



RON TUSLER

STATE REPRESENTATIVE • 3rd ASSEMBLY DISTRICT

**Testimony Before the
Assembly Committee on Education**

on

Assembly Bill 233

April 20, 2017

This bill is simple. ESSA requires all legislatures to provide “meaningful consultation” to its state educational authority.¹ Our Legislature should meet this requirement. We should provide “meaningful consultation” to the Department of Public Instruction regarding its plan. This bill gives us the opportunity to participate.

This bill requires the Senate and Assembly Education Committees to hold a hearing on DPI’s ESSA plan, if any members raise an objection or concern. I would suspect that some objection or concern will be raised as it is such an impactful plan.

After the hearing on objections, DPI has two weeks to respond whether it will modify the ESSA Plan, and if not, an explanation why. This bill has no effect after their reply. DPI has no obligation to change the plan, only to hear and consider the objections or concerns.

This bill will *not* affect submission of Wisconsin’s ESSA plan and jeopardize Federal education funding. DPI’s response to any objections raised by the committees will be returned to us before July 1, 2017, leaving plenty of time for DPI to seek additional input and make any further changes. There will also be more than enough time for gubernatorial review of the ESSA plan before the September deadline for submission to the Department of Education.

Further, this bill is our only chance to produce evidence that we have fulfilled this federal requirement. Further still, I suspect that our committee might be able to use our experience inside and outside of our schools to provide a different perspective that might improve Wisconsin’s plan.

Thank you again for your time and I look forward to answering any questions members of the committee may have.

¹ 20 U.S.C. § 6311(a)(1)(A).

**TESTIMONY ON ASSEMBLY BILL 233:
REQUIRED STATE PLAN FOR ESSA**

Presented to the Assembly Committee on Education

By Michael J. Lancaster

Superintendent of Catholic Schools for the Madison Diocese and WCRIS Board

President

April 20, 2017

On behalf of the Wisconsin Council of Religious & Independent Schools (WCRIS), I thank you for the opportunity to provide testimony for information on Assembly Bill 233 and Wisconsin's state plan under the federal Every Student Succeeds Act (ESSA).

I am the Superintendent of Catholic Schools for the Madison Diocese, which has 46 schools in the 11-county area of southwestern Wisconsin. I also serve as the President of the WCRIS Board of Directors, which represents 600 schools educating 100,000 students and employing more than 6,000 teachers and principals across the state.

WCRIS is dedicated to working closely with the DPI and public schools to foster educational quality in Wisconsin. We have the shared goal of forming engaged, thoughtful citizens, which is achieved when we ensure that every child can perform at grade level and that every teacher is qualified and effective in helping students meet this target.

WCRIS is the official Wisconsin chapter of the Council for American Private Education (CAPE). Through this network we have access to the progress and process in other states. So far, 12 states have turned in their ESSA plans to the U.S. Department of Education. In talking with our counter-parts across the country, it has become clear that Wisconsin is leading the way as a model of consultation and collaboration.

Here's what that path-breaking map looks like: Immediately after ESSA became law in December 2015, WCRIS contacted the DPI to discuss how it would address the federal law's many new provisions for serving private school children.

Over the past 15 months, we have been meeting regularly with DPI staff via an informal stakeholders work group to hammer out the practical application of this very complicated federal law. It has been a collaborative and productive process.

Input from private school representatives has allowed the DPI to anticipate many potential problems and collaborate to solve them before they even occur. For example, the ESSA requires a more stringent consultation process between a private school and a public school district for serving eligible private school children. When developing the form that collects and documents that school districts are in compliance with this requirement, WCRIS offered a wealth of useful suggestions to the DPI for improving the form (see attached), many of which were incorporated.

Archdiocese of Milwaukee

Association of Christian
Schools International

Christian Schools
International

Diocese of Green Bay

Diocese of LaCrosse

Diocese of Madison

Diocese of Superior

Lutheran Church
Missouri Synod
North Wisconsin District

Lutheran Church
Missouri Synod
South Wisconsin District

Wisconsin Association
of Independent Schools

Wisconsin Conference
of Seventh Day Adventists

Wisconsin Evangelical
Lutheran Synod
Northern Wisconsin District

Wisconsin Evangelical
Lutheran Synod
Western Wisconsin District

Wisconsin Evangelical
Lutheran Synod
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District

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Additionally, the WCRIS Board met with DPI Superintendent Tony Evers earlier this year to discuss, among many other issues, the ESSA and the need to continue this collaborative process.

We are grateful for the Legislature's concern about the application of the ESSA and its great potential for improving education in Wisconsin for all children. We agree that more input from stakeholders is better. The Legislature's leadership role is crucial.

However, the May 15 deadline in AB 233 is fast approaching. We hope this new and additional deadline does not thwart the ability of the DPI to continue to collaborate with educators and schools "on the ground" who are being served by the ESSA. We hope AB 233 means that WCRIS and other private school representatives will still be included as partners in this ESSA implementation process.

Finally, we invite legislators to use WCRIS as a resource for any questions you may have about the ESSA, and how it is serving private school children and teachers, as required by law, because we are committed partners in the state's K-12 education infrastructure.

Thank you.



Collection of this information is a requirement of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Public Law 114-95.

Local Educational Agency Name <i>Please Print</i>	Private School Name <i>Please Print</i>
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GENERAL INFORMATION

The Every Student Succeeds Act (ESSA) requires Local Educational Agencies (LEAs) to provide equitable participation to eligible private school children, teachers, and other educational personnel in programs under the Act. The services, materials, or other benefits shall be secular, neutral, and nonideological. 20 U.S.C. §§ 6320(a)(1)-(2) and 7881(a)(1)-(2).

ESSA prohibits the private school from obligating or receiving ESSA funds. The control of funds used to provide equitable services is maintained by the LEA. Materials purchased with the funds are administered by the LEA and remain the property of the LEA. Services shall be provided by an employee of the LEA or through a contract by the LEA with an individual or entity independent of the private school and any religious organization. 20 U.S.C. § 7881(d).

Therefore, ESSA requires that timely and meaningful consultation occur between the LEA and private school officials prior to any decision that affects the opportunities of eligible private school children, teachers, and other educational personnel to participate in programs under the Act, and shall continue throughout the implementation and assessment of activities under this section. The goal of consultation is to reach an agreement between the LEA and appropriate private school officials on how to provide equitable and effective programs for eligible private school children under Title I, Part A; Title II, Part A; Title III, Part A; and Title IV, Part A. 20 U.S.C. §§ 6320(b) and 7881(d).

Services provided by the LEA must be designed to meet the educational needs and supplement the services provided by the private school. In order to fully participate in services, private school officials will need to cooperate with public school officials to determine student eligibility; how the needs of the students will be identified; how the services (including family engagement activities) provided under each Title will meet those needs; and how services will be evaluated. Private school officials may choose not to participate in one or more the Titles under this Act. 20 U.S.C. §§ 6320(b)(1) and 7881(c)(1).

This form lists the required consultation topics to be discussed by the LEA and private school officials, requires the LEA and private school official to identify the Titles the private school will participate in and summarizes the services to be provided by the LEA. DPI's ombudsman will review the consultation form to help ensure equity for private school children, teachers, and other educational personnel.

REQUIRED CONSULTATION TOPICS
 20 U.S.C. §§ 6320(b)(1) and 7881(c)(1)-(2)

The following topics *must* be discussed during the ongoing consultation process.

1. How the LEA will identify the needs of private school children.
2. The method or sources of best available data that the LEA and the private school officials will use to determine the number of private school children from low income families residing in participating public Title I school attendance areas who attend private schools.
3. The services the LEA will offer.
4. How, where, and by whom the services will be provided.
5. When, including the approximate time of day, Title I services will be provided to eligible private school children.
6. How the services provided by the LEA will be assessed and how the results of the assessment will be used to improve those services.
7. The size and scope of equitable services to be provided to the eligible private school children, their families, teachers, and other educational personnel. The amount of funds available for those services and the how that amount is determined from the total amount of funds received by the LEA.
8. How and when the LEA will make decisions about delivery of services, including a thorough consideration and analysis of the views of the private school officials on the provision of services through potential third-party providers.
9. How, if the LEA disagrees with the views of the private school officials on the provisions of services through a contract, the LEA will provide to the private schools, in writing, an analysis of the reasons why the LEA has chosen not to use a contractor.
10. Whether the LEA shall provide services directly or through a separate government agency, consortium, entity, or third-party contractor.
11. Whether the LEA will provide equitable services by a) creating a pool or pools of funds or b) on a school by school basis.
12. Whether to use funds provided under Title I, Part A in coordination with eligible funds available for services to private school children under applicable programs as defined in Title VIII to provide services to eligible private school children participating in programs.
13. If the LEA will transfer funds as allowed under Title V, Section 5103. 20 U.S.C. § 7305b(e)(2).

**PARTICIPATION IN SERVICES AND
SUMMARY OF SERVICES BY TITLE**

For each Title, public and private school officials must:

1. Identify if the private school will participate in services by checking Yes or No; and
2. Summarize the equitable services agreed upon during the consultation that the LEA will provide (either directly or through a contract). It is not acceptable to state, "Services are to be determined."

A response is required for each Title.

LEAs should keep detailed records related the services agreed upon and the process used to determine the services.

Private school officials may choose not to participate in one or more Titles under this Act.

Title I, Part A	Yes <input type="checkbox"/>	No <input type="checkbox"/>
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Summary of equitable services provided by the LEA (directly or through a contract). *Limit response to space provided.*

**PARTICIPATION IN SERVICES AND
SUMMARY OF SERVICES BY TITLE (cont'd)**

Title II, Part A

Yes

No

Summary of equitable services provided by the LEA (directly or through a contract). *Limit response to space provided.*

Title III, Part A

Yes

No

Summary of equitable services provided by the LEA (directly or through a contract). *Limit response to space provided.*

**PARTICIPATION IN SERVICES AND
SUMMARY OF SERVICES BY TITLE (cont'd)**

Title IV, Part A

Yes

No

Summary of equitable services provided by the LEA (*directly or through a contract*).

As of March 2017, the Federal government had not appropriated funds for Title IV, Part A.

**PRIVATE SCHOOL VERIFICATION
Completed by the Private School Official**
20 U.S.C. §§ 6320(b)(5) and 7881(c)(5).

Check one

- The LEA provided consultation before the LEA made any decision(s) that affects private school equitable participation in ESSA services.

- The LEA did not provide consultation with the private school in a timely manner.
Checking this box will alert DPI's ombudsman to provide assistance.

Check one

- The LEA provided us ample time and a genuine opportunity to express our views regarding the topics listed on page one.

- The LEA did not provide us ample time and/or a genuine opportunity to discuss the following topic(s):

 - _____
Identify the number associated with the topic listed on page one.

- Checking this box will alert DPI's ombudsman to provide assistance.**

Check one

- The program design is equitable with respect to eligible private school children.

- The program design is not equitable with respect to eligible private school children.
Checking this box will alert DPI's ombudsman to provide assistance.

Private School Name *Please Print*

School Mailing Address

Name of Private School Representative *Please Print*

Email

School Phone No. *Area Code/No.*

Private School Representative Signature

Date Signed *Month/Day/Year*



**LEA VERIFICATION
Completed by the LEA Official**

Local Educational Agency Name *Please Print*

Local Educational Agency Official *Please Print*

Local Educational Agency Official Signature

Date Signed *Month/Day/Year*





WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
1139 E. Knapp Street, Milwaukee, WI 53202-2828
414-727-WILL; www.will-law.org

Informational Testimony on Assembly Bill 233
By CJ Szafir & Libby Sobic, Wisconsin Institute for Law & Liberty

April 20, 2017

Dear Chairman Thiesfeldt and members of the Assembly Committee on Education,

Thank you for giving us the opportunity to testify. My name is CJ Szafir, Vice President for Policy and Deputy Counsel at the Wisconsin Institute for Law & Liberty (WILL). Also testifying is Libby Sobic, Associate Counsel at WILL. WILL is a not-for-profit law and policy center in Milwaukee that works on, among other issues, education reform in Wisconsin. We appear before you to speak about Assembly Bill 233 for informational purposes only.

ESSA's state plan: Passed by Congress in December 2015 with bipartisan support, the Every Student Succeeds Act (ESSA) is the new – and massive – federal law governing K-12 education, replacing No Child Left Behind. Among the requirements in ESSA is that, in exchange for over \$200 million of federal Title funds, states must submit a state plan to the U.S. Department of Education. This plan will go a long way towards setting education policy for Wisconsin. For example, a state plan must do the following:

- Develop a statewide federal accountability system for public schools and students;
- Define “challenging academic standards” for public schools and students;
- Identify low-performing public schools;
- Determine the state’s “rigorous actions” for intervention in low-performing public schools;
- Assist school districts in identifying and helping children with disabilities, students who are economically disadvantaged, students from each major racial or ethnic group, and children who are English-language learners; and
- Detail the methods to measure teacher and school leader effectiveness.

Wisconsin has decided that it will submit the state plan to the U.S. Department of Education on September 18, 2017. After that, U.S. Secretary of Education Betsy DeVos must either approve or reject the state plan. Once submitted and approved, the state plan will be binding on Wisconsin and dictate K-12 education policy for years to come.

Opportunity to advance education reform: The contents of the plan will be critical, and it presents an important opportunity. Unlike No Child Left Behind, ESSA gives states a wide degree of freedom in determining how they will satisfy the requirements of the state plan. States must adopt certain policies – such as intervening in low-performing schools – but federal law

does not dictate the details of those policies. This flexibility was dramatically increased after the Trump Administration and Congressional Republicans repealed ESSA accountability regulations in February.

In other words, ESSA gives Wisconsin the freedom to customize its implementation of federal law. We can adopt a plan that fits our particular situation and that becomes a vehicle for reform. The legislature must make every effort to ensure that the state plan includes education reform opportunities that will support our diverse education landscape. Other states have begun to show the way.

There are a variety of ways Wisconsin can customize the state plan. Let's consider a few. This committee has already discussed some examples, such as selecting non-academic indicators for the federal accountability system on school quality or student success.

The state plan also requires the State to take "rigorous actions" regarding low-performing schools after a specific time period. This can be a vehicle for empowering families and enhancing educational diversity. "Rigorous action" could include converting the public school into a charter school or replacing the school's leadership. For example, New Mexico, in its state plan, mandates school districts do one of the following actions for any low-performing schools: close the school, close and reopen the school under a charter school operator, create more educational options for parents at the school including public charter, magnet, private, and online learning, or significantly restructure and redesign the school, i.e. staff changes or extending instructional time.

In Florida, the state legislature recently introduced a bill to satisfy the ESSA requirement for "rigorous action" that would incentivize successful charter school operators to open charter schools in areas with low-performing public schools. The chosen charter school operators will have access to a grant program that will help cover costs for things like teachers and transportation, and be able to take-over low-performing public schools.

ESSA also gives school districts and states greater discretion over the spending of Title I funds – federal dollars for low-income children – to improve low-performing schools. This has tremendous opportunity for innovation.

In its state plan, Wisconsin could decide to use the 7% set aside of federal Title I funds to create competitive grants for school districts with low-performing schools. Wisconsin could also decide to direct an additional 3% of federal Title I dollars for competitive grants to school districts that want to provide direct student services, i.e. personalized learning, tutoring, and other instructional programs. Alternatively, the State could use the 3% of federal Title dollars to create a statewide program to give students access to additional courses that their local public school does not provide – which could bolster our existing "Course Options" program.

Delaware's state plan, for instance, distributes a portion of federal Title I funds for school improvement through a hybrid of competitive grants and formula-based allocation. Each low-performing school will receive an allotment based on student enrollment. The school districts

may apply for and receive additional funds that will be allocated through a competitive grant process.

Legislative power relating to ESSA: The state legislature – and members on this committee – can make those things happen. Last year the Supreme Court of Wisconsin, in *Coyne v. Walker*, confirmed the legislature’s vested and preeminent constitutional authority to make education policy. It is unquestionable that the Wisconsin legislature is within its constitutional and statutory power to require legislative oversight of the state plan. Federal law requires that the state plan be crafted with “meaningful consultation” with the legislature and governor. Although this is undefined, federal law has set a floor, not a ceiling. Even if it wanted to (and it does not), Washington D.C. has no power whatsoever to restrict the involvement of state legislatures.

Therefore the state legislature can do more in the drafting of the ESSA state plan. This can include the passage of law that mandates formal review of the plan (such as the bill before you) or dictating certain provisions of the state plan. Other states are doing this.

We are not suggesting any particular approach, as we defer to the wisdom of the legislature. We do hope that anything the legislature does is done with the understanding that it – and not DPI – has the final word with the state plan.

Legal Concerns with DPI: We remain concerned about whether the Department of Public Instruction (DPI) is following state law in the creation of the state plan. According to Chapter 227 of the Wisconsin Statutes, a “rule” is defined as a “*statement of policy . . . which has the effect of law.*” Because the ESSA state plan includes policy decisions that are binding on Wisconsin’s schools and teachers, much of the ESSA state plan falls under this definition. As such, the DPI must go through the rule-making process in advance of submitting the state plan which includes, but is not limited to, submitting a statement of scope, going through passive review to the relevant legislative standing committees, and being published in the administrative register. The Supreme Court of Wisconsin in *Coyne v. Walker* did not exempt the DPI from the Chapter 227 requirement (with the exception of gubernatorial approval). Furthermore, this bill does not absolve DPI of the legal requirements of Ch. 227.

In February, we – along with the Wisconsin Manufacturers & Commerce (WMC) – wrote a letter to State Superintendent of Public Instruction Tony Evers outlining our concerns. If DPI ignores these legal obligations, it invites a legal challenge to the state plan.

Thank you for your time. We are happy to answer any questions you may have.

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Libby Sobiech; 414-727-6372; libby@will-law.org



WISCONSIN MANUFACTURERS & COMMERCE

**TESTIMONY BEFORE THE ASSEMBLY COMMITTEE ON EDUCATION IN SUPPORT OF
ASSEMBLY BILL 233**

Chairman Thiesfeldt and Committee Members:

Thank you for the opportunity to testify today. My name is Lucas Vebber I am the General Counsel and Director of Environmental and Energy Policy at Wisconsin Manufacturers & Commerce (WMC). WMC is the state's chamber of commerce and manufacturers' association. With approximately 3,800 members, we are the largest business trade association in Wisconsin. WMC represents members from all over Wisconsin of all sizes and in every sector of the state's economy. I am here today to testify in support of Assembly Bill 233.

Administrative agencies are creatures of the Legislature. They are only able to do those things that the Legislature has authorized them to do. The Legislature, inherent in its authority granted under Article IV, Section 1, of the Wisconsin Constitution, has oversight authority over executive branch agencies, including the Department of Public Instruction (DPI), to make certain that agencies do not exceed the authority given to them and that the laws are properly enforced.

This legislation sets some very clear guidelines within which the Legislature is proposing to exercise their oversight authority. This legislation requires DPI to submit its proposed state plan under the federal Every Student Succeeds Act to the Assembly and Senate Education Committees. Members of those committees may object to the plan, and this legislation provides a process for those objections to be resolved.

This legislation improves oversight, increases transparency, and certainly helps to meet the federal law requirement that DPI have meaningful consultation with the Legislature and the Governor. The Legislature, DPI and the General Public will all benefit from clearly laying out these additional oversight protocols. For these reasons, WMC supports this legislation before you today.

It is important to note, however, that this legislation merely enhances the Legislature's already existing oversight capabilities. It does not, in any way, absolve DPI of their ongoing obligations to comply with Wisconsin's Administrative Procedures law, contained in Chapter 227 of the statutes. All state agencies are required to comply with Chapter 227 whenever they regulate.

Wis. Stat. § 227.01 (13), 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."

Pursuant to Wis. Stat. § 227.10 (1), every State "agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute."

Wisconsin courts have interpreted Wis. Stat. § 227.10 (1) to mean that "any statement of general policy or interpretation of a statute adopted to govern enforcement or administration of that statute must be promulgated as a rule." (see Cholvin v. DHFS, 2008 WI App 127, ¶21).

Pursuant to Wis. Stat. § 227.10 (2m), “[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3.”

Any aspect of the state plan that would qualify as a rule under Wis. Stat. § 227.01 (13) must be promulgated as a rule. Steps to promulgation include, but are not limited to:

- The preparation of a scope statement (Wis. Stat. § 227.135 (1));
- Following appropriate rule drafting protocols (Wis. Stat. § 227.14 (1));
- Preparation of an economic impact analysis (Wis. Stat. § 227.137 (2));
- Review by the Legislative Council Rules Clearinghouse (Wis. Stat. § 227.15 (1));
- A public hearing (Wis. Stat. § 227.16 (1));
- An initial regulatory flexibility analysis (Wis. Stat. § 227.17 (3)(f));
- A comparison of similar provisions in neighboring states (Wis. Stat. § 227.14 (2)(a)4);
- Submission to the Legislature for their review (Wis. Stat. § 227.19).

Should any portion of the State Plan that DPI is now working on qualify as a rule, DPI must first prepare a scope statement before performing any activity related to drafting that plan. Pursuant to Wis. Stat. § 227.135 (2), “No state employee or official may perform any activity in connection with the drafting of a proposed rule except for an activity necessary to prepare the statement of the scope of the proposed rule until the governor and the individual or body with policy-making powers over the subject matter of the proposed rule approve the statement.” I note that under the Coyne v. Walker decision of the Wisconsin Supreme Court, DPI is not currently required to obtain gubernatorial approval of either scope statements or final draft rules.

Further, state agencies must have authority delegated to them by the Legislature in order to commence a rulemaking proceeding. This delegation must be *explicit*, general authority is not good enough to grant regulatory power. Pursuant to Wis. Stat. § 227.11 (2)(a)2, “A statutory provision describing the agency’s general powers or duties does not confer rule-making authority on the agency or augment the agency’s rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.”

Failure to follow the Chapter 227 process would put the state plan at risk of being invalid as an unpromulgated rule. In fact, courts would be *required* to strike such a plan down as invalid. Pursuant to Wis. Stat. 227.40 § (4)(a), “the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures” (emphasis added).

This legislation enhances public input and puts clear deadlines and expectations in place with which the Legislature can exercise their oversight powers. This will lead to more transparency and better public involvement and collaboration in this process. For these reasons WMC supports this legislation. Today we also remind DPI, and the members of this committee who are charged with an important role in establishing Wisconsin education policy, that many elements of DPI’s ESSA plan are almost certainly required to be promulgated as a rule in accordance with the requirements of Chapter 227, and those elements of their plan will not be valid unless and until they do so.