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**WISCONSIN LEGISLATIVE COUNCIL  
INFORMATION MEMORANDUM**

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**Applicability of 2011 Wisconsin Act 21 to the State  
Superintendent of Public Instruction:  
*Coyne v. Walker***

By orders issued on October 30, 2012 and November 26, 2012, the Dane County Circuit Court held that 2011 Wisconsin Act 21, relating to administrative rule-making by state agencies, is unconstitutional as it applies to rule-making by the State Superintendent of Public Instruction. Specifically, the court held that the provisions in Act 21 relating to approvals by the Governor and the Secretary of the Department of Administration (DOA) violate the Wisconsin Constitution and voided those provisions as they apply to rule-making by the State Superintendent. This Information Memorandum briefly describes Act 21 and the court's decision in *Coyne v. Walker*, Case No. 11-CV-4573.

**2011 WISCONSIN ACT 21**

2011 Wisconsin Act 21, which took effect on June 8, 2011, made several changes to the process used by state agencies to promulgate administrative rules. The Act requires approval of a scope statement by the Governor before an agency may publish the scope statement or proceed with drafting the rule, and the Act requires approval of a final draft rule by the Governor before the rule is submitted to the Legislature. The requirements relating to the Governor's approval of scope statements and final draft rules also apply to emergency rules.

In addition, the Act requires agencies to prepare an economic impact analysis, which includes information on the economic effect of the rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole. If an economic impact analysis indicates that a total of \$20,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, local governmental units, and individuals as a result of the rule, DOA must review the proposed rule and issue a report. The agency may not submit a rule to the Legislature for review until the agency receives a copy of DOA's report and approval of the DOA Secretary.

Lastly, the Act made changes to the legislative review of rules. Under the Act, if a rule is received by the Legislature after the last day of the Legislature's final general business floorperiod in the biennial session, the rule is considered received on the first day of the next regular session of the Legislature, unless the presiding officers of both houses direct referral of the rule before that day. The Act also requires every rule to be referred to the Joint Committee

for Review of Administrative Rules (JCRAR) following review by standing committees in each house of the Legislature.

For additional information on Act 21, refer to “Changes in Laws Relating to Administrative Rule-Making,” Information Memorandum 2011-15 (August 30, 2011), at: [http://legis.wisconsin.gov/lc/publications/im/IM2011\\_15.pdf](http://legis.wisconsin.gov/lc/publications/im/IM2011_15.pdf).

### **COYNE V. WALKER**

By orders issued on October 30, 2012 and November 26, 2012, the Dane County Circuit Court held that certain provisions of 2011 Wisconsin Act 21 are unconstitutional and void under Wis. Const., art. X, s. 1., as the Act applies to rule-making by the State Superintendent, who heads the Department of Public Instruction (DPI).<sup>1</sup> Wisconsin Constitution, Article X, Section 1, provides, in part, that “[t]he supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law.”

The circuit court began its analysis with a discussion of *Thompson v. Craney*, 199 Wis. 2d 674 (1996), in which the Wisconsin Supreme Court held that the Legislature may not provide equal or superior authority over public instruction to officers who are not subordinate to the State Superintendent. In *Thompson*, the Supreme Court found that the “other officers” referenced in Wis. Const., art. X, s. 1., are officers who are subordinate to the State Superintendent. Consequently, the Wisconsin Supreme Court concluded that a state law that created a state Education Commission, a state Department of Education, and the position of state Secretary of Education unconstitutionally transferred the powers of the State Superintendent to appointed “other officers” at the state level who were not subordinate to the State Superintendent.

Following its discussion of *Thompson*, the circuit court found that rule-making is an important method used by the State Superintendent to supervise public instruction and that Act 21 provides the Governor and, in certain circumstances, the DOA Secretary, the authority to prevent the State Superintendent from rule-making. Specifically, the court found that the requirement for approval by the Governor of scope statements and final draft rules provides the Governor with the authority to prevent rule-making. Similarly, the court noted that Act 21 requires a DOA report and approval by the DOA Secretary in circumstances in which an economic impact analysis indicates \$20,000,000 or more in costs and, in doing so, provides the DOA Secretary with authority to prevent rule-making in those circumstances. Because the Governor and DOA Secretary can prevent rule-making by the State Superintendent, the court found that Act 21 places the Governor and the DOA Secretary in a position that is superior to the State Superintendent in supervising public instruction.

Therefore, under *Thompson*, the circuit court held that the provisions in Act 21 relating to approvals by the Governor and DOA Secretary violate the Wisconsin Constitution as applied to rule-making by the State Superintendent. The court voided, and permanently enjoined the implementation of, the provisions in the Act relating to approvals by the Governor and DOA

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<sup>1</sup> The court’s decision in *Coyne v. Walker* does not affect the applicability of Act 21 to rule-making by other state agencies.

Secretary as they apply to rule-making by the State Superintendent.<sup>2</sup> The provisions in the Act relating to the legislative review of rules were not subject to the court's final order and remain in effect as applied to all agencies, including DPI.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Jessica Karls-Ruplinger, Scott Grosz, and Pam Shannon, Senior Staff Attorneys, on December 18, 2012.

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<sup>2</sup> The specific SECTIONS of Act 21 that were voided by the court with respect to the State Superintendent were SECTIONS 4, 5, 6, 21, 26, 27, 32, and 61.