



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 1, 2017

SENT VIA US MAIL

Tony Evers, State Superintendent
Wisconsin Department of Public Instruction
125 S. Webster Street
Madison, WI 53703

Dear Superintendent Evers:

This letter is in response to your November 28, 2017, correspondence concerning the pending matter of *Koschkee et al. v. Wisconsin Department of Public Instruction and Tony Evers, in his official capacity*.

As you know, on November 22, 2017, Governor Scott Walker requested that I represent the State in this matter by appearing for the Department of Public Instruction and the Superintendent in his official capacity. Wisconsin law provides that upon this request, “[t]he department of justice shall . . . appear for and represent the state, any state department, agency, official, employee or agent . . . in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested.”

It is my understanding, based on your press statements, that you believe this law—Wis. Stat. § 165.25(1m)—does not apply to you because you are a constitutional officer. You also believe that much of the Wisconsin Administrative Procedure Act, Wis. Stat. §§ 227.135 and 227.185, and perhaps other sections, likewise do not apply to you because you are a constitutional officer. You have not actually publically explained which laws apply to you and which laws do not, or what the public may expect from your future exercise of rulemaking powers impacting the citizens of this State.

I am a constitutional officer, and so is the Governor. The State’s position is that all laws passed by the Legislature and signed by the Governor apply to all constitutional officers. There is no exception in the law for you. And there is no exemption that would allow you to impose rules upon school districts, school teachers, or students without following the law on how to promulgate rules.

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I understand that you disagree with the litigation position that the State may take in this lawsuit. Despite my duty to represent the State, however, I support your desire to be heard in court. As my attorneys have attempted to explain to your Chief Legal Counsel, this lawsuit is not against you personally. It is an official-capacity lawsuit, meaning that it is technically a lawsuit against the State, and not against you. Even though your name appears in the caption, you are not personally a defendant—the State is.

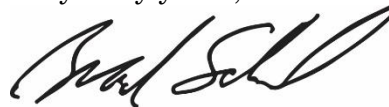
Although I will represent both the Department and defend the official capacity claims against the Office of the Superintendent, you may certainly participate in this lawsuit in your personal capacity, as the court rules permit.

To that end, my attorneys will consent to your intervention or amicus participation, whichever you prefer, and to your filing of briefs and participation at any oral argument. While it is true that the Wisconsin Statutes direct me to represent the State in a case such as this, no law would prohibit you participating and being heard in this lawsuit in your personal capacity.

Although we may not see eye to eye in this litigation, I hope you understand and respect my duties under state law and the Constitution. I certainly respect yours. The Department of Justice currently represents you and the Department of Public Instruction in approximately 17 pending cases. While we are happy to bear this burden at no cost to you or the Department of Public Instruction, and we always give due weight to your viewpoint, the Department of Justice ultimately controls the litigation and settlement positions (if any) in all of these cases because we represent the State.

We look forward to our continued interactions in hopes of making the best decisions for the State, its laws, and its citizens.

Very truly yours,



Brad D. Schimel
Wisconsin Attorney General

BDS:dpl:pwc

Cc via email: Tony Evers (Anthony.Evers@dpi.wi.gov)