

November 28, 2017

By Hand Delivery

Brad D. Schimel, Attorney General
Wisconsin Department of Justice
PO Box 7857
Madison, WI 53707-7857

Re: *Koschkee v. Evers*

Dear Attorney General Schimel:

Please be advised that I am terminating any representation provided by the Wisconsin Department of Justice in this matter pursuant to SCR 20:1.16(a)(3). I believe that your office is neither willing nor ethically able to provide representation in this matter.

As you know, four justices of the Wisconsin Supreme Court recently decided that Wis. Stat. § 227.135 could not be constitutionally applied to the State Superintendent. *Coyne v. Walker*, 2016 WI 38. I believe in the finality of court decisions, especially those regarding our state's founding document. The meaning of the constitution doesn't change depending on who is serving on our state's highest court.


Despite the clear ruling by the four justices, the petitioners in the present case are seeking a do-over of *Coyne v. Walker*. The present case even involves the exact same statute, Wis. Stat. § 227.135, and raises the exact same question, whether the State Superintendent must obtain permission from the Governor in order to promulgate administrative rules. Unfortunately, your office has taken the position that the petitioners are correct and the four justices in *Coyne* are wrong. It is also the exact same position that your office took in *Coyne v. Walker* when it argued *against* the State Superintendent's position. This approach was wrong then. It is wrong now.

I am also concerned that this position violates the Wisconsin Supreme Court's Rules of Professional Conduct. The rules require all attorneys, including those at the Department of Justice, to advocate for their clients, abide by a client's decisions concerning the objectives of representation, and avoid conflicts of interest. SCR R 20:1.2 and 20:1.7. Conceding the case is not advocacy. Further, the Department of Justice's adverse position in *Coyne* creates a conflict of interest.

For the reasons stated above, I asked my chief legal counsel, Attorney Ryan Nilsestuen, to represent me in this matter. On Wednesday, November 22, 2017, Attorney Nilsestuen informed your office that the Department of Public Instruction would not be requesting representation. Further, Attorney Nilsestuen filed a Notice of Appearance with the Wisconsin Supreme Court. Attorney Nilsestuen represented me in *Coyne v. Walker*, and I believe he can capably do so again

here. Pursuant to SCR 20:1.16(d), please provide Attorney Nilsestuen with your file in this matter, including all communications with the petitioners' counsel related to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tony Evers', written over the printed name.

Tony Evers
State Superintendent of Public Instruction

CC: Misha Tseytlin
Ryan J. Walsh