

WILL: DPI backs down after WILL questions rulemaking authority

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State Education Agency withdraws proposed rule ahead of hearing, WILL testimony June 8, 2018 – Milwaukee, WI – In a victory for the rule of law and separation of powers, the Wisconsin Department of Public Instruction (DPI) withdrew a proposed regulation after WILL attorneys had called into question its legality and threatened a legal challenge.

Policymaking is the constitutional role of the state legislature. To the extent the legislature decides to expressly delegate its policymaking authority to state agencies, those agencies must exercise that authority through the rule-making process in Chapter 227. But, as pointed out by Associate Counsel Libby Sobic in testimony, DPI did not have the explicit legal authority from the legislature to promulgate the proposed rule – which relates to the identification and collection of data.

WILL President and General Counsel Rick Esenberg explains:

“DPI’s decision vindicates both the power of the legislature and the sovereignty of the state of Wisconsin within our federal system. One of the chief problems with a growing administrative state is the creeping expansion of power accumulated by government agencies. DPI has, more than once, attempted to issue rules that affect Wisconsin schools and students when the agency hasn’t been empowered to do so. Here it argued that its authority was conferred by federal grant conditions. That doesn’t work. Wisconsin can make or change law to get federal money, but doing so

is a legislative – not executive – choice. We will continue to monitor DPI and other state agencies to ensure accountable government and protect the separation of powers.”

A state legislative committee (JCRAR) was supposed to hold a hearing yesterday on the rule; WILL was scheduled to testify there. Less than 24 hours before the hearing, DPI notified JCRAR that the proposed rule would be withdrawn.

On a different regulatory matter, WILL attorneys also submitted testimony that questioned the legality of DPI’s proposed rules relating to the implementation of the state plan for the Every Student Succeeds Act (ESSA). It is unclear what DPI and Superintendent Evers will do next but WILL plans to monitor the issue closely.

In addition, WILL sued State Superintendent Tony Evers in his official capacity arguing Evers was violating the REINS Act when it issued rules and regulations without the approval of the legislature or the Governor. The case is currently before the Wisconsin Supreme Court.