order to determine the reasons for the agency's decision.[25]

Agency officials are not likely to keep a written record of improper political contacts; the only way to uncover such contacts is by allowing limited discovery. Therefore, the courts have an important "gatekeeping function."[26]

Sokaogon Chippewa Community involved alleged improper political pressure exerted by high-level congressional and executive branch officials. On reconsideration, the court allowed plaintiffs to conduct limited discovery with regard to those issues. In addressing the political pressure issue, the court stated:

> Thus, interaction with the department and the congressional and presidential officials concerning an application such as plaintiffs' is not improper per se. But that does not mean that it is permissible for White House staff to dictate the outcome of a decision that is delegated by Congress to the Department of the Interior. Courts must inquire whether improper legislative or executive contacts have tainted agency decision impermissibly.

961 F. Supp. At 1279.

In looking at the arguments made by both sides in this case, this Court believes that evidence of Executive Branch meetings, correspondence, phone calls, documents, input, approvals, or any other evidence of involvement of the White House should be part of the AR. Without this information, meaningful judicial review would be impossible.

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[24] *National Sec. Archive v. C.I.A.*, 752 F.3d 460, 462-63 (D. C. Cir. 2014).
[25] *Schaghticoke Tribal Nation v. Norton*, 2007 WL 867987 (D. Conn. 2007); *DCP Farms v. Yeutter*, 957 F.2d 1183 (5th Cir. 1992), and *Sokaogon Chippewa Community v. Babbitt*, 961 F.Supp. 1276 (W.D. Wis. 1997).
[26] *Schaghticoke* 2007 WL 867987 at *3.

Plaintiff States have made the required significant showing that there exist materials Government Defendants are in possession of that are indicative of an incomplete AR. Four specific vaccine mandates, including the Head Start Mandate, were announced by President Biden at a press conference on September 9, 2021. Government Defendants concede that the White House influenced the decision to promulgate the Head Start Mandate.[27] The Head Start Mandate was published eighty-two (82) days after President Biden's September 9, 2021, press conference. This material should be added to the AR to allow meaningful judicial review. Government Defendants shall additionally provide documentation of White House involvement in waiving the notice of the Administrative Providers Act, if any exists.

3. Other Agencies

However, it does appear to this Court that involvement of OSHA, CMS, GSA, OPM, OIRA, or OMB in HHS's promulgation of the Head Start Mandate would be covered under the deliberate process privilege and, therefore, is not subject to judicial review.

4. Stakeholder Groups

Plaintiff States also ask this Court to order Government Defendants to complete the AR by providing evidence of meetings, communication, documents, input, approvals, or any other evidence of involvement of the National Head Start Administration, the National School Boards Association, the American Federation of Teachers, the National Education Association, or other stakeholder groups in HHS's promulgation of the Head Start Mandate.

If such information exists, it should have been included in the AR if this information was directly or indirectly considered by the agency decisionmakers. Additionally, this information would not be privileged pursuant to the deliberate process privilege.

[27] [Doc. No., 74 p. 12].

The Court must determine whether Plaintiff States have met their burden of a significant showing that it will find such material in the agency's possession that was directly or indirectly considered by the agency decisionmakers. Plaintiff States cited an October 20, 2021, Fox News report entitled "Teachers Union Influenced Last Minute CDC School Guidance, Received Copies Before Public Release, Emails Show." This article indicates the CDC sent a copy to several teachers' unions prior to the CDC school guidance policy's publication. The CDC is not a defendant in this suit. While it certainly makes it more likely that Government Defendants consulted with outside teachers' groups prior to publicizing the Head Start Mandate, this evidence does not meet the "significant showing" standard for Plaintiff States to show this occurred. Therefore, the Court will not order Government Defendants to complete the AR by providing this information.

5. Outside Experts

Plaintiff States lastly request Government Defendants to provide HHS's consultation with outside experts and entities. In response, Government Defendants state that all external consultations are already included in the AR, citing a transcript of a consultation with Dr. Sean O'Leary.[28] Evidently, this is the only consultation by Government Defendants, because they considered that all other consultations under 42 U.S.C. § 9836(a)(2)(A) were either deferred for good cause or have been satisfied through internal consultations. Deferred consultations have not yet occurred, and internal consultations would be excluded under the deliberate process privilege.

Because Government Defendants have conceded to only one outside consultation, the question whether this meets the requirement of 42 U.S.C. § 9836(a)(2)(A) will be discussed in

[28] [Doc. No. 56-64].

more detail when pending and future motions to dismiss and/or motions for summary judgment are addressed.

III. CONCLUSION

For the reasons set forth herein Plaintiff States' Motion to Order Completion of the Administrative Record [Doc. No. 68] is **GRANTED IN PART and DENIED IN PART.**

IT IS ORDERED that to the extent Plaintiff States request for Government Defendants to complete the administrative record by providing evidence of meetings, phone calls, communications, correspondence, documents, input, approvals, or any other involvement of the White House, the Motion is **GRANTED**.

IT IS FURTHER ORDERED that to the extent Plaintiff States request additional information in its Motion, the Motion is **DENIED.**

IT IS FURTHER ORDERED that Government Defendants complete the Administrative Record by filing the required information within thirty (30) days of this Order.

After Government Defendants file the completed Administrative Record, **IT IS ORDERED** that Plaintiff States shall have twenty-one (21) days to respond to Government Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment [Doc. No. 65], and then Government Defendants shall have fourteen (14) days to reply after filing of Plaintiff States' response.

MONROE, LOUISIANA, this 16th day of May 2022.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE