



February 7, 2017

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

*Via Electronic Mail To:
dpistatesuperintendent@dpi.wi.gov
and original via U.S. Mail*

Dear Superintendent Evers:

We write today to inquire about whether – and when – you intend to promulgate the state plan, required under the federal Every Student Succeeds Act (ESSA) as an administrative rule. It is our understanding that when you submit the state plan in September, many of the decisions set forth in the state plan will be immediately binding on Wisconsin students, teachers, and schools. If so, the state plan – or the applicable parts of it – would meet the definition of a rule under Wis. Stat. § 227.01(13) and must be promulgated as an administrative rule before it is submitted to the U.S. Department of Education. **Failure to follow state law could expose the State of Wisconsin to litigation and jeopardize hundreds of millions of dollars in federal funds for children attending Wisconsin’s schools.**

As you know, state law defines a “rule” as “a regulation, standard, *statement of policy*, or general order of general application *which has the effect of law* and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.” (Wis. Stat. § 227.01(13)) (emphasis added). This means that statements of policy that have the effect of law are “rules” and subject to the rule-making requirements of Chapter 227 of the Wisconsin Statutes.

The State of Wisconsin must make policy decisions which have the effect of law to comply with the new federal law, ESSA. Under ESSA, Wisconsin must submit a state plan describing these policy decisions to the U.S. Department of Education by September 18, 2017, to be eligible for a variety of federal funds. Because Wisconsin’s policy decisions must be submitted to the federal government by September 18, they must be made and promulgated by that date.

In many instances, ESSA requires each state to articulate in its plan how the state will comply with specific provisions of the law. For example, Section 4 of the model state plan requires the state to choose academic and non-academic indicators that the state’s public schools will be required to report on with respect to their performance. ESSA also requires each state to identify the “distinct and discrete levels of school performance, and how they are calculated” for each indicator. In essence, it requires each state to have a “report card” for public schools and it requires the report card to have certain categories that will be graded. The “report cards” will directly – and immediately – impose new reporting requirements on all public schools in the state and impact how public schools will be identified as low-performing, as required by federal

law and such identification will have legal impacts on those schools and the staff, teachers and students at those schools.

Wisconsin currently has such a “report card” and its categories are determined by state statute, *see, Wis. Stat. §§ 115.38-115.385*, and implemented by rule, *see, PI 8*. If the state plan to be submitted under ESSA modifies, amends, alters, replaces or amends the existing form of state report card for public schools that change must be done by statute or rule-making or both. The same would be true if the plan is to leave the existing state report card in place and provide a different form to comply with ESSA. DPI lacks the power to create a new report card without being delegated such power by the state legislature and then exercising that power through rule-making under Chapter 227.

As a second example, ESSA requires provisions in the state plan which will have the effect of law on educators in Wisconsin because each state must create definitions for specific terminology relating to educators. Section 5.3 requires the definition of “ineffective teacher,” “out of field teachers,” and “inexperienced teachers.” These definitions will be used to report on Wisconsin educators to the federal government. To comply with ESSA, Wisconsin will need to create and promulgate these definitions and again that will have to be done by statute or rule-making (assuming that DPI has the explicit statutory authority to promulgate such rules).

It is evident from recent media accounts – and your statements at the Equity in ESSA meetings – that DPI intends to make these policy decisions on its own and to include these newly created policies as part of the state plan. As such, DPI will be creating statements of policy that have the effect of law, which, as rules, would require following state law for rule-making set forth in Chapter 227. The first step required is for DPI to write and submit a statement of scope for the proposed rules. *See Wis. Stat. § 227.135(1)*. Although the decision in *Coyne v. Walker* exempts the scope statement from gubernatorial review, DPI is still required by law to prepare a statement of scope and have that statement of scope approved and published in the administrative register. To our knowledge, DPI has yet to comply with these statutory requirements. That must occur before DPI starts drafting a proposed rule and prior to the additional steps for rule-making set forth in Chapter 227. To the extent your staff is working on any portion of that state plan that will ultimately have the effect of law, then per *Wis. Stat. § 227.135(2)*, in the absence of an approved scope statement, those actions could be in violation of the law and would jeopardize the legal validity of the plan.

As of now, ESSA is going into effect in July 2017 with the state plan being submitted in September 2017. The state plan is a policy document, committing to the federal government that the State of Wisconsin has enacted or will enact certain policies and receipt of federal funding will be contingent on the existence and compliance with such policies. From our understanding, schools and teachers will have to immediately abide by the policies described in the state plan as soon as it is submitted and approved.

We understand you have created your own process for ESSA implementation. You have held public listening sessions (though only in select parts of the state and not Milwaukee), organized a “stakeholders” council (though the council is advisory only and the public cannot see what the committee has done for the last two meetings), and intend to brief the state legislature on the plan (though you are not giving them the ability to vote on the plan).

The process you are using is not the process that is required by state law. Policymaking is done by the state legislature. To the extent the legislature has delegated some of its policymaking authority to state agencies those agencies exercise that authority through the rule-making process in Chapter 227. That process specifically provides for public input and legislative oversight as laid out in the law. The process you have created for the state plan ignores and evades that oversight. That is problematic not only because it is yet another example of administrative over-reach but because of the legal difficulties it creates for the people of Wisconsin in the future under ESSA.

Every legal requirement that the DPI includes in the state plan that has not gone through the rule-making process is subject to legal challenge. Every promise that the DPI makes to the federal government that is based on policies described in the state plan that have not been the subject of proper rule-making is unenforceable under state law and the unenforceability of those promises puts the State at risk of losing access to federal funds under ESSA.

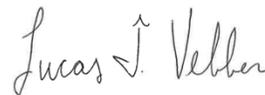
Submission of a legally enforceable state plan requires DPI to comply with state law. That means that the DPI must start with a statement of scope because under Wis. Stat. § 227.135(2) no work of any type may be done by any state employee on a proposed rule until the scope statement has been submitted. If the DPI skips this step, it permits a challenge to everything that comes after. Regulatory oversight by the public and state legislature is critical for open government and our principle of separation of powers. That can only be accomplished if DPI complies with Chapter 227.

We urge you to comply with state law as DPI works on the state plan.

Sincerely,



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