

FILED
05-13-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV001127

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

WISCONSIN STATE LEGISLATURE,

Plaintiff-Counterclaim-Defendant

v.

Case No. 24-CV-1127

WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION and TONY EVERS,

Defendants-Counterclaim-Plaintiffs

v.

SENATOR HOWARD MARKLEIN and
REPRESENTATIVE MARK BORN, in
their official capacities as chairs of the
joint committee on finance,

Counterclaim-Defendants.

ANSWER AND COUNTERCLAIM

ANSWER

Defendants hereby answer Plaintiff's complaint and counterclaim as follows:

1. ADMIT that in February 2024 the Legislature passed 2023 S.B. 971 (the "Bill"); ALLEGE that the Bill speaks for itself and DENY any allegations in paragraph 1 inconsistent with the Bill.

2. ALLEGE that the Bill speaks for itself and DENY any allegations in paragraph 2 inconsistent with the Bill.

3. ALLEGE that the Bill speaks for itself and DENY any allegations in paragraph 3 inconsistent with the Bill.

4. ADMIT that the Governor exercised his constitutional authority to approve the Bill in part, except DENY that the Governor merely "purported" to exercise his partial veto authority over the Bill.

5. Paragraph 5 consists of legal conclusions to which no response is required; ALLEGE that the cited constitutional provision speaks for itself and DENY any allegation in paragraph 5 inconsistent with that provision.

6. DENY the allegation in the first sentence of paragraph 6. As to the second sentence, ALLEGE that the Bill speaks for itself and DENY any allegations in paragraph 6 inconsistent with the Bill.

7. Paragraph 7 consists of legal conclusions to which no response is required; ALLEGE that the cited constitutional provision speaks for itself and DENY any allegation in paragraph 7 inconsistent with that provision.

8. ADMIT the allegations in paragraph 8.

9. DENY the allegations in paragraph 9.

10. DENY the allegations in paragraph 10.

11. DENY the allegations in paragraph 11.

12. ALLEGE that the partly approved version of the Bill speaks for itself and DENY any allegations in paragraph 12 inconsistent with that Bill.

13. ALLEGE that the partly approved version of the Bill speaks for itself and DENY any allegations in paragraph 13 inconsistent with that Bill.

14. Paragraph 14 consists of an ambiguous factual allegation to which no response is possible and therefore DENY; ALLEGE that DPI administers various literacy programs.

15. Defendants lack personal knowledge regarding the intentions of the Legislature and the Joint Committee on Finance and so DENY the allegations in the first two clauses of the first sentence of paragraph 15; as for the final clause of the first sentence and second sentence, ALLEGE that the partly approved version of the Bill speaks for itself and DENY any allegations inconsistent with that Bill.

16. ADMIT the Legislature's composition and mailing address; ALLEGE that the cited constitutional provision speaks for itself and DENY any allegation in paragraph 16 inconsistent with that provision.

17. ADMIT that the Wisconsin Department of Public Instruction (DPI) is a state agency and that its mailing address is 125 South Webster Street, Madison, Wisconsin. ALLEGE that DPI's powers and duties are set forth in various constitutional and statutory provisions and DENY any allegations in paragraph 17 that are inconsistent with those provisions.

18. ADMIT that Tony Evers is Wisconsin's 46th Governor and his mailing address is 115 East State Capitol, Madison, Wisconsin. ALLEGE that the cited constitutional provision speaks for itself and DENY any allegation in paragraph 18 inconsistent with that provision.

19. Paragraph 19 consists of legal conclusions to which no response is required.

20. Paragraph 20 consists of legal conclusions to which no response is required.

21. ADMIT the first sentence of paragraph 21. As to the second sentence, ADMIT that, during the biennial budget process, JCF passed a motion designated Motion #103¹; ALLEGE that the motion speaks for itself

¹ Senator Marklein and Representative Born, *Public Instruction, Omnibus Motion*, https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2023/2023_06_13/001_department_of_public_instruction/motion_103_omnibus_motion.

and DENY any allegation in paragraph 21 that is inconsistent with that motion.

22. ALLEGE that the motion referenced in paragraph 22 speaks for itself and DENY any allegation in paragraph 22 that is inconsistent with that motion. ADMIT that 2023 Wis. Act 20 was published on July 20, 2023; ALLEGE that this law speaks for itself and DENY any allegation in paragraph 22 that is inconsistent with this law.

23. ALLEGE that 2023 Wis. Act 20 speaks for itself and DENY any allegation in paragraph 23 that is inconsistent with this law; as for whether this law had “bipartisan support,” that factual allegation is vague and ambiguous and therefore no response is possible.

24. ALLEGE that 2023 Wis. Act 20 speaks for itself and DENY any allegation in paragraph 24 that is inconsistent with this law.

25. ALLEGE that 2023 Wis. Act 20 speaks for itself and DENY any allegation in paragraph 25 that is inconsistent with this law.

26. ALLEGE that 2023 Wis. Act 20 speaks for itself and DENY any allegation in paragraph 26 that is inconsistent with this law.

27. ADMIT the allegations in paragraph 27.

28. ADMIT that the biennial budget bill appropriated \$50 million for DPI for the purpose of funding a literacy program; ALLEGE that the entire Legislature appropriated this money and DENY that JCF itself did so.

ALLEGE that the Bill² speaks for itself and DENY any allegation in paragraph 28 that is inconsistent with the Bill.

29. ALLEGE that the Bill speaks for itself and DENY any allegation in paragraph 29 that is inconsistent with the Bill.

30. ALLEGE that the Bill speaks for itself and DENY any allegation in paragraph 30 that is inconsistent with the Bill.

31. ADMIT the allegations in paragraph 31.

32. ADMIT the allegations in paragraph 32.

33. ADMIT the allegations in paragraph 33.

34. ADMIT the allegations in paragraph 34.

35. ADMIT the allegations in paragraph 35, except DENY that the Governor merely “purported” to exercise his partial veto authority over the Bill.

36. ADMIT that the Governor’s partial veto message of 2023 Act 100 contains the quoted passages; ALLEGE that this entire message speaks for itself and DENY any allegation inconsistent with that message.

37. ADMIT the allegations in paragraph 37, except DENY that the Governor merely “purported” to exercise his partial veto authority in this manner.

² Again, the “Bill” refers to 2023 S.B. 971.

38. ADMIT the allegations in paragraph 38, except DENY that the Governor merely “purported” to exercise his partial veto authority in this manner.

39. ADMIT the allegations in paragraph 39, except DENY that the Governor merely “purported” to exercise his partial veto authority in this manner.

40. ADMIT the allegations in paragraph 40.

41. ADMIT the allegations in paragraph 41.

42. ADMIT the allegations in paragraph 42.

43. ALLEGE that 2023 Wis. Act 100 speaks for itself and DENY any allegations in paragraph 43 inconsistent with that law.

44. DENY the allegations in paragraph 44; ALLEGE that DPI administers various literacy programs.

45. ALLEGE that 2023 Wis. Act 100 speaks for itself and DENY any allegations in paragraph 43 inconsistent with that law; DENY that following an enacted law, as partially vetoed by the Governor, could somehow be “unlawful.”

46. ADMIT that, on March 7, 2024, DPI submitted to JCF a request for the release of funds under Wis. Stat. § 13.101; ALLEGE that this request speaks for itself and DENY any allegation in paragraph 46 inconsistent with that request.

47. ALLEGE that DPI's March 7, 2024, request and 2023 S.B. 971 speak for themselves and DENY any allegation in paragraph 47 inconsistent with them.

48. Defendants lack personal knowledge regarding how JCF might "be assured" and therefore DENY the allegations in paragraph 48.

49. Paragraph 49 consists of legal conclusions to which no response is required; ALLEGE that the relevant statutory provisions speak for themselves and DENY any allegations inconsistent with those provisions.

50. ADMIT that funds have already been appropriated for DPI for the purpose of funding a literacy program; Defendants otherwise lack personal knowledge regarding what JCF "would" do and therefore DENY the allegations in paragraph 50.

51. DENY the allegations in paragraph 51.

52. Defendants incorporate their responses to paragraphs 1 through 51.

53. Paragraph 53 consists of legal conclusions to which no response is required.

54. DENY the allegations in paragraph 54.

55. DENY the allegations in paragraph 55.

56. Paragraph 56 consists of legal conclusions to which no response is required; ALLEGE that the cited constitutional provisions speak for themselves and DENY any allegation inconsistent with those provisions.

57. Paragraph 57 consists of legal conclusions to which no response is required; ALLEGE that the cited constitutional provisions and judicial decisions speak for themselves and DENY any allegation inconsistent with those provisions and decisions.

58. Paragraph 58 consists of legal conclusions to which no response is required; ALLEGE that the cited judicial decisions speak for themselves and DENY any allegation inconsistent with those decisions.

59. Paragraph 59 consists of legal conclusions to which no response is required; ALLEGE that the cited constitutional provisions and judicial decisions speak for themselves and DENY any allegation inconsistent with those provisions and decisions.

60. ADMIT that funds were already appropriated for DPI for the purpose of funding a literacy program; otherwise ALLEGE that 2023 Wis. Acts 20 and 100 speak for themselves and DENY any allegations in paragraph 60 inconsistent with those laws.

61. ALLEGE that 2023 Wis. Act 100 speaks for itself and DENY any allegations in paragraph 60 inconsistent with that law.

62. DENY the allegations in paragraph 62.

63. The first sentence of paragraph 63 contains vague and ambiguous factual allegations to which no response is possible. As to the second and third sentences in paragraph 63, ADMIT the allegations but DENY that they are either relevant to or determinative of whether 2023 Wis. Act 100 is an “appropriation bill.” As to the final sentence, ALLEGE that the referenced constitutional provision speaks for itself and DENY any allegation inconsistent with that provision.

64. ADMIT that the Governor exercised his partial veto power over 2023 Wis. Act 100; DENY that the quoted passage of his veto message is relevant to or determinative of whether that partial veto was lawful.

65. ALLEGE that the referenced constitutional provision speaks for itself and DENY any allegation inconsistent with that provision.

66. DENY the allegations in paragraph 66.

67. DENY the allegations in paragraph 67.

68. DENY the allegations in paragraph 68.

69. ADMIT that the Bill was not passed with a roll-call vote; otherwise DENY the allegations in the first and second sentences of paragraph 69. As for the last two sentences, they consist of legal conclusions to which no response is required; ALLEGE that the cited judicial decision speaks for itself and DENY any allegation inconsistent with that decision.

70. DENY the allegations in paragraph 70.

71. DENY that the Legislature is entitled to any of its requested relief.

AFFIRMATIVE DEFENSES

1. If the Governor's partial veto of 2023 Wis. Act 100 is found to be invalid, then the Bill should be considered not to have been signed by the Governor and the Governor should be granted an opportunity to decide whether to sign the bill in full or veto it in full. *See State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622, 624–25 (1936).

COUNTERCLAIM

1. Defendants bring this counterclaim against the Wisconsin State Legislature and the co-chairs of its Joint Committee on Finance (JCF) seeking a declaration that the Legislature and JCF are improperly withholding nearly \$50 million that was appropriated for the Department of Public Instruction (DPI) for the purpose of funding a literacy program.

2. Through the biennial budget bill, 2023 Wis. Act 19, the Legislature and Governor set aside \$50 million for DPI for the purpose of funding a literacy program.

3. But rather than deliver that \$50 million in appropriated money to DPI, the Legislature instead credited it to an account controlled by the Joint Committee on Finance.

4. JCF apparently purports to retain statutory discretion under Wis. Stat. § 13.101(3) regarding whether to release that appropriated money to DPI and, in fact, has released almost none of that money to DPI despite DPI's request.

5. JCF's delay in releasing this appropriated money to DPI is unlawful for two alternative reasons.

6. First, as a statutory matter, the provision on which JCF apparently relies for its discretion over the \$50 million—Wis. Stat. § 13.101(3)—does not grant it discretion over this money. That provision

grants JCF discretion only over money intended to supplement agency appropriations due to “unforeseen emergencies” or similar circumstances. This case involves the opposite: money set aside in the biennial budget for a specific purpose that the Legislature plainly foresaw.

7. Second, as a constitutional matter, if Wis. Stat. § 13.101(3) did grant JCF discretion over whether to release this \$50 million to DPI, this result would be unconstitutional. Separation of powers principles prevent the legislative branch from exercising a legislative veto over the crediting of already-appropriated money to its intended executive branch recipient. Treating Wis. Stat. § 13.101(3) as permitting JCF to delay in releasing this money to DPI would amount to an unconstitutional legislative veto.

8. DPI therefore is legally entitled to this already-appropriated \$50 million and requests a declaration to that effect.

PARTIES

9. Defendant and Counterclaim-Plaintiff Wisconsin Department of Public Instruction is a state agency led by the State Superintendent of Public Instruction, an independent constitutional officer with the powers and duties set forth in, *inter alia*, Wis. Const. art. X, 1, and Wis. Stat. ch. 115. Its mailing address is 125 South Webster Street, Madison, Wisconsin.

10. Defendant and Counterclaim-Plaintiff Tony Evers (“Governor”) is the 46th Governor of the State of Wisconsin. Wis. Const. art. V, § 1. His mailing address is 115 East State Capitol, Madison, Wisconsin.

11. Pursuant to Wis. Stat. § 165.25(1m) and Wis. Stat. § 14.11(1), the Governor has requested that the Department of Justice appear for and represent these state entities and officials in the prosecution of this counterclaim.

12. Plaintiff and Counterclaim-Defendant Wisconsin State Legislature is the legislature of the State of Wisconsin. *See* Wis. Const. art. IV. The Legislature is composed of the Wisconsin State Senate and the Wisconsin State Assembly. Its mailing address is 2 East Main Street, Madison, Wisconsin.

13. Counterclaim-Defendants Senator Howard Marklein and Representative Mark Born are the Co-Chairs of JCF. They are named in their official capacities. Senator Marklein’s mailing address is Room 316 East, State Capitol, PO Box 7882, Madison, WI 53707. Representative Born’s mailing address is Room 308 East, State Capitol, PO Box 8952, Madison, WI 53708.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action under Wis. Stat. § 802.07 because Defendants have counterclaims upon which a judgment may be had.

15. This Court has jurisdiction over this action under Wis. Stat. § 806.04 because Defendants seek a declaratory judgment.

16. Venue in this Court is proper pursuant to Wis. Stat. § 801.50(2)(a) because the claims at issue here arose in Dane County.

FACTUAL ALLEGATIONS

17. On June 30, 2023, the Legislature passed its biennial budget bill for fiscal years 2023–24 and 2024–25, which became 2023 Wis. Act 19 after the Governor’s signature (and partial veto).

18. During the budget process, and before the Legislature and the Governor enacted 2023 Wis. Act 19, JCF passed Motion #103. That budget motion addressed various budget items relevant to DPI.³

19. Item 7 in the Motion read: “Early Literacy and Reading Improvement (Paper #638). Place \$50,000,000 GPR in the Joint Finance Committee supplemental appropriation for a literacy program.”

³ Senator Marklein and Representative Born, *Public Instruction, Omnibus Motion*, https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2023/2023_06_13/001_department_of_public_instruction/motion_103_omnibus_motion.

20. In the Legislative Fiscal Bureau’s summary of 2023 Wis. Act 19, and specifically in its description of “Joint Committee on Finance Appropriations for Agency Supplements,” it described this \$50 million as “reserved funding” designated for the “Public Instruction” agency in fiscal year 2023–24 for the “Purpose” of “Literacy.”⁴

21. 2023 Wis. Act 19 allocated roughly \$213 million to JCF’s general purpose revenue funds general program supplementation account under Wis. Stat. § 20.865(4)(a).

22. Included in this \$213 million was the \$50 million that Act 19 had “reserved” for DPI for the purpose of funding a literacy program.

23. On November 22, 2023, DPI sent to JCF a request that JCF release, into DPI’s spending appropriation under Wis. Stat. § 20.255(1)(a), \$336,400 of the \$50 million that Act 19 had “reserved” for a “literacy program.”

24. Specifically, DPI requested this \$336,400 to (1) cover the employment costs associated with the director position that would oversee an office of literacy called the Wisconsin Reading Center, a new office within DPI created by 2023 Wis. Act 20; and (2) provide stipends for members of the new Council on Early Literacy Curricula, also created by 2023 Wis. Act 20.

⁴ Legislative Fiscal Bureau, *Summary of Provisions 2023 Wisconsin Act 19*, https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/102_summary_of_provisions_2023_act_19_july_2023_entire_document.pdf (PDF page 256–57).

25. On December 5, 2023, JCF partly approved that request, and \$327,400 was credited to DPI's spending appropriation under Wis. Stat. § 20.255(1)(a).

26. On February 29, 2024, the Governor signed 2023 Senate Bill 971 with partial vetoes, which, upon enactment, became 2023 Wis. Act 100.

27. On March 7, 2024, DPI sent to JCF a request that JCF release the remaining \$49,672,600 to DPI's new spending appropriation under Wis. Stat. § 20.255(1)(fc), which had been created by 2023 Wis. Act 100.

28. Specifically, DPI requested this \$49,672,600 to "support the Office of Literacy and to implement the literacy programs created under 2023 Act 20."

29. To date, JCF has not released any of the remaining \$49,672,600 to DPI.

CLAIM FOR RELIEF

COUNT I: DECLARATORY JUDGMENT UNDER WIS. STAT. § 806.04 THAT JCF IS IMPROPERLY WITHHOLDING THE REMAINING \$49,672,600 THAT WAS APPROPRIATED FOR DPI FOR THE PURPOSE OF FUNDING A LITERACY PROGRAM.

30. Defendants incorporate and reallege paragraphs 1 through 29 of their counterclaim.

31. Any court of record in this State is authorized to enter a declaratory judgment declaring that a statutory provision, or an application of a statutory provision, is unconstitutional. *See* Wis. Stat. § 806.04(1). Further

relief based on a declaratory judgment may also be granted whenever necessary or proper. *See* Wis. Stat. § 806.04(8).

32. Through 2023 Wis. Act 19, the Legislature and Governor set aside \$50 million for DPI for the purpose of funding a literacy program.

33. At least two spending appropriations authorize DPI to spend appropriated money on literacy programs: (1) Wis. Stat. § 20.255(1)(a), which pre-dated 2023 Wis. Act 100; and (2) Wis. Stat. § 20.255(1)(fc), which was created by 2023 Wis. Act 100.

34. The Legislature has therefore completed the two necessary steps for appropriating money: (1) through Act 19, it set aside \$50 million in public funds for DPI for funding a literacy program; and (2) through Wis. Stat. §§ 20.255(1)(a) and (1)(fc), it authorized DPI to spend public funds for that purpose.

35. The Legislature itself and the Legislative Reference Bureau have described this \$50 million as “appropriated” money. *See* Compl. ¶¶ 50 (referring to relevant funds as “already appropriated”), 60 (describing “funds already appropriated in the biennial budget bill”); Walsh Aff. Ex. A (referring to “money that, under 2023 Act 19, was appropriated . . . for purposes of a literacy program”).

36. But even though this \$50 million appropriation has been completed, almost all the appropriated money still resides in JCF's account under Wis. Stat. § 20.865(4)(a).

37. JCF has so far declined to release to DPI the remaining \$49,672,600, apparently on the basis that JCF retains statutory discretion under Wis. Stat. § 13.101(3) to decide whether to release that money to DPI.

38. JCF's delay in releasing this \$49,672,600 to DPI is unlawful for two alternative reasons.

39. First, the statute on which JCF apparently relies to justify withholding the \$49,672,600 from DPI—Wis. Stat. § 13.101(3)—provides that JCF “may supplement, from the appropriations under s. 20.865(4), the appropriation of any department, board, commission or agency, which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made.”

40. The \$49,672,600 at issue does not fall within Wis. Stat. § 13.101(3)'s grant of statutory discretion because that money is not a supplement to agency appropriations that are “insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made.”

41. Act 19 intentionally and with foresight set aside \$50 million for DPI for the purpose of funding a literacy program. 2023 Act 20, passed only two weeks after Act 19, created those programs, and so DPI's need for this money is not an "unforeseen emergency."

42. Accordingly, JCF does not have statutory authority under Wis. Stat. § 13.101(3) to withhold the remaining \$49,672,600 from DPI.

43. Second, and alternatively, if Wis. Stat. § 13.101(3) did grant JCF discretion over whether to release the remaining \$49,672,600 to DPI, that discretion would be unconstitutional.

44. Once the Legislature appropriates money by law, constitutional separation of powers principles prevent the legislative branch from retaining further authority over whether or how that appropriated money is spent (unless the full Legislature passes another law).

45. Here, the Legislature's actions appropriated \$50 million for DPI for the purpose of funding a literacy program.

46. So, if Wis. Stat. § 13.101(3) granted JCF statutory discretion over whether to release that already-appropriated money to DPI upon DPI's request, that statute would permit JCF to exercise an unconstitutional legislative committee veto over the expenditure of already-appropriated money.

47. Constitutional separation of powers principles require JCF, upon DPI's request, to release to DPI the remaining \$49,672,600 that the Legislature already appropriated for DPI for the purpose of funding a literacy program.

48. JCF's constitutional obligation to release the already-appropriated \$49,672,600 to DPI is further illustrated by JCF's lack of constitutional authority to itself appropriate this money.

49. The constitutional lawmaking procedures of bicameralism and presentment, considered together with Wis. Const. art. VIII, § 2, mean that only the full Legislature can appropriate money (subject to the Governor's partial veto power).

50. But if JCF had discretion under Wis. Stat. § 13.101(3) to release money (or not) to executive entities upon their request, JCF would effectively be appropriating that money itself. Because JCF cannot itself appropriate money and must instead effectuate the full Legislature's appropriations, JCF must instead operate as a "pass-through" entity that lacks discretion over whether to release already-appropriated money to executive agencies upon their request.

PRAYER FOR RELIEF

WHEREFORE, Defendants request the following relief:

- A. A declaration that the remaining \$49,672,600 that was appropriated for DPI for the purpose of funding a literacy program must be credited to DPI's spending appropriation under either Wis. Stat. § 20.255(1)(fc) (if the Governor's partial veto of 2023 Wis. Act 100 is upheld) or Wis. Stat. § 20.255(1)(a) (if the Governor's partial veto of 2023 Wis. Act 100 is invalidated and the law does not take effect).
- B. A declaration that Wis. Stat. § 13.101(3) does not grant JCF discretion over whether to release this \$49,672,600 to DPI upon DPI's request.
- C. Alternatively, if Wis. Stat. § 13.101(3) did grant JCF discretion over whether to release this \$49,672,600 to DPI, a declaration that such statutory discretion would amount to an unconstitutional legislative veto as applied to these circumstances.

Dated this 13th day of May 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by Colin T. Roth

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed an Answer and Counterclaim with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of May 2024.

Electronically signed by Colin T. Roth

COLIN T. ROTH

Assistant Attorney General