



September 7, 2021

Senator Devin LeMahieu
Senate Majority Leader
Room 211 South
State Capitol

Representative Robin Vos
Assembly Speaker
Room 217 West
State Capitol

Dear Senator LeMahieu and Representative Vos:

On August 3, 2021, the Joint Committee for Review of Administrative Rules (JCRAR), pursuant to s. 227.26 (2) (b), Stats., voted to require the UW System and its delegates to promulgate its Covid-19 response policies as an emergency rule within 30 days or cease enforcement of these policies. Per the motion passed by JCRAR, the joint committee determined that the policies of the Board of Regents of the UW System and those issued by campus administrators relating to requirements associated with its response to Covid-19 meet the definition of rules subject to the provisions of the Wisconsin Administrative Rules Law (Chapter 227).

The motion passed by JCRAR also directed the UW System to promulgate any similar, subsequent policies that might be adopted by system officials or campus administrators as emergency rules at the time of the enactment of the additional Covid-19 policies. The requirements subject to the JCRAR directive include, but are not limited to, all Covid-19 policies that relate to physical access to system property, as well as all Covid-19 policies under which an individual may be subject to disciplinary action. It applies to any policies that are adopted by the agency or by its delegates on a campus-by-campus basis. Any agency may not implement or enforce policies determined to meet the definition of a rule under s. 227.01 (13), Stats., without following the statutory administrative rule promulgation process.

On September 2, 2021, officials with the UW System notified the co-chairmen of JCRAR that they had no intention of complying with the directive issued by the joint committee or meeting their statutory responsibilities as contained in the Wisconsin Administrative Rules Law (Chapter 227). The UW System response was not only a rejection of the JCRAR directive of August 3, 2021, but a broader dismissal of the authority of the legislature to exercise its constitutional right to control its delegated authority to state agencies to implement existing state law through the administrative rules procedures codified in Chapter 227 of the Wisconsin State Statutes.

The UW System (similar to other state agencies) has the authority to carry out actions they believe are justified under state statutes, but in taking those actions is generally required to

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comply with the provisions of the Wisconsin Administrative Rules Law (Chapter 227) unless an exemption from rulemaking exists in the law. In Chapter 227, there are 73 detailed exemptions to rulemaking that relieves a state agency from the procedures of the administrative rules law. The current circumstance with the UW System's Covid-19 policies are not covered by any of the 73 exemptions in state law according to an analysis by the Wisconsin Legislative Council.

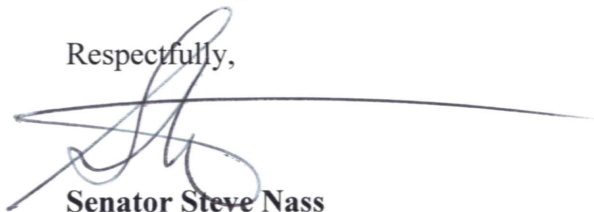
The administrative rules procedures are the explicit mechanism by which the legislature conducts oversight of the delegation of authority to state agencies to implement specific state laws. By law, the legislature has dictated that standing committees and ultimately JCRAR exercises most of the functions required of the legislature under the Wisconsin Administrative Rules Law. JCRAR and the legislature have the legal duty to ascertain that state agencies are complying with state law.

According to an analysis by the Wisconsin Legislative Council, the UW System has the authority to implement Covid-19 mandates on its employees because the Wisconsin Administrative Rules Law provides a specific exemption to rulemaking for such actions. However, the Wisconsin Administrative Rules Law does require the UW System to promulgate an administrative rule (emergency or permanent) to specifically implement or enforce Covid-19 requirements on students and campus visitors.

There now exists a significant dispute between the UW System, the JCRAR, and the legislature in regard to compliance with Wisconsin law and the system's adoption of Covid-19 requirements. Last year, the legislature confronted a similar circumstance with Governor Evers and his Department of Health Services (DHS) regarding their implementation of statewide Covid-19 requirements and it was resolved by taking legal action through a filing with the Wisconsin Supreme Court.

As co-chairman of JCRAR, I now find it necessary to request that legislative leadership commence legal action against the UW System for the purposes of obtaining the system's compliance with the Wisconsin Administrative Rules Law (Chapter 227) regarding their Covid-19 requirements.

Respectfully,

A handwritten signature in blue ink, appearing to read "Steve Nass", with a long horizontal line extending to the right.

Senator Steve Nass
Co-Chairman – JCRAR