

November 29, 2017

VIA HAND DELIVERY

Diane M. Fremgen
Office of Clerk
Wisconsin Supreme Court
110 E. Main St., Suite 215
Madison, WI 53701

RECEIVED
12/1/17

Re: *Koschkee, et al. v. Evers, et al.*

Dear Ms. Fremgen:

Please see the enclosed Motion to Deny Substitution of Counsel and to Disqualify the Attorney General from Representing the Respondents in the above-captioned matter. The original and nine copies are enclosed.

By copy of this letter and enclosure, copies have been served on the counsel of record via First Class U.S. Mail on this date, and on the Attorney General's office.

Thank you for your attention to this matter. Please let me know if you have any questions or concerns.

Sincerely,



Ryan Nilsestuen
Chief Legal Counsel
Department of Public Instruction

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CC (w. enc.) Richard M. Esenberg / Brian McGrath / CJ Szafir
Misha Tseytlin / Ryan Walsh

STATE OF WISCONSIN
SUPREME COURT

Case No. 2013AP416

KRISTI KOSCHKEE, AMY ROSNO, CHRISTOPHER MARTINSON,
and MARY CARNEY

Petitioners,

v.

ANTHONY EVERS and the WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION

Respondents

**MOTION TO DENY SUBSTITUTION OF COUNSEL
AND TO DISQUALIFY THE ATTORNEY GENERAL FROM
APPEARING ON BEHALF OF RESPONDENTS**

WISCONSIN DEPARTMENT OF
PUBLIC INSTRUCTION
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The Respondents, State Superintendent Evers (State Superintendent) and the Wisconsin Department of Public Instruction (DPI), by their undersigned counsel, respectfully request that this Court deny the substitution of counsel submitted by the Attorney General and the Wisconsin Department of Justice (DOJ) on November 22, 2017. Respondents further request that this Court disqualify the Attorney General and the DOJ from representing the Respondents in this matter. As grounds for this motion, Respondents state the following reasons:

1. Less than two years ago, this Court held that “[2011 Wisconsin] Act 21 is unconstitutional and therefore void as applied to the State Superintendent of Public Instruction and his subordinates.” *Coyne v. Walker*, 2016 WI 38, ¶ 4, 368 Wis. 2d 444, 454.

2. The specific provisions found unconstitutional by four justices in *Coyne* concerned Wis. Stat. §§ 227.135(2) (requiring the governor’s approval to promulgate administrative rule scope statements), 227.137(6) (requiring the Secretary of Administration’s approval for rules exceeding \$20,000,000 in costs), and Wis. Stat. § 227.185 (requiring the Governor’s final approval before an administrative rule takes effect). *Coyne*, 2016 WI 38, ¶¶ 6-8.

3. The DOJ represented the Governor in *Coyne v. Walker* and it took an adverse position to that of the State Superintendent and the DPI. Specifically, the DOJ argued that the State Superintendent and DPI must comply with Wis. Stat. § 227.135. *Id.*

4. On September 21, 2017, Governor Walker signed 2017 Wis. Act 57 into law.

5. Among other things, 2017 Wis. Act 57 amended Wis. Stat. § 227.135 to specify that scope statements first must be presented to the Secretary of Administration for review before being presented to the Governor for approval.

6. On November 20, 2017, the Petitioners filed a petition for review asking this Court to hold that Wis. Stat. § 227.135 now applies to the State Superintendent, despite a majority of the Court previously holding that Wis. Stat. § 227.135 cannot be applied constitutionally to the State

Superintendent.

7. In other words, the Petitioners raise the exact same issue already addressed and decided by *Coyne v. Walker*. (Petition to Supreme Court to Take Jurisdiction of an Original Action at p. 9)

8. The State Superintendent and the DPI take the unequivocal position that this Petition is frivolous and that the minor changes to Wis. Stat. § 227.135 do not make it constitutional as applied to the State Superintendent.

9. On November 20, 2017, Attorney Ryan Nilsestuen, Chief Legal Counsel for the DPI, sent a copy the petition and memorandum in support thereof to the DOJ, namely AAG David Meany, director for the DOJ Division of Legal Services. (Nilsestuen Affidavit)

10. On November 21, 2017, AAG Meany and AAG Daniel Lennington called Attorney Nilsestuen to discuss whether the DOJ would represent the DPI and the State Superintendent in the above-entitled matter. (Nilsestuen Affidavit)

11. During the telephone conversation, Attorney Nilsestuen stated what the State Superintendent's and the DPI's position was in the case.

12. During the telephone conversation, AAG Meany stated that it was the Attorney General's position that 2017 Wis. Act 57 applied to the State Superintendent and DPI notwithstanding the *Coyne* decision. (Nilsestuen Affidavit)

13. AAG Meany further stated that the Attorney General would advocate what he felt was the "state's" position which, incidentally, is identical to that of the Petitioners herein and also identical to the DOJ's position in *Coyne v. Walker*. (Nilsestuen Affidavit)

14. By an email dated November 21, 2017, AAG Meany stated that the DOJ would represent the "State's" position, not the State Superintendent's and DPI's position:

The Attorney General is committed to the rule of law, and as such, will articulate the State's

position in this matter. As you know, *Coyne* produced no controlling opinion, and thus the constitutional authority of the Superintendent remains unresolved. Given that *Coyne*'s fractured opinions only addressed Act 21, and this new lawsuit addresses the REINS Act, we see no legal basis to avoid the legal conclusion that the REINS Act applies to DPI's rulemaking going forward. We believe this is the only correct position that the State can take in this litigation, notwithstanding the Superintendent's position about the propriety of the REINS Act or Act 21.

Again, we are asking you whether you are requesting representation under s. 165.25(6). Either way, we need to know immediately so that the State's position is not prejudiced. I am not suggesting that you ask the Governor to appoint outside counsel under Chapter 14, but I merely commented that if you were going to take that step (and therefore refuse DOJ's representation), then we would like to know that as soon as possible.

(Emphasis added) (Nilsestuen Affidavit).

15. On November 22, 2017, at 12:00 p.m., Attorney Nilsestuen filed a Notice of Appearance with the Court. (*Id.*)

16. On November 22, 2017, at 12:30 p.m., Attorney Nilsestuen informed the DOJ by email that the Respondents would not refer the matter to the DOJ for representation and that the DPI would represent itself. (*Id.*)

17. On November 22, 2017, at 1:02 p.m., Attorney Nilsestuen received a copy of the Notice of Appearance and Substitution of Counsel filed by the Attorney General. (*Id.*)

18. On November 22, 2017, at 1:20 pm, AAG Daniel Lennington emailed Attorney Nilsestuen and stated, "We received a request from the Governor to represent DPI and Evers under s. 165.25(1m). We have filed an appearance on their behalf as provided by law." (*Id.*)

19. On November 22, 2017, at 1:31 pm, Attorney Nilsestuen responded, stating "Daniel, please send me a copy of the request." (*Id.*)

20. AAG Lennington never responded to Attorney Nilsestuen nor provided a copy of the Governor's request. (*Id.*)

21. By a letter dated November 28, 2017, the State Superintendent informed the Attorney General that he was "terminating any representation provided by the Wisconsin

Department of Justice in this matter pursuant to SCR 20:1.16(a)(3).” (*Id.*)

22. On November 28, 2017, the DOJ, through a press spokesperson, stated in the *Capitol Times* that the State Superintendent and DPI are not the “actual defendants” in this matter and, paradoxically, that the DOJ would continue to represent the Respondents:

Whether Superintendent Evers likes it or not, the State of Wisconsin is the actual defendant in this lawsuit, and his personal opinions as to the what the law is or should be will have no bearing on the Attorney General’s power or ethical duty to represent the State. The citizens of this state expect elected officials to carry out the laws passed by the Legislature, not resist them.

(Emphasis added). Nilsestuen Affidavit.

23. Contrary to the DOJ’s statements, the State Superintendent and the DPI are the only named respondents.

24. Pursuant to Wis. Const. Art. X, § 1, the State Superintendent is an independent, constitutional officer with the vested power to supervise public instruction. Pursuant to Wis. Stat. § 15.37, the DPI is supervised by the State Superintendent.

25. As a result, the State Superintendent, not the Attorney General, is responsible to determining the State Superintendent’s and DPI’s position in this matter.

26. The Attorney General has no vested constitutional power. Wis. Const. Art. VI, § 3 (“The powers, duties and compensation of the attorney general shall be prescribed by law.”).

27. Instead, the Attorney General only has the powers and duties a prescribed by law. Wis. Const. Art. VI, § 3. “Unless the power to prosecute a specific action is granted by law, the office of the attorney general is powerless to act.” *Estate of Sharp*, 63 Wis. 2d 254, 261 (1974).

28. AAG Lenington claims that the DOJ is representing the Respondents under Wis. Stat. § 165.25(1m). However, the DOJ failed to provide any evidence to the Respondents that the Governor made a request under that statute.

29. Regardless, considering the DOJ’s position in this matter, the DOJ is ethically

prohibited from representing the Respondents.

30. The Supreme Court alone has the “inherent and exclusive authority to regulate the practice of law.” *State ex rel. Fiedler v. Wisconsin Senate*, 155 Wis. 2d 94, 103, 454 N.W.2d 770, 774 (1990).

31. Pursuant to SCR 20:1.2, attorneys, including those at the Department of Justice, are required to “abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued.”

32. The DOJ has refused has refused to abide by State Superintendent’s and DPI’s decisions.

33. As stated above, AAG Meany stated that DOJ, not the named Respondents, determines the “State’s” position: “We believe this is the only correct position that the State can take in this litigation, notwithstanding the Superintendent’s position about the propriety of the REINS Act or Act 21.”

34. By taking a position directly contrary to the named Respondents and dismissing the Respondents’ role in this matter, the DOJ’s representation of the Respondents is in violation of SCR 20:1.2.

35. The DOJ is also prohibited from representing the Respondents due to a conflict of interest.

36. Pursuant to SCR 20:1.7, attorneys “shall not represent a client if the representation involves a concurrent conflict of interest.”

37. Similarly, under SCR 20:1.9(a), “a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter

in which that person's interests are materially adverse..."

38. As stated above, the DOJ represented Governor Walker in *Coyne v. Walker*, and it took an adverse position to the State Superintendent.

39. The DOJ is taking the exact same position in this matter.

40. The comments to SCR 20:1.7 highlight the problematic nature of DOJ's position: "...the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client."

41. Any doubts as to the existence of an asserted conflict of interest "are to be resolved in favor of disqualification." *Burkes v. Hales*, 165 Wis. 2d 585, 595, 478 N.W.2d 37, 41 (Ct. App. 1991).

42. If the Department of Justice is determined to advocate its position in this matter, it may do so legally and ethically by intervening on behalf of another client, such as the Governor. Wis. Stat. § 165.25(1m).

For all of the reasons stated above, the Respondents respectfully request that the Court dismiss the Notice of Substitution of Counsel and to disqualify the Attorney General and the DOJ from representing the Respondents in this matter.

Dated this 29th day of November, 2017.



Ryan Nilsestuen, SBN 1091407