

**THE MILWAUKEE PARENTAL CHOICE  
PROGRAM: A PIONEER FOR SCHOOL CHOICE  
PROGRAMS NATIONWIDE**

---

---

**HEARING**

BEFORE THE

COMMITTEE ON  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

JULY 20, 2015

Available via the World Wide Web: <http://www.fdsys.gov/>

Printed for the use of the  
Committee on Homeland Security and Governmental Affairs



U.S. GOVERNMENT PUBLISHING OFFICE

21-259 PDF

WASHINGTON : 2016

---

For sale by the Superintendent of Documents, U.S. Government Publishing Office  
Internet: [bookstore.gpo.gov](http://bookstore.gpo.gov) Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

RON JOHNSON, Wisconsin *Chairman*

JOHN McCAIN, Arizona

ROB PORTMAN, Ohio

RAND PAUL, Kentucky

JAMES LANKFORD, Oklahoma

MICHAEL B. ENZI, Wyoming

KELLY AYOTTE, New Hampshire

JONI ERNST, Iowa

BEN SASSE, Nebraska

THOMAS R. CARPER, Delaware

CLAIRE McCASKILL, Missouri

JON TESTER, Montana

TAMMY BALDWIN, Wisconsin

HEIDI HEITKAMP, North Dakota

CORY A. BOOKER, New Jersey

GARY C. PETERS, Michigan

KEITH B. ASHDOWN, *Staff Director*

COURTNEY J. ALLEN, *Counsel*

GABRIELLE A. BATKIN, *Minority Staff Director*

JOHN P. KILVINGTON, *Minority Deputy Staff Director*

LAURA W. KILBRIDE, *Chief Clerk*

LAUREN M. CORCORAN, *Hearing Clerk*

# CONTENTS

Opening statements:	Page
Senator Johnson .....	1
Prepared statements:	
Senator Johnson .....	37

## WITNESS

MONDAY, JULY 20, 2015

Justice Shorter, Former MPCP Student and Graduate of Messmer High School, Washington, D.C. ....	4
Diana Lopez, Former MPCP Student and Graduate of St. Anthony High School, Milwaukee, WI .....	6
Brother Robert Smith, Former Principal, Messmer High School, Milwaukee, WI .....	8
John F. Witte, Professor Emeritus, University of Wisconsin-Madison .....	9
Richard D. Komer, Senior Attorney, Institute for Justice .....	12
Henry Tyson, Principal, St. Marcus Lutheran School, Milwaukee, WI .....	15

## ALPHABETICAL LIST OF WITNESSES

Komer, Richard D.:	
Testimony .....	12
Prepared statement .....	81
Lopez, Diana:	
Testimony .....	6
Prepared statement .....	41
Shorter, Justice:	
Testimony .....	4
Prepared statement .....	39
Smith, Brother Robert:	
Testimony .....	8
Prepared statement .....	43
Tyson, Henry:	
Testimony .....	15
Witte, John F.:	
Testimony .....	9
Prepared statement .....	45

## APPENDIX

Statements submitted for the Record from:	
American Association of School Administrators .....	95
American Association of University Women .....	97
American Federation of Teachers .....	99
Americans United .....	101
Baptist Joint Committee .....	106
Disability Rights Wisconsin .....	107
The Institute for Science and Human Values .....	109
Erin Miller .....	114
National Association of Secondary School Principals .....	116
The National Coalition for Public Education .....	118
David Pinno .....	123
Cheryle Rebholz .....	124
Secular Coalition for America .....	126
Stop Special Needs Vouchers Wisconsin .....	129

IV

	Page
Statements submitted for the Record from—Continued	
Survival Coalition .....	131
Wisconsin Institute for Law and Liberty, Inc. ....	133

**THE MILWAUKEE PARENTAL CHOICE  
PROGRAM: A PIONEER FOR SCHOOL CHOICE  
PROGRAMS NATIONWIDE**

---

**MONDAY, JULY 20, 2015**

U.S. SENATE,  
COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 5 p.m., at St. Marcus Lutheran School, 2215 North Palmer Street, Milwaukee, WI, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Lankford, Enzi, Ernst, Sasse, Carper, McCaskill, Tester, Booker, and Peters.

Senator JOHNSON. Good evening. This hearing of the Senate Committee on Homeland Security and Governmental Affairs is now called to order. I want to thank everybody in the audience for taking time out of your busy schedules to attend what I hope to be a very informative hearing. I want to thank our witnesses for their time and efforts. I have read all of your testimony, it's very thoughtful; I think it is going to be very helpful and will be informative.

I certainly want to thank everybody here at St. Marcus. Henry Tyson, the Principal, who was very instrumental in helping set this thing up. Pastor Mark Jeske whose office I invaded, I appreciate that, Pastor. And we have some student volunteers, I want to call them up. Joanne, Brielle, Justin, Aleshia, Demia and Ambria, thank you all for your help and efforts. If you can give them a round of applause, I would appreciate it.

[Applause.]

Thank you very much. Let me just explain the purpose of this hearing. It is really two—I have two main purposes. I generally have a written statement, I will enter that into the record,<sup>1</sup> and would just like to speak extemporaneously here.

The Committee on Homeland Security and Governmental Affairs has broad jurisdiction in terms of oversight over the entire Federal Government. We also have jurisdiction for the District of Columbia. I think you may all know that the District of Columbia has its own school choice program, it is called the D.C. Opportunity Scholarship Program; and that is going to be coming up for reauthorization here in September, and that is something that my committee is highly interested in. And I thought, as we explore that reauthorization, I thought what would be a better place than coming here to

---

<sup>1</sup>The prepared statement of Senator Johnson appears in the Appendix on page 37.

Milwaukee, Wisconsin, which is really sort of the birthplace, the pioneer of school choice in the nation.

So we are really here today to explore the lessons learned within the Milwaukee Parental Choice Program (MPCP), which is its official name, and certainly give our hats off to people like Polly Williams, who is no longer with us; Dr. Howard Fuller, who could not be here today; and people like Susan George Mitchell. They were so instrumental, with a number of people on this panel as well, they were so instrumental in pioneering a concept that I do not think anybody, even supporters of this program here in Wisconsin, believe that we have the perfect model.

I come from a manufacturing background, a background of continuous improvement. You can always improve things. I think this is a very sincere attempt to take a look at what has worked, what has not worked, and how can we move forward to really provide the opportunities that we all seek.

And maybe that is something of an opening statement I should make as well. Regardless of where you are on the political spectrum, and I hope we actually have a broad spectrum of opinion here in this room today, let us start out today's hearing with an area of agreement. That is certainly how I would start out my business negotiations in my 30-some years in business in the private sector. I will not start out negotiating by arguing. I would start out trying to figure out all the areas of agreement.

So here is something we all agree on. We share the same goal. We all want a prosperous, a safe and secure Milwaukee, Wisconsin, and America. We are concerned about each other. We all want every American, every Wisconsinite, every Milwaukeean, to have the opportunity to build the life for themselves and their family. And let us face it, education is key to accessing that opportunity.

Now, the other part of my jurisdiction of this committee is really oversight, as I said, over the District of Columbia. And that also is going to be the purpose—I am a little concerned that the Department of Justice (DOJ) has been conducting a 4-year investigation into Wisconsin's Department of Public Instruction (DPI) as it relates to their administration of the School Choice Program. So we want to explore that, and we have a witness that will testify to that.

Let me just tell you the three basic principles that guide my thinking on this subject. I truly believe that America has been and should be and will be a land of unlimited opportunity. That is the first guiding principle. The second guiding principle is I believe every child should have the opportunity to access a quality education. And if they are within a system that is not serving them well, they ought to have the freedom to choose accessing a different system. And, finally, the third principle is my unwavering belief, having participated in a free market system, in the ability and the benefits of a free market system to basically guaranty three things.

When I was in the plastics business, I would have loved to have been a monopolist, nothing could have been easier. But because I had to compete in the marketplace, my prices were lower, my quality was higher, and my level of customer service was also higher. That is the three benefits that the free market system guaranties. But if you really want to drive quality, if you want a better result,

if you want lower costs, free market competition actually works. And that is really what we are trying to interject with the school choice system. Address the basic principle that every child and every parent should have the freedom to access a quality education, to access that opportunity and, understanding that it is the free market that is going to provide better results in the long term.

Now, just so you understand, my own experience, involvement, growing up I was educated in both the public system and the private system. I went to a Lutheran school, Missouri Synod Lutheran School, for about 3 years. Otherwise, it is all public education. In terms of my own children, they went to both public school as well as private school, the Catholic system, in Oshkosh. And it was really when my daughter left the Catholic system and went back to Oshkosh North High School I was called in by the principal—doing an exit interview. And really wanted to find out, why my daughter left. And that began my involvement in the President's Advisory Council really trying to do everything I could to help the Catholic school system in Oshkosh survive financially. It is always a struggle, it is a real struggle for private institutions. But just so we had a private, competitive model or competitive alternative to the public school system which was really quite good in Oshkosh as well.

And then my involvement with the Catholic school system led to my becoming the business co-chair of the Partners in Education Council of our chamber, where we had all the stakeholders. And so I have really been involved in a very robust fashion for about 6 or 7 years prior to my deciding to run for U.S. Senate. So this issue is very dear to my heart because it is such a basic and fundamental need.

So with that, I think we have really assembled a pretty good set of witnesses. I will briefly identify who we have; and before they testify, I will give you a more robust introduction. But we have Ms. Justice Shorter, who is a graduate of Messmer High School. We have Brother Robert Smith, who was President and Principal of Messmer High School. We have Diana Lopez, who is a graduate of St. Anthony's. We have Dr. John Witte who is pretty much the knowledge expert in conducting studies on trying to evaluate, exactly how successful the school choice program is. And then we have Richard Komer who is a Senior Attorney at the Institute of Justice.

So with that, I will say that when we conclude our hearing, if we have time—I have told St. Marcus that I will not invade their space for too long—we will probably have an open mic and allow members of the audience to come in here and make a 2-minute comment to also be involved in this process; and we will also hold the record open for additional testimony or written comments you also want to make into the Senate hearing.

So with that, it is the custom of this Senate committee to swear in witnesses. And I would also ask Mr. Henry Tyson to stand as well because we may take some testimony from him later on. So if you all will stand and raise your right hand.

[Witnesses sworn by Senator Johnson.]

Our first witness will be Ms. Justice Shorter. Ms. Shorter is a graduate of Messmer High School and a former participant in the Milwaukee Parental Choice Program. Ms. Shorter went on to re-

ceive a Bachelor of Arts Degree in Journalism from Marquette University, and is an August 2015 candidate for a Master of Arts Degree in Sustainable Development, International Policy and Management from the School of International Training (SIT) Graduate Institute in Washington, D.C. Ms. Shorter.

**TESTIMONY OF JUSTICE SHORTER,<sup>1</sup> FORMER MPCP STUDENT AND GRADUATE OF MESSMER HIGH SCHOOL, WASHINGTON, D.C.**

Ms. SHORTER. Good evening, everyone. I am a bit under the weather today. I will be reciting my Statement completely from memory, so please bear with me. I thank you in advance for your patience and your understanding.

My educational experiences have taught me the importance of capacity, clarity and equity. In the fall of 2004, my sight began to worsen; and I realized that for the foreseeable future, I would be recognized as someone who was legally blind. At the time, I was already enrolled in the Parental Choice Program as a student at Messmer Catholic High School, a place where I was surrounded by caring and committed individuals who wanted to ensure that I would be able to succeed academically.

Nevertheless, neither my family nor Messmer could financially afford to ensure that I would be able to receive all of the accommodations to support my educational endeavors. My mother and I, therefore, needed to research resources; and we independently sought out funding from private donors. Thankfully, I was able to reconnect with a former mentor who shared my story with a foundation which provided me with additional scholarships. We were able to use that funding to purchase several pieces of assistive technology.

Now, that technology coupled with the love, support, attention and time that I received from the staff at Messmer allowed me to truly thrive and excel academically in each of my courses. Messmer also was later able to secure financial assistance from donors which has immensely enhanced my educational pursuits as well as the access that I had to adequate accommodations.

After graduating from Messmer, I went on to Marquette University where I earned my Bachelor's Degree in Journalism with minors in Justice and Peace Studies as well as entrepreneurship.

During my time as an undergrad, I studied abroad in Capetown, South Africa, where I focused on community development and social entrepreneurship, as well as in Uganda and Rwanda where I studied peace and post-conflict reconciliation. In one month, the next month, I will officially earn my Master's Degree in Sustainable Development with an emphasis on international policy and management from SIT Graduate Institute in Washington, D.C.

These educational opportunities have reinforced my belief in capacity, clarity and equity. First, capacity. My family, the staff at Messmer, my mentors, my supporters, all firmly believe in my capacity to compete academically and to concur seemingly insurmountable odds. Students with disabilities can indeed achieve their academic aspirations. We have the capacity to contribute to class-

<sup>1</sup>The prepared statement of Ms. Shorter appears in the Appendix on page 39.

rooms, communities, the city of Milwaukee, the State of Wisconsin, the United States of America, as well as the rest of the world.

Second, clarity. Initially my mother and I were quite confused on where to go and what to do concerning educational issues associated with my visual impairment. Students with disabilities and their families must be properly informed on their rights as well as the educational options. I believe that the Department of Public Instruction should indeed provide all schools participating in the Parental Choice Program with the information that they need to raise awareness amongst parents about their educational choices as well as all available resources for students with disabilities.

Last, equity. While participating in the Parental Choice Program, I received the same voucher as all students including those without disabilities which did not fully account for the increased expenses associated with my visual impairment, which is why we had to seek out additional funding from outside sources. And, thankfully, I was surrounded by great and phenomenal individuals who were able to help me navigate that process. But not all students have access to that, and I believe that they should.

Consequently, I believe that students with disabilities who are voucher recipients should receive equitable access to State aid. We have to ensure that the Parental Choice Program fully considers and effectively incorporates the additional expenses associated with educating students with disabilities. This would allow the schools to operate with the security in knowing that they would be able to financially support all of the reasonable accommodations consistently throughout a child's education, especially those children with disabilities.

To be clear, I agree with the principal premise of the Parental Choice Program. We should all be able to make the very best choices for ourselves, our families, our future. However, the problems with students with disabilities not having access to accommodations when attending private schools on vouchers funded by the State of Wisconsin must be rectified.

Schools and parents should be secure in the knowledge that funding from the Parental Choice Program will complement rather than complicate the educational choices of students with disabilities.

This program clearly has the ability to bring forth transformative change in the city of Milwaukee and the State of Wisconsin. Moreover, if we focus on capacity, clarity and equity, it has even greater potential to serve as a model of what a State of dedicated supporters, parents, educators and legislators can do to ensure the empowerment of students in general and students with disabilities in particular. Thank you.

Senator JOHNSON. Thank you, Ms. Shorter. Our next witness will be Diana Lopez. And I would ask that you speak very closely into the mic. But let me introduce you first.

Ms. Lopez is a recent high school graduate of St. Anthony's High School in Milwaukee, Wisconsin, where she graduated third in her class. She plans to attend Yale University in New Haven, Connecticut, this coming fall where she will major in global affairs and minor in Arabic. She is also the recipient of the full tuition Gates

Millennium Scholarship which is earned by 1,000 minority students around the country. Ms. Lopez.

**TESTIMONY OF DIANA LOPEZ,<sup>1</sup> FORMER MPCP STUDENT AND GRADUATE OF ST. ANTHONY HIGH SCHOOL, MILWAUKEE, WISCONSIN**

Ms. LOPEZ. Hello. I am Diana Yvette Lopez, and I attended St. Anthony's School in Milwaukee, another choice school, from the third grade to my high school graduation.

My whole life has been a series of causes and effects, and I know this very well. With this in mind, I knew that in order to do well in life and to do what I wanted to do when I grew up, I needed to do well in school. I knew that becoming an archeologist in Egypt would only be done if I planned it out meticulously. So at the age of about nine, I started Googling universities that specialized in Egyptology, and I knew that from then on I would have to work as hard as I could to be the best in middle school and high school.

But which middle school would prepare me the best for my future? Before going to St. Anthony's, I went to a nearby public school. Despite being less than 10 minutes apart from each other, it felt like a completely different world. At public school, I had always questioned why Christmas had to be called Xmas, and why I couldn't sing Christmas songs. I felt weird that when I was in my community, a largely Hispanic community, everything seemed to revolve around going to church. But when I went to school, it was nonexistent. When I asked about it, I was gently told to let it go. I was frustrated.

Then one day, my grandma took me to pick up my uncle, only 4 years older than me, from his school, St. Anthony's. There I saw a multitude of kids dressed in fancy uniforms and a bunch of artwork on the wall like the prep schools I had seen in all the movies. On the overhead as I walked in, there were prayers and announcements blasting and it just clicked. I called my mom from the school office. I would get to dress up in uniforms. And by dressing up in the businesslike uniforms they had, I would be better prepared for when I had college interviews.

Middle school was great. I got to learn about so many things, and this time I could ask as many questions about any religion, not just Catholicism, as I wanted. However, I never knew how valuable going to a private school with choice program was until I started looking for high schools. I had my sights on a school in Bay View here in Milwaukee. It was perfect. They taught French, much needed by archeologists, and they had computer program classes, something I thought was cool. I wanted to go so badly, but the problem was the \$12,000 tuition.

I did everything I could. I applied for scholarship and got them all, I started saving my money, and I started promising my parents I would pay them back for my tuition once I was rich and famous. It just was not meant to be for me. My mom lost her job, and my little brother was born. My dad was about to lose his job, and we were all living paycheck to paycheck. One day they sat me down

---

<sup>1</sup>The prepared statement of Ms. Lopez appears in the Appendix on page 41.

and told me the reality. And in my mind, my whole future just crumbled.

After I cried for days, I looked for alternatives. In the end, I chose to go to St. Anthony's; and because they had the choice program, I was able to go at no cost. In the end, I am happy I graduated from there because not only did I receive a valuable and wholesome education, but I let my parents have some breathing space and not panic over paying tuition.

But, again, actions have consequences. Since I went to St. Anthony's, I was able to talk about religion. Many think that going to a Catholic school means being oppressed and kept thinking inside the box. However, that is not the case. Naturally curious, I was able to ask about my religion and ask my religion teacher about the differences between the Muslims and Christian ideals.

Suddenly, my dream of becoming an Egyptologist dissipated and I became interested in global affairs. What if I had never been able to ask about religion? Would I have ever discovered my passion? Also, because my parents didn't have to pay for tuition, I was able to go to a summer program that revolved around international relations. I fell in love, and to this day I have not wavered.

During the summer program, there was a representative from Yale who gave a speech and I got in contact with her. Never once did I think about going to an Ivy League school. However, after talking to her, I was convinced I would try as hard as I could to get in. A few months ago, after weeks of grueling applications, I discovered that I got into Yale and every other school I applied to.

Now I am going to Yale next fall to study global affairs and Arabic. But the point is what if I had never gone to the summer program and met the woman from Yale because my parents had to pay for tuition. Going to a choice school has opened so much for me. I was able to go to March For Life in Washington, D.C., this past winter; and I got to see firsthand a political movement.

I have met so many people of the church who have lived all over the world and taught me how to speak different phrases in different languages and who have time after time reinforced in me the idea of curiosity. My teachers care about me, and they are incredibly knowledgeable in their fields.

I hear horror stories about neighboring schools having fights every day and teachers that do not care about their students. I was never afraid of that happening at St. Anthony's. I was able to get the same quality education as someone of a higher socioeconomic standing without burdening my parents and sacrificing their peace of mind.

So to those who are thinking about signing your kids up for a choice school, think about the consequences of your actions. You are sending your child to a school where they do not have to worry about negligent teachers or fights every day, where they can ask the questions they want, and where you can rest assured that they are receiving a quality education.

To the School Choice Program, I want to thank you for giving me the opportunity to ask questions, for giving low income families like my own a chance to receive a peace of mind after being that one step ahead in the road to my future. I hope to make you proud.

Senator JOHNSON. Thank you, Ms. Lopez. Our next witness is Brother Robert Smith. Brother Smith was the president and principal of Messmer Catholic Schools for 26 years. While leading Messmer Catholic Schools, Brother Smith helped create the first independent K through 12 Catholic school system in the archdiocese in Milwaukee, increase student enrollment at the Messmer High School from 130 to over 700 students, renovate and build additions to two school campuses, and raise over \$100 million in student scholarships. Brother Smith.

**TESTIMONY OF BROTHER ROBERT SMITH,<sup>1</sup> FORMER PRINCIPAL, MESSMER HIGH SCHOOL, MILWAUKEE, WISCONSIN**

Brother SMITH. Thank you very much, Senator Johnson. Good evening, everyone. I am happy to be here. And I hope you are too.

Back during the times of the suffragette and abolitionist movements, there was a woman by the name of Sojourner Truth who freed many slaves, worked harder than most men, and wrote a very famous speech titled "Ain't I A Woman." Sojourner Truth was illiterate, spoke broken Dutch, yet she met two Presidents of the United States and was a great preacher who memorized the bible.

She was invited to come up north to preach at a church; and a group of ministers heard about it and sent word down and they said: You tell that woman if she comes up here to preach, we gonna burn down the church. And in her broken Dutch, Sojourner Truth sent word back: You tell them men that if they burn down the church, ol' Sojourner gonna preach from on top of the ashes.

Tonight we are talking from on top of the ashes. Messmer High School in 1984 was closed. It was reopened by a group of folks like you, parents and guardians who want a high quality school, a Catholic school, in the inner city of Milwaukee. What Henry and others have done here, those young ladies coming in nicely dressed, articulate, who shook your hand and looked you in the eye, are poor kids who have the ability like Sojourner, like Diana, like Justice, to create dreams that will lead the city, State, country and world.

All they need is a chance. And that is what the choice program was all about. There is no magic, there is no panacea about it. It is hard work, it is sacrifice, it is trusting them and trusting their parents and guardians to choose what school they want their children to attend. And that includes schools of every faith. It includes cyber schools, it includes home schooling, it includes public schools. All of that is school choice.

What has angered me over the years are some of the things that get said that are not misconceptions or mistakes, they are flat out lies. To say that private and religious schools do not educate students with disabilities is flat out wrong and has been wrong for decades. If you do not believe me, there is a book that you can get on eBay titled *The Three Archbishops* written in the 1920s. In that book, Archbishop Sebastian Messmer says: Take our Catholic school students, test them; if they do as well or better than the public students, then let the money follow the student.

<sup>1</sup>The prepared statement of Brother Smith appears in the Appendix on page 43.

Go and look at yearbooks of religious schools back in the 1930s, 1940s and 1950s. You will see seeing dogs, Braille machines, that were paid for by the religious schools. They did not get reimbursed by anybody. They did it because they cared about the education of the students.

At the end of the day, I do not care where a kid goes to school. And I have said that for decades. What I care about is that they and their parents and guardians get to choose a high quality school which can include a school of faith.

When I hear people talking about, well, we care about our kids and education, I expect them to be talking about all kids in the State. See, the choice program in Milwaukee started with under a thousand students. In 1998, we added religious schools. Today we have over 22,000 students in Wisconsin. But we were the oldest and biggest school system for years. Today there are 27 States in this country with choice programs. That is the miracle. And that is the key to the future.

Before I got into education here, I came from Detroit, Michigan. And I was a parole agent. I got burned out from watching people go in and out of prison. There were three things that were common. No. 1, most of the people coming in or out of prison were dropouts. No. 2, they had drug or alcohol problems. And No. 3, they had at or below a third grade reading level. So anybody that does not understand that education and a bright future do not walk on the same line is missing a lot.

We need good schools for everyone. And when I talk about education, I am talking about public schools. There are excellent public schools in Milwaukee and around this country. But we need people to be open to educating all kids in all families and let the parents and guardians and students make those choices. Thank you.

Senator Johnson. Thank you, Brother Bob.

The next witness is Dr. John Witte. Dr. Witte is a Professor Emeritus of Political Science and Public Affairs at the University of Wisconsin-Madison, Robert M. LaFollette School of Public Affairs.

Dr. Witte's research has focused on tax policy, politics and education, including school choice, vouchers and charter schools. Dr. Witte was the principal investigator for the School Choice Demonstration Project (SCDP) which studied the longitudinal effects of the Milwaukee Parental School Choice Program. Dr. Witte.

**TESTIMONY OF JOHN F. WITTE, PH.D.,<sup>1</sup> PROFESSOR  
EMERITUS, UNIVERSITY OF WISCONSIN-MADISON**

Dr. WITTE. Well, thank you, Senator. And it is nice to be back here in Milwaukee. It has been a long time since I have been here. I was actually born here in 1946, and we left here in 1951 we claim because the schools were so rotten. Was not true.

My career has been studying the voucher program, twice. Two 5-year stints, from 1990 to 1996, and then from 2006 to 2012. And I have taken the opportunity that was offered me here for this testimony to write a long paper this last week comparing those two.

<sup>1</sup>The prepared statement of Mr. Witte appears in the Appendix on page 45.

We have never looked at both of those studies together, we have looked at them separately.

So I want to give you a combination here of what happens. I am just going to say what everybody wants to know. Did it work and what worked? OK. And then I am going to give you my normative perspective and it will be my own values, and I realize there is a lot of room for other values involved in this because I am a little bit concerned about the direction of the voucher program today.

First of all, test scores. Everybody wants test scores, everybody complains about test scores; but boy, they sit up straight when you start talking about them. I make my living doing it, modeling it, doing everything else, and I am very suspicious of them. They have a lot of measurement error, a lot of problems with test scores. But the test score results have been flat in both times. There's complications that I could go into later; but more or less we have found out that the voucher program and comparison groups in the Milwaukee Public Schools (MPS) do about the same on test scores. Sometimes reading is a little higher, sometimes math is a little higher. But overall, they do about the same. And, again, there's some complications.

Parental satisfaction, there's other dimensions to what qualifies as a good education in what we produce. Parent satisfaction and student satisfaction have consistently across all 10 years, both the first study and the second study, have been positive for the voucher program, and really wildly positive in many cases. And one of the interesting things is when you ask parents what they are most concerned about in the Milwaukee Public Schools and why they go to choice and the vouchers, it has to do with a couple of things. The quality of education, the quality of teachers, and safety and discipline within the schools. Those are the things that they are most satisfied with in the private schools, when they come to private schools, those three dimensions. So it just flips around what they are most concerned about and why they are there.

Student—another thing that we were not able to study the first time around, because we did not have the resources, to be fully honest about it, and we also only had K–8 schools in the first set of schools from 1990 to 1996. This time when we began, I insisted that we get enough resources so that we could follow kids through graduation. For me, if there's one measure of quality of education in America and one thing we should focus on, it is graduating from high school. And good things happen on average if you graduate from high school; and bad things, as Brother Bob said, do not happen when you do not graduate from high school.

We were able to track kids in the graduation and then into college, 4-year colleges, and we are still tracking the kids that began in 2006. The news is very good here. The graduation rates among voucher students are considerably higher than MPS. And we have done this very well. It is also important because there is very little measurement error actually in graduating from high school where there is a lot of measurement error in test scores.

The rates may not seem high; but if you are involved with inner city education, you will know. It is between 4 and we think closer to 7 percent higher graduation and 4 to 7 percent higher attainment in 4-year colleges. They also tend to go to better colleges, and

we follow them now into their—at the end of their sophomore year, and they have a high persistence rate, much higher than the average in the schools, and they are stretching out over the MPS kids that go to 4-year colleges. That is a big, powerful finding, the first one I think for any voucher program which they usually do not follow kids as far as we have.

One other thing, there is another type of study that takes place within vouchers, and that has to do with what we call competition studies. The Senator mentioned this, that is why I want to talk about this. Competition studies are basically if you have competition from vouchers in an area, do the public schools get better? OK. And we measure these a lot of different ways.

There have been four studies in Milwaukee going back to 1998, actually the first ones, and then our recent one has been done in 2009–2010, sorry. All of those studies have been positive. There is a spillover effect into the public schools that's positive for vouchers. And the more voucher students' options there are around, the better the results. OK? They are not large, they are not really big, but they are statistically significant and they are always positive.

There have also been a number of studies in Florida that found the same thing. So we have a consistent range. Finally, one thing that is very important to me and sort of my rub here, and Brother Bob mentioned this in the very beginning, when this program began, it was to give families that did not have opportunities or alternatives in the Milwaukee Public Schools, to have an alternative that many middle class white people had. And that is to leave—if they were not satisfied with their public schools, they could either buy private school education or they could move to the suburbs, which I have studied here in Milwaukee as well, where the schools were much more positive.

Poor African-American primarily students did not have those options, and the voucher program provided those opportunities for the first time in many cases. There were no charter schools around, remember, at that time. OK? Now, and there is no question that over the years these opportunities have been extended and there have been many opportunities, the choice environment is much more positive today certainly with places like Messmer High School or this high school or a number of other places in the voucher program, the vast majority of the schools in the voucher program, 110 of them. They provide choices.

My problem is that when I was first asked to do this, my relatively liberal friends in Madison said you are being snookered here. This is not providing opportunities for poor. The real intent here is to get the rich people who go to private schools to be subsidized. I said I hope that's not the case because I am not in favor of subsidizing wealthy people to do things.

I am a little worried now that we are moving in that direction, to be honest. I was not in favor of lifting the income limit as high as they lifted it. They lifted it to 300 percent of the poverty line from 175 percent. Now, statewide is still at 175. 300 percent of the poverty line to be eligible for the voucher program is \$70,000, \$70,047 a year for a family of four. \$70,000 gets to be up there pretty high for people to buy their own private education. So I am concerned about that. To this point, I do not think it is necessarily

going to be that much of a problem. But if it goes that way, you go to what's called a universal voucher program.

Most people in the United States have always gone to private schools for religious reasons. God bless them for that. OK. But it is not necessary for me that the government should subsidize people that can afford that. If they cannot afford it, great, go to religious or nonreligious schools. But if they can afford it, we are going to spend all of our money—and I think it is going to be drained. I think the potential is to drain away the choices for the people that need it the most.

So that is my only concern. Otherwise, I am very happy to be involved with this program all these years. I am just proud that I made that decision years ago to do this, and I am proud of being friends with Brother Bob. He is not only the greatest speaker 20 years ago, I swore I would never follow him on a stage again in speaking. He is also one hell of an administrator. He built Messmer High School. I was in there, the first time we met was in 1991, and there were 100 kids in that. And to be honest, he was hanging on like this, like a cat hanging onto the wall, because it was coming down. And now that school is just magnificent, if you have not been there. And also all the other schools that are associated. Thank you.

Senator JOHNSON. Thank you, Dr. Witte. Our next witness is Richard Komer. Mr. Komer is a senior attorney for the Institute For Justice where he litigates school choice cases in Federal and State courts. Prior to joining the Institute, Mr. Komer worked as a career civil rights lawyer for the Federal Government, including the Departments of Education and Justice, and at the Equal Employment Opportunity Commission (EEOC). Mr. Komer.

**TESTIMONY OF RICHARD KOMER,<sup>1</sup> SENIOR ATTORNEY,  
INSTITUTE FOR JUSTICE**

Mr. KOMER. Thank you. It is a great honor to be here today for a wide variety of reasons. But I would like to commend the Senator for chairing this hearing because the Milwaukee Public—Parental Choice Program holds a special place in the hearts of all of us who have advocated for some 25 years for school choice.

I work at the Institute For Justice, a public interest law firm. And one of the things we do is we specialize in defending school choice programs. So our institute defended the Milwaukee program first in—well, actually, twice. Both times in State court all the way to the Wisconsin Supreme Court where fortunately the program was upheld both times.

School choice is an immensely important issue. But what makes it worthwhile for those of us who do that are sharing the stage with people like Justice Shorter or Diana Lopez who have benefited from the school choice programs that we have defended in court.

For me, coming here is in a sense coming full circle because this is literally where modern school choice began, with a program that enrolled just over 300 children in I think it was seven private schools until one of them dropped out. That is pretty small.

<sup>1</sup>The prepared statement of Mr. Komer appears in the Appendix on page 81.

Today, as Brother Bob mentioned, there are 27 States that have over 40 school choice programs; and the 300 school children in the original program have become 300,000 children across the United States.

This is an enormous success story. But what also has come full circle is that my first involvement with the Milwaukee Parental Choice Program way back in 1990 was an effort to kill the program by overregulation, by Herbert Grover who was the then superintendent of public instruction here in Milwaukee, who said that the private schools participating in the program were de facto public schools and subject to all of the Federal civil rights requirements that public schools are subject to.

This was a transparent effort to kill the program politically by forcing private schools out of the program. They would not participate if they had to provide all of the same services and act like de facto public schools. Because many of the Federal regulations, I hate to say this, imposed by various Federal agencies are part of why public education is the way it is today. And private schools, to offer an actual viable alternative, have to be different.

So that program, Senator Bob Kasten from Milwaukee sent a letter to the Department of Education where I was working at the time asking whether Herb Grover was right and that the program had to act like—the private schools had to be treated like public schools. I got the assignment to respond to that. I was at the Department of Education Office for Civil Rights. But we had a cross-cutting task force of the special ed. people, the Office of General Counsel (OGC), everyone, to try and determine: Are private schools public schools if kids get vouchers? And our answer was clear. They are not. They are not subject to these laws in the same way that public schools are.

Well, now, 25 years later, the Justice Department is investigating them, PCP, and trying again to say that through the Americans With Disabilities Act (ADA), that the private schools have to act like the public schools.

They have done this through trying to force the Department of Public Instruction, to basically impose requirements on private schools very similar to what Herb Grover tried to do 25 years ago. This effort is no more well founded legally than the original effort was because for a number of reasons. It is inconsistent with the Americans With Disabilities Act, it is inconsistent with the department's own regulations implementing that act, it is inconsistent with the Technical Assistance Manual the Department of Justice provides to people as to what their regulations mean and what the ADA requires, and it is pretty much inconsistent with common sense. Because the rules of statutory instruction at bottom are really just commonsensical rules. And under the ADA, there are two titles relevant to their investigation. Title II applies to public entities like DPI. Title III applies to private schools. The private schools that participate in the program under Title III are subject to a very different legal standard of what constitutes discrimination than a public school is. Because private schools do not have unlimited access to public resources. They have access only to what the parents are provided by the program and the parents pay the school in exchange for services.

Now, Title III contains a broad exemption for religious schools. That exemption is not an exemption the Department of Justice created. It is an exemption the Congress created. And the Justice Department does not get to overcome that exemption in Title III by saying that DPI has to enforce a different rule under Title II.

I am not going to get any more technical than that. But the legal rule is that the specific controls the general. It is not complicated when you are interpreting something and something is specific. What are the responsibilities of private religious schools? They are exempted. You do not get to interpret another part and say, oh, no, because Wisconsin is giving money to individual families to spend at those schools, suddenly they become public schools. That theory was rejected by the Wisconsin Supreme Court in the original case here and it should be rejected when the Department of Justice tries to impose it.

This is, unfortunately, part of a pattern because there is a second intervention by the same group of the Department of Justice, the Civil Rights Division, Economic Opportunities Section, which has tried to throw a monkey wrench into Louisiana's statewide program which is for students in the worst schools in Louisiana. And they have tried by resurrecting a school desegregation case to force Louisiana, the State of Louisiana, their DPI, to regulate and limit school choice for students otherwise eligible for the program on the theory that because miniscule numbers of students are leaving supposedly integrated public schools for African-American private schools, that this is undercutting school desegregation. It is an absurd theory. It is so lacking in just basic reasonableness that I do not think that the courts are going to let this stand.

The third thing we have with respect to school choice programs is the District of Columbia program. The D.C. Opportunity Scholarship Program was modeled consciously on the Milwaukee program, as were inner city programs in Cleveland and New Orleans. All of these programs are modeled on the success here in Milwaukee. And the D.C. program has shown the same sorts of success as Dr. Witte has talked about here in Milwaukee: improved graduation rates, improved parental satisfaction, all, I should add, at considerably less expense to the public taxpayer than the public schools these children left at their parents' choice.

Now, the administration, which has been quite enthusiastic about school choice when it involves public schools, has opposed continuation of the D.C. Opportunity Scholarship Program and has tried to cause it to wither on the vine. It has only been through the active intervention of this committee when it was previously chaired by Senator Joseph Lieberman, a democrat from Connecticut, and the Speaker of the House, John Boehner, that the D.C. Opportunity Scholarship Program is still up and running and serving the thousands of children that it does.

So I would like to just close and, again, thank the Senator for holding this hearing, thank him for supporting school choice, and hopefully thank him for bringing the hammer down on the U.S. Department of Justice. Thank you.

Senator JOHNSON. Thank you, Mr. Komer. We also should thank Mr. Komer because he cut short a vacation in Maine with his family, so he has a little makeup to do there.

I want to break procedure a little bit. I would like to ask Mr. Henry Tyson—is it Doctor?—Mr. Henry Tyson then, the principal of St. Marcus. They have been very helpful in obviously opening up their school to us here. It's been relatively disruptive, but we certainly appreciate it.

I met with Mr. Tyson earlier today. And I just want him to share kind of his thoughts and, the model here of—St. Marcus has worked. And, Mr. Tyson, why don't you just go ahead and describe that, and we will just have you too share during the questioning period. So Mr. Tyson.

#### TESTIMONY OF MR. TYSON

Mr. TYSON. Thank you, Senator Johnson. Thank you all, especially members of the public, for being here tonight and showing an interest in this issue. Probably the best way for me to do that is to tell St. Marcus's story and how it fits in with what parents are looking for in our city.

This school actually opened its doors in 1875, and by the late 1890s was serving 300 children on a relatively ragged building that stood on this site until about 2002. In the late 1960s, this neighborhood was decimated by the riots that took place, really centered on North Avenue and King Drive, just to our west. And there was white flight and the historical Lutheran, white, middle class population fled the city.

The result of that was that by 1981, the student population had shrunk to just 54 children. And at the time, the conversation was about whether or not the congregation and the school should stay or should it follow the previous student body out to the suburbs and elsewhere or just close entirely.

We got a new pastor in 1980, Pastor Mark Jeske, who along with some congregation members worked like crazy to rebirth the school and the congregation. Such that by 1997, there were about 80 children in the school. And it was that year that the voucher program was opened up to parochial schools. St. Marcus jumped into the program that year and by 2000 had just about 100 children in the school. And that brought the old building pretty much to capacity.

So the congregation at that time, in about 2000, recognized that there was a huge need in our community. The parents were desperate for access to high quality schools. And the school building at that time was filled to capacity, so they started a five and a half million dollar capital campaign. And in 2003 were able to open a new school building just on the other side of that wall that was designed for 300 children.

And as they did that, as that school opened in 2003, it was accompanied by a very specific vision. And the vision was to create the best urban Christian school in America. And combined with that vision was a philosophy that was, like most good ideas, stolen from the KIPP schools, the national charter program, that said we are not going to make excuses, there are no excuses for student failure.

And so the congregation, the staff, came together and said what do we need to do to make sure that any child who walks through our doors is ultimately successful. And what that meant was to extend the school day, it went from 8 until 4:30. We needed to imple-

ment a Saturday school program, a 4-week summer school program. We needed to have evening programs. So for some students, we kept them here and we fed them dinner and they took care of their homework here at school. And then we implemented a nationwide travel program for our middle school students so they could see for themselves the incredible opportunities that this country offers or should offer to every single child.

The bottom line is the parents loved it. And within 2 years of opening the 2003 building, the building was completely full and we had a growing waiting list. In response to that waiting list, in 2006 we started another capital campaign, which resulted in 2011 of the opening of the primary grades building, which is behind me, which houses 350 students. And then in 2013, this room, the Krier Center, to support the primary grades building. And then just last year, you would have thought if we just kept building we would eventually get to the bottom of the waiting list. Well, it just did not happen. And the reason it did not happen is because if you are, in particular, low income and African-American, in this city you are in a world of hurt.

They recently looked to what they call the 80/80 data, which is they looked at all of the schools in our city that are 80 percent low income and 80 percent African-American. They identified 95 schools, public, charter and voucher, serving just under 30,000 children with an average reading proficiency of under 8 percent. So what we know is that if you are low income and African-American in this city, the chances of your child being in a high quality school are extremely low.

So it is no surprise that the parents kept on coming. So as it is today, we serve 860 students on two campuses. We opened a new campus last year four blocks north of here. That campus has a waiting list, and in the fall we hope to build out that campus to serve 350 children. We follow to the tee the State's random selection process, so we look blindly at all of the applicants. Approximately 10 percent of our students have formal individual education plan (IEP). It means that they have been identified by the district as a student with special needs. And yet, as Ms. Shorter clearly articulated, we receive zero dollars to meet the special needs of those students beyond the \$7,200 voucher.

That creates immense challenges for us. It means we have to go out of our way to raise the money to provide the services for those students. This coming year, we will have two certified special education teachers and a host of other staff who support those students with special needs.

We do track our students for 8 years after they graduate. We know that 93 percent graduate high school through a traditional high school model. And according to, admittedly questionable testing data, we are amongst the highest performing schools amongst the 80/80 schools in Milwaukee.

So the bottom line, as we have heard from Brother Bob and others, the bottom line is without schools like St. Marcus and St. Anthony's and Messmer, and Atonement, Notre Dame, Nativity Jesuit, Garden Homes, the Hope Schools, there would be thousands of children who would be trapped in failing schools. And so the vouch-

er program has become a lifeline to thousands of kids, many of whom have special needs.

At the end of that, I am compelled to say because we live in such a divided city that as a voucher leader and voucher advocate, I want to acknowledge that our public schools run some fantastic schools, as do our voucher system, and some of the very worst schools in our city are voucher schools. And for those of you, like me, who are voucher proponents, just as the district has to deal with its struggling schools, so have we. And the critical need is to get as many high performing schools for as many kids as quickly as possible. Thank you.

Senator JOHNSON. Thank you, Mr. Tyson. Again, thank you for all your efforts here at St. Marcus for making your facility available to us.

I have a host of questions. Let me, before I start asking questions, let me just get a sense from the audience, would you raise your hand if you would like to take 2 minutes is what we will limit a comment to. How many people would be interested in that? Because that will govern my—OK, so a reasonable number. So I think that we will be able to accommodate that.

Let me go informal here, and I would like to use first names, and I have already said Brother Bob. I would like to start with you, Justice. Obviously with somebody with a disability that I think we all are very pleased to see you to a great extent overcome, can you just talk to us about the impediments you faced, both in public as well as in Messmer School, with your blindness; and was there a difference, one way or the other, between what you experienced in public versus private school. And speak very close to the microphone so we can hear.

Ms. SHORTER. Is this better?

Senator JOHNSON. Yes.

Ms. SHORTER. Yes. OK. I was able to receive, as I said, a ton of attention, a ton of time, from the staff members at Messmer Catholic High School; and they were later able to assist me with also securing additional financial assistance which was immensely beneficial.

However, students with disabilities have to encounter a slew of barriers, both formally and informally, both perceived and—a whole range of issues that people never take into consideration. It takes a community to ensure that these students will be able to strive and thrive academically. You have to take into consideration the classroom atmosphere, the atmosphere of the entire school, the communities that they live in, the parents, their families, all of these different entities must come together collectively in order to ensure that these students have the capacity to succeed.

I think we have to understand that students with disabilities are assets, not liabilities. And we need to understand the full potential of these individuals. Had someone not seen the capacity that I had, had people not acknowledged that, had people not supported that, I would not have been able to do half of the things that I have been able to do in my short lifetime. I am only 25.

However, I continue to encounter a number of barriers, even in graduate school, even as someone who can clearly articulate the things that I need at the age of 25 in graduate school. Now, imag-

ine if I was 5 years old or 10 years old or at the time 14 years old when my sight initially began to worsen.

The difficulty in simply acknowledging, for one, what was happening to me at the time and, two, what it was that I needed in order to succeed, but having individuals around me who could recognize the problem, but who can also help me find the resources, and not only find that information, but to actually access those resources was absolutely imperative.

Senator JOHNSON. So did you see—I did not realize, you lost your site at about the age of 14, you started losing your sight—

Ms. SHORTER. Yes.

Senator JOHNSON [continuing]. At the age of 14?

Ms. SHORTER. It began to worsen at 14, yes.

Senator JOHNSON. And you were in public school prior to that? I mean during that time period or—

Ms. SHORTER. No, I was at Urban Day Middle School, which I believe at the time was a charter school. Yes.

Senator JOHNSON. But you started accessing the voucher system when you started going to Messmer, correct?

Ms. SHORTER. I believe so, yes.

Senator JOHNSON. OK. Again, were there—I guess the question is really kind of a moot point then, you were sighted in charter school and you started losing your sight in—

Ms. SHORTER. When I went to high school, yes. So when I was in middle school, I was able to effectively maneuver and operate. My vision was not good whatsoever. However, I was not in need of many of the resources that were absolutely essential once I went to high school because my sight began to worsen even more and I could no longer hide it or pretend as if it did not exist. It was imperative to my learning.

Senator JOHNSON. So can you just tell us a little bit about your aspirations. And, again, you have overcome an awful lot and you have continued to gain education. Can you just tell us really what you plan on doing now with the rest of your life, what you aspire to be.

Ms. SHORTER. No pressure there. No. I graduate in August, and everyone has been asking me that question. But I am excited to continue applying for positions both domestically, nationally across the country, as well as internationally.

I would love to continue working on issues related to international policy. During my time in D.C., I have interned for World Learning, which is an international non-governmental organization (NGO); the Hunger Project, another international NGO; as well as Women Enabled International, which focuses on protecting the human rights of women and girls with disabilities worldwide.

At present, I am doing an internship for the Department of State, their international visitor leadership program, and I am developing the disability inclusion guides for host families and organizations to use so that when visitors come, they can truly access all of the amazing things that America has to offer.

So I will continue to be an advocate for disability issues, but that is not the only issue that I will work on. I intend to work on a plethora of different issues, whether it relates to disability or gen-

der or racial minority issues, LGBC issues, and a whole host of issues. So I am hoping to secure employment after graduation.

Senator JOHNSON. Well, as you realize your aspirations, you are going to continue to inspire people. So, again, thank you. We wish you all the best.

Diana, you mentioned uniforms. I thought that was interesting. Can you just kind of talk a little bit about what wearing a uniform did. I mean, just the effect it had. And, again, if you would speak very close to the mic so we can hear you.

Ms. LOPEZ. OK. So going to a public school, I could wear whatever I want. So in the morning when trying to get to school on time, it would be what should I wear. And when my parents started to lose their jobs, we had to go to the—those centers to get clothes. And finding clothes that everyone else wore was very difficult. And so I often went to school embarrassed and often went home crying and telling my mom why can't you buy me new clothes?

But when I went to St. Anthony's and saw the uniforms, I thought that it was going to prepare me for the future. Because I had seen how presidents and ministers and everyone wears uniforms; and if I wore a uniform, I would have the same type of thinking as them. And in that way I would be better prepared to do what I wanted to do.

Senator JOHNSON. Did you find that was kind of a common attitude among your classmates? Did people enjoy wearing uniforms? Did they feel it was onerous or—what was the general attitude?

Ms. LOPEZ. Most of them hated it, but . . .

Senator JOHNSON. But they fell into line.

Ms. LOPEZ. Yes. After graduating and talking to their friends from public schools, they had kind of an appreciation that they did not have to wake up and figure out what they were going to wear in the morning. Instead they could, figure out how their homework was and where to, spend their money instead, instead of buying clothes. I think it was the general attitude of appreciation that we knew what we were going to wear and we did not have to worry about impressing everyone else.

Senator JOHNSON. OK. Great. You also mentioned in your testimony the word "safety." Can you talk about that, again, just—again, I am always looking for comparison, to compare, contrast, public versus your experience at St. Anthony's. Can you just talk a little bit about that aspect of the choice program.

Ms. LOPEZ. While at St. Anthony's, I have friends who on their phones they would show videos of neighboring high schools and the fights that they would have there, and how they would be really intense and really violent. And all of us just went around the person who had the phone and we all could not believe that something like that was happening not that far away from us. And we all kind of had this attitude that thank God this does not happen here.

Senator JOHNSON. Great.

Brother Bob, I mean, certainly what I saw within the campus school system was a pretty nurturing environment. Again, and let me say within the Oshkosh school system, which my kids also went to, I saw—and being the co-chair of the Department of Education Council, I saw dedicated teachers across the board, people who

were skilled and knew how to educate the kids in their community. But I did notice a difference, a more nurturing environment, certainly the ability to teach morals and values.

Can you just talk about the environment within your school, the extent of parental involvement, and again, any kind of comparison of experience that you know about between that and the public situation.

Brother SMITH. Sure. I have always, Senator Johnson, been a proponent of the Paul Bear Bryant school of education. He was the football coach at Alabama. And he began each season by telling his players be good or be gone. My belief of every educator, every adult in a school building, is you will treat every child as if he or she was your own. And if you can't or won't do that, then you gotta go. Because parents and guardians entrust the most precious thing they have, their children, to us. And a frown, a harsh word, ignoring a kid that's trying to answer a question or to get a need met, that's a start.

And, what Justice was saying in answering your question about some of the challenges, simple things like winter weather, which is unpredictable in Wisconsin. I used to watch her out of my window when there was a black ice. And I made our buildings and grounds people as well as our former principal, Mr. Monday, made sure that that back area was clear and dry so that she and other students would not slip. If there was an early day of school, we had to make sure that she was able to get her ride.

Schools live by rules. We have an elevator in Messmer. Students are not allowed on the elevator. She was allowed on the elevator because there are three floors. For testing, the tests are done in a certain way. She needed someone to read directions or if there were colored pictures, things like that. So as an administrator, it is the job of an administrator to make sure that everybody else does what they are supposed to do beginning with the adults and then with the students. And the parents and guardians—and, what Henry said earlier is absolutely true. Parents and guardians that I have known in this city and across this country want the best for their children. They hate nothing more than going to jails and prisons and funerals and hospitals, and they expect the educators and the other students in schools to treat their child as they treat their child. And that's what our jobs are, and they start the minute the kids get there to the minute they get home.

Senator JOHNSON. I want to talk a little bit about parental involvement. I am going to transition from you to Dr. Witte during this question. But, again, it is my general sense, again, having attended as well as sending my kids to both systems, that certainly the private school system really encourages parental involvement. I guess it's just my anecdotal belief that parental involvement made a big difference. I mean, can you just talk about, how, to what extent Messmer encouraged parental involvement, kind of what your belief was; and then I am going to turn it over to Professor Witte, is there any study that kind of backs up whatever our beliefs might be. But, Brother Bob.

Brother SMITH. Yes. The key, Senator, is we tell students that from day one that the adults run this building; and that means the faculty, staff and parents. So just as the students at St. Marcus

were out there greeting every person that walked in that door, we teach the students you will treat every person with dignity, respect and love, or you gotta go. And it's really that simple. Parents and guardians do the same thing. And we expect that they will treat the teachers and other staff the exact same way, as adults.

It is irrelevant whether I have a Master's Degree or a high school diploma, we are still adults and the education of every single student is the responsibility of every single adult. Private schools and, in particular, religious schools have a lot less money than public schools. We do not have a tax base to operate on. Which means there has to be a lot of volunteer work, it means tutoring, making sure your students do their homework. And it does not matter if you understand trigonometry or Spanish, it means that you have a responsibility, whether you go to the Khan Academies on the Internet or whether you call up another parent and say can you check my child's homework, the homework gets checked. So that when that student comes to school the next morning, that they come prepared.

It also means that if you have a problem in your family, that there is an illness or a death and you need money, that you talk to us. We do not have a lot of stuff, but we can do a little. Recently that 11-year-old boy who opened the door, he's a student from Burma, and these guys went in and shot the father. He was a student at St. Rose/St. Leo. The entire Messmer community gathered around as well as Marquette High school to help support funeral costs and other costs of that family because they are dirt poor. You do it not because you have to do, but because you choose to.

Senator JOHNSON. You used a word that put a smile on my face, "volunteer." We had one of the moms—that was her license plate. And she was one heck of a volunteer.

Dr. Witte, can you just kind of describe any kind of study results in terms of parental involvement in education.

Dr. WITTE. Yes. We extensively ask about parental involvement, both the beginning in the first wave, first study, with what they had in the public schools, and then also to compare it to the private schools. And we also asked public school parents. And we asked three types of parental involvement basically. In organizations in school like parent teacher associations (PTAs), in activities in schools such as communicating and connecting to teachers and other things, and then parental involvement at home. And there are different dimensions of all of those, too, so they are very good measures.

And in the first wave of studies, parental involvement was higher statistically and considerably higher in the private schools than in the public schools; and also higher when the people moved from public schools to private schools. The second wave of studies, it was higher in the parental activities of the school and in belonging to organizations that communicated with schools. But the parental involvement was slightly higher in the public schools at home. So there was an improvement there. And there was quite a change from the earlier period than the latter period.

The other thing I will say about the public schools is WETA asked parents to grade their schools, and it's a very common question around the country. A through F, right? Just like we grade

kids and like you will get graded at Yale and like you get graded in high schools. So on a four-point scale. And it turns out the first time around, the public schools had about a 2.8 average grade, a little between a B and a C, and 2.7 for the private schools. That's because a dimension came here about the schools closing. In the first 2 years, it was rocky around here in the voucher program because the courts had not yet approved it. So people thought it was going to get closed. And we had this very bad school, the Juanita Virgil Academy, which I can identify because we never got to do a case study of it, and it was very—well, that closed in the middle of the school. It was a terrible school. We had pictures of kids throwing wet toilet paper out of the windows at each other. That's the kind of order they had in Juanita Virgil Academy. So it had a bad reputation. Then it really picked up that last few years.

This last time around, the public schools graded out at 3.0, an easy B, higher, and the private schools at 3.4. One other thing that's important about the two waves, it turns out that the first wave, which there was about 1,500 students in 1995, almost all the students were black. OK. 92 percent. OK. It was an African-American program. There were no Asian students, not a single Asian family that we could identify in the program. It's much more diversified now, with many more students obviously, 20,000 students here rather than 1,500 at the end. And it's 57 percent African-American, 24 percent Hispanic, and then the rest is split. And there's 15 percent white. And then there's smaller numbers of both Asians and Native Americans. So it's a much more diverse program now than it was.

The parents of the private school kids are still poor, lower income, than MPS parents. They were both times. But they have slightly higher education levels. Not too much the second time around, actually. They were very close of parent higher education. The first time around, the MPC parents, the public choice parents, were considerably lower educated.

Senator JOHNSON. Now, having read your testimony, I understood most of it, that's the point, I mean, it's very complex. I mean, trying to study these, trying to come up with some kind of evaluation is necessarily very difficult. But it did sound in your testimony that student attainment, graduation rates, that you found some real significance there that's been somewhat indisputable.

Dr. WITTE. Nobody's disputed it. If anybody quibbles and says, well, it's only 4 percent or 5 or 6 or 7 percent, we think it's closer to 7, 7 percent jump in graduation is big time.

Senator JOHNSON. Let me ask you what you mean by that, though. Is it you are going from 70 to 77 percent or is it a point increase or is it a percentage increase?

Dr. WITTE. It's a percentage increase, and it's going to about 75 percent for the kids that are now graduating compared to 69 percent. That's the range. Which we didn't make too much of because the problem is—if the kids stayed for 4 years in the private schools, in other words, they were in the private schools in 2006 and they were still in them in 2010, 93 percent graduation rate. 93 percent.

Now, a lot of people think, trick, there's a problem with this, and Brother Bob knows this. The first year in high school for these kids—we discovered this time around, it did not apply to the first

group—was very difficult for many kids. Because they took them under lottery conditions, and these kids were sometimes way behind. The private high schools tend not to give grades out free. OK? I do not know how else to say that. They have to earn those grades.

So what happens after the first year, and often the kids left the private schools because maybe they only got two credits and they needed six because the private schools have high graduation rates. Right? High graduation levels. You gotta have six credits, 24 credits to graduate in most of these schools. So they only got one or two credits after the first year. Then what happens is they look around and they say, gee, how am I going to graduate on time and they may go back to public schools.

The public schools have a lot of ways of getting through that are not quite as rigorous, let me put it that way, as what the private high schools are. Now, what the private high schools will do, after they have figured this out, of course, is they have all kinds of remedial type programs, they have summer school in advance for kids coming out of the eighth grade, kids got into schools, low test scores, for example, or low grades in the middle school, they will require them to go to summer school to try to catch them up. They put them in smaller classes, they put them in—remember, there's a whole series of things that we outline in our reports that the schools do to try to solve this problem, but they can't solve it all because often the kids come in so far behind.

Senator JOHNSON. Thank you. Just one last quick question. You mentioned competition studies. Can you elaborate a little bit on that. Anything definitive there in terms, does choice—even at this very minimal level. I need to point that out. There's only 3 percent of Wisconsin students K through 12 that are actually part of the School Choice Program. Now, that is some competition in the public system, but it's pretty minimal competition.

So anyway, what results have you found in terms of competition studies?

Dr. WITTE. OK. The competition now is more, Senator, because the voucher programs are one thing, but remember we're looking at competition with charters.

Senator JOHNSON. Correct. That's about 8½ percent, I think, total.

Dr. WITTE. Yes. You have a lot more in charters. Not in all these places, because a lot of places like in Oshkosh you may not have that many—you have a lot of charters, actually, in Oshkosh.

Senator JOHNSON. Right.

Dr. WITTE. But in some places you don't, like, I don't know, Fort Atkinson where I was raised, we don't have charters.

Senator JOHNSON. But surely, even there, it's about 8½ percent of the population. Again, it's competition, but it's still under 10 percent.

Dr. WITTE. But wherever it occurs, and it occurs mostly in the large cities, it's been positive. And this is really across the country. This is not just Milwaukee. This is not just Wisconsin. Florida has found four major studies of vouchers there, and they have all found competition effects.

And they do them in different ways. What we did here with the last study done by a man named Jay Green, who was working with

me, they did it very cleverly. They looked at the density of charter schools—I mean of voucher schools, in other words, how many charter schools are close. The more charter schools are close to a public school, the higher the achievement gains of the public school.

Senator JOHNSON. So, again, I guess you are basically confirming what my basic principle would be is competition actually works, it drives quality, even at a pretty minimal level, because we are talking a pretty minimal level of competition. This isn't like it's full competition, this is still pretty minimal.

Dr. WITTE. Yes. That's correct. I think that's absolutely correct.

Senator JOHNSON. Thank you. Mr. Komer, I know opponents obviously will talk about public payments or public support for religious schools and the separation of church and state. One thing I have always thought about is within our university system, we have Pell Grants, we have student subsidized loans. Is there any legal difference between that type of public support for potential—for example, Notre Dame or, other religious universities, religious high schools or K through 12 or K, lower level? And, again, speak right into your microphone.

Mr. KOMER. At this point, since we won a case called *Zelman* versus *Simmons-Harris* involving the Cleveland scholarship program, which was, once again, modeled on Milwaukee, there is no legal difference between higher education programs and lower education programs. For many years, in trying to explain what is school choice, we would always point to these other programs at higher education, like Pell Grant programs. And almost every State has a Pell Grant-like program of State scholarships that have very similar eligibility requirements as the Federal Pell Grant program. We use vouchers in housing programs. Section 8 housing is a voucher program. We have pre-K voucher programs. We have childcare voucher programs. It was K-12 education that was unique in not having voucher programs and not allowing private religious schools to participate on an equal basis.

The difference, of course, was K-12 education is the only place where we provide free public education. And because it was free and a monopoly, there were no competitive effects; and like any public monopoly or private monopoly, monopolists don't like competition, they don't want competition because it allows them to be inefficient. It allows them to get away with failure. Don't get me started on how public education—

Senator JOHNSON. OK. We won't.

Mr. KOMER [continuing]. Requires failure to get more funding every year. But it is a system that rewards failure and is, just like other systems, based on the ignorance of the American public.

Because if you knew what was being spent on children in the public schools per capita, you would be aghast in most States.

Senator JOHNSON. Well, let me give you some figures on that. In Milwaukee, it's about \$12,000 per pupil. In Washington, DC, it's \$29,000. That's the most recent figure. Now, just real quick, I mean, think of if you had 20 students and you got \$29,000 per student, that's almost \$600,000. I mean, in the hands of an experienced educator, I think you could do a pretty good job educating 20 kids for \$600,000.

But let me ask you, because in your testimony, your written testimony, you talked about—I think you raised this issue, that with the Department of Justice investigation of with the way DPI is administering this program in terms of disability discrimination, that would really be more the jurisdiction and function of Department of Education, not Department of Justice.

Can you just talk about that, the appropriateness or the legal jurisdiction of the Department of Justice to even be pressing this investigation.

Mr. KOMER. Sure. The Americans With Disabilities Act covers pretty much everything. But it assigns to eight different areas of enforcement, to different Federal agencies. Not surprisingly, education is generally assigned to the U.S. Department of Education where it's vested in the Office For Civil Rights which is when I was at the Office For Civil Rights we were answering the Milwaukee question way back in 1990 under the Individuals with Disabilities Education Act (IDEA), which was a Department of Education program, and under Section 504.

Now, the IDEA says that for education, you are supposed to enforce it the way you do the IDEA in Section 504, which are Department of Education responsibilities in education, and generally everything education related is supposed to be done at the U.S. Department of Education. But in this particular case, there was no referral of the complaints that triggered this investigation to the U.S. Department of Education which has considerable experience with the sort of handicap discrimination issues. Instead it was held by the Department of Justice with no explanation why.

And I have no idea why they kept it. It's not really a violation of law not to send it to the U.S. Department of Education. But it left it in the hands of some people who, quite frankly, don't know what the hell they are doing, compared to sending it to people who actually generally know what they are doing.

Senator JOHNSON. We are going to try and get to the bottom of that. By the way, we did invite a representative from the Department of Justice to testify here and they declined.

Professor Witte, before—I forgot to ask you a little bit about in terms of just macro evaluations. And, from my standpoint, for example, the D.C. Opportunity Scholarship Program, there's 16,157 thousand [sic] students that have applied. There's 6,252 vouchers that are granted. So people are applying at 2.5, 2.6 times the rate. So demand is 2.6 higher than supply.

And then, again, how—it's incredibly complex trying to evaluate this. I got this little chart from School Choice Wisconsin. Obviously an advocate. But I thought this was a pretty strong evaluator. As a business person, if I am looking at a sales chart that looks like this, and let me just—I know it's hard to see. But let me just read off the results here. In the year 2000, 8,000 students took advantage of school choice; in 2005, it was almost 16,000. By 2010, it was 21,000. Last year it was almost 30,000. No matter what your studies say, no matter, the controversy over does it do a better job, have better educational outcomes, I mean, this is a pretty strong indication that the parents and the kids, the customers, obviously see value in their voting with their feet by accessing and taking advantage of the voucher program.

Would you kind of agree with that statement?

Dr. WITTE. Yes. I think that 29,000 might be applications. Does that—

Senator JOHNSON. No. I believe this is total, this is Milwaukee, plus Racine, this is the statewide program.

Dr. WITTE. Oh, yes, sure. Yes, let me put it this way. 25 years ago I started to study choice. And at that time, basically there wasn't any choice. I mean, you went where you were assigned, and that assignment came because if your address was on one side of the street you went to that school, if it was on the other side of the street you went to another one. And that's still the case in a lot of cases.

So what's happened in the United States is just extraordinary. I mean, now most of the people in Milwaukee actually choose a school that's not their neighborhood school. Either through a charter school or the Chapter 220 program that's still going. That's still going out there. That sends kids to the suburbs from the city, or from the voucher program. So it's an extraordinary situation that Milwaukee has done. And the change over time is just amazing.

It's actually hard to figure out who is in MPS anymore. Because charter schools are in some cases they are on the books if they go to the Chapter 220 program, they are still on the book at MPS. So it's really kind of difficult to even get the numbers of kids. So you have an unbelievably changed environment. And, in fact, a lot of the times when kids go back to MPS from the private schools, it's because there's no slots, they run out of slots at the high school level or even sometimes at the middle school level. So there aren't enough positions.

Henry was saying how they are expanding so fast, it's amazing what's happening with these schools. And they can't keep up, they can't keep up. The good schools can't keep up. They can't expand fast enough. And you literally, unless you want to go to a virtual world, still bricks and mortar matter. And you don't want to have, 50 kids in a classroom to do it. Maybe we should go back to that, years ago, the Catholic schools had 40 kids in the classroom and they did pretty darn well. But, no, it's greatly expanded and that certainly is an indication.

Senator JOHNSON. So, Mr. Tyson, if you would quick grab the mic there. As long as we are talking about waiting lists, just real quickly, how—out of a student body of about 800 you said?

Mr. TYSON. 860.

Senator JOHNSON. What's your waiting list?

Mr. TYSON. It's somewhere around 300, 330.

Senator JOHNSON. Almost 35, 40 percent are waiting to get into the system. What I am going to do is I am going to ask—

Dr. WITTE. What's Messmer's?

Brother SMITH. It's a good question. I retired in 2012.

Dr. WITTE. So did I.

Senator JOHNSON. Do you know what it was then?

Brother SMITH. I'm sorry?

Senator JOHNSON. Do you remember what it was then?

Brother SMITH. The high school, probably 150, 200. The elementary schools—boy.

Senator JOHNSON. Higher? More than that?

Brother SMITH. Yes, it was more than that. I can tell you the K-4, K-5 and first grade were extremely high, almost two to one for every student that was accepted. And there were two classes of every grade.

Senator JOHNSON. So the demand definitely outstrips the supply which, again, if I were judging the success of a program, I would say the demand outstripping the supply by that much is certainly evaluated.

What I am going to do because, again, I want to be respectful to St. Marcus's time here, is I do want to give those audience members a chance to make comments. If you want to start lining up, where are we going to set up the microphone? And while you are doing that—so if you want to ask questions, start lining up over here. And then I am going to ask a couple of questions of Mr. Tyson and Brother Bob here as well.

You talked about the individual education plan. Can you describe, in the public school system when a child gets an individual education plan, then they get the funding to provide those services, correct? Can you just give us some sort of range of how much additional funds go into a public school versus people on vouchers, you get the 7,200 voucher and that's it.

Mr. TYSON. Yes. If I may just dismiss the students, the St. Marcus students. You guys are good to go. Some of your parents may be waiting. So you can just—nice job, by the way.

Senator JOHNSON. Yes, thank you very much.

[Applause.]

I love the uniforms.

Mr. TYSON. Senator, I do not have a real definitive answer to that question simply because, as you have stated, in our experience when we have those children with special needs, there are no dollars. So for us it's a moot point.

Now, from what I understand, in the public sector, the amount of money that is available to educate the child depends upon the severity of the need. So if you go to Gaenslen Elementary School, MPS, just up the street, absolutely phenomenal school with their special needs population. They have some kids that have two adults on one child, and it's tens of thousands of dollars.

Senator JOHNSON. So bottom line, we already have a system in the State of Wisconsin to accommodate those disabilities, provide the funding to provide the services within the public system. That would be I would think pretty transferable, again, it's a State issue. Professor Witte.

Dr. WITTE. Yes. We did a report on this. When DPI came out a few years ago saying that there were 2 percent or less than 2 percent of the kids identified in the voucher program whereas Milwaukee had 20 percent identified, this means formally have an IEA, they have an IEA, right, they have an education plan, an IEP. OK. We felt that was wrong and we had some data that applied to it. Because we had these kids that were in the public school and then switch to the private school.

And we were able to estimate that in fact the private schools were taking care of kids with disabilities at a rate of about between 8 and 14 percent depending on how we did it. And we also felt that the MPS school with 20 percent were probably over-identifying.

They were under-identifying in the private schools because of two reasons; no money, OK, in some cases very severe disabilities that they could not deal with, which is true also of the public. And then also there were some parents that did not want their children to be identified. They were identified in the public system, but they did not want to because they lose legal rights when you get identified. And so they came to the private schools in some cases because they wanted to get help from under. Now, that says a lie. So we felt the numbers were really wrong. And we have them in a report, a pretty sophisticated report.

Senator JOHNSON. So we will close out with two more questions, two questions for both Brother Bob as well as Mr. Tyson. I want you first to address your accommodation of students with disabilities. Brother Bob, you were pretty clear in your statement on that earlier. In one of your testimonies, one of you reported that the public school system sometimes refers students with disabilities.

So if you can speak to that. And then second—and do it at the same time, just the financial challenges of running a private school system. I am certainly well aware of that having worked to try and keep the Bleward (phonetic) system financially solvent. And it's a struggle. It's always going to be a struggle.

But if you can address both those issues. Then I will close out the hearing and turn it over to 2 minutes of comments to those who want to make them. Mr. Tyson, we will start with you.

Mr. TYSON. Sure. Well, to answer the first question, last school year, we had students with autism, cognitive disabilities, emotional behavior disabilities, specific learning disabilities, other health impairments, significant developmental delays, and speech and language impairments. So about 8 of the 12 possible diagnoses, we had them here.

Some of the more severe students, such as students with moderate autism to severe autism, require one-on-one or small group instruction throughout most of the day. So we have two certified special education teachers who meet that need. We have another non-certified special education teacher who works with other students.

We receive about \$300,000 in Federal title money, so this is Federal money for low income students who are at least one grade level behind. And some of that staffing is used to meet the needs of the special education students.

Senator JOHNSON. But it's not specifically for that purpose, you are just able to utilize it for that purpose.

Mr. TYSON. Correct. You asked about the challenges. I mean, I think everybody in the room knows this, urban education in any context is phenomenally challenging. The single greatest challenge that we face is the fact that we have in aggregate a lower income population than the district and we are being asked to educate those children with about 70 percent of the dollars. When you do the math and you figure out, even if you add \$2,000 more per child, the number of additional teachers that we would get is absolutely stunning.

And so the challenge is how do you meet all of the needs because we want to meet the needs of every single child excellently, how do you do that on such a relative low dollar amount.

Senator JOHNSON. And, again, the cost to educate a child in your system is slightly under \$9,000, you get a \$7,200 voucher?

Mr. TYSON. Yes. The voucher is \$7,200 and then we raise about \$1,700 per child or about \$1.5 million a year.

Senator JOHNSON. That compares to a cost per pupil in Wisconsin in general of about \$11,000, Milwaukee is about \$12,000, correct?

Mr. TYSON. Correct.

Senator JOHNSON. Brother Bob, can you answer those two questions?

Brother SMITH. Yes, Senator Johnson. One of the things, and Dr. Witte said it earlier, that it's really important for people to know in education and in particular in urban schools, probably the top goal for many parents is safety and security of their children. There are parents who will bring a child to a private school and who will say my child has no special need when in fact the child is attention deficit disorder (ADD), attention deficit hyperactivity disorder (ADHD), dyslexic. It may be because I don't want the child on Ritalin or any other medication. It may be because I think the child is going to get labeled later on. It may be because I think you are going to try to kick my child out of school. What is important and what Messmer and other schools have done for years is we try to counsel parents and guardians. No. 1, we do a disservice to you and your child if your child cannot do college prep work if it's at the high school level or other things.

That does not mean there are not ways, as Dr. Witte mentioned, if a child comes in deficient in credits, there's Saturday school, there's taking an eighth period, there are all types of things. But the child has to do it, the parent and guardian has to help provide transportation, et cetera. It can happen, but it's not cheap.

What also is important is MPS has always referred in Milwaukee students to private schools. And I will be very frank. Sometimes it's done in a very collegial way, other times some of the State superintendents who have said that if religious schools were in the program, we would have Wiccan schools or David Koresh schools. Those same State superintendents called me when a student in MPS was expelled, for reasons I will not give, to say, Bob, can Messmer take this kid. What the superintendent did not say was, Bob, we will pay you for doing it. It means that the kid's low income, you take this kid and you pay for the kid. We took the kid because education is our business.

I think at the end of the day, what is important to remember, too, is there are some students that even MPS or other public systems cannot educate. That's why we have a St. Francis School next to Cardinal Stritch, St. Amelia's, the former St. John's School. There are a number of places that students are educated that are paid for, but it's very expensive. And whether you are talking about Milwaukee, D.C., the North Mariana Islands. It's anywhere from \$15,000 to \$50,000. It's expensive. But the students need to be educated.

Senator JOHNSON. OK. Well, again, I just want to thank all of our witnesses for taking the time and your thoughtful written and oral testimony and answering my questions. I could keep going on,

but I want to be very respectful. We told St. Marcus we would close this out by 7, and I want to give members of the audience a chance.

What I will do is formally close out the hearing here by saying that this hearing record will remain open for 15 days, until August 4 at 5 p.m., for the submission of statements and questions for the record. The Committee has already received a written statement for the record from Wisconsin Institute For Law and Liberty. We appreciate that. And I welcome statements for the record from anyone else who would like their voice heard as the committee considers these issues moving forward.

This hearing is adjourned.

[Formal hearing adjourned at 6:47 p.m.]

Senator JOHNSON. Thanks. Now, what I would like to do, again, I want to be respectful of St. Marcus and to other people so everybody has a chance. So I would—and I'll time it. But if you could make your comment—first of all, tell us your name, and if you could spend 2 minutes. And, please, keep it within that timeframe and I will use that when you are getting past. Thank you.

Ms. CHRISTOPHERSON SCHMIDT. You are asking the impossible from a teacher.

Senator JOHNSON. Again, I would really ask you to speak very closely to the microphone so we all can hear you. So state your name and then speak closely to the microphone.

Ms. CHRISTOPHERSON SCHMIDT. Joan Christopherson Schmidt. But for the last 60 years as a teacher here in Milwaukee and abroad, I have been known as Ms. Chris. And I didn't really mean to be the first speaker, but maybe I should be because I have probably taught longer than any of you.

Sixty years is a long time, from kindergarten, early childhood, all the way up through the grades, through high school, college, university, television and radio, and even out in the country wherever kids needed to have some art and activities.

I am a little confused at this hearing. Because I was brought up going to a public school that whatever we did in public office at Badger Girls State, it was for public good. Public good, which means all. And if I were still teaching, I would love to teach at your school, Dr. Tyson. Those children are very fortunate. The same for yours. But public school can't say it's either you be good or you are out. They would be sued.

I thought, Senator, that your job was to defend public schools; and I do not see anyone here from the public school which is—we have to have by law, it's a civic right. And it has to take every child. And it's the base of our democracy. And if we take that away, even if we don't mean to, we are going to destroy our democracy and we are going to have the beginning of school and power from the top down.

The Dean of Education at Edgewood College said it very well. He said the system that we are going into privatizing is here's the test; public schools, teach it; but we are not giving you the same tools.

Let me tell you, the children in Milwaukee, the poor kids, many of them children raised by children, if they were given the same opportunities, the art, the music, the phy. ed., access to good books, and maybe breakfast and be sure that there's a home for them at night, they would rise like every child in any school. I have taught

in both. I know. It just takes a connection between a teacher and one child. But when teachers in the public school have 30, 40, 50 kids in a class, they can't possibly go out, like I used to, into the core, into the homes, to see a parent and a child if they were not there.

I know you want me to cutoff.

Senator JOHNSON. No. I want to make sure everybody else has a chance to speak. So, when you see this—I really don't want to be banging the gavel on anybody. So, please, if you would let the next person come and speak.

Really, we are giving 2 minutes per person so everybody has a chance. OK?

Ms. CHRISTOPHERSON SCHMIDT. But please support public school.

Senator JOHNSON. Yes. And, again, I would encourage you to submit a comment to the record. We would appreciate that. If you would like to submit a written comment for the record, you are happy—

Ms. CHRISTOPHERSON SCHMIDT. I can't hear worth a hoot.

Senator JOHNSON. I said we encourage you to submit a written statement for the record. OK?

Sir. Go ahead.

Mr. PRIDEMORE. Thank you, Senator Johnson. My name is Don Pridemore.

Anyway, I am a recently retired State legislator for 10 years; and I have served on every education committee that the legislature has offered, including education reform. I have been to many MPS schools, choice schools, charter schools, Montessori schools. And my comment is that if you really want to judge how a student does in our system, all you have to do is talk to them, talk to their parents, see how excited they are to learn, what their plans are once they leave school. And that's the one fallacy that I see in our education system is that we don't track these kids once they leave school, what happens to them, how successful are they.

To me that's much more important than a 1-day test to see what they may have learned or maybe they didn't sleep well the night before. That to me is the highest priority in terms of really judging how well our schools are doing regardless of where they are educated.

But I support the Choice Program, I always have in the legislature. And what I see in students in a choice school is a level of character, a level of discipline, and just an excitement to have the opportunity to be in a school where teachers really care about them.

And my question is of Dr. Witte, is your report available online or published at this point?

Dr. WITTE. The testimony here in a long form will be part of this record or I can send you the copy as well.

Mr. PRIDEMORE. Thank you.

Senator JOHNSON. Thank you, Don. And, again, I really don't want to bang the gavel on anybody. When you see me pick it up, it's already been 2 minutes, so if you can wrap it up, I would appreciate it.

Ms. REBHOLZ. Hi, my name is Cheryle Rebolz.

This is a school setting. I am listening. Just recently, back home in my Mequon-Thiensville community, we had in our local newspaper, News Graphic, a lot of back-and-forth and op. ed. pieces about charter, choice, voucher, public. And I submitted something that I want to read. "Education is the key that opens doors for young people and allows them to achieve their dreams. The latest U.S. ranking show teens are 25th in math, 17th in science and 14th in comparison to 30 more industrialized nations. Education Secretary Arnie Dunkin called the performance of American students a wake-up call.

"Wisconsin is one of the only States confronting and introducing reforms that can improve schools so they work better for students. Overhauling harmful policies and bringing commonsense changes to our public education increases the chance at the American dream. Clinging to outdated laws and policies protect the status quo.

"I support and endorse charter schools and vouchers for those families wanting to withdraw from failing public schools with the conditions that they are held to the same standards outlined by DPI, especially if they are to receive taxpayer funded money. Parents should not have to enroll their children in failing and unsafe public schools solely because of their geographical address. Local schools should offer an excellent diverse education in their community to eliminate the need for parents to outsource their children to other districts. Because this is not the case, charter schools are a solution.

"Charter schools on average receive \$8,000 per pupil compared to my district of \$10,796 in the Mequon-Thiensville School District and cannot levy taxes for the difference, unlike the public school system.

"It is not a lack of the money that equates to better education. Wisconsin is one of the top four States spending the most money on public education, yet Wisconsin is not in the top four when it comes to most proficient and successful academic outcomes. The return on our investment is lagging. Adapt, live—"

Senator JOHNSON. Again, I would ask you to submit that for the record. You have it written, so I appreciate that. Thank you for your comment. Again, when I lift this up, I really don't want to bang the gavel. Hello.

Ms. MILLER. Yes. Hi, I am Erin Miller and I am autistic. I have been in both public and private schools. I have friends who send their children to both public and private schools. Including my former teacher who went to private school in the audience, as you can see here.

My vent is not that private schools are bad. My question is in regards to our recent budget, with shoving things into the budget like specialty vouchers in the middle of the night. Again, my objective it's not public and private schools are bad. My objective is what is happening with our educational system and with our nation? And I am sorry to ramble. I may have to cutoff short. Thank you, sir.

Senator JOHNSON. OK. Thank you. Next.

Ms. MILLNER. My name is Lynn Millner. I think this panel is so stacked, it's all about vouchers and private schools. The two young

women that you have here are, like—they excel in academics. Wouldn't it have been better if you took someone who was failing in MPS and then went to a voucher school and is now succeeding? I don't understand what you are showing. These women would succeed anywhere they went. Anyplace they would succeed. Because they are that kind of people.

I also want to say so to my understanding, people get—kids who excel go to these schools, right? And if they don't fit in, if they don't do well enough, they don't get to stay there. And so what I understand is that in New Orleans, they don't have a public school system and they have thousands of kids who have been thrown out and have nowhere to go back to.

Also, I am a retired MPS teacher. My daughter went to a parochial school for 4 years and she went to the Shorewood Public Schools. I am so insulted, I have heard over and over again that public school teachers don't care about their kids.

I have worked with parochial school teachers, I have worked with—as a parent, I have worked with public school teachers. I think I am more caring than any of them. And I have been with public schools, Milwaukee Public School teachers. I don't understand that there is this big agreement that public schools are inferior. I don't know how you can say that.

Senator JOHNSON. I don't believe anybody said that here.

Ms. MILLNER. Yes, they did.

Senator JOHNSON. And nobody denigrated teachers. But your time is—

Ms. MILLNER. Oh, yes. I heard it several times.

Senator JOHNSON [continuing]. Up. Again, so I would recommend you submit a statement for the record. Thank you.

Ms. MILLNER. I will.

Senator JOHNSON. Ma'am.

Ms. STEVENSON. My name is Degusta Stevenson, and my daughter attends St. Marcus. First of all, I want to say thank you to St. Marcus, it's a really good school.

My only concern is that in the time that I have been here, and it hurts my heart to know that I had to fight with MPS because I am one of the parents that wanted her child to be recognized as a special education student. She was diagnosed with dyslexia, and she had a special education as far as with her math. But for whatever reason, when she came over to St. Marcus, there was no special education funding or program in place. They had to use other resources. And just like the gentleman, it hurt to know that I had to fight with MPS, Jennifer Powell, Dennis Duff who is DPI, Christina Flood who is also over the section of special education; and even went to the school board. And Sandy O'Brien here can attest because I called her so much. And when I got over here, we had to put other resources in place.

That's not fair. My daughter deserves an equal education coming from MPS over to a choice school. I made that decision because if I had to go out of my pocket to pay for things that I wanted to make sure she was getting the best that she can, and she's entitled to that.

Someone had mentioned up here about the American Disability Act. One of the lines state in the parent resource as far as that you

have to ensure that everyone is entitled to the freedom and equality of education. Why didn't you or have them address the questions and not addressing it as to how you plan on addressing the lack of funding for the choice schools to ensure that every student, regardless of their disability, is being serviced at the proper level to excel as other students. That's my question.

Senator JOHNSON. Thank you. That was a purpose of the hearing was to kind of lay out those realities. So thank you very much. I appreciate it. Sir.

Mr. STROEBEL. Good evening. I am Duey Stroebel. I am the State senator for the 20th Senate District. And as an elected official, I don't specifically advocate for public schools, I don't specifically advocate for private schools. I specifically advocate for the kids in the system that we want to get a good education. And I think we need to understand that it's not one size fits all. And we need to know what's best for each individual child here.

Now, we have great public schools. We also have great voucher schools. We have great charter schools. We have options out there. And I think options are what we want. And I think the studies have shown that when you have options, you raise all boats and they are all better options.

And so that's what I think we have to continue to advocate for, that competition which makes everyone better, as the studies have shown.

And I think what I would like to see in the future is a little more—I don't think the vouchers are necessarily looking for, cheerleaders in the private sector. But let's have a little less pushing back on them so they have a chance to thrive just the same.

When I see what goes on here in Milwaukee versus some of our charter and our choice schools, I mean, they are fighting a battle every day to succeed. I think if everybody could just step back, understand that there is a route for both private and public schools and that together when they both succeed, they will both succeed to a greater degree. I think we both understand that we both sit back and we don't fight on that basis, but move ahead together, I think we are going to do great things for Wisconsin and great things for the city. That's the way I see it.

So, again, I appreciate the opportunity to speak here. And let's all, again, work together and make this whole system better on both ends of the spectrum. Thank you.

Senator JOHNSON. Thank you, Senator. Anybody else? OK.

Please. I didn't know whether you were just standing back there.

FEMALE SPEAKER. Good evening, I just appreciate the opportunity to speak to you. I had not planned on speaking, so I felt compelled to come up here.

I am an alumna of Milwaukee Public Schools. I went to UW-Madison. And I have three children who attend Milwaukee Public Schools right now. I am not a proponent for public money being funneled out, it's been over a billion dollars since the start of this that comes out of public schools. We are essentially funding two, three, now maybe with virtual schools having no cap, maybe four new school systems.

At some point the public schools will not be financially solvent. We need a certain amount of students involved in that to keep it

going. Charter schools, private schools, they can pick their students. They get counseled out. And that money doesn't follow the student. The money stays at the school. So that's an extra disadvantage. It's a funding flaw that I gave testimony to already in the last budget at the Capitol.

Public dollars support public schools as a civil right. And my children, they have done without librarians, without art, without music, because of cuts and because of money being funneled out of the public system.

And I echo the sentiments of the other women that were up here. These women who are up on the panel, they would have succeeded. I mean, my children are going to succeed from MPS. There are children who aren't—and there are also shining star schools in MPS, as there are—maybe St. Marcus School is doing better than some of the other voucher schools. My children's K-8 school, they have almost 400 children there, they have a wait list of over 100 kids to get in. So you can pick those same kinds of things out in public schools.

I don't like to see that money coming out of the public school system to fund another—I think we should—all that money should go to resources to support all the children, the children of Milwaukee. Kids who come to St. Marcus have parents who are concerned about their education. A lot of kids in MPS, their parents are not—they are nonexistent. That's all I wanted to say. Thank you for your time.

Senator JOHNSON. Thank you for your comments.

Again, I want to thank everybody for taking the time here to attend. I hope you found it informative. Again, I encourage you, if you have any written comments you want to submit to the record, it will be open until August 4th at 5 p.m.

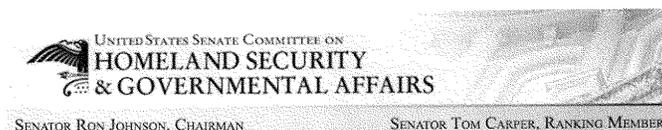
Again, thank you to all of our panel here, and have a very good evening. Take care.

[Whereupon, at 7:07 p.m., the Committee was adjourned.]



# A P P E N D I X

---



## Opening Statement of Chairman Ron Johnson

### *“The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide”*

July 20, 2015

*As prepared for delivery:*

Good afternoon and welcome.

I would like to open this by thanking St. Marcus Lutheran School for hosting this important hearing. Some other schools also offered their facilities and staff when the committee was planning this hearing, and I would like to thank them for their generous assistance. Most of all, I would like to thank every parent in the audience today for taking the time and making the effort to attend this hearing.

We all have one thing in common: We all want a prosperous America. An important step is educational success for all children.

The issue of school choice is particularly important to me. In many cities, public schools are working poorly. Children trapped in these schools have a reduced chance of escaping poverty. A child's future should not be pre-determined by ZIP code or by a lottery to get into one of a few good schools.

As chairman of the Senate Committee on Homeland Security and Governmental Affairs, I have the opportunity to oversee operations across the federal government. One of the areas of jurisdiction that my committee oversees is the District of Columbia, which has some of the worst public schools in the nation. But Washington also has its own school choice program, and this fall, Congress is going to debate whether to continue this program, which has given thousands of poor children a better shot at a good education.

Fortunately, being from the great state of Wisconsin, I know that Congress can gain insight from the oldest and largest urban school choice program in the country, the Milwaukee Parental Choice Program.

I would be remiss if I didn't point out that the Milwaukee Parental Choice Program, and dozens of school choice programs across the country, would not exist if it were not for the tireless effort

**Contacts:**

Melinda Schnell, Communications Director: [Melinda\\_Schnell@ronjohnson.senate.gov](mailto:Melinda_Schnell@ronjohnson.senate.gov)  
Patrick McIlheran, Communications Advisor: [Patrick\\_McIlheran@ronjohnson.senate.gov](mailto:Patrick_McIlheran@ronjohnson.senate.gov)



by the late Assemblywoman Polly Williams, who helped draft the legislation in the Wisconsin state Legislature that created Milwaukee's program.

Just as crucial was Dr. Howard Fuller, who unfortunately cannot be with us here today. Dr. Fuller, who was then the superintendent of Milwaukee Public Schools, chose to put students' needs first by embracing school choice. He continues that legacy through his education reforms efforts at the Black Alliance for Educational Options. The Milwaukee Parental Choice Program was signed into law by Governor Tommy Thompson in 1989. It has grown steadily. Now schools in it educate more than 24,000 children in Milwaukee, a number that suggest many parents find it a valuable way to choose an education they find well suited to their children.

I hope in this hearing to find out why. Why are parents choosing to make the effort to apply for the program and choose a private school for their children? Does the program produce better results? Are students more likely to graduate from schools the program opens up to them? What is happening in these schools that contributes to those results?

The Milwaukee Parental Choice Program has survived a series of legal challenges in the 1990s, but in recent years it has faced new scrutiny from the current administration. Since 2011, the U.S. Department of Justice has been investigating the program based on complaints from activist groups alleging discrimination against students with disabilities. To date, the Department of Justice has not found any evidence of such discrimination.

Last month, I wrote to the Department of Justice to gain a better understanding of the investigation. The Department of Justice has declined to provide even basic information and has asserted that it will continue to monitor Milwaukee's program. I invited the Justice Department to testify today. Unfortunately, the department declined.

I will continue to pursue answers from the department and will consider all available options, including subpoenas, to obtain transparency. Wisconsin parents, teachers and children deserve that.

Today, we will hear from individuals who have participated in the Milwaukee Parental Choice Program, from an expert who has researched the program for more than 20 years, and from another expert who can speak to the legal challenges facing the Milwaukee Parental Choice Program and other school choice programs around the country. I thank you all for being here today, and I look forward to your testimony.

###

**Contacts:**

Melinda Schnell, Communications Director: [Melinda\\_Schnell@ronjohnson.senate.gov](mailto:Melinda_Schnell@ronjohnson.senate.gov)

Patrick McIlheran, Communications Advisor: [Patrick\\_McIlheran@ronjohnson.senate.gov](mailto:Patrick_McIlheran@ronjohnson.senate.gov)

Statement of Justice Shorter

"The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide"

July 20, 2015

***Please Note:** The following statement is reflective of my personal experiences as I remember them to be true. All views and opinions are entirely my own and stem from a genuine interest in the enhancement of educational opportunities for low income students as well as students with disabilities.*

My educational experiences have taught me the importance of capacity, clarity and equity. In the fall of 2004 my sight began to worsen and I realize that for the foreseeable future I would be recognized as someone who is legally blind. At the time I was already enrolled in the Choice program as a student at Messmer Catholic High School, a school where I was surrounded by caring individuals who were fervently committed to my academic success. Nevertheless, in those early years neither Messmer nor my family had the financial resources to ensure I received all of the accommodations needed to support my educational endeavors.

My mother and I therefore decided to research resources for students with disabilities and independently sought out funding from private donors. Thankfully, I was able to reconnect with a former mentor who shared my story with a foundation which granted me additional scholarships. The funding equipped me with several pieces of assistive technology. This equipment coupled with the unwavering support and attention I received from teachers and staff allowed me to not only participate but to excel in each of my courses. Messmer was later able to secure additional financial support from donors which immensely enhanced my educational pursuits and access to adequate accommodations.

After graduating from Messmer I went on to attend Marquette University where I earned a degree in Journalism with minors in Justice & Peace Studies as well as entrepreneurship. As an undergrad I studied Community Development & Social Entrepreneurship in Cape Town South Africa in addition to Peace & Post Conflict Reconciliation in Uganda and Rwanda. Next month I will earn a master's degree in Sustainable Development with an emphasis on International Policy from SIT Graduate Institute in Washington DC.

As a result of my educational experiences, I have come to passionately believe in capacity, clarity and equity.

1. **Capacity:** My family, mentors and the staff at Messmer firmly believed in my capacity to compete academically and conquer seemingly insurmountable odds. Students with disabilities can indeed achieve their educational and professional aspirations. We have the capacity to contribute to classrooms, communities, the city of Milwaukee, the state of Wisconsin, the United States of America as well as the rest of the world.
2. **Clarity:** Initially, my mother and I were quite confused on what to do and where to go concerning educational issues associated with my disability. Accordingly, students with disabilities and their families must be properly informed about their rights and educational options. The Department of Public Instruction should provide all schools participating in the Wisconsin Parental Choice Program with the information needed to enhance parental awareness related to academic choices and available resources for students with disabilities.
3. **Equity:** While participating in the Parental Choice Program I received the same financial voucher as students without disabilities which did not account for the increased expenses affiliated with my visual impairment. Correspondingly, I believe that students with disabilities who are voucher recipients should have equitable access to state aid. The additional expenses associated with educating students with disabilities must therefore be considered and effectively integrated into the Parental Choice Program. This would provide choice schools with the financial resources needed to ensure that students with disabilities are reasonably and consistently accommodated.

I agree with the principle premise of the Parental Choice Program. We should all be able to make the best choices for ourselves, our families and our future. However, the problem of students with disabilities not having access to adequate accommodations when attending private schools on vouchers funded by the state of Wisconsin must be rectified. Schools and parents should be secure in the knowledge that funding from the Parental Choice Program will complement rather than complicate the educational choices of students with disabilities. This program clearly has the ability to bring forth transformative change within the city of Milwaukee. Moreover, I believe that if we focus on capacity, clarity and equity the program will truly have the potential to serve as a model for what a dedicated state of educators, parents, legislators and supporters can do to ensure the empowerment of students in general and students with disabilities in particular.

**Statement of Diana Lopez**  
**“The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide”**  
**July 20, 2015**

Hello. I am Diana Yvette Lopez and I attended Saint Anthony’s School of Milwaukee, another Choice school, from the third grade all the way up to my high school graduation. My whole life has been a series of causes and effects and I know this very well. Since I was a little girl, I always thought about what kind of consequences would come from my actions. For example, if I wanted to watch Toy Story a couple more times, I needed to clean my room. If I wanted to help the teacher hand back papers, I needed to be the first to finish the math worksheet.

With this in mind, I knew that in order to do well in life and do what I wanted to do when I “grew up”, I needed to do well in school. I knew that my dream of becoming an archeologist in Egypt, inspired by the movie The Mummy, would only be done if I planned it out meticulously. So, at the age of about nine, I started googling universities that specialized in Egyptology and I knew that from then on I would have work as hard as I could to be the best in middle school and high school.

But which middle school would prepare me the best for my future? Before going to Saint Anthony’s, I went to a nearby public school. Despite being less than ten minutes apart from each other, it felt like a completely different world. At public school, I had always questioned why Christmas had to be called Xmas and why I couldn’t sing Christmas songs. It felt weird that when I was in my community, a largely Hispanic community, everything seemed to revolve around going to Church but, when I went to school, it was nonexistent. When I asked about, I was gently told to let it go. I was frustrated. Then, one day, my grandma took me to pick up my uncle, only four years older than me, from his school: St. Anthony’s. There, I saw a multitude of kids my age dressed in fancy uniforms and a bunch of artwork on the wall, like the prep schools I had seen in all the movies. On the overhead as I walked in, there were prayers and announcements blasting and it just clicked. I called my mom from the school office while my grandma was with my uncle and I told her to switch my schools. In my mind, I knew that if I went to St. Anthony’s, I would get to dress up in the uniforms. By dressing in the business-like uniforms they had, I would be better prepared for when I had to interview for colleges because they would know I was a professional.

Middle school was great. I got to learn about so many things and this time I could ask as many questions about any religion, not just Catholicism, as I wanted. However, I never knew how valuable going to a private school with the Choice program was until I started looking for high schools. I had my sights on a school in Bay View here in Milwaukee. It was perfect: they taught French, much needed by archeologists, and they had computer programming classes, something I thought was cool. I wanted to go so badly but the problem was the \$12,000 tuition a year. I did everything I could: I applied for scholarships and got them all, I started saving my money, and I started promising my parents I would pay them back my tuition once I was rich and famous. It just was not meant to be for me. My mom lost her job and my little brother was born. My dad was about to lose his job and we were all living paycheck to paycheck. One day they sat me down and told me the reality and, in my mind, my whole future just crumbled. After I cried for days, I looked at alternatives. In the end, I chose to go to Saint Anthony High

School and, because they had the Choice program, I was able to go at no cost. In the end, I am happy I graduated from there because not only did I receive a valuable and wholesome education, but it let my parents have some breathing and not panic over paying tuition.

Again, actions have consequences. Since I went to Saint Anthony's, I was able to talk about religion freely. Many think that going to a Catholic school means being oppressed and kept thinking "inside the box". However, that is not the case. Naturally curious, I was able to ask my religion teacher about the differences between the major religions of the world and I became very interested in how the Christian and Muslim ideals interacted with each other. Suddenly, my dream of becoming an Egyptologist dissipated and I became interested in Global Affairs. What if I had never been able to ask about religion? Would I have ever discovered my passion? Also, because my parents didn't have to pay tuition for me to go to Saint Anthony's, I was able to go to a summer program my junior year that revolved around International Relations. I fell in love and to this day and I haven't wavered. During the summer program, there was a representative from Yale who gave a speech and I got in contact with her. Never once did I think about going to an Ivy League school. However, after talking to her, I was convinced I would try as hard as I could to get in. A few months ago, after weeks of grueling applications, I discovered that I got into Yale and every other school I applied to. Now I am going to Yale next fall to study Global Affairs and Arabic. But, the point is, what if I had never gone to the summer program and met the woman from Yale because my parents had to pay for tuition?

Going to a Choice school has opened up so much for me. I was able to go to the March for Life in Washington D.C. this past winter and I got to see firsthand a political movement. I have met so many people of the Church who have lived all over the world and taught me how to speak phrases in different languages and who have, time after time, reinforced in me the idea of curiosity. My teachers care about me and they are incredibly knowledgeable in their fields. I hear horror stories about neighboring schools having fights every day and teachers that don't care about their students. I was never afraid of that happening at Saint Anthony's. I was able to get the same quality education as someone of a higher socioeconomic standing without burdening my parents and sacrificing their peace of mind. So to those who are thinking about signing your kids up for a Choice school, think about the consequences of your actions. You are sending your child to a school where they don't have to worry about negligent teachers or fights every day, where they can ask the questions they want, and where you can rest assured that they are receiving a quality education. To the School Choice Program, I want to thank you for giving me the opportunity to ask my questions, for giving low income families like my own a chance to receive a peace of mind, and for being that one step in the road towards my future. I hope to make you proud. Thank you all very much.

**Testimony of Brother Bob Smith**  
**"The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide"**  
**July 20, 2015**

As a young child walking on a spring day after the 1968 riots in Chicago, Illinois something happened that changed my life forever. Walking down Madison street with the smell of recent fires still in the air I remember hearing a loud "bang," and almost immediately seeing a white teenage boy running across the busy street without stopping to check the traffic. Seconds later, a large number of black students chased the boy as cars screeched to avoid hitting the kids. A student caught the first kid and pushed him to the ground as the angry group kicked and then literally walked over the helpless boy. As I watched in horror, my mother and her female friend pushed me against a building wall and said, "stay here." I can clearly remember as I watched this senseless act wondering, "why doesn't somebody do something?" The answer came from my mother and her friend. These two ladies started pulling and pushing kids away from the helpless boy, and formed a protective shield for him until staff from the high school and later police and medical help arrived.

My mother and her friend spoke to the police and we continued down the street. The things I remember are seeing 'footprints of blood' on the street of kids who walked over another kid just because he was white, and being grateful that my mother was my mother. While I don't remember talking about what happened (other than telling my brothers and sisters later), this act of courage from two women who cared only about helping someone who needed help has shaped most of who I am as a person and what I have done with my life.

Tonight, I am happy and honored to share the experiences I have been fortunate to have seen during the last decades here in Milwaukee, and in states across our country. School Choice is a lot of things - and it is important that we keep making sure that everyone knows the truth whenever there is a conversation about this most important educational option for all students. School Choice can be delivered through tax credits, home schooling, cyber-schooling, charter schools, nonsectarian schools, public schools, religious schools and vouchers. Charter schools ARE public schools, and public schools are also part of the Choice program. My interest in the concept of School Choice came in my early years at Messmer. There was rarely a week that passed where we didn't have parents or guardians coming to our high school desperate for a better education. Most of the families were ethnic minorities and were low-income. They could not afford tuition, but wanted a future for their kids! I read the papers and listened to Governor Thompson, Representative Williams and Mayor Norquist, and I couldn't understand why a parent was being blocked from making a free decision about where their child could best be educated. I knew the history of the GI Bill, and knew that a military veteran could use their funds to attend any educational institution - public or private, and could attend religious colleges. A veteran could also use their funds to attend a seminary if that was their choice. I knew that Milwaukee was filled with schools that served special needs students or students who were expelled from public schools, and some of these were religious schools/institutions.

It seemed to me that the argument/debate was about "public money" being used for religious purposes, but if that were the sole logic being used - why could or would money from religious citizens/people of faith be used for public purposes? The fact was and is that the money is public, but does not belong to the government - it belongs to the people. They can, should and will have a say in how their money is used - especially as it relates to the most important thing they have - their children! It is also important to remember that poor people have as much to say about how funds are used as others, and an

argument could be made that they should have a greater stake in making sure that their children receive a high quality education.

A quote that Shakespeare said that has become a favorite of mine is, "tis an ill cook that will not taste his own soup." The play that this quote came from was simply warning anyone who had the soup that they would die because it was poison! If the cook would not taste it... This applies to some people who are the most aggressive in opposing School Choice - those who decry vouchers, but in fact, practice another form of School Choice. I find it odd that people who work at and for Public Schools would pay for their children to attend private and religious schools when their kids could attend school for free! Depending on where you live in the United States, this figure of public school teachers and administrators sending their children to private and religious schools could be anywhere from 30 to 60%. But, the greater hypocrisy comes from people who hold the highest political offices in our country, and who could have many levels of security if safety was a concern about where their kids went to school. I speak of many people running for President/Vice President who decry private and religious schools and feed at the trough of the NEA, but send their own kids to private schools. The silence is deafening that no one has ever questioned this blatant repeated act that the poor could not exercise in Washington, DC.

The truth is that this battle for some has never been about education - it has always been about jobs, money, and God. While many have been credited with the idea or concept of vouchers, it is a bit ironic that an out of print book, *The Three Archbishops*, talked about the history of Milwaukee in the early 1900's. There was a convention in Milwaukee for Catholic School Educators and Archbishop Sebastian Messmer gave the keynote speech. He said in his simple and humble way, "let the public schools test our Catholic students, and if they do as well or better than their kids - let the money follow the students." That, was probably one of the earliest calls for vouchers, but it was met with silence for decades.

There never was a question in my mind about the chances of success of School Choice in Milwaukee. Having diverse choices for parents, putting the power in the hands of parents, and making it clear that ALL schools needed to provide high quality education or the punishment was going out of business. It is why we have Burger King, McDonalds, Wendys, Culvers and many other places that specialize in hamburgers. If a store does not provide high quality service a customer can and will take their money down the street to a competitor. They will also probably share the story of bad service with family, friends and neighbors. You won't lose one customer - you will lose 10!

Our nation cannot afford mediocre education anywhere and for anyone. People who cannot see the connection between this and many of the societal ills plays a dangerous game. High quality education is the key to freedom, success and citizens who make our country a better place. The question that I asked during the horror of watching a human being being stepped on in 1968, "why doesn't somebody do something," is being asked and answered again. The courage of those supporting School Choice is admirable.

Our small Choice program of less than 1000 students in the early 1990's has grown to over 22,000 students in Wisconsin and includes religious schools of all faiths. Our actions have inspired over 27 states to start Choice programs, and some of these programs have been led by Democrats. This is not about me, but about WE. School choice now and forever.

*Evaluating Voucher Programs: the Milwaukee Parental Choice Program*

Professor John F. Witte

U.S. Senate Homeland Security Committee Hearing:  
The Milwaukee Parental Choice Program

Milwaukee WI, July 20, 2015

My name is John F. Witte a Professor Emeritus in Political Science and Public Affairs from the University of Wisconsin-Madison. I come before you today because I was twice the official evaluator of the Milwaukee Parental Choice Program (MPCP). The first evaluation, *Study I* in what follows was from the inception of the program in 1990 until 1995; the second, *Study II*, was from 2006 to 2011. In the first study I was named official state evaluator by then State Superintendent of Schools, Bert Grover. Bert was, by his own declaration, an unremitting opponent of vouchers.<sup>1</sup> The second study was written into legislative Act 125 in 2005 that specified an evaluation and assigned it to the then Georgetown University School Choice Demonstration Project (SCDP). That project was funded by a range of foundations from liberal to conservative. I was co-principal investigator of that project at the request of the other principal investigator, Professor Patrick Wolf of Georgetown and later a chaired Professor at the University of Arkansas where he moved the SCDP. In both cases I was part of a large team that worked on those studies. This paper will first discuss school voucher evaluations in general terms, including what we study in a broad context, and how these studies are carried out. Second, I will outline the types of studies completed in *Study I* and *Study II* and the results of

---

<sup>1</sup> He was, however, not happy when the *Wall Street Journal* ran an editorial, with portrait drawing of Grover, mad an analogy of Grover's opposition to that of George Wallace "standing in the school house door."

those studies. I will use non-technical language, but reference scholarly books and published articles and reports which of course contain technical details.

### **Types of School Voucher Studies and How They Are Accomplished?**

#### **Student Effects.**

*Standardized Achievement Tests.* Despite the popularity of political attacks on standardized achievement tests, especially when mandated by the federal government, the first and clearly most often required and reported results in voucher studies are the differences between standardized test results for private-school voucher students and those attending public schools without a voucher. Two comparisons can be made; 1) those who just receive a voucher but do not use it (called the intent to treat condition - ITT); and, 2) those who receive a voucher and attend a private school with it (treatment condition). For most the latter is most important.

There are any number of types of comparisons that can be done with test scores. The simplest is simply to compare the averages of test scores in each comparison group. The reliability of these results depend completely on the method of selection of the two groups. If, for example they were assigned in a truly random fashion, as in say a drug study in which a full set of procedural standards are required, the averages between groups in the ITT and Treatment conditions would provide reliable estimates of the effects. Statistical measures of how likely the results would occur by chance could be accurately computed for the differences in averages. However, those procedural standards are very difficult to meet in most social science settings. They include: 1) identification of the full sample to which the study (and drug) apply; 2) a method of random selection into the treatment and non-treatment groups that is independent of anyone involved in the study; 3) double-blind conditions in which neither the person administering the drug or a suitable placebo or the subject knows which they are receiving; 4)

full accounting for subjects who leave the study before the specified end-date; and, 5) adequate quantitative outcome measures of the effects of the drug and any side effects that might occur.

Obviously many of these conditions cannot be met in education studies. For example, students and teachers know what type of school they are in so the double-blind condition is never met. Almost always, because we cannot coerce students to attend private schools, the samples of those in treatments are those who apply for vouchers (or other experimental treatments). And, depending on the program, a number of students will not end up in the type of school assigned by the randomization process.<sup>2</sup> This does not mean that random assignment studies are not of immense value and a major research step forward. Many of these problems can be attenuated by statistical and other procedures, for example, by following strict protocols in the random assignment process. However, they pose enough problems that random assignment research designs are not the only way forward, and often they are simply impossible to implement in situations on which we need as much reliable information as possible. That was the situation in Milwaukee in both *Study I* and *Study II*.

In non-random studies, simple cross-sectional comparisons of voucher and non-voucher students are of little value. The reason is that, without some controls or completely different approaches, the two groups may have very different background characteristics that may affect test score results. For example, we know from many studies that, all else being equal, private school families, without a voucher program, are of considerably higher socio-economic status than non-private school users (See Witte and Thorn, 1996 for Milwaukee comparisons). There are a number of ways to mitigate the effects of these differences as long as the differences are

---

<sup>2</sup> This can occur for both conditions: voucher-receiving students may have to be accepted in private schools, but may not, or they may not get into the ones they want; and non-voucher receiving students may attend private schools on their own accord (i.e. paying tuition).

observed and can be measured. For example, statistical controls can be used that account for the effects of say parental education or family income if we can reliably measure those variables.

In addition, a very popular approach, in all types of education studies is to look not at the simple cross-section averages, but rather the individual student changes in those scores from a base-year score to subsequent years. These models come in many forms that fall under the heading *value-added* measures. If this is done without controls, the assumption being made is that the effects of family background affect base scores, but not the potential growth scores from the base year. Or put another way, the learning slopes can be expected to be the same for students who begin at different levels of achievement. Subsequent differences are attributable to the (value-added) differences that schools and teachers make. Because this assumption may not always hold, often value-added models also include controls on background variables that may continue to affect learning growth after the beginning (base line) of the study.

Short of randomization there are also methods of selecting samples that may offset anticipated differences in voucher applicants and non-voucher students. For example, most voucher programs to date in the United States have used family income differences, either to be eligible for a voucher or to determine the amount of money the voucher-recipient receives. For example, during the time frame in the Milwaukee studies, most of the time only students with family incomes below 175% of the poverty line (\$20,000 for a family of three in 1990) were eligible for vouchers. Therefore in *Study I*, we studied all students who received vouchers as the treatment group, but picked the comparison groups from Milwaukee Public School (MPS) students who were eligible for free or reduced free lunch (which was 185% of the poverty line), and then we picked a second group as a random sample of all MPS students. The low-income

group gave us somewhat of a better match, which we later verified through surveys of parents in each group.<sup>3</sup>

More sophisticated matching techniques are more common in recent years and are sometimes combined with randomization. The reason for this is that researchers are constantly worrying about factors that are unobserved or unmeasured between groups that may bias outcome estimates. For example, let us assume it is difficult to measure motivation or discipline, especially in small children. If these factors affect learning, not a heroic assumption, and they exist more in the one group than the other, the differences we observe in outcomes will, at least in part, be attributed to these factors. However, these factors are not observed and thus cannot be easily controlled for statistically. Random assignment, if done with rigor, should also randomize these unmeasured factors so if the sample is large enough they will occur equally in each group. That is the true value of randomized studies.

In Milwaukee *Study II*, from 2006 to 2011, we used a sampling procedure for the public school control group that advances the comparison group validity considerably over prior research. We first selected a random sample of students in private schools with vouchers based on their numbers in each grade. For the ninth-grade we included all students because we wanted to also study high school graduation rates. We then focused on the base 2006 standardized test score in reading and math of the selected voucher students. For each student we located the set of public students in the same grade that simultaneously lived in the same *neighborhood* and had very close 2006 test scores. Why the same neighborhood? The reason is that research by

---

<sup>3</sup> There were some interesting results of these, and other comparisons between the samples of families in *Study I*. Actually the voucher families were considerably poorer than the public school sample and they were more likely to be single-parent (almost always women-headed) families. However, the voucher parents were more educated and education of their children meant more to them than other values. They were also more likely to practice some form of religion. See Witte, 2000.

demographers indicate that people who live together in neighborhoods share attitudes, behaviors, and situations, such as exposure to crime. These types of commonalities are indirect measures of those unobserved factors that concern us in setting up comparison groups. Given that list of public school students how did we ranked them as matches using what are called “propensity scores.” These scores take into consideration other variables such as race, ethnicity, gender, and income to come up with a score measuring the goodness of the match to the individual voucher student. We then selected the top candidate to be in the comparison group.

The analysis of student test scores in *Study I* and *Study II* were both value-added studies that estimated changes in test scores in reading and math from a base test year. They both controlled for different sets of family and student background variables.<sup>4</sup> The analysis in *Study II* was more sophisticated because statistical methods and computer programming had advanced considerably. However, the basic analytic techniques were similar enough that the results presented below are comparable.

The one exception to differences in *Study I* and *II* also introduces the last important methodological problem – how to treat those that leave the study? Subjects leaving a study is called *attrition*. Attrition creates problems of many sorts, but mostly it comes down to biased attrition from the treatment or control groups. If, for whatever reason, one set of subjects is more likely to leave than another, outcome estimates can be very biased. The attrition problem reaches

---

<sup>4</sup> One issue in most education studies is that some variables are present for all students in terms of “administrative data” that districts must collect and thus are available for all students. These are usually: gender, age, race, eligible for free lunch, and disability status. Some have family below poverty line as a measure of income. Other variables used in our models come from parent surveys. These include parent education, better income measures, and a large set of attitude and other behavioral measures. The problem is that not all parents respond to surveys so the samples including just administrative variables differ from those that also include survey data. The latter reduce the sample sizes (N) and may introduce bias due to which families respond to the survey. In *Study I* survey response were high for urban surveys (in the 20% rates); but for *Study II* they were over 50% because we had the resources to pay respondents.

back into research designs. For example, some programs that award vouchers in a careful random process, such as the private voucher programs in New York, Washington, and Dayton, private schools had to accept students with vouchers and many did not. The bias occurs if those denied were, for example, the poorest students or students with prior behavioral problems. That makes the accepted students a non-random subset of the randomly selected voucher students. In programs where private schools have rights to accept and dismiss students those who come and leave are critical to studies. I highlight this because in studies of inner-city education, attrition rates are always high. Poor families move and family situations change. That means that students change homes and schools.

Another attrition issue is how the research accounts for those who leave? Do you drop them from the study? If they switch groups and you can follow them, what is their status? Do they stay where they began, or do you switch them from one group to the other? If they spend one year in a private school and 3 in a public school to whom do you attribute their educational achievement after four years?

I am not certain there is a definitive answer to these questions for social and specifically educational research. In the formal world of random assignment, in say the medical field, there is a specific answer, which we followed in *Study II*. The answer is that initial status is the only status: if one receives the treatment initially (say a drug), the subject is in the treatment group to the end of the study regardless of whether they continue to follow the drug regime or not. The reason is that in the real world people stop taking prescribed drugs and switch to other drugs or stop all drugs. Thus to get an accurate population estimate of effects, the study must include these population behaviors.

But, is this comparable to kids switching schools and attributing all subsequent learning to the initial school, *when the study is comparing treatments (i.e private and public schools)* Is this different from studies *determining if a single treatment is effective?* In *Milwaukee Study I* we decided to drop students from the study when they left the program even if they switched to the other sector and we had test scores for them. That meant all learning was attributed to the sector where they began, but ended if they switched. In *Study II* we ascribed to the classical formulation of leaving students in their initial sector, although we also did other analyses using weighted results and other models. Results usually did not change when we altered the methods. We also carefully evaluated attrition of students who left the system for whom we lost outcome data. We found little bias in terms of test scores, and other variables for those who left in the respective treatment or control groups.

*Student Attainment (Graduation).* Graduation from high school leads to many good things; dropping out does not. The evidence on this simple difference is overwhelming. Graduates earn much more; create stable families; have more successful children; and are happier throughout their lives. Dropouts earn much less; have more out of wedlock births; have higher rates of incarceration; and express lower levels of happiness. If I had one measure of educational success in America it would be the high school graduation rate. Other than *Study II* no voucher studies in the United States have estimated graduation effects. Our study has and it is a critical finding of our research.

*Attitudes and Behaviors of Students and Parents.* Test scores and hopefully attainment are appropriate outcome measures of voucher evaluations and dominate reporting, but other results are also important and we tried to measure them as well. Student attitudes and behaviors toward their schools, teachers, and learning are important ingredients in education. The same

holds for parents, with perhaps an added importance of their participation in the education of their child both at school and at home. In general, studies have focused on which parents know about choice options and how they learned about them? They also study why parents apply for choice options, or why not. And, for both students and parents, measures of satisfaction levels with various aspects of the school experience are reported.

In *Study I*, these were generally measured using surveys (Witte, 2000, Chapters 4 and 5). Because the program was studied from the very beginning and most students transferred from public schools, we were able to ask students and parents to assess traits of prior public schools, such as various items of satisfaction, and compare them to their current private schools. We did the same for public school students if they had recently moved from another public school.<sup>5</sup> These comparisons to prior schools were not as relevant in *Study II* because most students had been in their respective schools for much longer. However, in that study, additional information was gathered through a series of focus groups with parents from both sectors, often meeting together (See Stewart, *et al.*, 2010).

#### **Institutional and Systemic Effects.**

*School-Level Effects.* Although less attention has been paid to the effects of vouchers on schools – both private and public – the issues involved are critical for the general well being of education in a choice environment. At the school-level, there is a great deal of speculation when voucher programs are being considered about the consequences for public schools which may lose students and/or face competition from new or existing private schools. Indeed the original

---

<sup>5</sup> One of the things that caught us off-guard after the first year were the number of students who switched public schools during or after that year when the student had not reached the terminal grade in the school. This made a difference in analyzing test scores and other outcomes but also posed a unanticipated policy problem that we then analyzed. We found that approximately 35% of students in grades 3 to 5 switched schools unnecessarily each year. At the same time a group of researchers in Chicago discovered the comparable figure in Chicago public schools was over 40%.

argument for vouchers by Milton Friedman was premised on the assumption that with a full voucher system for all schools, demand for better schools would lead to their survival and growth, and the lack of demand for poor schools would lead to their shrinking and going out of business (Friedman,1962).

Although these are important issues discussed below under systemic effects, less attention has been paid to internal effects on schools. How does choice affect staff morale, hiring, and retention? Are there curricular responses to introducing vouchers? Is pedagogy affected? Are there leadership changes? And these questions apply to both public and private schools.

Studies that include school effects also usually involve surveys, possibly focus groups, but almost always case studies of schools that may incorporate the former. In both *Study I* and *Study II* these case studies were done by research teams from two to four people and involved between one and three days in a school. The variance depended on the size of the school and the research team. The surveys were always in the form of face-to-face semi-structured interviews with teachers and administrators. Case studies always involved extensive classroom observation and usually discussions with students. Anonymity was given to both individuals and to the schools.

*Market-Competition Studies.* Economists love markets and they love competition. Thus if they study educational choice they are solemnly obligated to study competition generated by the introduction of vouchers into a public school system. The standard study, of which I have also participated, tries to determine if the introduction voucher students have impacts on neighboring public schools from which students may leave with vouchers and attend private schools. These studies almost always analyze changes in test scores in the affected public

schools. They also may include distance measures between public and private schools and recently the “density” of private school options within a certain radius of public schools. They often now include charter and private school options. And, as a direct measure of competition they include, if data are available, the number of students transferring from a specific school to choice alternatives. The hypotheses are that the closer the alternatives, the higher their density, and the more students lost, will lead to greater competition and thus incentives for the public schools to increase their achievement levels. If the hypotheses prove correct, the happy result is that all students may learn more.

*Financial Studies.* The rhetoric surrounding the voucher debate may be the strongest, and have the least common ground for opponents and proponents of vouchers when the discussion turns to money. Opponents routinely claim that vouchers cost the public schools resources and can eventually bankrupt public schools. The proponents argue that system-wide voucher programs save money because students are on average being educated at a lower total cost. The reason for the latter is that private schools, and hence the price of the voucher, is much less than the per member cost of public education. On average the latter point is correct if all costs are included, but so is the fact that public schools do lose money when students leave. Public school proponents further argue that because the losses are marginal for any school they cannot make up the losses easily by reducing staff or programs. The studies are further complicated by having to make an assumption concerning what potential private school students would do in the absence of vouchers. In short, how many would go to public versus pay to go to private schools in the absence of vouchers? And the answer to that depends on voucher program design, specifically income eligibility limits, the size of the voucher, and whether private schools can require “add-ons.”

*The Effects on Family Choices.* Perhaps the least studied of all the voucher issues is the one that for many voucher supporters, including myself, is the most compelling outcome. Education choices in America, at all education levels, are greatly affected by family income and well being. The initial argument for vouchers in Milwaukee was publicly stated as a way to allow poor, mostly black families, in the disaster that was the Milwaukee Public Schools (MPS), to have the same opportunity for alternatives that were available to the white middle classes. And those alternatives were to buy private education in Milwaukee or buy housing in the suburban districts where schools were considerably better. Thus the original constraints on the program: income limits; students had to reside in Milwaukee; and, excepting kindergarteners, students had to have been in MPS in the prior year. Over time all of those conditions have been changed, but at the same time, the program has grown from the original 341 students in 1990 to over 22,000 students in 2014-15. We turn now to those results and the results for the many issues raised above for each of the study periods involved.

#### **The Results of Voucher Studies of the Milwaukee Parental Choice Program**

The results described below are listed separately for each of the study periods, *Study I* from 1990 to 1996 and *Study II* from 2006 to 2011. In each case I shall describe the results briefly and in non-technical terms. These results were reported in each study in extensive reports to funding and government agencies. They have also been published in refereed scholarly books and journals. The initial reports are available from the authors, with those from *Study II* also on a website: <http://www.uaedreform.org>. The results, when available, will favor refereed articles over reports.

**Student Effects.**

*Standardized Achievement Tests.* The general conclusions for both studies are that there were no consistent statistically significant differences using value-added measures of test results between the voucher-students and the public school comparative samples over the four years of each study. There were some controversies and nuances in the two studies however.

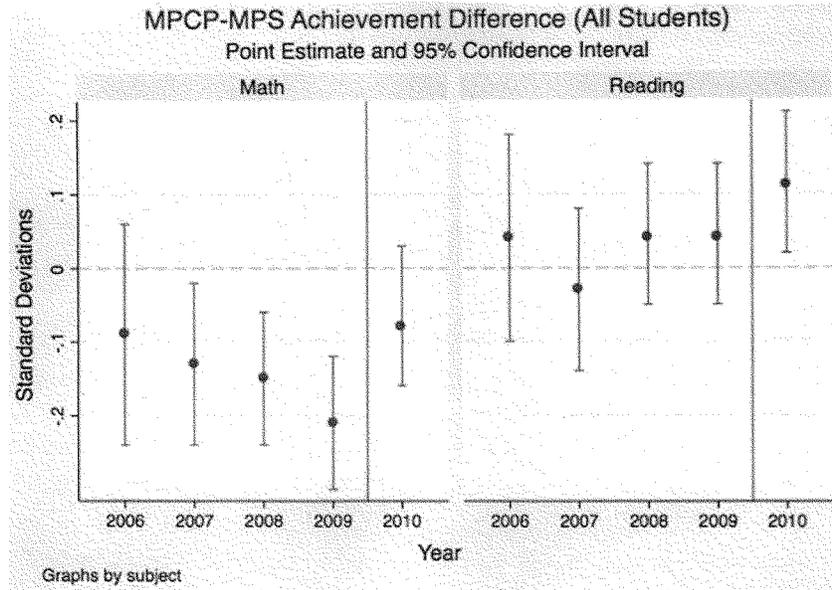
*Study I.* There were no statistically significant results in any year in either reading or math for our most robust model with the largest N. If survey data are included, which allowed for variables such as parental education, income, and involvement, but with a considerably reduced N, in year two the reading estimate was negative and significant favoring the public school students. However in the last two years the differences were very close to zero.

There was a significant controversy over four year math scores with a team of researchers from Harvard University headed by Professor Paul Peterson (Greene, J. P., *et al*, 1998). That group used a different comparison group – students who tried to get in the choice program in 1990 but were rejected. They find a very large effect when this very small group is used. We found no significant effect for math in year four using any of our models. However, when we reanalyzed their control we found definitive evidence that the rejects who could be followed (their comparison group), meaning they continued on in MPS and thus had test scores, were far from a random sample of rejects. Indeed, they had much lower prior test scores, were poorer and came from families with lesser educated parents. The ones who left probably moved out of MPS or went to private schools when they did not receive vouchers. Also it turned out that with their small comparison group, five students accounted for the significant negative results and had scores close to zero on the math test in year four (when they averaged the 33<sup>rd</sup> percentile in year three). These five students probably simply put their names on the tests and turned them in

without doing the tests. When they were excluded, the math result was not significant (Witte, 2000, Chapter 6).

*Study II.* In the second study, which had a number of technical advantages over the first study, the researchers ultimately concluded that there was no clear differences between the voucher sample and matched control group. The descriptive differences are presented in Figure 1. The methods we used to model these results were sophisticated but were almost all value-added results with extensive controls. Again there were some issues in the last year. The first three years after the 2006 base line test (2007 to 2009) produced mostly significant, negative value-added results in math, with the MPS comparison group doing better than the voucher sample. But this was not the case in the fourth year when the differences were not significant. However, in reading the opposite occurred with the voucher students doing better than the matched sample in years 2007 and 2008, but the differences were not significant. However, as with math, there was considerable improvement in reading in the fourth year and the difference with the control group was statistically significant at the .05 level.

The big issue is why the jump in the fourth year (2010) in both subjects? After long deliberations, we ended up arguing that the result was more the effect of high stakes tests than of advances in the voucher schools. The reason was that the legislature had passed a requirement that first took place in 2010 that all students receiving vouchers in the private schools had to be tested and the results published and entered on the state web site. Prior to that point we were responsible for testing only our sample, and we tested them whether they were still in private schools or if they were in MPS. As it happened, those who returned to MPS prior to 2010 did not experience the jump that those that were still in the private schools did. That suggested

Figure 1. Achievement Test Results for *Study II*

Source: Witte, *et al*, forthcoming.

that test pressure in the newly tested private schools probably produced the upward results after years of quite consistent lower results (Witte, *et al*, forthcoming). The conclusion that there were no positive test results favoring the voucher students is thus a bit controversial, but there were also several years of negative math tests to offset the positive final reading test even if it was a true, and not test-induced result.

Thus, in summary our best estimates over ten years of study were that for achievement tests, there were no consistent differences from the base year between voucher students and comparison groups drawn from students in public schools. That is not the result for attainment.

*Student Attainment (Graduation)*. An attainment study was not possible for *Study I*. Because of this lapse, I was adamant that we include one in *Study II*. To that end we sampled all ninth graders in the base year of 2006 to maximize the sample we could follow beyond graduation in 2010 and into college.<sup>6</sup> The results of that study are definitive, not involving controversy, and may be the most important finding in voucher studies to date. The latter is contingent on how much importance one places on graduating from high school and going on to four year colleges. Our research team has placed very high importance on that outcome. As we demonstrate in the article reporting those results (Cowen, *et al*, 2013) graduating from high school is positively correlated with a lot of very good things (higher immediate and lifetime income, solid family structures, access to higher education, etc.) and negatively correlated with a lot of bad things (jail, out of wedlock births, drug and alcohol dependency, etc.).

The results were quite simple. Compared to the control group, students receiving vouchers beginning in the 2006 cohort graduated from high school and attended four year colleges at between 4 percent and 7 percent higher rates than the comparison group of 2006 public school students. The colleges that they attended also appeared to be of higher status than the ones attended by public school students. And, for the 2006 freshmen cohort the voucher students had a high persistence rate into their sophomore year of college. Although 7 percent may not appear to be a high number to some, it is an extremely steep increase for large urban city school districts that have reached seeming limits in graduation success in the last several decades.

---

<sup>6</sup> As it turned out, we should also have sampled all eighth graders because we were able to stretch our funds to another year and more to follow those students. To date we have tracked the ninth graders two years after high school and eighth graders one year.

*Attitudes and Behaviors of Students and Parents.* As I stressed above, there are many measures of educational outcomes beyond test scores and attainment but they are often overlooked. Some are considered “soft measures” by some researchers and some are very difficult to study due to data or policy issues. One of the latter, that is a critical issue for many educators and families, are disciplinary outcomes, especially suspensions and expulsions. Our studies in Milwaukee did not attempt to analyze these disciplinary measures because they vary in terms of definitions and more importantly implementations at the school level. Specifically, suspensions come in many forms and school principals have very different approaches to what is an action requiring suspension and what is not? Expulsions are actually rare events which mean rates are very inconsistent. These problems are exaggerated when trying to make comparisons between public and private schools and their distinctive cultures on disciplinary issues. Because of these issues our studies measured discipline and safety in schools through student and parent surveys. Certainly not the best measures, but we feel they are more valid than administrative data.

*Study I.* The overall theme from *Study I* was that parental satisfactions were much more positive for voucher families than families in the public school control group. This included both parental evaluations of current, private schools in contrast to parental evaluations of current schools by public school parents, as well vouch parents comparison between their current school and prior public schools. Because of limited resources, in the first year, 1991, both parents in the MPS control groups (MPS random; MPS random low-income) and applicants to the voucher program were twice sent mailed surveys. Subsequently only new voucher parent applicants were sent surveys through 1995. Thus comparisons between groups were based on 1991 MPS parent surveys and yearly surveys on voucher parents.

The first set of issues involved why parents sought vouchers? The answers were very consistent over the five years. MPCP parents listed education quality, teacher pedagogy and quality, and superior discipline and safety in private schools as the most important factors affecting their decisions (Witte, 2000, p. 63). A second issue was the difference between applicants and non-applicants in terms of dissatisfaction with their prior (public) schools. Those who applied for vouchers were extremely dissatisfied with their prior school experience compared with those who did not attempt to obtain a voucher (Witte, 2000, p.65). Finally there were also some important demographic differences between the MPCP and MPS parents. MPCP parents were overwhelmingly black throughout the five years. Also MPCP families tended to have lower incomes than even the low-income sample of MPS parents, but they had higher education. They also were more religious in terms of beliefs and activities.

Other parental data also involve comparisons between responses about behavior and attitudes. The most striking results were that voucher-school parents expressed considerably higher satisfaction on almost all dimensions of schooling - the largest difference being in the areas of highest priority they listed for why they sought vouchers – educational and teacher quality and discipline in the school. The results also indicated considerably more participation of choice parents in all aspects of education – school activities, school organizations and involvement at home.

In summary, parent response to the voucher program, based on parent surveys, in the first study of the MPCP were consistently positive.

*Study II.* In the second study, from 2006 to 2011, much more surveying was done with a much higher response rate partly due to hiring professional pollsters who persisted in subject

contacts and offered money for complete surveys.<sup>7</sup> Surveys included both parents and students from grades 4 to 9. The surveys in *Study II* were more extensive and included such questions as political activity and knowledge, and civic duties. These questions have produce further insights into program effects.

Some of the first issues, asked in both studies were: how families learned of choice options; why some families applied for vouchers and others did not; and the comparative characteristics of MPCP parents and their MPS control group counterparts. An article by David Fleming and co-authors (2013) addresses the first two of these issues. The leading mechanisms for learning about choice were identical to the results from *Study I* and the same for MPCP and MPS parents: friends and relatives and their child's school. The characteristics of choosing parents were somewhat different in *Study II* than in the first study. One important difference was that by the time of the second study, the program had become much more racially diverse than in the early years, in which MPCP students were almost all black. By 2006, 56.7% were black, 24.5% Hispanic, and 15.8% white. (Witte, *et al*, 2008, p.17). However, as with the first study, MPS parents had somewhat higher incomes, but somewhat lower levels of education (Fleming, *et al*, 2013; Witte, *et al*, 2008). However, the overall education of MPCP parents was considerably lower than the first time around.<sup>8</sup> Also, as in *Study I*, religion was more important and MPCP families were more likely to engage in religious activities than their MPS counterparts.

---

<sup>7</sup> The response rates for parents were 65.4% for MPCP parents and 51.6% for MPS. Student response rates were 84.5% for MPCP and 46.6% for MPS (Witte, *et al*, p. 16).

<sup>8</sup> The average income of MPCP families was \$23, 371 compared to \$27,577 for MPS families. For education, in *Study I*, 46 percent of MPCP mothers had some college education, while in *Study II*, only 30 percent of MPCP parents and 26.3 percent of MPS parents in our sample are in the "some college education" category (Witte, *et al*, p.18-19.).

There was, however, a difference in reported parental involvement between the two sectors in *Study II*. As reported above, in the first study MCPC parents were more involved in all measures of parental involvement, in the school and at home. In *Study II*, While school activities remained higher for MPCP parents, home involvement was actually reportedly higher for MPS parents.

In terms of parental attitudes, there was also a shift from *Study I* in that the importance placed on education expectations, which were higher for MPCP families earlier, were the same between groups in the second study. On the other hand, the satisfaction of MPCP parents with most school characteristics were higher than MPS parents, although both sets of parents were reasonably well satisfied (Witte, *et al*, p. 26). One measure of school satisfaction that seemed to differ from *Study I* to *Study II* was the “grade” parents gave to their schools on an A to F, 0 to 4 point scale. In the first study, MPCP grades ranged over the years from an average of 2.0 in the first year (C) to 2.7 by the last year; while MPS schools ranged from 2.4 to 2.8. Overall there was no statistical difference between the samples. The MPCP grades reflected a very difficult first two years of the program (Witte, 2000. P.68). The second study resulted in average grades for MPCP of 3.4 while MPS averaged 3.0. Thus both were improved, but MPCP was statistically higher.

The same findings carried over to students. Overall voucher students expressed great satisfaction with most aspects of their schools. The difference on items such as when asked to agreement with statements such as, “My school promotes a drug-free environment,” was that MPCP students tended to Strongly Agree, while MPS students used the Agree category more often. That was true of most student responses. On the behavioral side MPCP students reported

fewer disciplinary actions against them and fewer suspensions, but as noted above, these are notoriously hard to validate because of differing school-level policies.

Political and civic duty has also been studied as a result of the second Milwaukee voucher study. In a study by David Fleming, William Mitchell, and Michael McNally, differences in civic responsibilities between voucher parents and the MPS control group parents were explored. They summarize their findings as: “We find that voucher students demonstrate modestly higher levels of political tolerance, civic skills, future political participation, and volunteering when compared to public schools students. Further analyses indicate these results may be driven in part by those students attending Catholic and other religious schools.” (Fleming, *et al*, 2014, p. 2). In a similar vein, Fleming, in exploring the political connections and activity of voucher and non-voucher parents, found voucher parents are more likely to connect government to education, to report learning about government from participation in the voucher program, and to be more politically active in general (Fleming, 2014).

In summary, many of the findings from the first and second wave of studies are similar. For the main, parental knowledge of and reasons for choosing vouchers or not are very similar. Comparisons were similar on parental income and education, with MPCP being poorer but more highly educated. Families differed, however, both in terms of a dramatic increase in racial diversity of the program, and in that MPS parents had more involvement at home with their children, and higher expectations for their children’s future education in *Study II*. The results were similar in terms of overall satisfaction with their respective school, with MPCP parents and students expressing higher level of satisfaction on most measures in both studies.

**Institutional and Systemic Effects.**

*School-Level Effects.* It is impossible to fully summarize the widely varying contexts of the many schools we visited in the two study periods of the MPCP. This report will highlight some of the major conclusions and innovative practices we came across during our ongoing interactions with schools. During the first study the schools involved were, by statute, limited to secular schools. The statute was changed in 1995 to include religious schools, which dominated the second study. However, one unique aspect of the first wave of schools was that a number of the schools were former Catholic schools that had been abandoned by the Archdiocese in the late 1960s and 1970s as a result of reduced enrollments produced by white flight. In some of those schools women in orders (nuns) were allowed to remain and in several instances they were mainstays of the teaching and administrative staffs.

*Study I.* The MCPC began with the first students in 1990-91. There were 341 students in seven schools. One school closed in mid-year that made for a very bad first year. Over 70 students were affected by the closing. Because the program was being challenged in court, and because of the publicity surrounding the closing and bankruptcy of Juanita Virgil Academy there were only six schools and 521 students in the second year. Of those six schools, four had been Catholic schools at one time. All were kindergarten through at most eighth grade. By the end of the first study there were 12 schools enrolling 830 students (Witte, 2000, p.56). There were still no high schools in the program. In 1995 there were a number of legislative changes in the program, the most important being that religious schools were admitted, the cap on students was raised from the original 1500 to 15,000, and the state evaluation requirement was dropped, not to be reinstated until 2005 in Act 125.

There were a number of lessons from these early years. The first was that it was clear that private schools were not the silver bullet answer to the myriad of problems in inner-city American education. Juanita Virgil Academy was a terrible place, run for five months by an incompetent principal. Parents from the school, surveyed in the first year, made very disparaging comments about the school, and many quickly pulled their children out before the school went under. We argued at the time that over 80 children lost all or part of a full year of education because of that school. And several others were not much better, with one other principal leaving school following drug charges for events happening in the school. Another school, that later rallied and became a star school in Milwaukee, Bruce Guadalupe School, was in the first two years in chaos and it was housed in one of the worst school buildings we had ever seen.

For all the schools, staffing was a problem because wages were about half the public schools and benefits even worse. Staff turnover was high with average tenure of only 4.2 years in 1990-91, and 24 % of the teachers had no certification. However, both of these numbers improved by 1994-95 to 6.5 years tenure and 13% non-certified teachers (Witte, 2000, p. 94).

Finances were also very poor in the first years, but the voucher program stabilized some schools, and higher wages and benefits allowed for more discriminatory hiring of teachers. The limited financial resources had several effects that might be judged positively. Because of limited resources, the schools had to focus on what later became known as “academic press”—they could not afford non-academic courses or activities. But of course that also meant limited music and art in most schools.<sup>9</sup>

A number of the schools proved to be specialty schools such as Waldorf and Montessori, but there were also two African cultural schools and one Hispanic oriented school (Bruce

---

<sup>9</sup> The exceptions to that were a Waldorf and two Montessori schools in which art, music, and non-academic activities such as growing and preparing food are standard parts of the curricula.

Guadalupe). However, even given these emphases, there were many similarities to traditional schools. As I wrote later from a case study: "...in one first grade class, a male black teacher on two successive days taught lessons using the books *The Little Engine that Could* and *The Red Hen*." (Witte, 2000, p.96). And from rigorous observational protocols comparative case studies with MPS and MPCP schools found that pedagogy and class organization were very similar and followed traditional practices.<sup>10</sup>

One clear difference was governance. All the private schools had governing boards with varying powers over principals and teachers. And in all schools, parental involvement was encouraged, high, and in some cases mandatory through parent contracts for time of service signed when their children were enrolled. Some of these practices have been taken over by public schools, but they were rare to non-existent in the 1990s.

Another obvious difference from earlier MPS school case studies, which was very consistent with the findings from parent surveys, was the emphasis on discipline, order, and respect in the private schools.<sup>11</sup> Several schools required uniforms, and inspected them. Students walked in pairs holding hands on the right side of the halls and stairs, and talking back to teachers or other adults was not tolerated. These behaviors were reinforced by two circumstances not available to public schools: small school and class sizes; and the ability to expel students. Thus in some ways the playing field was not level. In addition the private schools

---

<sup>10</sup> Because of limited resources we could not do case studies of public schools in either study. However, we had done many case studies of public schools in both MPS and suburban districts as part of a prior two year study in 1984 and 1985. We used many of the same instruments in both *Study I and II* and this allowed comparative statistics on classroom practices, time on task, and teacher and administrator data and attitudes.

<sup>11</sup> In the first year, however, that was not the case in Juanita Virgil Academy in which we observed students throwing wet toilet paper rolls from second story windows or, at the time, in Bruce Guadalupe where parents self-organized to sit at the entrances to monitor activities. As I said above, over the years, after the school was taken over by the (Hispanic) United Community Center and moved into a brand new building, that all changed. The school now has a waiting list of hundreds.

were working with families who mostly chose to be there. The family differences described above obviously played out in the schools.

Finally, our studies clearly led to another conclusion that has not been characteristic of traditional public schools – independence for the schools and teachers. Although that is a characteristic often put forward for today’s charter schools, charter schools were only beginning in the early 1990s in Wisconsin and elsewhere. Many of the administrators and teachers mentioned this independence in open-ended interviews as one the most positive aspects of the environment, and they listed it high on the list as to why they stayed. None were unionized and none were a part of a larger organization.

Given the above I want to stress that I ended a chapter on these schools with a “reality check” concerning what these schools and staff had to face every day. I quoted one of the original principals in the first MPCP schools:

“The hardest problem are to find a safe, stable environment at home and at school. If either are not safe or stable, they (children) are in trouble, at risk. Most of our kids come from dysfunctional families – alcohol, drugs, and physical and sexual abuse. Children can’t follow academic pursuits when affected domains are in disarray.” (Witte, 2000, p.111)

*Study II.* In many ways, despite many more research resources, the characteristics of schools in the second study are even harder to summarize than in the early study. The reasons are many more schools, of even more variation in type, focus, organization, and grade-level. For example, there were by 2006 a number of high schools of various sizes and catering to different student populations. Also, with religious oriented schools (approximately 85% in *Study II*) new dimensions opened up. For example, some remained wholly independent and others were linked to central organizations which varied in their efforts to control the schools. Also with more organizations, and much higher voucher levels, the cash nexus becomes an issue for some

proprietary schools. This led to more school closings. As indicated in Table 1, over the course of *Study II*, the numbers of total schools decreased, and the number of private school closings increased.<sup>12</sup>

**Table 1. *Study II* Voucher Schools and Students**

<u>Year</u>	<b>SCHOOLS</b>			<u>Total</u>	<b>STUDENTS</b>
	<u>Continuing</u>	<u>New</u>	<u>Closed</u>		
2006-07	122			122	17,749
2007-08	114	+10	-8	116	19,069
2008-09	114	+13	-10	117	19,803
2009-10	113	+2	-14	101	20,899
2010-11	103	+4	-12	95	20,996

Source: McShane, *et al*, pp. 4-5.

However, as in *Study I* there were some observations from our research teams that were not simply idiosyncratic and may prove useful in other contexts. These results are most effectively conveyed in a research report derived from eleven case studies done in 2011 by researchers under the direction of Thomas Stewart (Stewart, *et al*, 2012). That led the authors of that report to describe a series of lessons learned. I submit the executive summary of that report as the most succinct statement about schools in the second study.

<sup>12</sup> There are other ways of counting than in Table 1. Table 1 reports payments to private school organizations, some with multiple schools. An accounting of individual schools open for the entire year had: 06-07=122, 07-08=116, 08-09=112, 09-10=115, 10-11=107. But the drop is the same as in Table 1. One of the reasons for this drop was that choice supporters began to work closely with the Department of Public Instruction to better monitor the financial solidity and capability of voucher schools. In short they tightened up on a few schools that had considerable financial difficulty.

### School Site Visits: What can we learn from choice schools in Milwaukee?

#### Executive Summary

The School Site Visits study is part of the fifth series of annual reports produced by the School Choice Demonstration Project (SCDP). It describes some of the major challenges experienced and common practices demonstrated by thirteen (13) K-12 schools participating in the Milwaukee Parental Choice Program (MPCP). During the 2010-11 school year, there were 107 religious and secular schools participating in the MPCP. This report is based on visits to six of the high schools and seven K-8 schools that collectively reflect the wide range of characteristics associated with participating schools. This includes whether schools scored above or below average on the 2010-11 Wisconsin Knowledge and Concepts Examinations in math and reading. Teams of researchers from the SCDP conducted one-day visits to each school during the spring and fall of 2011. Using a variety of interview, survey and observation instruments, the research teams gathered information about school practices in six general areas: (1) school culture, (2) student academic success, (3) effective leadership, (4) teacher quality, (5) religious integration and accommodation, and (6) school facilities. We use the data collected during the visits to describe the most common challenges the schools face and the common practices and strategies they use to overcome these challenges. Overall, a number of general lessons were learned.

**Lesson I:** Academic Challenges Interviews with teachers, students and administrators at most of the high schools revealed that many choice students who arrive on their campuses are behind academically; in some cases by two or more grade levels in multiple subject areas. Interviews with teachers and administrators at the high school level indicate that while significant efforts are often made to accelerate student development, some students cannot close the gap in the four years they are with the schools. This affects whether schools can invest in college preparation versus career development. At both the high school and K-8 levels, mentoring systems are in place in many schools to help new students assimilate. This practice is particularly effective in schools with a diverse student body because it helps to build relationships and community between students of different achievement levels, ages, and ethnic backgrounds.

**Lesson II:** Postsecondary Preparation College attendance was emphasized in some of the K-8 and all of the high schools. At one K-8 school, for instance, this is reflected in the school motto: "Christ, College and Character." This school begins preparing students for college in Pre-K when they are addressed by the year they are expected to graduate from college. Likewise, one high school has an intense focus on preparing every freshman for college admission. Entering freshmen complete an interest inventory, followed by an occupational assessment, to help students begin to explore possible career options. During their freshman and sophomore years, guidance continues via use of the WISCareers website, which enables students to identify potential career opportunities and obtain information on all the colleges in the state that have related programs. A guidance counselor at this school emphasized the importance of talking to students from the moment they arrive in ninth grade about their life plans after graduation.

**Lesson III:** Teacher Quality Schools in the sample with a clear mission and a well-defined set of professional development practices tend to be very successful in recruiting and retaining teachers. These schools have formed strong partnerships with teacher preparation and degree granting programs across the city and state. In some cases, prospective teachers are specifically seeking positions in schools with the religious orientation or student development philosophy these schools embody. It appears that teachers seeking positions with these schools

view the curriculum, professional development and other aspects of the school as consistent with their “career pathway.” The schools that fall into these categories are often able to retain teachers for ten years or more and promote many of them to leadership positions. In contrast, teacher recruitment and retention in February 2012 School Site Visits: What can we learn from choice schools in Milwaukee? is a particular challenge for many of the newer schools in our sample. The less successful schools in the area of teacher recruitment also experience greater teacher turnover, and they are more likely to rely on financial incentives to recruit and retain teachers.

**Lesson IV: Effective Leadership** A majority of respondents at each school cited school leadership as one of the most significant influences on student and school success. In general, shared responsibility for leadership was considered to be the most effective model. School leadership was frequently described as a very complex set of roles and responsibilities that cannot be adequately performed by a single individual. School size and financial resources appear to be the most significant influences on the type of leadership model that is adopted. The larger schools are more likely to use the team or shared leadership approach, which allows them to draw from a variety of talents, expertise and interests that exist among teachers and administrators. These schools seem to have an in-house pipeline of candidates who are being prepared to assume important leadership roles. In contrast, the smaller schools in our study, at both the K-8 and high school levels, face resource constraints that do not permit them to adopt a team model. As a consequence, they often rely on a single dynamic school leader capable of managing all aspects of instruction, operations and finance, with very modest administrative and other supports.

**Lesson V: Religion and Integration** During the school visits, we attempted to better understand how the choice program has influenced the religious orientation of the schools that emphasize specific practices and traditions as part of their school model. As several principals affiliated with schools that existed before MPCP noted during their interviews, participation in the program over time has changed the demographics of their student body. The change in the student body has brought challenges relating to the integration of families that appreciate the academic reputation but who do not participate in the religious traditions of their school. Additionally, this has raised concerns among some school stakeholders about whether enrolling students from other religious backgrounds may weaken the culture and community. Most teachers and administrators from the older schools, however, emphasized the importance of nurturing a community that is tolerant of everyone’s beliefs and religious practices, and they appreciated how the choice program has helped to diversify their schools.

**Lesson VI: Facilities and Infrastructure** Each school we visited was well maintained and appeared to be very safe. However, the facilities and infrastructure varied greatly. There appears to be a close association between the length of time a school has existed and the overall quality of the facilities and infrastructure. Many of the schools that have been in existence for fifty years or more were mainly located in very traditional buildings or campuses, whereas most of the newer and specialty schools were located in unconventional or temporary facilities. A good range of amenities, such as libraries and other learning resources; large indoor and outdoor common spaces; computers and other technology, etc., were generally found in the older schools. These amenities were less common in the newer and specialty schools, in which there was a need to rely on more creative ways to maximize space and support learning.

I direct the reader to the full report for a wide range of descriptive facts about the schools and their programs and characteristics, including their performance on standardized tests, methods of dealing with identified problems, and the range of characteristics of the schools, broken down by high school or elementary/middle schools.

*Market-Competition Studies.* Economists and others have studied the competitive effects on school achievement for many years with many types of competitive pressures from open enrollment, magnet schools, charter schools and a few with vouchers. An old mega-analysis of 41 such studies by Clive Belfield and Henry Levin found competitive effects in most of these studies. What that meant was that when competitive pressure came from say a nearby charter school, non-charter schools responded with increased school-level achievement gains. The studies rely almost exclusively on standardized achievement tests as the outcome measures (Belfield and Levin, 2001).

The largest number of voucher studies have occurred in Florida and Milwaukee. And interestingly, in both places most of those studies, using different methods, have reported modest, but significant positive effects of competition. There have been four such studies in Milwaukee. Caroline Hoxby (2001) and Rajashri Chakrabarti (2007) both exploited the considerable gain in voucher students in the program following a Wisconsin Supreme Court ruling approving the program in 1998. They found that in schools with the largest numbers of free-lunch eligible students, who would be eligible for vouchers, achievement gains were modestly but significantly higher. Martin Carnoy and a number of other researchers, including myself, replicated those results, but did not find comparable differences when they modeled competitive pressures using distances from voucher schools as the central measure. In addition,

when the results of the 1998 surge were extended forward they found the gains in low-income schools did not persist (Carnoy, *et al*, 2007).

The most recent study completed as part of *Study II* was done by Jay Greene and Ryan Marsh (2009). The Greene and Marsh study made several advances and innovations over earlier studies in part because they had access to individual student records and, for voucher students, home and voucher-attended school addresses. The earlier Milwaukee studies only had access to school aggregate data on both school composition and school test scores. Greene and Marsh first used MPCP student distances to their school to get a measure of how far voucher students traveled to school. Using these data they then computed radii that measured ranges that the MPCP students traveled. So, for example the 90% (farthest range) was set at 5.6 miles (Greene and Marsh, 2009, p. 5).

For the MPS students, who were the object of the achievement study, they only had the addresses of the school they attended. For these students the key measure was the *number of voucher schools* within the various radii of travel that had been calculated for the MPCP students. This clever measure is unique for competition studies. It builds on the assumption that a higher number of close alternatives will produce more competition, and that will lead to higher achievement scores for public school students.

The results of their study were, as with most prior studies positive for competition and significant at the .01 level or higher. However, they were relatively modest in size. As expected the results per additional school also diminished with larger radii, but interestingly when they used as the radii, the entire MPS district, there still was a competitive effect.

The results of competition in education, from whatever source, seem to be related to higher student achievement in traditional public schools. For vouchers, that occurred in both

Florida and Milwaukee studies. The effect is important because, to a degree, it points to a positive result for choice that for many opponents could offset some of the perceived negative consequences.

*Financial Studies.* Financial studies are inherently difficult to do for a number of technical reasons, including accuracy and access to data, decisions on what to include in the analyses, and assumptions about where students would go to school if voucher programs were terminated. In general these studies fall into two categories: 1) comparisons of costs of private, public, and the amounts of vouchers; and 2) how these programs affect taxpayers? Each approach was tried for the Milwaukee Parental Choice Program, the first type during, but not part of *Study I*; and the second type as part of *Study II*.

Henry Levin, utilizing detailed financial data required of all schools in Wisconsin, did a study published in 1998 that tried to compare the voucher level with an appropriate comparison of costs in public schools. Public school costs had to be adjusted to private school expenses primarily by eliminating public school expenditures for disabled students, assuming private schools do not educate them, and transportation costs because private schools get reimbursed for them. To match the private schools during the first years, he only included K-8 MPS schools. What he found was the average per student adjusted cost in these public schools was \$3,469 while at that time the voucher level was \$4,373 (Levin, 1998, p.384). Although one can quibble about the adjustments, and there were other minor ones, the study did undercut the often floated assumption that private school costs are half that of public schools.

A study completed by Robert Costrell as part of *Study II* asked a much different question and the implications of his results are very different from those of Levin's 1998 study. Costrell asked the question, what would be the impact on taxes if the voucher program had not existed? A

secondary question was who would benefit or lose from any gains or losses if the program had not existed? A key assumption of such a study is what would the voucher-receiving students have done in the absence of a voucher? Or, more specifically, what percent would have gone to Milwaukee public schools? For the main results in the study Costrell assumes 90% would have returned to MPS in the absence of a voucher. This was derived by assessing where lottery-losers went when they did not win a lottery in studies of voucher and charter school lottery programs. A reasonable assumption.

The results of his study show a consistent and growing savings of the voucher program over time. This is because of the cost to taxpayers in terms of state and local aid to MPS if MPS had to educate 90% of the voucher receivers in each year. The overall savings grew from \$1.6 million in FY 1994 when there were 742 students in the program to \$31.9 million in FY 2008 when there were 17,149 students (Costrell, 2008. P.1).

In terms of who benefits from the program, there were dramatic results that showed that through the first six years, MPS gained because they were allowed to keep the state aid for voucher students. After that property tax payers outside of Milwaukee benefitted from the savings. Because of increasing local levies, throughout the entire period, Milwaukee taxpayers were negatively affected. Costrell explains: "Specifically, the MPCP funding mechanism continues to deduct state aid from MPS for 45% of the voucher expenses, even though the state aid formulas no longer allocate any funds to MPS for voucher students. MPS is allowed to recoup these funds by raising property taxes. The net result is an adverse effect on Milwaukee taxpayers due to this funding mechanism." (Costrell, 2008, p.3) There is an obvious disparity in this mechanism, but politically it may be very hard to change given the general animosity toward the program by school district personnel within and clearly outside of Milwaukee.

*The Effects on Family Choices.* There is a normative power behind educational choice in whatever form it occurs (vouchers, charter schools, open enrollment). And that is because historically public schools had a monopoly on educational choices for parents who could not, or did not purchase private school education. For most – in the small towns, suburbs or rural areas – this did not create a problem. Students were assigned a school by their address, and the most important issue for parents may have been the teacher to which their student was assigned. But as our large city school systems began to deteriorate, and as the middle class abandoned them, the options for those remaining rapidly declined. And many of the poor, minority families left behind in the great exodus had no options. The private-school market or suburban districts were not feasible for financial and racial reasons. They and their children were trapped.

The MPCP initially provided a reasonable alternative that had been available to the middle class. And it certainly has provided that choice to now more than 20,000 students per year. And that alone may justify its existence and continuation. But if that program is really only a gateway to a fully universal voucher program, with no income or other limits, the choices for those poor, trapped families will obviously decline. Across America those who attend private schools in the absence of vouchers, do so primarily for religious reasons (over 80% of private schools have always been religious schools) and the families selecting private schools have incomes way above the mean (Witte and Thorn, 1996).

The question for the future is whether the slippery slope to universal vouchers, which I was warned about by liberal friends 25 years ago, is taking place in Wisconsin? There are many indications that the answer is yes. Income eligibility levels have been increased dramatically in Milwaukee to 300% of the poverty line (from an initial 175%). That translates into income for a family of four of \$70,047. A statewide program was created in 2013, initially capped and with

low-income limits of 185% of the poverty line. However, the recently passed budget will lift most of those limits over a ten year period creating close to a universal voucher program (assuming there is no further legislation to reverse those statutes).

For most voucher opponents their motives are simple: they hate vouchers and oppose the idea. Voucher supporters are more diverse. For some voucher supporters, such as founder Milton Friedman, there is an unflappable belief that market forces can improve education if it is allowed to be freed from the public school monopoly. Thus there would be no public/private distinction and no limits or regulations on schools. For other supporters there is simply an animosity toward public schools and their constraining unions and self-protective bureaucracy. A position that matches the main motivation of those who oppose vouchers. But for a small group there is the simple normative position that choices on an issue as important as education of one's children should not be determined by family situations, particularly economics. Small children have nothing to do with that situation. These various motivations clash and the fate of vouchers will depend on the power of the respective groups.

## References

- Belfield, C. and Levin, H. (2002). The Effects of competition between schools on educational outcomes: A review for the United States. *Review of Educational Research*, 72, pp. 279-341.
- Carnoy, M., Adamson, F., Chudgar, A., Luschi, T., and Witte, J. (2007). *Vouchers and Public School Performance*. Washington D.C. Economic Policy Institute.
- Chakrabarti, R. (2007) Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public School Performance? Evidence from Milwaukee. Federal Reserve Bank of New York.
- Costrell, R.M. (2008). The Fiscal Impact of the Milwaukee Parental Choice Program in Milwaukee and Wisconsin, 1993-2008. [http://www.uark.edu/ua/der/SCDP/Milwaukee\\_Eval/Report\\_2.pdf](http://www.uark.edu/ua/der/SCDP/Milwaukee_Eval/Report_2.pdf). For a shorter version, see Robert M. Costrell (2009). Who Gains, Who Loses? *Education Next*, winter, pp. 62-69, [http://media.hoover.org/documents/ednext\\_20091\\_62.pdf](http://media.hoover.org/documents/ednext_20091_62.pdf).
- Costrell, R.M. (2009). The Fiscal Impact of the Milwaukee Parental Choice Program in Milwaukee and Wisconsin: 2009 Update. [http://www.uark.edu/ua/der/SCDP/Milwaukee\\_Eval/Report\\_7.pdf](http://www.uark.edu/ua/der/SCDP/Milwaukee_Eval/Report_7.pdf).
- Cowen, J. M., Fleming, D. J., Witte, J. F., Wolf, P. J. & Kisida, B. (2013). School vouchers and student attainment: Evidence from a state-mandated study of the Milwaukee Parental Choice Program. *Policy Studies Journal*, 41, 147-167.
- Fleming, D. J., Cowen, J. M., Witte, J.F., and Wolf, P.J. (2013) Similar students, different choices: Who uses a voucher in similar populations of students? *Education and Urban Society*, Online version at: <http://eus.sagepub.com/content/early/2013/12/17/0013124513511268>.
- Fleming, D.J. (2014). Learning from Schools: School Choice, Political Learning, and Policy Feedback. *The Policy Studies Journal*, 42, 55-78.
- Friedman, M. (1962). *Capitalism and Freedom*. Chicago, Ill.: University of Chicago Press.
- Greene, J. P., Peterson, P. E., & Du, J. (1998). Effectiveness of school choice: The Milwaukee voucher experiment. *Education and Urban Society*, 31, 190-213.
- Greene, J. P. and Marsh, R.H. (2009). The effect of the Milwaukee's Parental Choice Program on student achievement in Milwaukee public schools. Retrieved from: <http://www.uark.edu/ua/der/SCDP/Research.html>.
- Hoxby, C.M. (2001). The Rising Tide. *Education Next*, Winter.

- Levin, H. (1998). Educational vouchers: Effectiveness, choice and costs. *Journal of Policy Analysis and Management*, 17, pp. 373-92.
- McShane, M. Q., Kisida, B., Jensen, L. I., & Wolf, P. J. (2012). *Milwaukee Parental Choice Program: Descriptive report on participating schools*. Fayetteville, AR: University of Arkansas Department of Education Reform. Retrieved from <http://www.uaedreform.org/milwaukee-parentalchoice-program-descriptive-report-on-participating-schools-2010-11>.
- Stewart, T., Lucas-Mclean, Jensen, L.I., Fetzko, C., Ho, B, Segovia, S. (2010). *Family voices on parental school choice in Milwaukee: What can we learn from low-income families?* Retrieved from: <http://www.uaedreform.org>.
- Stewart, T., Jacob, A.M., Jensen, L.I. (2012). *School Site Visits: What can we learn from choice schools in Milwaukee?* Fayetteville, AR: University of Arkansas Department of Education Reform. <http://www.uaedreform.org/downloads/2012/02/report-34-school-site-visits-what-can-we-learn-from-choice-schools-in-milwaukee.pdf>.
- Witte, J.F., Thorn, C. (1996). "Who Chooses? Vouchers and Interdistrict Choice Programs in Milwaukee" (with Chris Thorn). *American Journal of Education* 104 (May): 186-217 (1996).
- Witte, J. F. 2000. *The Market Approach to Education*. Princeton, NJ: Princeton University Press.
- Witte, J.F., Wolf, P.J., Cowen, J.M., Fleming, D.J., and Lucas-McLean, J.. 2008. *MPCP Longitudinal Educational Growth Study Baseline Report*. Fayetteville, AR: University of Arkansas, Department of Education Reform. Education Working Paper Archive. SCDP Milwaukee Evaluation Report 5.

TESTIMONY OF RICHARD D. KOMER

To

THE SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

MILWAUKEE, WISCONSIN

July 20, 2015

Good evening, and thank you for inviting me to testify before you today. It is a great privilege and honor for me to be here, even though I have incurred the wrath of my wife and children by interrupting our family vacation in Maine.

My name is Richard Komer, and for the last 22 years I have been a senior attorney at the Institute for Justice (“IJ”) in Arlington, Virginia, a public interest law firm that litigates cases involving the freedom of speech, private property rights, economic liberty, and school choice. My work is exclusively in our school choice area, and I head our school choice team. We help defend school choice programs that states enact, representing parents who want to use the scholarships made available for their children’s education. We have participated in 23 such lawsuits to date, including the successful defense of both cases to reach the United States Supreme Court: *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Arizona Christian School Tuitioning Organization v. Winn*, 563 U.S. \_\_\_\_ (2011). More relevantly, the Institute for Justice was involved in both cases defending the Milwaukee Parental Choice Program in the Wisconsin Supreme Court, *Davis v. Grover*, 480 N.W.2d 460 (1992), and *Jackson v. Benson*, 578 N.W.2d 602 (1998).

In addition to defending school choice programs after they are passed, the IJ school choice team is often asked to help design school choice programs and to testify in legislative hearings about proposed bills. The last time I was in Wisconsin was in 2011, when I was invited to testify before the House Education Committee about a school choice bill that would have created a scholarship program

targeted to children with special needs. I testified in favor of the bill, and although the bill failed that year and in several subsequent sessions I am delighted to say that this year a special needs scholarship bill has finally passed.

With passage of the new Wisconsin program there are now 17 scholarship programs specifically targeted to children with special needs in 12 states. In addition, several broader programs that include scholarships to both students with and without disabilities provide larger scholarships for children with special needs. The oldest and largest of the special needs programs, the John M. McKay Scholarships for Students with Disabilities Program, enacted in 1999, now enrolls over 29,000 students in over 1,270 private schools. This is actually more students than Milwaukee's Parental Choice Program serves, which is the oldest modern school choice program, begun in 1990. In short, far from ignoring the population of children with special needs, the school choice movement has in fact recognized that the families of these children, like all families, need and can benefit from the greater array of educational opportunities that school choice can provide.

The reason that the school choice movement encourages both the creation of freestanding scholarship programs for children with special needs and the provision of larger scholarship amounts for such children in broader programs is that the education of children needing special education is often more expensive than educating other children and often requires special services and teachers with special training. The federal government has long recognized this fact by its creation and ever increasing funding of the IDEA, the Individuals with Disabilities Education Act, which subsidizes state special education programs with billions of dollars every year. It is the federal government's second largest education aid program, exceeded only by Title I's aid to economically disadvantaged students. The fact, however, that it may cost more to educate some special needs children does not mean that failure to provide larger scholarships to them represents an effort to discriminate against them. It simply means

that the program may not be as attractive to them as to families with non-special needs children. In addition, the fact that special needs children receive special treatment in public schools not offered to their non-special education peers also serves to make private education less attractive, because they would forego their special benefits and treatment.

This leads me to the heart of my testimony about the Department of Justice's intervention with respect to the Milwaukee Program. But first allow me to make a short confession: in a previous incarnation before I came to work at the Institute for Justice I was a career federal civil rights attorney for 14 years, from 1978 until January 1993. I began my federal career after law school in the Civil Rights Division of the Office of General Counsel in the Department of Health, Education, and Welfare ("HEW"), shortly after HEW's Section 504 regulations took effect. As a brand new attorney in that office most of my time was spent dealing with the new Section 504 regulations, which few people understood despite a four-year long developmental process (Section 504 being a single sentence of the Rehabilitation Act of 1973). After creation of the Department of Education in 1980 I was transferred to its Office for Civil Rights ("OCR"), where I again spent most of my time on disability issues. This focus continued when I was hired by the Department of Justice's Civil Rights Division, and again when I was hired by then-chairman Clarence Thomas as a special assistant at the EEOC. After serving as Director of the Office of Legal Counsel at the EEOC, in 1990 I was appointed to be Deputy Assistant Secretary for Policy in the Office for Civil Rights back at the Department of Education, where I served until President Clinton's inauguration in 1993.

Chief Justice John Marshall observed in 1819 in *McCullough v. Maryland*, 17 U.S. 316, that the power to tax is the power to destroy. It is equally true that the power to regulate also contains the power to destroy. The Department of Justice's intervention in Milwaukee is not the first attempt to derail the MPCP by over-regulation. In 1990, Herbert Grover, the Wisconsin State Superintendent of

Public Instruction and an outspoken opponent of the program, announced that the private schools participating in the program would be functioning as de facto public schools and be subject to the same federal civil rights obligations as the public schools themselves. This announcement was a transparent attempt to discourage private schools from participating in the program, because application of the Title IX regulations would have prevented single-sex private schools from participating and application of the Section 504 regulations requiring that public schools provide a free and appropriate public education would have imposed significant financial burdens far in excess of the value of the scholarship amounts, thereby deterring private school participation. Wisconsin Senator Robert Kasten asked the federal Department of Education if Grover was correct, and I was assigned to chair a small working group that prepared the reply. We concluded that because no federal funds were involved in the program that Title VI, Title IX, Section 504, and the IDEA did not apply to the participating private schools.

Various groups challenging the constitutionality of the MPCP in court alleged that the private schools had to comply with these federal regulations but the trial judge accepted the conclusions the U.S. Department of Education had reached and held that the private schools were not required to comply with the federal regulations implementing these three civil rights statutes. Ultimately the Wisconsin Supreme Court held that the private schools remained private schools despite their students receipt of state-funded scholarships, and were not de facto public schools. In a very real sense, DOJ's assertions in its ADA letter repeat the mistakes of the public school advocates and treat the private schools as if they are de facto public schools.

The core of DOJ's approach to the MPCP, and its core error, is to regard the State of Wisconsin as "delegating the education function to private voucher schools." In its April 9, 2013 letter to State Superintendent Tony Evers, the Educational Opportunities Section of DOJ's Civil Rights Division concludes its cursory analysis by stating that "In short, the State cannot, by delegating the education

function to private voucher schools, place MPCP students beyond the reach of the federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs.” See DOJ Letter at 2. The DOJ Letter concludes that “because DPI is charged with operating the school choice program, it is responsible for monitoring and supervising the manner in which participating schools serve students with disabilities.” See DOJ Letter at 3.

DOJ has fundamentally misapprehended the nature of school choice programs like the MPCP. Such programs do not “delegate” the State’s education function to private schools: **on the contrary they provide parents with the resources to exercise their fundamental right to direct the education of their own children.** Programs like the MPCP empower low-income parents to send their children to the same private schools their wealthier peers use every day. The State is not responsible for the education provided by the private schools the parents select for their children and the families have no recourse against the State if they are dissatisfied with the schools’ performance, although they may have some sort of contractual claim against the schools themselves.

This right of parents to direct the education of their children was affirmed long ago by the United States Supreme Court in a case entitled *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In 1922 advocates for public schools had succeeded in getting the voters of Oregon to require that all students had to attend public schools, which was the longtime goal of the public school establishment. In a suit brought by two private schools that would have been put out of business if the law went into effect, the Supreme Court unanimously rebuffed the public school advocates, saying that:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

*Pierce*, 268 U.S. at 535.

Of course, the right of parents to direct the educational destiny of their children can only be effective if parents can actually choose among educational alternatives. Low-income parents usually lack the means of accessing private education because, unlike the public schools, private schools are part of a private marketplace, providing their educational services in exchange for tuition payments. School choice programs like the MPCP simply try and provide parents will similar access to the private school marketplace that their well-off peers have. But providing eligible low-income families the financial means of accessing private schools is no more a “delegation” of the State’s education function than providing Medicare and Medicaid reimbursements is a delegation of a State’s provision of medical care or providing higher education grants is a delegation of higher education functions to private colleges. No parents are forced to take scholarships for private school, and all parents eligible to use scholarships for their children remain free to send their children to the public schools.

It is precisely this power of parental choice that, when coupled with religious neutrality, prevents school choice programs from running afoul of the Establishment Clause of the federal Constitution. See *Zelman v. Simmons-Harris*, *supra*. If scholarships did in fact delegate the education function to schools receiving scholarship students, unrestricted payments to those schools would violate the Establishment Clause. See *Mitchell v. Helms*, 530 U.S. 793 (2000). Given that DOJ is surely aware of situations where public school districts actually do delegate their responsibilities to private schools, its erroneous application of that concept to the MPCP is hard to fathom.

Treating the MPCP as a program delegating the State’s educational responsibilities is the core of DOJ’s mistaken approach under the Americans with Disabilities Act (“ADA”), but it is compounded by several others. First, DOJ fails to properly read the ADA as a whole, by ignoring the part of the ADA that directly applies to private schools like those participating in the MPCP. Second, DOJ improperly interprets its own regulations by treating DPI as providing services “through a third party.” DOJ Letter at

2. Thirdly, it ignores its own Technical Assistance Manual, which explicates the relevant regulations and implicitly conflicts with the reading provided in the Letter. And finally, it incorrectly cites cases as support that do not stand for the proposition that DOJ asserts they do, to the extent those cases constitute good law (one does not). I'll address each of these points in turn.

The ADA contains two titles relevant to the DOJ Letter. Title II prohibits public entities like DPI from excluding or denying benefits to qualified individuals by reason of disability from its services, programs, or activities, or subjecting them to discrimination. Title III applies to places of public accommodation, specifically including private schools, although those operated by religious entities are deliberately exempted from coverage. Private schools are not considered "public entities" under Title II and public entities like DPI are not considered "places of public accommodation" under Title III. On its face, DPI is clearly subject to Title II's nondiscrimination requirement in its own activities and no one has questioned that. While the State's administration of the MPCP is plainly subject to Title II, DOJ goes much further and takes the position that DPI is responsible for ensuring that the private schools participating in the MPCP also not discriminate, as part of its administration of the program. As noted, the critical idea that leads DOJ to this conclusion is the idea that DPI is delegating the education function, " : "In short, the State cannot, by delegating the education function to private voucher schools, place MPCP students beyond the reach of federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs." DOJ Letter at 2. But as previously noted, DPI and the State have not "delegated" the education function to private schools at all. Nor does the State place MPCP students beyond the reach of federal laws – to the extent that any public entity has done so, it is actually the U.S. Congress that has done so by specifically exempting from Title III private schools operated by religious entities. DOJ does not get to trump the deliberate exemption of those private schools from Title III by interpreting Title II to remove the exemption.

DOJ's position with respect to IDEA protection of the same children with disabilities illustrates that it recognizes that scholarship programs like the MPCP do not constitute a delegation of the education function to private the parents choose. In footnote 2 on page 2 of its letter, DOJ acknowledges that students whose parents voluntarily forego IDEA services by placing their children in private schools pursuant to a voucher are not entitled to the "free and appropriate public education" (FAPE") mandated by the IDEA for students in public schools. What DOJ has failed to recognize is that under the IDEA where in fact the school district has contracted out the provision of FAPE for a particular child to a private school, the district has in fact delegated its educational responsibilities (via the contract) and the district remains responsible for ensuring the student receives a free and appropriate public education. In that circumstance the district is obligated to ensure that its contractor provides the required services and the district is liable to the family for any failure of the student to receive all the services FAPE requires.

Unlike the IDEA contracting-out scenario in which the students are publicly-placed in private schools, scholarship programs like the MPCP involve parentally-placed students, and, as noted above, DOJ acknowledges that the districts are not obligated to ensure that the students receive FAPE . The same analysis applies to the ADA, or otherwise the outcome under the IDEA is wrong. But as related statutes, the two should be interpreted together, and the IDEA is both more specific and older, with no indication that the ADA was passed to change the IDEA. Similarly, the fact that that Title III of the ADA specifically addresses the responsibilities of private schools, including exempting religious schools from its mandates, while Title II does not, mandates that the specific treatment of private schools, including the exemption of the subclass of religious schools, trumps any general requirements supposedly established by Title II. What Congress has specifically given in Title III cannot be taken away by an administrative agency like DOJ under Title II. Yet that is precisely what DOJ does in the position asserted in its Letter.

The DOJ regulations implementing the ADA's Title II state that public entities like DPI may not discriminate "through "contractual, licensing, or other arrangements" in its provision of services to individuals with disabilities. See 28 C.F.R. § 35.130(b)(1). This regulation is perfectly reasonable: what is unreasonable is DOJ's interpretation of that regulation as extending to the provision of services by private schools participating in the MPCP. We have already discussed an actual "contractual arrangement" under the IDEA where public entities (local school districts) are responsible for ensuring that private schools provide the same services as the students are entitled to in public schools operated directly by the public entities. But the MPCP is not a situation involving contracting out of services by DPI. DPI merely provides scholarships to eligible individuals whose parents are responsible for selecting schools and contracting with them for educational services. DOJ is supposed to interpret Title II consistently with the IDEA and Section 504, neither of which consider the private schools to be bound to provide the same services that public entities do.

DOJ provides a Technical Assistance Manual ("TAM") to aid the public entities covered by its Title II regulations to comply with those regulations. The TAM provides examples of situations where a contract with a private entity has Title II implications, but those examples (contracting for operation of a restaurant in a public park, leasing a part of a public building, building a publicly-owned stadium through use of a private contractor, contracting with a private vendor to operate group homes) involve the government using a private vendor to provide government services. See The Americans with Disabilities Act – Title II Technical Assistance Manual, II-1.3000 (available at <http://www.ada.gov/taman2.html#II-3000>). Again, the interpretation given in the TAM is fully consistent with treating IDEA public-placements of students in private schools, but not with treating parental placements using scholarships.

Finally, the four cases that DOJ cites in its Letter (DOJ Letter at 2) do not support their position. Each involves a situation where a public entity contracted with one or more private entities to provide a

service the government was responsible for providing. These cases are consistent with the regulations, consistent with the TAM, and consistent with the approach taken under the IDEA's treatment of public-placement of children in private schools. They do not support extension of Title II to require DPI to police the private schools chosen by parents under the MPCP.

The first case DOJ cites, *Armstrong v. Schwarzenegger*, 622 F.3d 1058(9<sup>th</sup> Cir. 2010), held that Title II covered discrimination against state prisoners that the State placed in county jails via contracts with the county jails. The second case, *Kerr v. Heather Gardens Association*, 2010 WL 3791484 (D. Colo. Sept. 22, 2010), held that a contractor with a public entity responsible for providing senior living care assumed the responsibilities of the public entity under the contract. The fourth case, *James v. Peter Pan Transit*, 1999 WL 735173 (E.D.N.C. Jan. 20, 1999), held that where a public entity, the City of Raleigh, contracted with a private company to operate its public transit system, the public entity (the City of Raleigh) remained responsible for deficiencies in the operation of the buses' wheelchair lifts. The third of the cases DOJ cited, *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009), cannot be used at all, because DOJ mistakenly characterized the case as having been "reversed on other grounds" by *Disability Advocates, Inc. v. New York Coal. For Quality Assisted Living, Inc.*, 675 F.3d 149 (2<sup>nd</sup> Cir. 2012), when in fact the decision was vacated because the plaintiffs lacked standing to bring suit.<sup>1</sup>

What these cases have in common is that they all involve public entities contracting with private providers to provide public services the public entity could have provided itself. They simply do not support the idea that Title II requires DPI to police the operations of private entities like the private schools participating in the MPCP, which provide private educational services the DPI and local districts cannot themselves provide. Far from supporting DOJ's interpretation of its Title II regulations to the

<sup>1</sup> Although the trial court decision involved a situation where a public entity contracted with a private entity to provide public services, which supports our reading of the regulations rather than DOJ's, a vacated decision has no precedential value whatsoever.

MPCP schools, these cases support the narrower reading limiting those regulations to situations where public entities contract out their own responsibilities.

DOJ also failed to cite two cases that reject its reading of Title II. In *Bacon v. City of Richmond*, 475 F.3d 633(4<sup>th</sup> Cir. 2007), the Fourth Circuit rejected a claim that because the City funded the public schools it was obligated to remedy the lack of accessibility of school buildings operated by the local district. And in *Liberty Resources v. Philadelphia Housing Authority*, 528 F. Supp. 2d 553 (E.D. Pa. 2007) , the court rejected a claim that Title II required a public housing agency administering the Section 8 rental voucher program to ensure that the private rental properties were accessible to disabled persons. Thus, while none of the cases cited in the DOJ Letter support its overly expansive reading of Title II, two cases directly contradict that reading.

This last case highlights another relevant fact: that there are a considerable number of federal and state subsidy programs that provide individuals with scholarships or vouchers to enable them to buy services from the private marketplace for those services. This means that DOJ's expansive reading of Title II has far-reaching implications for these programs, and would bring within DOJ's Title II enforcement purview a wide range of private entities Congress specifically covered in Title III. Just as private schools are places of public accommodation covered by Title III, so are many of the private businesses involved in these other sorts of voucher programs. In other words, there is no limiting principle that limits DOJ's power grab to Milwaukee and Wisconsin.

The effects of DOJ's position thus have far-reaching ramifications that go beyond the MPCP. But let's focus on its potential effects on the private schools in the MPCP itself, because those potential effects are likely to be typical of effects on other school choice programs, as well as service providers in the wider universe of voucher-type programs. As you may be aware, approximately 85% of the schools participating in the MPCP are religious schools, a slightly lower percentage than the percentage of all

private schools in Wisconsin that are religious (90%). This is, of course, a function of the fact that religious schools predominate in the private school marketplace, for a couple of historical reasons. First, the public schools were originally designed and operated as generically Protestant religious schools, and Catholic immigrants found them to be inhospitable to their religious beliefs. This led the Catholic Church to create its own parochial schools, and even today Catholic schools represent roughly one quarter of all private schools and enroll roughly 41% of all private school students.

Second, after the U.S. Supreme court held that the federal Establishment Clause applied to the states in 1947, it then decided a series of cases secularizing the public schools by largely excluding school prayer, bible reading and religious observances. This led many Protestants previously comfortable with the public schools to create their own religious private schools, such that 67% of all private schools are religious, enrolling 77% of all private school students. Accordingly, in Milwaukee as in the rest of the country, the large majority of the private schools participating in Wisconsin's school choice programs is religious and enroll a substantially larger majority of the private school students.

These private religious schools are largely exempted by Title III of the ADA, but DOJ's action seeks to effectively nullify that exemption that Congress has granted them. If DOJ's action is allowed to stand, those religious schools will understand that the only way to retain their exemption is to withdraw from the program and non-participating religious schools will be deterred from joining the program. This will limit, potentially to a severe extent, the educational opportunities that students desiring to participate in the program can receive. The effect in Milwaukee and elsewhere will be diminished participation by religious schools, the largest sector of the private school marketplace, and will potentially cripple school choice programs by limiting the supply of participating private schools.

Private school organizations are well aware of DOJ's actions, and fully cognizant that if DOJ can do this in Milwaukee it can do it in the ever-growing number of states that have enacted school choice

programs. There are over 40 programs in more than 20 states, all enacted since Wisconsin created the MPCP in 1990. They represent a growing threat to the education status quo, which is essentially a public monopoly based on free public schools drawing nearly unlimited financial support from public funds. Not surprisingly, the supporters of the status quo, in particular the national teachers' unions and their state affiliates, are vigorous opponents of school choice program. They frequently file lawsuits in an effort to halt school choice programs and demand that the politicians that they support oppose school choice. Although increasing numbers of Democrats, particularly those who represent low-income communities, support school choice, the Democratic Party opposes school choice.

It is no secret that the current Administration opposes school choice and would like to roll back the progress made. The Obama Administration has consistently sought to kill the only federally-funded school choice program, the D.C. Opportunity Scholarship Program, which has succeeded in greatly increasing the likelihood of high school graduation for its low-income scholarship recipients. The program has only survived because of the efforts of Speaker of the House John Boehner and former Senator Joe Lieberman, former chairman of this Committee when Democrats controlled the Senate.

Because the federal government does not fund the state school choice programs, the Administration is not in a position to de-fund them, the way it has tried to de-fund the D.C. program. But when in 2011 DOJ received a patently ridiculous complaint under Section 504 and the ADA involving two applicants and students at two religious schools participating in the MPCP and then proceeded to announce in its April 9, 2013 Letter to DPI an approach to Title II enforcement it had never asserted in the past two decades of enforcing the ADA (the ADA was enacted in 1990, the same year as the MPCP), one reasonably suspects that politics has played a role. This suspicion was reinforced when this same component of DOJ, the Educational Opportunities Section of the Civil Rights Division, filed a motion in a moribund civil rights case (*Brumfield v. Dodd*) in Louisiana asserting that Louisiana's new state wide

scholarship program was undercutting efforts to desegregate a couple out of 64 school districts there. The effects DOJ alleged were truly miniscule and a function of a number of eligible African-American students transferring from failing public schools to private schools that were predominantly African-American. The State of Louisiana has been in compliance with *Brumfield* since 1975, when the case required that any private schools participating in two state assistance programs certify to the State they do not discriminate based on race.

These three attacks by the Obama Administration on three different school choice programs in three different jurisdictions, when coupled with the borderline incompetence of the approaches taken in the two legal enforcement actions, suggests the Administration's opposition to school choice has gotten the better of its prosecutorial judgment. The Department of Justice is not exercising its responsibilities in a considered, even-handed manner: it is instead twisting the law to suit its own ends. If the Department is allowed to continue to distort the law, it has the potential to do incalculable damage to the educational opportunities of those families served by school choice programs, families that are disproportionately poor, disproportionately minority, and served by public schools that are disproportionately inferior in performance.

Thank you for the opportunity of sharing my views with the Committee.



1615 Duke Street | Alexandria, VA 22314  
 Phone: 703.528.0700 | Fax: 703.841.1543  
 www.aasa.org

August 4, 2015

Mr. Ron Johnson  
 Chairman  
 Senate Committee on Homeland Security  
 and Government Affairs  
 386 Russell Senate Office Building  
 Washington, DC 20510

Mr. Thomas Carper  
 Ranking Member  
 Senate Committee on Homeland Security  
 and Government Affairs  
 513 Hart Senate Office Building  
 Washington, DC 20510

RE: AASA Opposes the Reauthorization of the D.C. Voucher Program

On behalf of AASA, The School Superintendents Association, which represents the federal education policy views of 10,000 school administrators across the United States, I write to voice our strident opposition to the continuation of the D.C. voucher program known as the D.C. Opportunity Scholarship program. As the representative of local school district leaders, we are the national organization most invested in returning control over critical education funding and decision-making back to the local level. As such, we find it considerably disconcerting that this committee is considering the reauthorization of the D.C. voucher program without reflecting on whether the people elected to represent D.C. residents want the program to be maintained or whether the continuation of the program benefits the majority of students educated in the District.

Recently, this Committee held a hearing entitled "The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide" in an attempt to bolster support for reauthorization of the D.C. voucher program by comparing it to Milwaukee's program. However, both the Milwaukee voucher program and the D.C. voucher program have not and cannot sustainably and comprehensively improve educational outcomes for students in these cities. More egregiously, by siphoning limited dollars away from the public schools, which must serve all students, and redirecting these funds to private schools, these programs only hinder the progress of administrators who are attempting to enhance educational outcomes for the students attending the public schools in these communities.

In particular, the D.C. voucher program, which is the most studied voucher program in the nation, has failed to demonstrate that students attending private schools authorized by the D.C. voucher program have experienced significant improvements in reading and math achievement.<sup>1</sup> The studies also indicate that many of the students in the voucher program are less likely to have access to key services such as ESL programs, learning supports, special education supports and services, and counselors than students who are not part of the program.<sup>2</sup>

In addition, the quality of the D.C. private schools serving students using federal funds is of great concern. A special investigation conducted by the *Washington Post* found that many of

<sup>1</sup> *Final US Dep't of Educ. Report* at xv, xix, 34; *2009 US Dep't of Educ. Report* at 39; *2008 US Dep't of Educ. Report* at 34, 36-38; *2007 US Dep't of Educ. Report* at xvii, 44, 46.

<sup>2</sup> *Final US Dep't of Educ. Report* at 20; *2009 US Dep't of Educ. Report* at xxii, 17; *2008 US Dep't of Educ. Report* at xviii, 16.

the private schools in the program are run-down and lack adequate facilities.<sup>3</sup> It described one school that consisted entirely of voucher students as existing in just two classrooms in “a soot-stained storefront” where students used a gymnasium two miles down the road.<sup>4</sup> Another voucher school was operated out of a private converted home with facilities so unkempt that students had to use restrooms in an unaffiliated daycare center downstairs.<sup>5</sup> Congress cannot justify reauthorizing a program that uses federal funds to place D.C. students in such schools.

Vouchers also do not offer a meaningful choice to parents or students. Private schools can reject students based on prior academic achievement, economic background, English language ability, or disciplinary history. Also, the D.C. voucher allows religious schools to discriminate against students on the basis of gender.<sup>6</sup> In contrast, public schools serve all students who live in D.C.

Certain groups of D.C. students have less access to voucher schools than others. For example, students with special needs often cannot find a private school that can, or chooses to, serve them. The Department of Education reports show that a significant number of students with special needs had to reject their voucher or leave their voucher school because the schools failed to offer them needed services<sup>7</sup> that would have been available to them had they remained in a public school.

With limited federal dollars we must invest available funding into the public schools that help the greatest percentage of children. It is the children left behind by vouchers who are at the greatest risk. Scarce taxpayer dollars should be focused on interventions to improve education for all students, rather than diverting funds to let a select few out of the public system.

Washington, D.C. already offers a multitude of public school choices for parents through its expanding charter school system. If the city wishes to maintain the D.C. Opportunity Scholarship Program, it can do so with local funds. Taxpayers across the nation should not be forced to subsidize an ineffective program that sends small numbers of D.C. students to private schools.

We urge this Committee to work on more pressing national security and oversight issues, and to allow the city of D.C. to determine whether to maintain the D.C. voucher program, or at the very least, to consider testimony by the D.C. council regarding whether they want federal funding dedicated to the continuation of the D.C. voucher program.

Sincerely,



Sasha Pudelski  
Assistant Director, Policy & Advocacy, AASA

<sup>3</sup> Lyndsey Layton, D.C. School Voucher Program Lacks Oversight, GAO Says, WASH. POST (Nov. 15, 2013)

<sup>4</sup> *Id.* (revealing details about Academia de la Recta Porta).

<sup>5</sup> *Id.* (discussing Muhammad University of Islam, which enrolled one-third voucher students).

<sup>6</sup> P.L. 108-199 Stat. 3 (2004).

<sup>7</sup> *Final US Dep't of Ed. Report* at 24.



## Oppose Reauthorization of the D.C. School Voucher Program

August 4, 2015

Mr. Ron Johnson  
Chairman  
Senate Committee on Homeland Security and  
Government Affairs  
386 Russell Senate Office Building  
Washington, DC 20510

Mr. Thomas Carper  
Ranking Member  
Senate Committee on Homeland Security and  
Government Affairs  
513 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Johnson and Ranking Member Carper:

On behalf of the 170,000 bipartisan members of the American Association of University Women (AAUW), **I urge you to oppose the reauthorization of the District of Columbia private school voucher program.**

On July 20, 2015, this committee's hearing entitled "The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide" examined Milwaukee's voucher program and offered suggested "improvements" for the District of Columbia voucher program. AAUW urges the committee to reject vouchers, whether they are located in Milwaukee, D.C. or elsewhere, because studies consistently show that private school vouchers do not improve reading and math achievement. For example, a five-year longitudinal study from the Legislative Audit Bureau showed "no significant difference in the performance of [Milwaukee Parental Choice Program] and similar [Milwaukee Public School] pupils after four years of participation."<sup>i</sup> These controversial voucher programs not only have poor track records of producing good educational outcomes, they also funnel taxpayer money to private schools that do not have to follow accountability requirements and civil rights laws like Title IX.

Continued funding of the D.C. program is particularly egregious because it is similarly ineffective and unaccountable to the taxpayers. A 2010 Department of Education study showed a system replete with problems including: no improvement in student academic success, failure to improve student motivation and engagement in the educational experience, failure to meet the needs of students with special needs, and more.<sup>ii</sup> A 2013 Government Accountability Office study found severe problems with lack of financial accountability, failure of schools to comply with accreditation standards, inaccurate and outdated information provided to parents, and more problems.<sup>iii</sup>

AAUW has long opposed diverting public funds to private or religious elementary and secondary schools. AAUW's member passed public policy priorities supports "adequate and equitable funding for quality public education for all students" and opposes the use of public funds for

nonpublic elementary and secondary education.<sup>iv</sup> AAUW stands firmly by the belief that our nation should provide an excellent education for all children, not private school vouchers for a few. In these tight fiscal times, it is irresponsible to divert taxpayer dollars to schools that are not accountable to the public or local elected officials. We need meaningful education reform, but vouchers are not the answer. We must use precious tax dollars to improve the public schools serving all of our students.

AAUW strongly **urges you to oppose reauthorization of the D.C. private school voucher program**. Cosponsorship and votes associated with this issue may be included in the AAUW Action Fund *Congressional Voting Record* for the 114th Congress. If you have any questions or need additional information, feel free to contact me at 202/785-7720, or Erin Prangley, Associate Director of Government Relations, at 202/785-7730.

Sincerely,



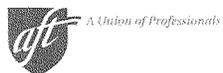
Lisa M. Maatz  
Vice President for Government Relations

<sup>i</sup> See Legislative Audit Bureau, Test Score Data for Pupils in the Milwaukee Parental Choice Program (Report 4 of 5), 17 (Aug. 2011)

<sup>ii</sup> US Dep't of Educ., Evaluation of the D.C. Opportunity Scholarship Program: Final Report xv, xix, 34 (June 2010) (Final US Dep't of Educ. Report); Final US Dep't of Educ. Report at 34; US Dep't of Educ., Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Three Years 34 (March 2009) (2009 US Dep't of Educ. Report); US Dep't of Educ., Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Two Years 34, 36-38 (June 2008) 2008 US Dep't of Educ. Report); US Dep't of Educ., Evaluation of the D.C. Opportunity Scholarship Program: Impacts After One Year xvii, 44, 46 (June 2007) (2007 US Dep't of Educ. Report).

<sup>iii</sup> U.S. Gov't Accountability Office, District of Columbia Opportunity Scholarship Program: Actions Needed to Address Weaknesses in Administration and Oversight, Publication No. GAO-13-805 (Nov. 2013) <http://www.gao.gov/assets/660/658416.pdf> (2013 GAO Report); US Gov't Accountability Office, District of Columbia Opportunity Scholarship Program: Additional Policies and Procedures Would Improve Internal Controls and Program Operations, Pub. No. 08-9 at 26 (Nov. 2007) <http://www.gao.gov/new.items/d089.pdf> (2007 GAO Report).

<sup>iv</sup> AAUW. (June 2013). 2013-2015 Public Policy Program. [www.aauw.org/resources/principles-and-priorities/](http://www.aauw.org/resources/principles-and-priorities/)



August 3, 2015

Sen. Ron Johnson, Chairman  
 Sen. Thomas Carper, Ranking Member  
 U.S. Senate Committee on Homeland Security & Governmental Affairs  
 340 Dirksen Senate Office Building  
 Washington, DC, 20510

Dear Chairman Johnson and Ranking Member Carper:

On behalf of the 1.6 million members of the American Federation of Teachers, I write to express our strong opposition to private school voucher programs.

The AFT opposes voucher programs because vouchers don't work, and in a period when every dollar matters, public funds must be directed to public schools—not to private schools. American public schools, unlike private schools, are open and nondiscriminatory; they accept all students. Private schools can pick and choose which students to accept and may turn away students or families that have the greatest needs. Vouchers divert funding from the public schools, leaving them with fewer resources to serve all children. Federal and other public funds would better serve our children if they were invested in making our public schools stronger.

Because your committee has jurisdiction over the Washington, D.C., private school voucher program, we particularly want to highlight that the D.C. program has proven ineffective and lacks accountability to the citizens of the District of Columbia and all federal taxpayers. Multiple Department of Education studies have concluded that the program has failed to improve education outcomes for participating students, and two U.S. Government Accountability Office reports have identified its repeated management and accountability failures. Further, numerous studies have shown that the D.C. voucher program has not improved students' reading or math scores, and has not had an effect on student satisfaction, motivation, engagement or views on school safety. The studies also have indicated that many of the students in the voucher program were less likely to have access to key services—such as English as a Second Language programs,

The American Federation of Teachers is a union of professionals that champions fairness, democracy, economic opportunity, and high-quality public education, healthcare and public services for our students, their families and our communities. We are committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work our members do.

American Federation  
 of Teachers, AFL-CIO

AFT Teachers  
 AFT PSRP  
 AFT Higher Education  
 AFT Public Employees  
 AFT Nurses and Health  
 Professionals

555 New Jersey Ave. N.W.  
 Washington, DC 20001  
 202-879-4400  
 www.aft.org

Randi Weingarten  
 PRESIDENT

Lorretta Johnson  
 SECRETARY-TREASURER

Mary Kathryn Ricker  
 EXECUTIVE VICE PRESIDENT

VICE PRESIDENTS

Shelby Y. Abrams  
 Mary J. Armstrong  
 Barbara Bowen  
 Elsie P. Burkhalter  
 Christine Campbell  
 Stacey Caruso-Sharp  
 Kathy A. Chavez  
 Melissa Cropper  
 Evelyn DeJesus  
 Marietta A. English  
 Eric Feaver  
 Francis J. Flynn  
 Andy Ford  
 Catalina R. Fortino  
 David Gray  
 David Hecker  
 Fredrick C. Ingram  
 Keith R. Johnson  
 Jerry T. Jordan  
 Dennis Kelly  
 Susan M. Kent  
 Ted Kirsch  
 Frederick E. Kowal  
 Karen GJ Lewis  
 Karen E. Magee  
 Louis Malfaro  
 John McDonald  
 Martin Messner  
 Daniel J. Montgomery  
 Michael Mulgrew  
 Ruby J. Newbold  
 Candice Owley  
 Andrew Pallotta  
 Joshua Pechthalt  
 Paul Pecoreale  
 David J. Quolke  
 Stephen Rooney  
 Denise Specht  
 Tim Stoebl  
 Richard Stritman  
 Ann Twomey  
 Adam Urbanski



Chairman Johnson and Ranking Member Carper/Vouchers/Page 2

learning supports, special education supports and services, and counselors—than students who were not part of the program. Likewise, studies have shown that students participating in the Milwaukee voucher program do not perform better in reading and math than students in public schools, and that students with disabilities are particularly underserved in the Milwaukee program.

Oversight concerns also have been found in both the Milwaukee and D.C. programs. The D.C. voucher program in particular has been plagued by lack of oversight and issues concerning quality, as documented by GAO reports and a *Washington Post* special investigation. These problems, which have persisted for years, even after congressional intervention, include voucher schools operating in facilities so poor they did not have usable bathrooms, and a school that used a learning model based on music, stretching and meditation. Despite receiving public funds, the private schools participating in the D.C. voucher program are not subject to all federal civil rights laws and public accountability standards that public schools must meet, including those in Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, the Individuals with Disabilities Education Act, Title II of the Americans with Disabilities Act, and the Elementary and Secondary Education Act. Students who attend private schools with vouchers are also stripped of the First Amendment, due process, and other constitutional and statutory rights they are entitled to if they attend public schools.

A program with repeated and serious oversight problems that has not increased academic achievement and strips students of their rights does not deserve continued federal support. For these reasons, we oppose the reauthorization of the D.C. voucher program, and oppose any use of federal funds for private school vouchers.

Thank you for considering our views.

Sincerely,



Kristor W. Cowan  
Director of Lobbying and Outreach, Government Relations

KWC : emc opeiu#2 afl-cio



Maggie Garrett  
Legislative Director

(202) 466-3234 x226  
(202) 898-0955 (fax)  
garrett@au.org

1301 K Street, NW  
Suite 850, East Tower  
Washington, D.C. 20005

August 3, 2015

Mr. Ron Johnson  
Chairman  
Senate Committee on Homeland Security and  
Government Affairs  
386 Russell Senate Office Building  
Washington, D.C. 20510

Mr. Thomas Carper  
Ranking Member  
Senate Committee on Homeland Security and  
Government Affairs  
513 Hart Senate Office Building  
Washington, D.C. 20510

RE: Opposing the Reauthorization of the D.C. School Voucher Program

Dear Chairman Johnson and Ranking Member Carper:

On July 20, the Senate Committee on Homeland Security and Government Affairs held a hearing entitled, "The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide." At that hearing, the Committee touted the Milwaukee program as a success and used it to promote the D.C. voucher program. Indeed, there are many similarities between the Milwaukee and D.C. voucher programs; unfortunately those similarities point to flaws, rather than successes. Just as Milwaukee's failed voucher program should not be expanded, D.C.'s program should not be reauthorized or expanded either.

**Shortcomings of the Milwaukee Voucher Program**

Enacted in 1990, the Milwaukee voucher program is the oldest state voucher program in the country. Accordingly, it has been the subject of multiple studies. These studies demonstrate that students in the program who are offered vouchers do not perform better in reading and math than students in public schools.<sup>1</sup> In 2011, the Wisconsin Legislative Audit Bureau released a five-year longitudinal study,<sup>2</sup> which concluded that students in Milwaukee using vouchers to attend private and religious schools perform no better on standardized tests than their counterparts in public schools.

Students with disabilities in particular, are underserved in the program. In 2011, private schools accepting vouchers reported serving a population of only 1.6% of students with

<sup>1</sup> See John F. Witte, Patrick J. Wolf, et al., *MPCP Longitudinal Educational Growth Study Third Year Report* (Apr. 2010); Witte, Wolf, et al., *MPCP Longitudinal Educational Growth Study Second Year Report* (Mar. 2009); Witte, Wolf, et al., *MPCP Longitudinal Educational Growth Study Baseline Report* (Feb. 2008); Witte, *Achievement Effects of Milwaukee Voucher Program* (Feb. 1997); Witte, et al., *Fifth Year Report Milwaukee Parental Choice Program* (Dec. 1995); *News Release, WISC. DEPT OF PUB. INSTRUCTION* (April 8, 2014), <http://dhs.wis.gov/sites/default/files/news-releases/2014-08.pdf> (finding that in 2014, 15.5 percent of Milwaukee voucher students

scored proficient in math, compared to 19 percent for Milwaukee public school students; and 11.9 percent of Milwaukee voucher students scored proficient in reading, compared to 14.7 percent for Milwaukee public school students).

<sup>2</sup> Legislative Audit Bureau, *Test Score Data for Pupils in the Milwaukee Parental Choice Program (Report 4 of 5)*, 17 (Aug. 2011) ("The project's five-year longitudinal study shows no significant difference in the performance of Choice and similar MPS pupils after four years of participation.")

disabilities, compared to the public school system, which serves a population of 19.5%.<sup>3</sup> And a 2012 study of the Milwaukee voucher program found that private voucher schools provided less resources for students with special needs and that the Milwaukee voucher program “lack[ed] the full complement of educational programs that students with disabilities are entitled to if they receive their education in the public sector.”<sup>4</sup>

The Milwaukee program also has significant administrative problems. For example, since 2004, the state has paid \$139 million to private voucher schools that failed to meet the state’s requirements for operation, including “requirements related to finances, accreditation, student safety and auditing.”<sup>5</sup> Private schools in the voucher program have also been found to be employing teachers with no background in education or teacher credentials and operating out of old factories, strip malls, or car dealerships.<sup>6</sup>

Given all of its shortcomings, the Milwaukee program does not provide any support for reauthorizing or expanding the D.C. voucher program.

#### **History of the D.C. Voucher Program**

The D.C. voucher program was established in 2003 and was intended as a “pilot” program with a slated end date of 2008.<sup>7</sup> The original legislation passed by only one vote in the House,<sup>8</sup> bypassed the Senate altogether because it could not garner the necessary votes, and was inserted into the conference report of a \$280 billion omnibus appropriations bill. After passing continuing resolutions for FY2009 and FY2010 to maintain the program, Congress officially reauthorized the D.C. voucher in 2011 through the Scholarships for Opportunity Results (SOAR) Act.<sup>9</sup> The SOAR Act reauthorized the D.C. voucher program for another five years. Like its predecessor, the SOAR Act only passed in 2011 as part of the FY2011 continuing resolution – a compromise to prevent an imminent government shutdown. Thus, the D.C. voucher legislation has never garnered enough votes in both the House and the Senate to pass as a standalone bill.

#### **The D.C. Voucher Program Has Failed to Improve Educational Outcomes**

The D.C. voucher program has proven ineffective and, thus, should not be reauthorized by Congress. Reports issued by the Department of Education in 2007, 2008, 2009, and 2010 all indicate that the program has not lived up to the promises made by proponents and, instead, make the case against reauthorization.<sup>10</sup> The Final 2010 Report concluded that the

<sup>3</sup> Complaint at 10, *ACLU v. State of Wisconsin*, available at [https://www.sclu.org/sites/default/files/field\\_document/complaint\\_to\\_doj\\_re\\_milwaukee\\_voucher\\_program\\_final.pdf](https://www.sclu.org/sites/default/files/field_document/complaint_to_doj_re_milwaukee_voucher_program_final.pdf)

<sup>4</sup> *Id.*

<sup>5</sup> Molly Beck, *State Paid \$139 Million to Schools Terminated from Voucher Program Since 2004*, WISC. STATE J. (Oct. 12, 2014), [http://host.madison.com/news/opinion/column/dave\\_zweifel/plain-talk-wisconsin-s-school-vouchers-are-a-scam/article\\_63516c51-ee6c-5f8e-a9c4-1948d0c1195.html](http://host.madison.com/news/opinion/column/dave_zweifel/plain-talk-wisconsin-s-school-vouchers-are-a-scam/article_63516c51-ee6c-5f8e-a9c4-1948d0c1195.html).

<sup>6</sup> Ruth Conniff, *Voucher School Tour*, THE PROGRESSIVE (Aug. 18, 2014), <http://www.progressive.org/news/2014/08/18/7790/voucher-school-tour>

<sup>7</sup> Section 304(b) of P.L. 108-199 Stat. 3 (2004); see also Section 302(7) of P.L. 108-199 Stat. 3 (2004).

<sup>8</sup> Spencer S. Hsu, *How Vouchers Came to D.C.*, EDUC. NEXT (2004), available at <http://educationnext.org/howvoucherscametoD.C./>.

<sup>9</sup> P.L. 112-10 (2011).

<sup>10</sup> US Dep’t of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Final Report* xv, xiv, 34 (June 2010) (*Final US Dep’t of Educ. Report*); *Final US Dep’t of Educ. Report* at 34; US Dep’t of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Three Years* 34 (March 2009) (*2009 US Dep’t of Educ. Report*); US Dep’t of Educ., *Evaluation of the D.C. Opportunity Scholarship Program:*

use of a voucher had no statistically significant impact on overall student achievement in math or reading.<sup>11</sup> The studies also indicated that many of the students in the voucher program were less likely to have access to key services such as ESL programs, learning supports, special education supports and services, and counselors than students who were not part of the program.<sup>12</sup> In addition, all four studies found that students from “schools in need of improvement,” which are the students targeted by the program, have shown no improvement in reading or math due to the voucher program. Furthermore, participation in the voucher program had no impact on student safety, satisfaction, motivation, or engagement.<sup>13</sup>

#### **The D.C. Voucher Program Lacks Accountability**

U.S. Government Accountability Office (GAO) reports from both 2007 and 2013 document the D.C. voucher program’s repeated failure to meet basic and even statutorily required accountability standards.<sup>14</sup> The 2013 report concluded that the D.C. Children and Youth Investment Trust Corporation (Trust), has continually failed to ensure the program operated with basic accountability measures and quality controls, stating that the “Trust’s policies and procedures lack sufficient detail to ensure each participating school in [the voucher program] has the financial systems, controls, policies, and procedures in place to ensure federal funds are used according to the law.”<sup>15</sup> The Trust even failed to maintain adequate records on its own financial accounting: it did not file financial statements for the years 2010-2012 and had no record of its own expenses prior to 2012.<sup>16</sup>

In its 2007 report, the GAO criticized the D.C. voucher program’s annual directory, saying that the program administrator “did not collect or omitted or incorrectly reported some information that would have helped parents evaluate the quality of participating schools.”<sup>17</sup> The most recent GAO report found that six years later, the program still suffered the same flaw.<sup>18</sup> In a similar vein, the 2007 GAO report found that several schools receiving vouchers lacked valid certificates of occupancy.<sup>19</sup> In response, Congress included a provision in the SOAR Act specifying that private schools accepting vouchers must obtain

*Impacts After Two Years* 34, 36-38 (June 2008) (2008 US Dep’t of Educ. Report); US Dep’t of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After One Year* xvii, 44, 46 (June 2007) (2007 US Dep’t of Educ. Report).

<sup>11</sup> Final US Dep’t of Educ. Report at xv, xix, 34; 2009 US Dep’t of Educ. Report at 39; 2008 US Dep’t of Educ. Report at 34, 36-38; 2007 US Dep’t of Educ. Report at xvii, 44, 46.

<sup>12</sup> Final US Dep’t of Educ. Report at 20; 2009 US Dep’t of Educ. Report at xxii, 17; 2008 US Dep’t of Educ. Report at xviii, 16.

<sup>13</sup> Final US Dep’t of Educ. Report at 43-47; 2009 US Dep’t of Educ. Report at xxvi, xviii, 35, 44-45, 49-50; 2008 US Dep’t of Educ. Report at 42-43, 50, 57, and 2007 US Dep’t of Educ. Report at xx, 53-55.

<sup>14</sup> U.S. Gov’t Accountability Office, District of Columbia Opportunity Scholarship Program: Actions Needed to Address Weaknesses in Administration and Oversight, Publication No. GAO-13-805 (Nov. 2013) <http://www.gao.gov/assets/660/658416.pdf> (2013 GAO Report); US Gov’t Accountability Office, District of Columbia Opportunity Scholarship Program: Additional Policies and Procedures Would Improve Internal Controls and Program Operations, Pub. No. 08-9 at 26 (Nov. 2007) <http://www.gao.gov/new.items/d089.pdf> (2007 GAO Report).

<sup>15</sup> 2013 GAO Report at 19.

<sup>16</sup> *Id.* at 28.

<sup>17</sup> 2007 GAO Report at 36.

<sup>18</sup> 2013 GAO Report at 12-16 (noting that the 2012-2013 directory listed only one tuition cost for each school even though many schools offer discounts and varying prices, failed to list certain fees associated with attending the schools, and it did not provide updated information on schools’ accreditation status).

<sup>19</sup> 2007 GAO Report at 34.

and maintain one.<sup>20</sup> Nonetheless, in 2013 the GAO reported that nine of the ten schools they investigated still did not meet the certificates of occupancy requirement.<sup>21</sup>

The interim executive director of the Trust even admitted that “quality oversight of the program as sort of a dead zone, a blind spot.”<sup>22</sup> And a special investigation conducted by the *Washington Post*<sup>23</sup> corroborated findings that private schools in the program lacked important quality controls. The *Washington Post* described one school that consisted entirely of voucher students that existed in just two classrooms in “a soot-stained storefront” where students used a gymnasium two miles down the road.<sup>24</sup> Another voucher school was operated out of a private converted home with facilities so unkempt that students had to use restrooms in an unaffiliated daycare center downstairs.<sup>25</sup> And yet another school, where 93% of the students had vouchers, used a “learning model known as “Suggestopedia,” an obscure Bulgarian philosophy of learning that stresses learning through music, stretching and meditation.”<sup>26</sup>

#### **The D.C. Voucher Program Denies Students Civil Rights and Constitutional Protections**

The voucher program also strips students of civil rights protections. Despite receiving public funds, the private schools participating in the D.C. voucher program are not subject to all federal civil rights laws and public accountability standards that all public schools must meet, including those in Title VI, Title IX, the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act, and the Elementary and Secondary Education Act (ESEA). Students who attend private schools with vouchers are also stripped of their First Amendment, due process, and other constitutional and statutory rights provided to them in public schools. Schools that do not provide students with these basic civil rights protections should not be funded with taxpayer dollars.

#### **The D.C. Voucher Program Predominantly Funds Religious Schools**

Private school vouchers predominantly fund students to attend private, religious schools. In fact, in 2014 the Department of Education found that 62% of D.C. voucher schools were religious, but when that data was weighted by the number of students served in each school, the religiously affiliated schools rose to 81% of all voucher schools.<sup>27</sup>

Most religious primary and secondary schools are part of the ministry of the sponsoring church. Because these schools either cannot or do not wish to separate the religious components of the education they offer from their academic programs, it is impossible to

<sup>20</sup> Pub. L. No. 112-10, § 3007(a)(4), 125 Stat. 38, 203.

<sup>21</sup> 2013 GAO Report at 21.

<sup>22</sup> Lyndsey Layton and Emma Brown, *Quality Controls Lacking for D.C. Schools Accepting Federal Vouchers*, *WASH. POST*, Nov. 17, 2012, [http://articles.washingtonpost.com/2012-11-17/local/35507144\\_1\\_voucher-program-voucher-dollars-private-schools](http://articles.washingtonpost.com/2012-11-17/local/35507144_1_voucher-program-voucher-dollars-private-schools).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (revealing details about Academia de la Recta Porta).

<sup>25</sup> *Id.* (discussing Muhammad University of Islam, which enrolled one-third voucher students).

<sup>26</sup> *Id.* (discussing the Academy for Ideal Education).

<sup>27</sup> U.S. Dep’t of Ed., *Evaluation of the D.C. Scholarship Program: An Early Look at Applicants and Participating Schools Under the SOAR Act*, 10, 29 (2014).

prevent a publicly funded voucher from paying for these institutions' religious activities and education. This conflicts with one of the most dearly held principles of religious liberty—the government should not compel any citizen to furnish funds in support of a religion with which he or she disagrees, or even a religion with which he or she does agree. Vouchers also threaten the religious liberty and autonomy of religious schools, as vouchers open them up to government audits, monitoring, control, and interference from which they would otherwise be exempt.

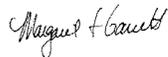
**The D.C. Voucher Program Allows Government-Funded Discrimination**

The D.C. voucher scheme permits religious schools that accept vouchers to discriminate on the basis of religion in hiring and on the basis of gender in admission. A central principle of our constitutional order, however, is that “the Constitution does not permit the State to aid discrimination.”<sup>28</sup> In addition to raising constitutional concerns, federally subsidized religious discrimination raises significant public policy concerns. When funding any school, whether public or private, the government should not surrender the longstanding principle of equal treatment for all—all students should be treated the same regardless of sex and all teachers the same regardless of religion. Taxpayer money should not fund programs that harm the fundamental civil rights of students and teachers.

**Conclusion**

The federal government should fund public schools rather than funnel taxpayer funds to private schools that lack accountability, religious liberty, and civil rights standards—and most importantly, do not meet the goals of helping D.C. students.

Sincerely,



Maggie Garrett  
Legislative Director  
Americans United for Separation of Church and State

---

<sup>28</sup> *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).



200 Maryland Avenue, N.E.  
Washington, D.C. 20002-5797

July 27, 2015

<p>Alliance of Baptists</p> <p>American Baptist Churches USA</p> <p>Baptist General Association of Virginia</p> <p>Baptist General Conference</p> <p>Baptist General Convention of Missouri</p> <p>Baptist General Convention of Texas</p> <p>Baptist State Convention of North Carolina</p> <p>Cooperative Baptist Fellowship</p> <p>National Baptist Convention of America</p> <p>National Baptist Convention U.S.A. Inc.</p> <p>National Missionary Baptist Convention</p> <p>North American Baptist Conference</p> <p>Progressive National Baptist Convention Inc.</p> <p>Religious Liberty Council</p> <p>Seventh Day Baptist General Conference</p>	<p>Mr. Ron Johnson Chairman Senate Committee on Homeland Security and Government Affairs 386 Russell Senate Office Building Washington, DC 20510</p> <p>RE: BJC Opposes Reauthorization of the D.C. School Voucher Program</p> <p>Dear Chairman Johnson and Ranking Member Carper:</p> <p>The Baptist Joint Committee for Religious Liberty (BJC) serves fifteen national and state Baptist bodies, and thousands of churches and individuals nationwide. We write today to ask that you oppose any attempt to reauthorize the D.C. School Voucher Program as the current program has been ineffective and remains constitutionally questionable.</p> <p>The BJC opposes efforts to fund private religious education with public dollars, including through vouchers. While we recognize parochial schools serve a valuable function, religious teaching should be funded by voluntary contributions, not through taxation. Government proposals that divert public dollars to private religious interests violate this principle and threaten religious liberty. Most parochial schools either cannot or do not wish to separate the religious components of the education they offer from the academic programs. Indeed, that is why most of the schools were created and continue to exist. Parents certainly may choose such an education for their children, but should not ask the federal government, which must remain neutral in matters of religion, to fund private, religious interests.</p> <p>Vouchers violate the religious liberty rights of all taxpayers – rights that are protected by the “no establishment” principles of the First Amendment to the U.S. Constitution. Vouchers may also bring unintended consequences for religious schools accepting the government money. It is an iron law of politics that what the government funds, the government regulates. Without regulation, there can be no accountability. Vouchers open the door to excessive government entanglement with religion through burdensome government regulation and oversight. If religious schools are to maintain their distinct character, they should not accept government vouchers.</p> <p>The U.S. Supreme Court has upheld a voucher program under specific criteria. It did not hold that vouchers were <i>per se</i> constitutional in all cases or imply that they are a good policy response to perceived problems in public schools. Studies of the D.C. Voucher Program have shown that it falls short of the goals of improving student education and improving public schools by fostering competition.</p> <p>Expanding educational opportunities for young residents of the District is a laudable goal. While the BJC supports such efforts, we call on the Congress to find solutions that do so without continuing an ineffective and unconstitutional voucher program. We invite you to contact us if we can be of any assistance and strongly urge you to oppose any efforts to reauthorize the D.C. School Voucher Program.</p> <p>Sincerely,</p> <p></p> <p>K. Hollyn Hollman General Counsel</p>	<p>Mr. Thomas Carper Ranking Member Senate Committee on Homeland Security and Government Affairs 513 Hart Senate Office Building Washington, DC 20510</p>
---	---	---

*The Baptist Joint Committee is a 79-year-old, Washington, D.C.-based religious liberty organization that works to defend and extend God-given religious liberty for all, bringing a uniquely Baptist witness to the principle that religion must be freely exercised, neither advanced nor inhibited by government.*

Phone: 202-544-4226 • Fax: 202-544-2094 • E-mail: [bjc@BJCOnline.org](mailto:bjc@BJCOnline.org) • Website: [www.BJCOnline.org](http://www.BJCOnline.org)



July 20, 2015

To: United States Senator Ron Johnson (WI)  
Members, Senate Committee on Homeland Security and Governmental Affairs

Re: "The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide."  
U.S. Senate Committee on Homeland Security and Governmental Affairs Committee hearing in Milwaukee, Wisconsin

Testimony by Disability Rights Wisconsin – For Information Purposes Only

Thank you Senator Johnson and Members of the Senate Committee on Homeland Security and Governmental Affairs for hosting a hearing here in Milwaukee on the topic of school choice and for welcoming Disability Rights Wisconsin to submit informational testimony on this important issue. We appreciate your interest in developing strong educational opportunities for all children, including children with disabilities, and for your commitment to address any discriminatory treatment.

Disability Rights Wisconsin is the state's Protection and Advocacy agency, charged with ensuring the rights of individuals with disabilities, including students and their parents. We support parents to achieve a quality education for their children and challenge districts and the state to fully comply with the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and other laws protecting children with disabilities from discrimination and advancing their right to full participation in society. This testimony represents our experience with parents of children with disabilities statewide.

The Wisconsin Department of Public Instruction has an obligation under Title II of the Americans with Disabilities Act (42 U.S.C. Secs. 21131-12134) to ensure that students with disabilities who seek to attend voucher schools through the Milwaukee Parent Choice Program, or any other Wisconsin taxpayer funder voucher school, do not encounter discrimination on the basis of their disability. Students with disabilities must not be excluded from a full and meaningful education afforded by these choice schools.

Disability Rights Wisconsin received complaints from a number of parents whose children with disabilities had either been dissuaded from participating in the Milwaukee Parent Choice Program, or who, once enrolled did not receive the educational supports necessary to engage in and benefit from the education offered in the choice school. Enrollment data reinforces the claim that children with disabilities are discriminated against in the access to and delivery of education by choice schools. Based upon the most recent data available to us a disproportionate number of children with disabilities have been disenrolled from choice schools and placed back into the Milwaukee Public School District. For example in the 2012-2013 school year, 109 of 420 students who came back to a Milwaukee Public school from a choice school were students with disabilities – nearly 25% compared with an estimated enrollment of 7.5% to 14% of children with disabilities by the Wisconsin Policy Research Institute. At the same time, since the advent of the Milwaukee Parent School Choice Program, the Milwaukee Public School District has experienced an increasing concentration of children with disabilities enrolled in its regular public schools.

MADISON	MILWAUKEE	RICE LAKE	
131 W. Wilson St. Suite 700 Madison, WI 53703	6737 West Washington St. Suite 3230 Milwaukee, WI 53214	217 West Knapp St. Rice Lake, WI 54868	<a href="http://disabilityrightswi.org">disabilityrightswi.org</a>
608 267-0214 608 267-0368 FAX	414 773-4646 414 773-4647 FAX	715 736-1232 715 736-1257 FAX	800 928-8778 consumers & family

DRW Testimony to U.S. Senate Committee on Homeland Security and Governmental Affairs  
"The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide."  
July 20, 2015  
Page 2

Because voucher schools receive public funding they must comply with the regulations implementing Title II of the Americans with Disabilities Act, namely, that they make reasonable modifications in policies, practices, and procedures necessary to avoid discrimination on the basis of disability. This requires not only non-discriminatory access to voucher schools through the enrollment process, but also meaningful supports and accommodations to ensure the opportunity to participate in and benefit from the education that is offered once enrolled in the choice school. It is our experience that students with disabilities often have been denied such meaningful access. We hope you share our goal that all children be allowed to benefit from the education available through the Milwaukee Parent Choice Program and other voucher school programs.

Moreover, because voucher schools are not subject to the same reporting, outcome, and disclosure requirements as other taxpayer-funded public schools, there exists a lack of accountability and transparency important to families of children with disabilities. Under current law, a comparison of educational achievement by children with disabilities using the same assessments, with the same accommodations availability to allow parents to adequately compare scores across different types of schools is not in place. Nor do voucher schools employ a common definition of disability across all schools.

Parents of children with disabilities require robust information about their child's school in order to make good educational choices and to be part of the system of improvement for their district. No matter where a student with a disability attends, a parent often must be significantly more involved in their child's education than the parent of a typically developing child. The outcome of an education for a student with a disability can mean the difference between a young adult who leaves school with real-world job skills prepared for employment or postsecondary education or someone who will be solely reliant on public benefits, live in poverty, or end up in our criminal justice system. Meaningful accountability for schools and transparent information is a way to empower parents.

Thank you in advance for addressing the concerns outlined in this testimony. Disability Rights Wisconsin would be happy to discuss these concerns in greater detail with the committee.

Daniel Idzikowski  
Executive Director

Mr. Jason Chaffetz  
 Chairman  
 House Oversight & Government Reform  
 Committee  
 2236 Rayburn House Office Building  
 Washington, DC 20515

Mr. Elijah Cummings  
 Ranking Member  
 House Oversight & Government Reform  
 Committee  
 2230 Rayburn House Office Building  
 Washington, DC 20515

RE: The Institute for Science and Human Values (ISHV), a member organization of NCPE Opposes Reauthorization of the D.C. School Voucher Program

Dear Chairman Chaffetz and Ranking Member Cummings:

The Institute for Science and Human Values (ISHV) writes to voice opposition to the reauthorization of the District of Columbia private school voucher program. We oppose this and all private school voucher programs because public funds should be spent on public schools, not private schools. It is the view of ISHV that two major goals drive voucher programs. One, is to simply destroy the public school system in the United States, replacing it with corporate owned and religious schools, displacing tax dollars and forcing taxpayers to support the profits of big business and the income of religious schools thereby favoring those religions, a clear violation of democratic principle. The public school system is an important component of the U.S. democracy.

The other is a long term tactic to re-segregation the school population.

The D.C. program, in particular, has proven ineffective and unaccountable to taxpayers. Not only have multiple Department of Education (USED) studies concluded that the program has failed to improve educational outcomes for participating students, but two U.S. Government Accountability Office (GAO) reports have also identified its repeated management and accountability failures.

We acknowledge that the Committee may be able to point to some students who have gone to exemplary schools and seen improvement from the program. But according to government studies and investigative reports, these students are, unfortunately, the exception rather than the rule. Congress should not reauthorize this unsuccessful and poorly managed program.

**Our Public Schools Have Great Value, but They Are Undermined by Private School Vouchers**

Open and nondiscriminatory in their acceptance of all students, American public schools are a unifying factor among the diverse range of ethnic and religious communities in our society. Public schools are the only schools that must meet the needs of all students. They do not turn children or families away. They serve children with physical, emotional and mental disabilities, those who are extremely gifted, and those who are learning challenged, right along with children without special needs.

Vouchers undermine this vital function, however, by placing some of the most motivated students into private schools, leaving the students who are most difficult to educate behind in the public schools. Voucher programs also divert desperately needed resources away from the public school system to fund the education of a few voucher students. The government would better serve our children by using these funds to make the public schools stronger.

#### The D.C. Voucher Program Does Not Improve Academic Achievement

All four of the congressionally mandated USED studies that have analyzed the D.C. voucher program have concluded that it did not significantly improve reading or math achievement. The USED studies further found that the voucher program had no effect on student satisfaction, motivation or engagement, or student views on school safety. The studies also indicated that many of the students in the voucher program were less likely to have access to key services such as ESL programs, learning supports, special education supports and services, and counselors than students who were not part of the program. A program that has failed to improve the academic achievement or school experience of the students in the District of Columbia does not warrant reauthorization.

#### The D.C. Voucher Program Lacks Sufficient Oversight

GAO reports from both 2007 and 2013 document that the D.C. voucher program has repeatedly failed to meet basic and even statutorily required accountability standards. The 2013 report concluded that the D.C. Children and Youth Investment Trust Corporation (Trust), has continually failed to ensure the program operated with basic accountability measures and quality controls and even failed to maintain adequate records on its own financial accounting. The interim executive director of the Trust at that time even admitted that “quality oversight of the program as sort of a dead zone, a blind spot.”

Congress has attempted to address the oversight problems, yet they continue. For example, in its 2007 report, the GAO criticized the D.C. voucher program’s annual directory, saying that the program administrator “did not collect or omitted or incorrectly reported some information that would have helped parents evaluate the quality of participating schools.” The most recent GAO report found that six years later, the program still suffered the same flaw. In a similar vein, the 2007 GAO report found that several schools receiving vouchers lacked valid certificates of occupancy. In response, Congress included a provision in the SOAR Act specifying that pri-

P/727 278-8446, F/727 391-8459

59 John Glenn Dr. Amherst, NY 14228 \* 2502 N. Rocky Point Dr, Suite 1010, Tampa, FL 33607  
[www.instituteofscienceandhumanvalues.net](http://www.instituteofscienceandhumanvalues.net) \* [support@ishv.net](mailto:support@ishv.net)  
 Mailing Address/11280 Freedom Ct. Seminole FL 33772

vate schools accepting vouchers must obtain and maintain one. Nonetheless, in 2013 the GAO reported that nine of the ten schools they investigated still did not meet the certificates of occupancy requirement.

A program with such repeated and serious oversight problems should not be reauthorized.

#### Many Participating Schools Are of Poor Quality

A special investigation conducted by the Washington Post found that many of the private schools in the program are not quality schools. It described one school that consisted entirely of voucher students as existing in just two classrooms in “a soot-stained storefront” where students used a gymnasium two miles down the road. Another voucher school was operated out of a private converted home with facilities so unkempt that students had to use restrooms in an unaffiliated daycare center downstairs. And yet another school, where 93% of the students had vouchers, used a “learning model known as “Suggestopedia,” an obscure Bulgarian philosophy of learning that stresses learning through music, stretching and meditation.” Congress cannot justify reauthorizing a program that uses federal funds to place D.C. students in such schools.

#### The D.C. Voucher Program Threatens Civil Rights and Undermines Constitutional Protections

The voucher program strips students of civil rights protections. Despite receiving public funds, the private schools participating in the D.C. Voucher program are not subject to all federal civil rights laws and public accountability standards that all public schools must meet, including those in Title VI, Title IX, the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act, and the Elementary and Secondary Education Act (ESEA). Students who attend private schools with vouchers are also stripped of their First Amendment, due process, and other constitutional and statutory rights provided to them in public schools. Schools that do not provide students with these basic civil rights protections should not be funded with taxpayer dollars.

The D.C. Voucher Program Does Not Provide Parents Real Choice

Vouchers do not offer a meaningful choice to parents or students. Voucher schools can reject students based on prior academic achievement, economic background, English language ability, or disciplinary history. Also, the D.C. voucher allows religious schools to discriminate against students on the basis of gender. In contrast, public schools serve all students who live in D.C.

Certain groups of D.C. students have less access to voucher schools than others. For example, students with special needs often cannot find a private school that can, or wants to, serve them: The Department of Education reports show that a significant number of students with special needs had to reject their voucher or leave their voucher school because the schools failed to offer them needed services” that would have been available to them had they remained in a public school.

Thank you for your consideration of our views.



Toni Van Pelt

President and Public Policy Director

August 03, 2015

Dear Ms. Schnell,

I was glad to hear Senator Johnson's concern for how people with disabilities face discrimination in school. Esp. concerning vouchers. Here are a few other things he should know: As an adult on autism spectrum, my experience with school discipline practices are a mixed bag. There were many times I was disciplined for adaptive behavior that today I use to fulfill my responsibilities. Such as flapping my hands to reduce anxiety. Fear makes it next to impossible to access what I know academically and conduct-wise.

Like pushing over the shelves in a library and expecting that child to find a book on the quadratic equation, stopping adaptive behavior such as hand-flapping is counterproductive to our ability to access impulse control. And counterproductive to producing citizens who find ways to fulfill their responsibilities. Yet with calm body I could behave more appropriately. Laying down on the floor to receive feedback on where my body is in space, is something that my teachers often thought looked goofing around. little did they know, I was filling a need to know where my head was in relation to my knee, where my elbow was in relation to my back and hips. And laying on the floor served to give a stable surface from which to gain needed information for tasks such as walking to the next class.

And that was just my experience as white student with a disability. Since the voucher program is situated in Milwaukee, imagine what school experiences are like for our black and brown counterparts, who face deep racial disparities. How might authority figures interpret a black or brown student who waves their hands around? How might authorities interpret our black and brown counterparts who lay on the floor to seek sensory input? And since Milwaukee's voucher program is a pioneer for how vouchers work in other states, this has far-reaching implications for our nation as well. As an adult with a disability, I frequently get stopped in the park for the way my body presents. And if you've watched the news at all this past year, we've already seen what happens to our adult black and brown counterparts. What does this mean for our black and brown counterparts in school? It is a question I find deeply troubling. And one that keeps me up at night.

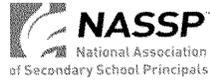
First the context for my input in bold below: I attended tonight's hearing on voucher schools deeply concerned about the education system as whole. As a human ecosystem. Not for anyone particular "side." At the state level, I find it deeply disturbing that our Wisconsin legislators promote school choice for one party by shoving it in the budget, in middle of the night, long after our friends and neighbors' children have been put to bed. Since other states voucher programs, Louisiana, Florida, Cleveland(Ohio?) is modeled after the pioneering work of Wisconsin, this development could have scary far-reaching consequences for the nation. At the federal level. Above all...

**If we want competition in our schools (worrying about public education getting a monopoly) I would hope we let our choices stand upon their \*own\* merit. Not advanced via the long arm of big government. Or our partisan legislators.**

Sincerely,

Erin Miller

Hi. My name is Erin Miller. And I'm autistic. I have been in both public & private schools. And have friends who send their children to both. Including my former teacher from private school who is in the audience. It's not about private school = bad. I am deeply concerned about the health of our education system. In our recent budget, we've had special need vouchers among other education items thrown in, at the middle of the night. This has implications for Wisconsin at the state level, and the nation at the federal level. What is going on with our education system? whose interests are we serving when it is "controversial" to say we didn't get a choice out of legislators Partnership showed it in



August 4, 2015

Mr. Ron Johnson  
 Chairman  
 Senate Committee on Homeland Security and Government Affairs  
 386 Russell Senate Office Building  
 Washington, DC 20510

Mr. Thomas Carper  
 Ranking Member  
 Senate Committee on Homeland Security and Government Affairs  
 513 Hart Senate Office Building  
 Washington, DC 20510

RE: NASSP Opposes Reauthorization of the D.C. School Voucher Program

Dear Chairman Johnson and Ranking Member Carper:

In light of the hearing held by the Senate Committee on Homeland Security and Government Affairs on July 20<sup>th</sup> entitled "The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide," the National Association of Secondary School Principals (NASSP) would like to express strong opposition for the use of Milwaukee's failed program as a model for the DC private school voucher program. Private school vouchers drain money away from public schools, reduce accountability in the education system, and have not conclusively been proven to result in student achievement. With fewer financial resources, public schools that are already struggling may be forced to implement reform efforts at the expense of other vital programs within the school.

Since its inception in 2003, the D.C. private school voucher program has failed to improve educational outcomes for participating students<sup>1</sup> and has also demonstrated a lack of accountability and effective management practices<sup>2</sup>. While supporters of the D.C. private school voucher program have argued that it has provided students with increased educational opportunities, many participating private schools choose not to accept students based on a number of discriminatory factors. On the other hand, public schools in Washington, D.C., and across the country are mandated to educate all students regardless of academic ability, socioeconomic status, or other challenges that private schools may not be equipped to accommodate.

<sup>1</sup> U.S. Dept. of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Final Report* at xiv, 34 (June 2010) [Final U.S. Dept. of Educ. Report]; *Final U.S. Dept. of Educ. Report at 34*; U.S. Dept. of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Three Years* 34 (March 2009) [2009 U.S. Dept. of Educ. Report]; U.S. Dept. of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Two Years* 34, 36-38 (June 2008) [2008 U.S. Dept. of Educ. Report]; U.S. Dept. of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After One Year* xvii, 44, 46 (June 2007) [2007 U.S. Dept. of Educ. Report].  
<sup>2</sup> U.S. Gov't Accountability Office, District of Columbia Opportunity Scholarship Program: Actions Needed to Address Weaknesses in Administration and Oversight, Publication No. GAO-13-805 (Nov. 2013) <http://www.gao.gov/assets/14/140268/140268.pdf> (2013 GAO Report); U.S. Gov't Accountability Office, District of Columbia Opportunity Scholarship Program: Additional Policies and Procedures Would Improve Internal Controls and Program Operations, Pub. No. 08-9 at 26 (Nov. 2007) <http://www.gao.gov/new.items/d089.pdf> (2007 GAO Report).



School choice is appropriate within the public school system as long as equal access and opportunity are ensured without discrimination on the basis of race, gender, socioeconomic status, or disability, and as long as accountability requirements are consistently applied. Instead of funding private school voucher initiatives, Congress should direct federal funds to public school improvement initiatives that increase the academic achievement of all students.

NASSP urges the Senate Committee on Homeland Security and Government Affairs to cease congressional support for the D.C. private school voucher program and find a more responsible use of taxpayer dollars. Thank you in advance for your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "JoAnn D. Bartoletti". The signature is written in a cursive style with a large initial "J".

JoAnn D. Bartoletti  
Executive Director, NASSP

**The National Coalition**  
 for  
**Public Education**

August 4, 2015

Mr. Ron Johnson  
 Chairman  
 Senate Committee on Homeland Security and  
 Government Affairs  
 386 Russell Senate Office Building  
 Washington, DC 20510

Mr. Thomas Carper  
 Ranking Member  
 Senate Committee on Homeland Security and  
 Government Affairs  
 513 Hart Senate Office Building  
 Washington, DC 20510

RE: NCPE Opposes Reauthorization of the D.C. School Voucher Program

Dear Chairman Johnson and Ranking Member Carper:

The 54 undersigned organizations write to voice opposition to the reauthorization of the District of Columbia private school voucher program. We oppose this and all private school voucher programs because public funds should be spent on public schools, not private schools. But the D.C. program, in particular, has proven ineffective and unaccountable to taxpayers. Not only have multiple Department of Education (USED) studies<sup>1</sup> concluded that the program has failed to improve educational outcomes for participating students, but two U.S. Government Accountability Office (GAO) reports have also identified its repeated management and accountability failures.<sup>2</sup>

Recently, this Committee held a hearing entitled "The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide" in an attempt to bolster support for reauthorization of the D.C. voucher program by comparing it to Milwaukee's program. We acknowledge that the Committee may be able to point to some students who have gone to exemplary schools and seen improvement from the program, but these students are, unfortunately, the exception rather than the rule. In 2011, the Wisconsin Legislative Audit Bureau released a five-year longitudinal study, concluding that students in Milwaukee's voucher schools perform no better on standardized tests than those students in Milwaukee's public schools.<sup>3</sup>

The same is true of the D.C. voucher program. According to government studies and investigative reports, the D.C. program does not improve academic achievement, provide access to greater quality schools, or meet even baseline accountability standards. Congress should not reauthorize or expand this unsuccessful and poorly managed program.

**Our Public Schools Have Great Value, but They Are Undermined by Private School Vouchers**

Open and nondiscriminatory in their acceptance of all students, American public schools are a unifying factor among the diverse range of ethnic and religious communities in our society. Public schools are the

<sup>1</sup> US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Final Report* xv, xix, 34 (June 2010) (*Final US Dep't of Educ. Report*); *Final US Dep't of Educ. Report* at 34; US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Three Years* 34 (March 2009) (*2009 US Dep't of Educ. Report*); US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Two Years* 34, 36-38 (June 2008) (*2008 US Dep't of Educ. Report*); US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After One Year* xvii, 44, 46 (June 2007) (*2007 US Dep't of Educ. Report*).

<sup>2</sup> U.S. Gov't Accountability Office, *District of Columbia Opportunity Scholarship Program: Actions Needed to Address Weaknesses in Administration and Oversight*, Publication No. GAO-13-805 (Nov. 2013) <http://www.gao.gov/assets/660/658416.pdf> (2013 GAO Report); US Gov't Accountability Office, *District of Columbia Opportunity Scholarship Program: Additional Policies and Procedures Would Improve Internal Controls and Program Operations*, Pub. No. 08-9 at 26 (Nov. 2007) <http://www.gao.gov/new.items/d089.pdf> (2007 GAO Report).

<sup>3</sup> Legislative Audit Bureau, *Test Score Data for Pupils in the Milwaukee Parental Choice Program (Report 4 of 5)*, 17 (Aug. 2011) ("The project's five-year longitudinal study shows no significant difference in the performance of Choice and similar MPS pupils after four years of participation.")

August 4, 2015  
Page 2 of 5

only schools that must meet the needs of all students. They do not turn children or families away. They serve children with physical, emotional and mental disabilities, those who are extremely gifted, and those who are learning challenged, right along with children without special needs.

Vouchers undermine this vital function, however, by diverting desperately needed resources away from the public school system to fund the education of a few voucher students—without offering any actual reforms. The government would better serve our children by using these funds to make the public schools stronger.

#### The D.C. Voucher Program Does Not Improve Academic Achievement

All four of the congressionally mandated USED studies that have analyzed the D.C. voucher program have concluded that it did not significantly improve reading or math achievement.<sup>4</sup> The USED studies further found that the voucher program had no effect on student satisfaction, motivation or engagement, or student views on school safety.<sup>5</sup> The studies also indicated that many of the students in the voucher program were less likely to have access to key services such as ESL programs, learning supports, special education supports and services, and counselors than students who were not part of the program.<sup>6</sup> A program that has failed to improve the academic achievement or school experience of the students in the District of Columbia does not warrant reauthorization.

#### The D.C. Voucher Program Lacks Sufficient Oversight

GAO reports from both 2007 and 2013 document that the D.C. voucher program has repeatedly failed to meet basic and even statutorily required accountability standards. The 2013 report concluded that the D.C. Children and Youth Investment Trust Corporation (Trust), has continually failed to ensure the program operated with basic accountability measures and quality controls<sup>7</sup> and even failed to maintain adequate records on its own financial accounting.<sup>8</sup> The interim executive director of the Trust at that time even admitted that “quality oversight of the program as sort of a dead zone, a blind spot.”<sup>9</sup>

Congress has attempted to address the oversight problems, yet they continue. For example, in its 2007 report, the GAO criticized the D.C. voucher program’s annual directory, saying that the program administrator “did not collect or omitted or incorrectly reported some information that would have helped parents evaluate the quality of participating schools.”<sup>10</sup> The most recent GAO report found that six years later, the program still suffered the same flaw. In a similar vein, the 2007 GAO report found that several schools receiving vouchers lacked valid certificates of occupancy.<sup>11</sup> In response, Congress included a provision in the SOAR Act specifying that private schools accepting vouchers must obtain and maintain one.<sup>12</sup> Nonetheless, in 2013 the GAO reported that nine of the ten schools they investigated still did not meet the certificates of occupancy requirement.<sup>13</sup>

A program with such repeated and serious oversight problems should not be reauthorized.

<sup>4</sup> Final US Dep’t of Educ. Report at xv, xix, 34; 2009 US Dep’t of Educ. Report at 39; 2008 US Dep’t of Educ. Report at 34, 36-38; 2007 US Dep’t of Educ. Report at xvii, 44, 46.

<sup>5</sup> Final US Dep’t of Educ. Report at 43-47; 2009 US Dep’t of Educ. Report at xxvi, xviii, 35, 44-45, 49-50; 2008 US Dep’t of Educ. Report at 42-43, 50, 57; and 2007 US Dep’t of Educ. Report at xx, 53-55.

<sup>6</sup> Final US Dep’t of Educ. Report at 20; 2009 US Dep’t of Educ. Report at xxii, 17; 2008 US Dep’t of Educ. Report at xviii, 16.

<sup>7</sup> 2013 GAO Report at 19.

<sup>8</sup> 2013 GAO Report at 28.

<sup>9</sup> Lyndsey Layton, *D.C. School Voucher Program Lacks Oversight, GAO Says*, WASH. POST (Nov. 15, 2013)

[http://www.washingtonpost.com/local/education/D.C.-school-voucher-program-lacks-oversight-gao-says/2013/11/15/9bb8c35e-4e3d-11e3-be6b-d3d28122e6d4\\_story.html](http://www.washingtonpost.com/local/education/D.C.-school-voucher-program-lacks-oversight-gao-says/2013/11/15/9bb8c35e-4e3d-11e3-be6b-d3d28122e6d4_story.html).

<sup>10</sup> 2007 GAO Report at 36.

<sup>11</sup> 2007 GAO Report at 34.

<sup>12</sup> Pub. L. No. 112-10, § 3007(a)(4), 125 Stat. 38, 203.

<sup>13</sup> 2013 GAO Report at 21.

August 4, 2015  
Page 3 of 5

Many Participating Schools Are of Poor Quality

A special investigation conducted by the *Washington Post* found that many of the private schools in the program are not quality schools.<sup>14</sup> It described one school that consisted entirely of voucher students as existing in just two classrooms in “a soot-stained storefront” where students used a gymnasium two miles down the road.<sup>15</sup> Another voucher school was operated out of a private converted home with facilities so unkempt that students had to use restrooms in an unaffiliated daycare center downstairs.<sup>16</sup> And yet another school, where 93% of the students had vouchers, used a “learning model known as “Suggestopedia,” an obscure Bulgarian philosophy of learning that stresses learning through music, stretching and meditation.”<sup>17</sup> Congress cannot justify reauthorizing a program that uses federal funds to place D.C. students in such schools.

The D.C. Voucher Program Threatens Civil Rights and Undermines Constitutional Protections

The voucher program strips students of civil rights protections. Despite receiving public funds, the private schools participating in the D.C. voucher program are not subject to all federal civil rights laws, adhere to religious freedom protections provided to public school students under the First Amendment of the U.S. Constitution, or face the same public accountability standards that all public schools must meet, including those in Title VI, Title IX, the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act, and the Elementary and Secondary Education Act (ESEA). Students who attend private schools with vouchers are also stripped of their First Amendment, due process, and other constitutional and statutory rights provided to them in public schools. Schools that do not provide students with these basic civil rights protections should not be funded with taxpayer dollars.

The D.C. Voucher Program Does Not Provide Parents Real Choice

Vouchers do not offer a meaningful choice to parents or students. Voucher schools can reject students based on prior academic achievement, economic background, English language ability, or disciplinary history. Also, the D.C. voucher allows religious schools to discriminate against students on the basis of gender.<sup>18</sup> In contrast, public schools serve all students who live in D.C.

Certain groups of D.C. students have less access to voucher schools than others. For example, students with special needs often cannot find a private school that can, or wants to, serve them: The Department of Education reports show that a significant number of students with special needs had to reject their voucher or leave their voucher school because the schools failed to offer them needed services<sup>19</sup> that would have been available to them had they remained in a public school.

Conclusion

The D.C. voucher program fails to offer D.C. students better educational resources, greater opportunities for academic achievement, or adequate accountability to taxpayers. For these reasons and more, we oppose the reauthorization and expansion of the D.C. voucher program.

Thank you for your consideration of our views.

Sincerely,

AASA: The School Superintendents Association  
African American Ministers In Action  
American Association of University Women (AAUW)

<sup>14</sup> Layton, *supra* note 8.

<sup>15</sup> *Id.* (revealing details about Academia de la Recta Porta).

<sup>16</sup> *Id.* (discussing Muhammad University of Islam, which enrolled one-third voucher students).

<sup>17</sup> *Id.* (discussing the Academy for Ideal Education).

<sup>18</sup> P.L. 108-199 Stat. 3 (2004).

<sup>19</sup> *Final US Dep't of Ed. Report at 24.*

American Atheists  
American Civil Liberties Union (ACLU)  
AFL-CIO  
American Federation of School Administrators (AFSA), AFL-CIO  
American Federation of State, County, and Municipal Employees (AFSCME)  
American Federation of Teachers, AFL-CIO  
American Humanist Association  
American Jewish Committee (AJC)  
Americans for Democratic Action  
Americans for Religious Liberty  
Americans United for Separation of Church and State  
Anti-Defamation League  
Association of Educational Service Agencies  
Baptist Joint Committee for Religious Liberty  
Center for Inquiry  
Central Conference of American Rabbis  
Clearinghouse on Women's Issues  
Council for Exceptional Children  
Council of the Great City Schools  
Disciples Justice Action Network  
Equal Partners in Faith  
Feminist Majority Foundation  
Gay, Lesbian & Straight Education Network (GLSEN)  
Hindu American Foundation  
Institute for Science and Human Values  
Interfaith Alliance  
Lawyers' Committee for Civil Rights Under Law  
League of United Latin American Citizens  
National Alliance of Black School Educators  
NAACP  
National Association of Elementary School Principals  
National Association of Secondary School Principals  
National Association of State Directors of Special Education  
National Black Justice Coalition  
National Center for Lesbian Rights  
National Council of Jewish Women  
National Education Association  
National Organization for Women  
National PTA  
National Rural Education Advocacy Coalition  
National Rural Education Association  
National School Boards Association  
People For the American Way  
School Social Work Association of America  
Secular Coalition for America  
Southern Poverty Law Center  
Texas Faith Network

August 4, 2015  
Page 5 of 5

Texas Freedom Network  
Union for Reform Judaism  
United Church of Christ Justice and Witness Ministries  
Women of Reform Judaism

Please send the following message to Senator Johnson

I am a Wisconsin Resident and I live in New London, Wisconsin. I was in special education in high school and grades schools, vouchers will only hurt students who need accommodation to succeed.

I was a victim of being bullied and that's why I don't support vouchers for special education students.

I had a learning disability and was called many names by teachers and labeled by peers.

Please support the following bills.

**H.R. 5: Student Success Act**

**S. 311: Safe Schools Improvement Act of 2015**

These two bills will help people with disabilities succeed to the fullest

Please don't support vouchers thank you for your time

--

David Pinno Self advocate

From: **Cheryle Reibold** [mailto:cheryle@reibold.com]  
Subject: No Subject  
Date: June 24, 2015 at 7:49 AM  
To: **Lisa Curtis** [mailto:lisa@reibold.com]

Hi Lisa,

Thank you for the extension, I appreciate it. Here is the final version.

Have a nice week,  
Cheryle

---

Education is the key that opens doors for young people and allows them to achieve their dreams. The latest U.S. rankings show teens are 25th in math, 17th in science and 14th in comparison to 34 industrialized nations. Education Secretary Arnie Duncan called the performance of American students a "wake up call".

Wisconsin is one of the only states confronting and introducing reforms that can improve schools so they work better for students. Overhauling harmful policies and bringing common sense changes to our public education increases the chance at the American dream. Clinging to outdated laws and policies protect the status quo.

I support and indorse charter schools and vouchers for those families wanting to withdraw from failing public schools with the conditions that they are held to the same standards outlined by the DPI, especially if they are to receive tax-payer money. Parents should not have to enroll their children in failing and unsafe public schools solely because of their geographical address. Local schools should offer an excellent diverse education in their community to eliminate the need for parents to outsource their children to other districts. Because this is not the case, charter schools are the solution.

Charter schools on average receive \$8,000 per pupil (compared to \$10,796 in Mequon-Thiensville) and cannot levy taxes for the difference unlike the public system. It is not a lack of money that equates to a better education. Wisconsin is one the top four sates spending the most on public education, yet, Wisconsin is not

in the top 4 when it comes to most proficient and successful academic outcomes. Their return in investment is lagging.

Adapt. Live within the generous means of taxation. Prioritize needs versus wants. Districts should not be fearful of change. Embrace competition and innovate. Do not shy away from it and be the status quo.

Cheryle Rebholz

Former board member, Mequon-Theinville School District

*I care*  
*Practicing MPS in 2000-2004*  
*As a parent & volunteer*  
*as a parent, board member & volunteer*  
*supporting school improvement +*  
*community*  
*change + balance*  
*community*



**Representing Secular Americans**  
In Our Nation's Capital

August 4, 2015

Mr. Ron Johnson  
Chairman  
Senate Committee on Homeland Security and  
Government Affairs  
386 Russell Senate Office Building  
Washington, DC 20510

Mr. Thomas Carper  
Ranking Member  
Senate Committee on Homeland Security and  
Government Affairs  
513 Hart Senate Office Building  
Washington, DC 20510

**RE: Reauthorization of the D.C. School Voucher Program**

Dear Chairman Johnson and Ranking Member Carper:

The four undersigned non-theist organizations write to voice opposition to the reauthorization of the District of Columbia private school voucher program. While we take a neutral stance on secular private school vouchers, the current program in D.C. allows for public money to go to private religious institutions and has proven ineffective and unaccountable to taxpayers. Not only have multiple Department of Education (USED) studies<sup>1</sup> concluded that the program has failed to improve educational outcomes for participating students, but two U.S. Government Accountability Office (GAO) reports have also identified its repeated management and accountability failures.<sup>2</sup>

Recently, this Committee held a hearing entitled "The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide" in an attempt to bolster support for reauthorization of the D.C. voucher program by comparing it to Milwaukee's program. We acknowledge that the Committee may be able to point to some students who have gone to exemplary schools and seen improvement from the program, but these students are, unfortunately, the exception rather than the rule. In 2011, the Wisconsin Legislative Audit Bureau released a five-year longitudinal study, concluding that students in Milwaukee's voucher schools perform no better on standardized tests than those students in Milwaukee's public schools.<sup>3</sup>

The same is true of the D.C. voucher program. Taxpayer money should never be used to fund private religious institutions or organizations. It violates the civil rights of students and jeopardizes the health of D.C.'s public schools. Congress should not reauthorize this unconstitutional and poorly managed program.

**There Are Limited Options for Students Seeking Non-Religious Private Schools**

In a recent study of the D.C. voucher program, the Department of Education noted that 62% of the participating private schools were affiliated with a religious denomination.<sup>4</sup> When weighing the schools

<sup>1</sup> US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Final Report* xv, xix, 34 (June 2010) (*Final US Dep't of Educ. Report*); *Final US Dep't of Educ. Report* at 34; US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Three Years* 34 (March 2009) (*2009 US Dep't of Educ. Report*); US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Two Years* 34, 36-38 (June 2008) (*2008 US Dep't of Educ. Report*); US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After One Year* xvii, 44, 46 (June 2007) (*2007 US Dep't of Educ. Report*).

<sup>2</sup> U.S. Gov't Accountability Office, *District of Columbia Opportunity Scholarship Program: Actions Needed to Address Weaknesses in Administration and Oversight*, Publication No. GAO-13-805 (Nov. 2013) <http://www.gao.gov/assets/660/658416.pdf> (2013 GAO Report); US Gov't Accountability Office, *District of Columbia Opportunity Scholarship Program: Additional Policies and Procedures Would Improve Internal Controls and Program Operations*, Pub. No. 08-9 at 26 (Nov. 2007) <http://www.gao.gov/new.items/d089.pdf> (2007 GAO Report).

<sup>3</sup> Legislative Audit Bureau, *Test Score Data for Pupils in the Milwaukee Parental Choice Program (Report 4 of 5)*, 17 (Aug. 2011) ("The project's five-year longitudinal study shows no significant difference in the performance of Choice and similar MPS pupils after four years of participation.")

<sup>4</sup> US Dep't of Educ., *Evaluation of the D.C. Scholarship Program: An Early Look at Applicants and Participating Schools Under the SOAR Act* 10, 29 (October 2014)

by the number of students attending each, the number rose to 81%. Furthermore, vouchers often only cover the cost of religious school tuition, which is generally cheaper than secular private schools. A July 2009 report by Rutgers University on the Washington, D.C. voucher program found that the \$7,500 voucher provided per student would have to be increased to \$24,000 to cover the cost of the average secular private school in the area. The report found that the cost difference "essentially push[es] students into Christian Association and Catholic schools, pricing out independent (non-religious) schools and Hebrew schools."<sup>5</sup>

Not only that, but in their report analyzing the impact of the voucher program after two years, the Department of Education found that out of the students who left, 8% stated "religious activities at the private school made the child uncomfortable" as their main reason.<sup>6</sup> The government should not fund a program that places a student in the uncomfortable position of choosing between staying at a school with their friends or staying silent while being mandated to attend religious services or participate in religious activities.

#### The D.C. Voucher Program Lacks Sufficient Oversight to Protect Against Constitutional Violations

GAO reports from both 2007 and 2013 document that the D.C. voucher program has repeatedly failed to meet basic and even statutorily required accountability standards. The 2013 report concluded that the D.C. Children and Youth Investment Trust Corporation (Trust), has continually failed to ensure the program operated with basic accountability measures and quality controls<sup>7</sup> and even failed to maintain adequate records on its own financial accounting.<sup>8</sup> The interim executive director of the Trust at that time even admitted that "quality oversight of the program as sort of a dead zone, a blind spot."<sup>9</sup>

Congress has attempted to address the oversight problems, yet they continue. For example, in its 2007 report, the GAO criticized the D.C. voucher program's annual directory, saying that the program administrator "did not collect or omitted or incorrectly reported some information that would have helped parents evaluate the quality of participating schools."<sup>10</sup> The most recent GAO report found that six years later, the program still suffered the same flaw. In a similar vein, the 2007 GAO report found that several schools receiving vouchers lacked valid certificates of occupancy.<sup>11</sup> In response, Congress included a provision in the SOAR Act specifying that private schools accepting vouchers must obtain and maintain one.<sup>12</sup> Nonetheless, in 2013 the GAO reported that nine of the ten schools they investigated still did not meet the certificates of occupancy requirement.<sup>13</sup>

A program with such repeated and serious oversight problems, especially when it involves a delicate Constitutional issue, should not be reauthorized.

#### The D.C. Voucher Program Threatens Civil Rights and Undermines Constitutional Protections

The voucher program strips students of civil rights protections. Despite receiving public funds, the private schools participating in the D.C. Voucher program are not subject to all federal civil rights laws and public accountability standards that all public schools must meet, including those in Title VI, Title IX, the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act, and the Elementary and Secondary Education Act (ESEA). Students who attend private schools with vouchers are

<sup>5</sup> Bruce D. Baker, *Private Schooling in the U.S.: Expenditures, Supply, and Policy Implications, Education and the Public Interest*, Center & Education Policy Research Unit (July 2009)

<sup>6</sup> 2008 US Dep't of Educ. Report at 23.

<sup>7</sup> 2013 GAO Report at 19.

<sup>8</sup> 2013 GAO Report at 28.

<sup>9</sup> Lindsey Layton, *D.C. School Voucher Program Lacks Oversight, GAO Says*, WASH. POST (Nov. 15, 2013)

[http://www.washingtonpost.com/local/education/D.C.-school-voucher-program-lacks-oversight-gao-says/2013/11/15/9bb8c35e-4e3d-11e3-be6b-d3d28122e6d4\\_story.html](http://www.washingtonpost.com/local/education/D.C.-school-voucher-program-lacks-oversight-gao-says/2013/11/15/9bb8c35e-4e3d-11e3-be6b-d3d28122e6d4_story.html).

<sup>10</sup> 2007 GAO Report at 36.

<sup>11</sup> 2007 GAO Report at 34.

<sup>12</sup> Pub. L. No. 112-10, § 3007(a)(4), 125 Stat. 38, 203.

<sup>13</sup> 2013 GAO Report at 21.

August 4, 2015  
Page 3 of 3

also stripped of their First Amendment, due process, and other constitutional and statutory rights provided to them in public schools. Schools that do not provide students with these basic civil rights protections should not be funded with taxpayer dollars.

Not only that, but religious schools are not held to the same non-discrimination standards as public schools. They can refuse admission based on a student's sexual orientation or gender identity, citing religious belief, further stigmatizing a vulnerable population. Religious schools can also refuse admission based on if they disapprove of the child's family, limiting options for LGBT parents and their children. These schools also discriminate against non-theistic children and their families, adding to the distrust and hostility our community faces.

Conclusion

The D.C. voucher program fails to offer D.C. adequate accountability to taxpayers and violates the secular nature of our government by directing taxpayer money to private religious schools. For these reasons and more, we oppose the reauthorization and expansion of the D.C. voucher program.

Thank you for your consideration of our views.

Sincerely,

American Atheists  
American Humanist Association  
Center for Inquiry  
Secular Coalition for America



## Stop Special Needs Vouchers Wisconsin

<https://www.facebook.com/StopSpecialNeedsVouchers>

<http://stopspecialneedsvouchers.org>

27 July 2015

To: The Honorable Ron Johnson (U.S. Senator, Wisconsin)  
The Members of the Senate Committee on Homeland Security and Governmental Affairs

Re: "The Milwaukee Parental Choice Program: A Pioneer for School Choice Programs Nationwide."  
U.S. Senate Committee on Homeland Security and Governmental Affairs Committee July 20  
hearing in Milwaukee, Wisconsin

Stop Special Needs Vouchers Wisconsin is a statewide grassroots volunteer group, run by and for families of students with disabilities. We have been advocating since 2012 toward our shared vision for well-funded, inclusive public education for all.

"For all" is a particularly crucial educational element for students with disabilities. Public schools are the only type of schools in Wisconsin that, by law, cannot refuse to educate our children on the basis of disability. The federal Individuals with Disabilities Education Act (IDEA), which emerged through passionate advocacy on the part of a previous generation of parents like us, offers our children the right to be educated at their neighborhood public school, no matter how complex their disability might be. When our tax dollars fund public schools, that promise is afforded to all our children.

In Wisconsin's private voucher schools, by contrast, families of taxpayer-funded students with disabilities forfeit the rights and protections of the IDEA, including the right to a legally-enforceable Individualized Education Plan and the right to have their disability taken into account in an expulsion hearing. Voucher schools need not have special educators or therapists on staff, nor are they currently required to abide by Wisconsin law regulating the harmful practices of seclusion and restraint which are used most heavily on students with special needs.

Even in context of the much narrower legal protections in private voucher schools, such as the Americans with Disabilities Act (ADA) and the universal-acceptance provisions of Wisconsin's voucher law, Wisconsin families of students with special needs have reported disturbing incidents of disability-related discrimination. These families' experiences of being discouraged from attending voucher schools, or pushed out by failure to provide reasonable accommodations, led to the 2011 disability-discrimination complaint filed with the U.S. Department of Justice by the American Civil Liberties Union and Disability Rights Wisconsin in 2011.

In fact, in 2012-13, nearly 25 percent of students who returned to the Milwaukee public schools from voucher schools -- 109 of 420 students -- were students with disabilities. Unfortunately the voucher schools have not been required to report apples-to-apples numbers that document how many students with disabilities are actually being served, so that crucial piece of transparency for families is lacking. However, it is clear that Milwaukee's public schools are faced with ever-increasing challenges of educating the students with disabilities that the voucher schools cannot or

*Stop Special Needs Vouchers is comprised of Wisconsin families committed to quality inclusive public education and to stopping harmful special needs vouchers.*

will not educate. Overall the Milwaukee public schools now have a concentration of one-in-five students with a disability, with some schools as high as 30%.

In context of the important, ongoing Department of Justice investigation and the fact that families of students with disabilities are required to give up so much – rights, protections, and transparency – when they take a voucher, Stop Special Needs Vouchers continues to strongly object to the expansion of Wisconsin’s voucher programs. Special needs vouchers, which were repeatedly defeated in the regular legislative process in the wake of overwhelming concerns from families like ours and disability organizations across the state, are particularly troubling, now that they have been installed for the 2016/17 school year via a state budget amendment that afforded no opportunity for public hearing or testimony.

Stop Special Needs Vouchers appreciates the opportunity to at least provide written testimony regarding our perspective on the pitfalls of Wisconsin’s voucher programs for students with disabilities. We hope for a process that takes seriously the experiences of students with disabilities and their families, and that strives to uncover and end all disability discrimination in Wisconsin’s voucher programs. The people of Wisconsin deserve no less.

***Stop Special Needs Vouchers Steering Committee***

Paula Buege  
5218 Shorecrest Dr.  
Middleton, WI 53562

Pam DeLap  
685 Clairville Rd.  
Oshkosh, WI 54904

Kevin Fech  
3735 E. Plankinton Ave.  
Cudahy, WI 53110

Nancy Gapinski  
2615 W. Hunter Circle  
Glendale, WI 53209

Terri Hart-Ellis  
6110 N. Santa Monica Blvd.  
Whitefish Bay, WI 53217

Tracy Hedman  
4903 N. Mohawk  
Glendale, WI 53217

Joanne Juhnke  
430 Oak Crest Ave.  
Madison, WI 53705

Kelli Simpkins  
8409 Elderberry Rd.  
Madison, WI 53717

Mary Swifka  
412 Oak St.  
New London, WI 54961

*Stop Special Needs Vouchers is comprised of Wisconsin families committed to quality inclusive public education and to stopping harmful special needs vouchers.*



---

*P.O. Box 7222, Madison, Wisconsin 53707*

July 24, 2015

To: The Honorable Ron Johnson  
Members, U.S. Senate Homeland Security Committee

From: Survival Coalition of Wisconsin Disability Organizations

Re: July 20<sup>th</sup> U.S. Senate Homeland Security Committee Hearing:  
The Milwaukee Parental Choice Program

Our member organizations thank you for the opportunity to provide testimony related to our experiences with the Milwaukee Parental Choice Program and its enrollment of students with disabilities.

The Survival Coalition has consistently requested a pause in the expansion of voucher programs in Wisconsin as we remain concerned about the capacity to adequately serve students with disabilities and the lack of requirement to do so under the law.

While the July 20<sup>th</sup> hearing testimony documented how some schools are serving students with disabilities, available data demonstrates that the MPCP voucher program overall serves very few children with disabilities, resulting in a growing percentage of students with disabilities in Milwaukee Public Schools (MPS), typically those with more severe disabilities. In 2012-13, nearly 25 percent of students who returned to the Milwaukee public schools from voucher schools -- 109 of 420 students -- were students with disabilities. Voucher program data verifies that less than 1.5% of voucher schools' students have documented disabilities, compared with an MPS average of just under 20%. Parents of students with cognitive and behavior disabilities have reported they are excluded from voucher schools because of a lack of appropriate services. A recent peer-reviewed article examining the MPCP indicated inadequate handling of the special needs of students was the second most common reason (11% of respondents) for students leaving MPCP.<sup>1</sup> This finding should not be ignored.

We request your further review, in coordination with the U.S. Department of Justice, of the MPCP due to claims by parents of discrimination as documented in a complaint filed by Disability Rights Wisconsin and the ACLU in June 2011. We ask for your support as the U.S. Department of Justice continues to investigate these claims and makes recommendations to improve the system to address concerns.

---

<sup>1</sup> Cowen, Josh; Fleming, David; Witte, John and Patrick J. Wolf. 2012. "Going Public: Who Leaves a Large, Longstanding, and Widely Available Urban Voucher Program?" *American Educational Research Journal* (April 2012) (pp. 231-256). <http://aer.sagepub.com/content/49/2/231>

Allegations of discrimination under federal law should be taken seriously and investigated to the fullest extent. Discriminatory practices, particularly when public funding is involved, should be addressed and schools provided with appropriate information and support to correct problems so that all students, including those with disabilities, can have equal access to this publicly funded program.

We also suggest that it is essential to collect more consistent data about students with disabilities attending voucher programs. Definitions of students must be consistent across educational settings receiving public funding so that parents can compare educational outcomes of students who have similar disabilities. This change will not only help parents to make the best informed choices for their child, but all schools will benefit from a more accurate and objective comparison.

Ultimately all parents want access to high quality education options for their child with a disability. However, for students with disabilities, additional information, protections and scrutiny must be in place to ensure their success. Thank you for your assistance in assuring the civil rights of our students with disabilities.

For additional information contact Survival Co-Chairs:

Maureen Ryan, [moryan@charter.net](mailto:moryan@charter.net); (608) 444-3842;  
Beth Swedeen, [beth.swedeen@wisconsin.gov](mailto:beth.swedeen@wisconsin.gov); (608) 266-1166;  
Kristin M. Kerschensteiner, [kitk@drwi.org](mailto:kitk@drwi.org); (608) 267-0214



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.  
 1139 E. Knapp Street, Milwaukee, WI 53202-2828  
 414-727-WILL  
 Fax 414-727-6385  
 www.will-law.org

**Written Testimony**

**July 20, 2015**

**Attorney Rick Esenberg, President**  
**Attorney CJ Szafir, Education Policy Director**  
**Wisconsin Institute for Law & Liberty**

Chairman Johnson, Ranking Member Carper, and distinguished members of the Senate Committee on Homeland Security & Governmental Affairs:

Thank you for the opportunity to submit written testimony about the United States Department of Justice's investigation into the Milwaukee Parental School Choice Program. For two years, we have been tracking – and pushing back against – the U.S. Department of Justice's unprecedented and baseless investigation into the Milwaukee Parental Choice Program. We have provided legal advice to clients and stakeholders in the school choice community and released two comprehensive memos on the subject, attached to the testimony as Exhibits A and B. Our work on this issue has been cited by columnist George Will, "*Justice Department becomes a schoolyard bully in Wisconsin*" and appeared in the National Review, Politico, and the Milwaukee Journal Sentinel, among other outlets.

We are attorneys at the Wisconsin Institute for Law & Liberty (WILL), a nonprofit, nonpartisan law and policy center with offices in Milwaukee. Through education, litigation, and public advocacy, we seek to advance the public interest, the rule of law, individual liberty, constitutional government, and a robust civil society.

For today's [hearing](#) on the Milwaukee school choice program, we are releasing a primer about the DOJ's investigation into school choice in Wisconsin. It is important to note that the investigation has little to do with children and everything to do with the prerogatives of the educational establishment. There is not one documented instance of what any reasonable person might call discrimination against a child with special needs by a school participating in one of Wisconsin's private school choice programs. While DOJ ordered the state Department of Public Instruction (DPI) – the state education agency – to gather such complaints, it appears that not one complaint has been filed with DPI.

Indeed, what the DOJ and anti-choice advocates say is "discrimination" is actually a product of their own political maneuvering against parental choice. If a school participating in the choice program is unable to provide a given level of services to a student with special needs, it is often because Milwaukee Public Schools (MPS), as the gatekeeper for federal aid, have failed to adequately allow funds appropriated for those services to "Follow the Child." When the state legislature has proposed special needs vouchers to remedy the situation, they have been opposed by the very "disability rights advocates" who instigated the DOJ's investigation.

The DOJ investigation is not about kids. It's about a policy – school choice – that the adults who benefit from the traditional public educational structure and vehicles for providing services to children with special needs see as eroding their prerogatives and market share. It is an assault on the sovereignty of the state of Wisconsin, and yet another attempt by the Obama Administration to recast federal law into something that Congress has not passed.

### **I. The Investigation**

Wisconsin has one of the nation's largest and oldest school choice programs. In 2014-15, nearly 28,000 low-income families, mostly in Milwaukee, took advantage of a state-funded voucher to attend a private school of their choosing. Two weeks ago, Governor Scott Walker and the Republican legislature passed a budget that greatly expands the program statewide.

Following a complaint filed by the ACLU, Disability Rights Wisconsin and two unnamed families<sup>1</sup>, the U.S. Department of Justice, in August 2011, opened a formal investigation into the state of Wisconsin and the Milwaukee Parental Choice Program as to whether the program violated federal law by discriminating against children with disabilities. In April 2013, the Civil Rights Division of the DOJ sent a letter and legal memo to the state Department of Public Instruction (DPI), accusing the school choice program of violating Title II of the Americans with Disabilities Act (ADA). The letter concluded that Wisconsin had to impose new requirements on schools participating in the choice program by June 2014. Failure to comply, it said, could lead to litigation. No evidence of discrimination was presented at that time. We responded with a legal memorandum, concluding that the DOJ's legal theory was an unprecedented use of federal disability law (see Exhibit A).

A year later, the DOJ forced the DPI to obtain student disability records from private schools in the choice program. We wrote a legal memo (see Exhibit B), advising schools against doing so because, among other reasons, the DPI lacked the statutory authority to request disability records. Few schools complied. In October 2014, the DOJ required the DPI to establish a new disability complaint process, so any complaints against the choice program can be forwarded to attorneys at the DOJ.

The US DOJ refuses to comply with our open records requests about the investigation, media inquiries, and document requests from the Senate Committee on Homeland Security & Governmental Affairs. Yet, the DPI has responded to our records request, and, as of our last request, not one complaint has been filed against a private school in the choice program.

### **II. The DOJ's Legal Theory is Wrong**

The DOJ essentially believes that private schools in the choice program should be regulated like public schools under Title II of the Americans with Disabilities Act (ADA). That statute prohibits discrimination by public entities. Title II's injunction against discrimination has come to mean that a public entity subject to it must accommodate the special needs of persons with disabilities unless doing so would "fundamentally alter" the affected program. DOJ argues that DPI, which is itself subject to Title II, has certain limited administrative responsibilities with respect to the provision of state-funded vouchers to parents. The parents then use these vouchers at private schools. DPI must, therefore,

<sup>1</sup> The allegations of discrimination in the complaint were highly stylized. In neither case had a school rejected a voucher student. In one instance, the school was unable to provide the same level of service as the student's former public school because it did not receive the same level of funding. In the other, a school was accused of "discrimination" for imposing reasonable behavioral requirements, which, in its view, would better serve the child in the long run.

assure that these schools comply with Title II standards even if they have no access to the public funds that would enable them to do so. By this “six degrees of separation” method of interpretation, DOJ seeks to transform private schools into public ones.

This is an unprecedented and astonishing legal theory. First, it conflicts with the ADA itself. Private schools, as “public accommodations,” are governed by Title III, which *completely exempts religious schools from the ADA*. Over 85% of choice schools are religious. It is odd to think that Congress intended regulators to use a Rube Goldberg interpretive contraption to use a part of the law that does not, by its plain terms, apply to schools that are elsewhere excluded from the law. Second, it is contrary to long-held U.S. Department of Education (ED) policy. A 2001 ED memo states: “Title II of the ADA does not directly apply [to private schools], as the private schools are not public entities.” Memorandum from Susan Bowers, U.S. ED, 2 (Mar. 30, 2001). In 1990, the ED determined that federal disability laws do not apply to “placements in private schools resulting from parents decisions to participating in the Choice Program.” Memorandum to Gov. Tommy Thompson, U.S. ED Education (1990).

Third, the DOJ’s legal theory also violates U.S. Supreme Court precedent. The Supreme Court has held that a “private entity [that] performs a function which serves the public does not make its acts state action.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). In *Rendell-Baker*, the Court concluded that employees in private schools, whose income is from public funds, are not state employees. *Id*; see also *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (holdings that state funding alone is not enough to treat nursing homes as public entities); see also *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26 (1<sup>st</sup> Cir. 2002) (“[E]ducation is not and never has been a function reserved to the state . . . and [courts] have declined to describe private schools as performing an exclusive public function.”)

Finally, DOJ’s theory defies logic and erodes the distinction between public and private entities. It is not unlike saying that, because recipients of SNAP benefits may use them at Wal-Mart, the store itself has been transformed into a public entity – and must now comply with legal requirements that apply only to the government.

A more detailed legal analysis can be found in WILL’s August 28, 2013 letter to DOJ and Executive Summary (Exhibit A). It can also be found in the testimony of Richard Komer of the Institute for Justice submitted today.

### **III. Why the Investigation Matters**

- *DOJ’s legal theory would end the school choice program.* Title II of the Americans with Disabilities Act (ADA) requires public entities to accommodate students with disabilities unless doing so would “fundamentally alter” their program. Public schools are subject to this requirement and additional obligations under federal statutes governing education for children with special needs. But they also receive additional funding to meet these obligations and, as public entities with their own taxing authority and that of the state, have access to more. Private schools participating in the choice program, for the most part, do not receive these additional funds. To impose comparable obligations would result in a substantial – and potentially fatal – financial burden on the choice program and its participating schools.

In addition, school choice is valuable because it permits different approaches. It embodies the simple truth that “one size does not fit all.” Imposing federal – or even state – supervision and direction of precisely how schools serve children with special needs would undercut the benefits of educational diversity. This is undoubtedly one of the reasons that Congress exempted religious schools from the ADA in the first instance.

- *The State of Wisconsin has been “commandeered” by the U.S. government.* In June 2014, the DOJ forced the DPI to ask private schools to complete a Disability Data Report, which includes specific questions about students’ disabilities and whether they were suspended or expelled. There is no state statute that authorizes DPI to request such data. Fourteen choice schools did turn their student data over to the DPI, who then promptly sent it to the DOJ.

In October 2014, the DPI – on behalf of the DOJ’s orders – established a new disability complaint process. Although they are not advised what discrimination means, parents can fill out a form and submit to DPI claiming that their children have been subject to discrimination. Once submitted to the DPI, the form is forwarded to the US DOJ. Moreover, the DPI will initiate a complaint procedure by contacting the school about the complaint, proposing a resolution, and, if no solution can be agreed upon, issuing a written decision and plan to correct the violation. The DPI has not said if there is a way to appeal their decision.

To its credit, DPI has recognized that Wisconsin law does not give it authority to oversee the activities of schools participating in the choice program. Its administrative role with respect to the program is carefully delineated and limited by state law. The DPI admitted that it has no statutory authority to create such a procedure. Even if the federal standards that DOJ wants it to enforce applied to private schools, DPI has admitted that it lacks authority to issue or enforce decisions that would be binding on private schools.

Yet, DOJ has ignored these legal niceties and regarded the law of a sovereign state as something to be brushed away. It has told DPI that it will do what Washington bids without regard to what Wisconsin permits. And, to its discredit, when the U.S. DOJ has said “jump,” the DPI has simply asked “how high?” DOJ has forced DPI to aid in its investigation and the Tenth Amendment of the U.S. Constitution does not permit states to be “commandeered” in this way. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot force local law enforcement officers to perform background checks on handgun owners); *New York v. U.S.*, 505 U.S. 144 (1992) (holding that the federal government cannot require States to provide for the disposal of radioactive waste generated within their borders).

- *A “chilling” effect.* No school in Milwaukee wants to find themselves on the opposite side in a courtroom from their country. Yet, the U.S. DOJ says that schools must do one thing – but the text of federal law, U.S. Department of Education, and U.S. Supreme Court all say do to something else. The DOJ seems to demand that the schools do what public schools are funded to do even though they are not. For many, they may be required to do things inconsistent with their distinctive and alternative faith-based approaches (not everyone believes, for example, that students with “oppositional-defiance order” should not be taught to conform themselves to generally applicable requirements), even though federal law exempts religious schools from such requirements.

School leaders, who wish not to be named and who are understandably reluctant to go public, ask us what exactly they are supposed to do. The investigation has left parents and school leaders confused

and concerned about when and if another shoe will drop. By launching a never-ending and baseless investigation, DOJ is attempting to regulate by in terrorem effect without accountability.

#### **IV. Timeline of Events**

*June 7, 2011, The complaint is filed:* The American Civil Liberties Union (“ACLU”) and Disability Rights Wisconsin file a complaint with the U.S. Department of Justice, asking them to investigate the “systematic discrimination against and exclusion of students with disability in Wisconsin’s school voucher program.” They file the complaint against: State of Wisconsin, Department of Public Instruction, Messmer Preparatory Catholic School, and Concordia University School.

The complaint alleges that students with disabilities in the choice program are 1) deterred by DPI and participating voucher schools from participating in the school choice program; 2) denied admission to voucher schools when they do apply; and 3) expelled or forced to leave because of choice schools’ policies and practices that fail to accommodate the needs of students with disabilities.

*August 17, 2011, The investigation begins:* The Civil Rights Division of the United States Department of Justice (“DOJ”) opens an investigation into Wisconsin’s school choice program to determine whether the choice program “discriminates against students with disabilities.”

*September 27, 2011, DOJ questions DPI:* The DOJ begins to investigate the Wisconsin Department of Public Instruction (“DPI”), the state’s education agency. The DPI initially resists the DOJ by saying that federal disability laws do not apply to the choice program: “DPI has no policies or procedures that reference the obligation of participating MPCP schools to comply .... [b]ecause there is no such obligation.”

*April 2013, DOJ determines that the school choice program must be changed:* The Civil Rights Division of the U.S. DOJ sends a letter and legal memo to the Wisconsin Superintendent of Public Instruction Tony Evers. The DOJ declares – without citing to any evidence of discrimination – that the State of Wisconsin and the Milwaukee school choice program are in violation of federal disability law, the Americans with Disabilities Act. Therefore, the State must “do more to enforce the federal statutory and regulatory requirements that govern the treatment of students with disabilities.” The DOJ mandates that:

1. DPI must establish and publicize a procedure for individuals to submit complaints about private schools.
2. DPI must report to the U.S. DOJ the number of disabled students that are served by voucher schools. The DOJ will review the data.
3. DPI must report all discrimination claims to the Justice Department.
4. DPI must conduct outreach to educate the families of students with disabilities about school choice.
5. DPI must provide mandatory ADA training to voucher schools.
6. DPI must develop program guidance in consultation with the U.S. to enforce compliance.

The letter ends with a threat: the DPI is required to implement new policies for the upcoming 2013-2014 school year, and if not, “the United States reserves its right to pursue enforcement through other means.”

*August 2013, WILL Responds to DOJ:* On behalf of clients in the school choice community, Attorneys Rick Esenberg and CJ Szafir at the Wisconsin Institute for Law & Liberty (WILL) [release a legal response](#). We argue that the DOJ's letter is legally inaccurate and supported by no evidence of actual discrimination.

*September 2013 – May 2014, WILL files open records request with DPI:* The few records that are not withheld under attorney-client privilege show that the DOJ made threats to the DPI and references to an “on-going” investigation.

*May 2014, State GOP calls out Evers:* Republicans in the Wisconsin State Senate [notify](#) Superintendent Tony Evers that they want to be updated on the DOJ's investigation.

*June 2014, US DOJ demands data from private schools:* The US DOJ orders the state DPI to obtain private school student disability data by the end of June. [The Disability Data Report](#) that DPI sends to schools in the choice program, asks about what actions private schools have taken regarding students with disabilities (i.e. suspended, expelled, denied admission).

*June 2014, WILL calls out DPI, DOJ:* On behalf of clients in the school choice community, Attorneys Rick Esenberg and CJ Szafir [release a legal memo](#), advising private schools in the choice program not to comply with the DPI's request for data because the DPI has no legal authority to enforce this request. As a result, only a handful of schools comply with DPI's request.

*July 2014, DOJ invokes “law enforcement” exception to FOIA request:* WILL files a Freedom of Information Act (FOIA) request with US DOJ for all communications with DPI and documents pertaining to the Wisconsin school choice program. The request is denied. DOJ states that the records and communications “pertain to an ongoing law enforcement proceeding” and releasing them would “risk of jeopardizing the ongoing enforcement proceeding.”

*August 2014, DPI sends data to DOJ:* The DPI compiles all of the disability data from its June 2014 request. Only 14 schools turned in data dealing with 30 students. A full version of the Disability Data Report was sent to the US DOJ. A redacted version was given to legislators, WILL, and SCW. DPI would not explain why a redacted version was sent to the public and a full version was sent to the US DOJ.

*October 2014, DOJ orders DPI to create complaint process:* The DPI – pursuant to DOJ's “orders” – establishes a new disability complaint process and form for parents who believe that their children have been discriminated against in the choice program. The form does not define discrimination. It is not clear what type of complaints will be pursued by DPI. The DPI does not have the legal authority to create a broad disability discrimination complaint procedure. It is clear that, after a parent submits the form to the DPI, the form will be forwarded to the US DOJ.

If it does act, the DPI says it will contact the school about the complaint, propose a resolution, and, if no solution can be agreed upon, issue a written decision and plan to correct the violation. The DPI has not said if there is a way to appeal their decision.

*March 2015, U.S. Rep. notifies DOJ:* U.S. Congressman Jim Sensenbrenner [notifies](#) Attorney General Holder that the DOJ investigation is of “great concern” to him and that he is “worried about the

incorrect application of Title II ADA standards the effect this will have on the viability of the private school voucher programs.”

*May 2015, No complaints filed yet:* DPI responds to open records request from WILL and claims that no one has filed a disability complaint against a private school in the choice program.

*June 2015, U.S. Senator asks for DOJ records:* U.S. Senator Ron Johnson, Chairman of the Committee on Homeland Security and Governmental Affairs, [calls on the DOJ](#) to explain their investigation. Senator Johnson requests documents and communications by June 30. According to Johnson’s office, the DOJ did not comply.

**V. Conclusion**

We are confident that at the end of this hearing you will come to the conclusion that the DOJ’s investigation into the Milwaukee School Choice Program is dangerous, unprecedented, and without any real evidence of discrimination. On behalf of the proponents of the education status quo, the DOJ is trying to change the school choice program in ways that would cause it to collapse. In addition to poor public policy, this raises significant Tenth Amendment issues that will have to be addressed in the future.

We welcome any questions you may have and our contact information is below. Thank you for allowing us to submit this testimony.

Sincerely,

**Rick Esenberg**

President & General Counsel  
Wisconsin Institute for Law & Liberty  
Bloodgood House  
1139 E. Knapp Street  
Milwaukee, Wisconsin 53097  
(414) 767-6367  
rick@will-law.org

**CJ Szafir**

Education Policy Director & Associate Counsel  
Wisconsin Institute for Law & Liberty  
Bloodgood House  
1139 E. Knapp Street  
Milwaukee, Wisconsin 53097  
(414) 727-6373  
CJ@will-law.org



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.  
 1139 E. Knapp Street, Milwaukee, WI 53202-2828  
 414-727-WILL  
 Fax 414-727-6385  
 www.will-law.org

August 28, 2013

To: Interested Parties

From: Rick Esenberg, President and General Counsel  
 CJ Szafir, Associate Counsel and Education Policy Director  
 Wisconsin Institute for Law and Liberty (WILL)

Subject: A legal analysis of the United States Department of Justice's Letter to the Wisconsin Department of Public Instruction regarding compliance with Title II of the Americans with Disability Acts.

#### INTRODUCTION

On April 9, 2013, the United States Department of Justice – Civil Rights Division (“DOJ”) wrote a letter to the Wisconsin Department of Public Instruction (“DPI”) claiming that the DPI “must do more to enforce federal statutory and regulatory requirements that govern the treatment of students with disabilities who participate in the school choice program.” *See U.S. Department of Justice Letter to State Superintendent Tony Evers*, 1, April 9, 2013 (“DOJ Letter”). The Letter lays out the actions that, in DOJ’s view, DPI must take in order to be compliant with Title II of the Americans with Disabilities Act (“Title II”). It ends with a threat: the DPI is required to implement new policies for the upcoming 2013-2014 school year, and if not, “the United States reserves its right to pursue enforcement through other means.” *Id.* at 4.

Although referring to it only in passing, the DOJ Letter was presumably prompted by a complaint filed on June 8, 2011, by Disabilities Rights Wisconsin and the American Civil Liberties Union (“the Complaint”). The Complaint contains highly stylized allegations of “discrimination,” but the DOJ Letter does not address them and makes no allegations of its own. The Letter contains no claim or “finding” that any school (collectively “Choice Schools”)

participating in the Wisconsin's various forms of school choice ("the choice program")<sup>1</sup> has engaged in any form of discrimination against students with disabilities.

To the contrary, the Letter is nothing more than an assertion of the power to regulate. It claims that DPI is somehow empowered to enforce a federal statute (Title II) that is applicable only to "public entities" (like DPI) against private schools. While the Letter is vague on just what this might mean, it suggests that, in applying Title II, DPI must impose on Choice Schools the exact same legal standard applicable to government schools, *i.e.*, a requirement that Choice Schools change their programs to accommodate students with a disability as long as the change would not "fundamentally alter" the school. *DOJ Letter*, p. 2 (citing to 28 C.F.R. § 35.130(b)(7)). In other words, DOJ apparently believes that the legal standards applicable to DPI as a public entity are "transferred" to private Choice Schools because DPI administers payment of the vouchers to choice families.

But Title II has never been applied to private entities (including schools), save for the situation (not present here) when a public body has "contracted out" its responsibilities to a private entity. Nor has the exacting standard urged by DOJ ever been applied to Choice Schools. To the contrary, federal law expressly calls for a different – and less intrusive – standard for most, if not all, private schools. In the absence of some violation of federal law, DOJ has no authority to tell Wisconsin how to regulate Choice Schools, and Wisconsin has not chosen to regulate them in the way that DOJ now demands. DPI has no authority under state law to force Choice Schools to do what DOJ demands or to deny eligible families the opportunity to send their children to an otherwise eligible school if they don't.

Furthermore, the DOJ Letter is unnecessary. State law already requires that Choice Schools may not deny admission to any student on the basis of disability and that DPI provide vouchers to families of disabled and non-disabled students alike. As noted above, DOJ does not allege that DPI and the Choice Schools have not complied with these requirements.

The DOJ's demands are potentially harmful. The application of Title II to Choice Schools would require them to adjust their programs or provide additional services as long as it does not "fundamentally alter" their programs. That might require these schools to significantly alter their distinctive approaches with no benefit to disabled students. If, for example, Choice

---

<sup>1</sup> There are three different programs. The Milwaukee Parental Choice Program ("MPCP") limited to the city of Milwaukee began in 1990. The Parental Private School Choice Program ("PPSCP") in Racine went into effect in 2012. As of the 2013-2014 school year, there is also a statewide Parental Choice Program ("PCP").

Schools do not provide the same type and quantity of services as public schools, it is because they, unlike their public counterparts, do not receive funding to provide them. Calling this “discrimination” will not cause the services to be provided unless and until the state provides funding for them. If no funding is provided, the effect of the DOJ’s approach would be to force schools out of the program, reducing the alternatives available to low income families.

In addition, some Choice Schools may offer distinct approaches to discipline and may be unwilling to tolerate certain forms of misbehavior alleged to stem from mental disabilities. While such an alternate approach may be impermissible in public schools, Congress has never said that it must be forbidden in private schools – even when poor families have chosen to place their children in those schools with publicly funded vouchers. Imposing a “one size fits all” requirement on Choice Schools will deny parents of disabled and non-disabled students an alternative without expanding opportunities for those families that prefer a traditional approach.

All of this might be justified if Choice Schools were being utilized by the state of Wisconsin to replace public schools, but that is not the case. Voucher students attend them only if their parents so choose, while public schools remain open and fully funded. Choice students have the right to leave and enroll in a public school. The DOJ’s position might be more appealing – although perhaps still not legally sound – if Choice Schools were provided the resources to provide additional programming for students with disabilities but failed to do so. But that, too, is not the case.

In sum, DOJ seeks to commandeer a state agency to enforce a law against private schools that does not apply to them through means that the state agency has no authority to employ. We conclude that: 1) Title II does not apply to Choice Schools, 2) to the extent that Title II imposes obligations on DPI with respect to the choice program, they are limited to the role it plays in the program’s administration and the limited benefits that it provides, 3) the DPI lacks the authority to implement the DOJ’s “requirements,” and 4) the DOJ lacks the authority to order the DPI to take the actions mandated in their Letter.

## ANALYSIS

### **I. Title II Does Not Apply to Choice Schools**

#### *A. Choice Schools are not public entities*

Title II of the Americans with Disabilities Act provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the

benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 1232. Under the ADA, “public entity” includes any department or agency of a local government. 42 USC § 12132(1)(B).

Private schools participating in the choice program are not “public entities.” *See* Wis. Stat. § 118.165(1)(b) (stating that an institution is a private school if it, among other things, is privately controlled.). After establishment of the program in 1989, it was challenged as, among other things, a violation of the requirement that public “district schools” (as they are called in the Wisconsin Constitution) be uniform. The Wisconsin Supreme Court rejected the challenge, holding that the use of vouchers at private schools does not transform them into “public schools.” *Davis v. Grover*, 166 Wis. 2d 501, 540, 480 N.W. 2d 460, 474 (1992). Noting that public schools remained open and the choice students were free to attend them, the court observed that “[i]n no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school” and “decline[d] the opportunity to adopt such a conclusion.” *Id.*

When the program was expanded in 1995 to include sectarian schools, it was challenged again on the same basis and also as a violation of federal and state constitutional prohibitions against the establishment of religion or the use of public funds for sectarian instruction. Again, the Wisconsin Supreme Court upheld the program, in part because private schools are not made “public” by accepting state funded vouchers from students and their families:

In *Davis* this court squarely rejected the argument that private schools receiving state funds under the original [choice program] were “district schools” to which the uniformity requirement applies. The court noted that the original [choice program] explicitly referred to participating schools as “private schools” and observed that “[i]n no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school.”

We apply the same reasoning in this case.

*Jackson v. Benson*, 218 Wis. 2d 835, 893, 578 N.W.2d 602, 627 (1998) (citations omitted).

This should surprise no one. DPI’s only powers with respect to the choice program are enumerated in Wis. Stat. § 119.23 and include enrolling schools into the program, collecting fees, ensuring financial viability of participating schools, teacher accreditation, and informing parents which schools participate in the program. It has no authority to “ensure” that schools are

structured in any particular way or to provide additional funding for the provision of “nondiscriminatory services.” Its ability to remove schools from the program is carefully delineated in § 119.23(10) and does not include oversight, approval, or disapproval, of a school’s curriculum, programming, or operations. Its authority over educational programming in Choice Schools is limited to enforcement of the general and limited requirements imposed on all private schools. *Id.*

Although the vouchers may be used only at schools that meet certain minimal eligibility requirements, the DPI does not control where they may be used. It is students and their families who decide whether they will leave the public schools and enroll in a private Choice School. It is they who decide where the voucher will be used. Nor does the DPI “administer” or exercise any control over how voucher funds are used by Choice Schools. *See, e.g., Davis v. Grover, supra*, 166 Wis. 2d at 542 (“[N]o express limitations exist on the use of the funds paid to private schools through the MPCP.”).

To be sure, DPI must award vouchers to students without regard to their disability and, to be eligible for the program, Choice Schools must admit them. *See* Wis. Stats. § § 119.23(2), 118.60(2). But there is no assertion that these requirements – all a matter of state law – have not been met and, even if they had not, DOJ has no power to enforce them. What DOJ wants is to turn the choice program into something that Wisconsin did not adopt. It wants the state to treat these schools not as an alternative to public schools that remain open to all, but at their extension. It wants Wisconsin to go beyond providing a financial benefit to families to use as they see fit, to one that either controls the activities of the schools that these families choose or exclude those schools that do not comply with a standard that, as we shall see, Congress has chosen not to impose on (at least) the overwhelming majority of Choice Schools.

*B. The Receipt of Public Money Does Not Make Choice Schools Public Schools for Purposes of Title II*

In order to get around the law, DOJ argues that in order to be Title II compliant, DPI must “ensure that voucher schools do not discriminate against students with disabilities” in some way that goes beyond the state mandate of equal treatment. It appears to be saying that the limited authority DPI plays with respect to the choice program requires not only that DPI *administer* the voucher program in a non-discriminatory fashion, but that *all of the operations* at Choice Schools would have to be structured so as to meet Title II’s requirement that a policy,

practice, or procedure must be modified unless it can be shown that the reasonable modification would “fundamentally alter the nature of the service, program or activity.” See *DOJ Letter*, p. 2 (citing to 28 C.F.R. § 35.130(b)(7)). In other words, the limited role that DPI, as a public entity, plays in administering the choice program supposedly turns all of the private schools into public entities subject to Title II.

If this sounds contrived, it is because it is. It is also unprecedented. The receipt of public money does not make the recipient a public entity. It is not the case that if a private organization receives public money, it inherits all the responsibilities of a public entity. The fact that parents use vouchers at private schools does not turn them into public entities any more than the use of SNAP benefits at a Wal-Mart or TANF benefits to pay a child care provider makes either the store or the daycare subject to Title II.

The U.S. Supreme Court has repeatedly held that a “private entity [that] performs a function which serves the public does not make its acts state action.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). For example, private schools can receive public money but not be held to the same laws as traditional public schools. See *Id.* (holding that employees in private schools whose income is primarily from public funds are not state employees); *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (holding that state funding alone is not enough to treat nursing homes as public entities); See *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (“[E]ducation is not and never has been a function reserved to the state . . . and [courts] have declined to describe private schools as performing an exclusive public function.”); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002) (holding that schools participating in a choice program can be religious without implicating Establishment Clause or religious discrimination concerns).

Wisconsin’s treatment of Choice Schools reflects this holding. *Jackson v. Benson*, *supra*, 218 Wis. 2d at 893-894 (“In *Davis* this court squarely rejected the argument that private schools receiving state funds under the original [choice program] were “district schools” to which the uniformity requirement applies.”); *Davis v. Grover*, *supra*, 166 Wis. 2d at 539-540 (holding that “private schools participating in the [choice program] do not constitute “district schools” for purposes of the uniformity clause”).

Title II does not transfer the obligations it imposes on a public entity to whomever it pays public funds or make those public entities responsible for the actions of the recipients of tax

dollars. In *Liberty Resources v. Philadelphia Housing Authority*, 528 F. Supp. 2d 553 (E.D. Pa. 2007), the plaintiff argued that Title II compelled a public entity administering the Section 8 rental voucher program to ensure that the private rental properties at which these vouchers were used were “handicap accessible.” *Id.* at 566. The public entity, the court concluded, was “not responsible and cannot control the actions of private landlords” and could not be held to have violated ADA for the “failure of the private rental market to provide voucher holders with a sufficient number of accessible units.” *Id.* at 570.

This case is remarkably like *Liberty Resources*. DPI administers financial assistance to families who choose a private school. That does not obligate DPI to enforce – or the private schools to adhere to – the same legal standards applicable to public schools (who, of course, receive additional funding that the Choice Schools do not).

The DOJ’s theory of Title II “osmotic transfer” was also rejected in *Bacon v. City of Richmond*, 475 F.3d 633 (4<sup>th</sup> Cir. 2007). The U.S. 4<sup>th</sup> Circuit Court of Appeals held that the City of Richmond was not liable for, or obligated to remedy, the lack of accessibility in school buildings operated by the Richmond City Public Schools. This was so even though the City owned and provided funding to the public schools to maintain the allegedly offending buildings and that the plaintiff had argued, as the DOJ does here, that this “power of the purse” obligated the city to ensure that the operations it funded were ADA compliant. *Id.* at 640. In rejecting this theory of “pass through” liability, the court observed that the City did not control the school buildings, school system, or day-to-day school activity. *Id.* According to the court, “[t]he plain text of Title II limits responsibility to public entities that discriminate against or exclude persons with disabilities for services . . . . To hold that a city or State by virtue of its funding authority is liable for injury caused solely by a separate and independent corporate body is a novel and unprecedented theory.” *Id.* at 642 (emphasis added).

The relationship between DPI and Choice Schools is much weaker than that between the city and public schools in *Bacon*. Here, there is no direct payment to private schools. DPI does not own the Choice Schools or maintain them. Rather, DPI simply sends a voucher check to qualifying parents who then give it to the private school of their choice.

Significantly, the 4th Circuit noted that federal circumspection was particularly appropriate in public education and courts should “tread with especial caution” when asked to “recalibrate the State’s basic system of educational governance . . . .” *Id.* at 641. Wisconsin’s

commitment to school choice represents a considered – and long standing – determination of the state of Wisconsin that low income families will benefit from having an alternative in addition to private schools. Observing that “Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children,” the Wisconsin Supreme Court has recognized that public schools provide a “not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin.” *Jackson v. Benson, supra*, 218 Wis.2d at 895. In enacting school choice, “the State has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities in addition to those provided by [public schools.]” *Id.* The federal government should not frustrate Wisconsin’s choice to provide something extra for low income families by distorting Title II to make private schools act like public schools.

C. *In relation to the Choice Program, Title II applies only to DPI’s “Authorized Activities”*

Because the receipt of vouchers does not turn private schools into public, providing state money to a private party does not create a federal obligation on part of the provider to control the private entity’s actions in a way not contemplated by state law. Title II only applies “with regard to the services [that public entities] in fact provide”. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 (1999). A state need not expand or alter a program because doing so might make it more effective for or valuable to persons with disabilities. The State of Wisconsin, by providing state money through vouchers, is not responsible for or required to assume control over the activities of those schools at which they are used to ensure that they meet whatever standard would be applied to DPI’s own activities. Wisconsin is not obligated to assert control over private schools or deny parents the right to use vouchers at schools that do not meet whatever standards might apply to public schools.

Courts have repeatedly decided that the obligation of nondiscrimination under Title II extends only to the program a state has chosen to enact. *See Tennessee v. Lane*, 541 U.S. 509, 537 (2004); *Olmstead*, 527 U.S. at 603 (states do not have to make “fundamental alterations” to their services and programs); *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999); *Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d 884, 888-89 (D. Idaho 2006) (“State is not required to assure the disabled greater benefits than provided to non-handicapped but only that all citizens are equally able to access the benefits of the services provided.”); *see Liberty*

*Resources, supra*, 528 F. Supp. 2d at 567 (analyzing several Supreme Court cases to conclude that “ADA only requires a program to provide equal access to its core service.”)

For example, in *Rodriguez*, the plaintiff sued New York under Title II arguing the state’s Medicaid plan coverage of “personal care services” designed to help beneficiaries remain in their homes did not include safety monitoring devices claimed to be necessary for disabled persons. 197 F.3d at 618. The plaintiffs argued that the unavailability of these devices rendered the entire Medicaid package “ineffective” for certain disabled persons who wished to use it to remain in their homes. They demanded that the state restructure its Medicaid program in a way that accommodated this need and argued that failure to do so constituted impermissible discrimination.

The Second Circuit rejected this argument. Citing and clarifying *Olmstead*, the court stated that the “ADA does not mandate the provision of new benefits,” such as a safety monitoring device, and it is not the court’s role to determine what benefits should be provided by the state. *Id.* at 619. The ADA only allows the court to determine whether the state discriminates against disabled persons “with regards to benefits *it does provide.*” *Id.* (emphasis added). Consequently, because New York’s Medicaid program did not provide safety monitoring devices “as a separate benefit for anyone, it does not violate the ADA by failing to provide this benefit to [plaintiff].” *Id.*

In other words, if a state decides to provide a limited benefit, say vouchers, it need not expand the program. The fact that a more capacious program, say public administration of Choice Schools, might be said to provide greater benefits to disabled persons does not make it a violation of Title II. This is consistent with the Supreme Court’s interpretation of Section 504 of the closely related Rehabilitation Act of 1973 (“section 504”).<sup>2</sup> In *Alexander v. Choate*, 469 U.S. 287, 301 (1985), the Supreme Court considered the argument that Tennessee’s limitation of

---

<sup>2</sup> The language of the ADA and section 504 of the Rehabilitation Act are virtually identical - with the exception of the program with rules and regulations. He required all participating schools to test nor requires MPCP schools to provide t that sec. 504 applies only to federally funded programs. Given their similarities, Congress has intended to have Title II and section 504 be “construed and applied consistently.” *Liberty*, 528 F. Supp. 2d at 564. According to 42 U.S.C § 12133, the “remedies, procedures, and rights” under 504 are also available under Title II. As a result, the courts have interpreted statutes as being “interchangeable” with one another. *Gorman v. Bartch*, 152 F.3d 907, 912 (8<sup>th</sup> Cir. 1998); see also *DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist.*, 126 F.3d 1102, 1105 (8<sup>th</sup> Cir. 1997) (“Congress intended Title II and its implementing regulations to be consistent with the Rehabilitation Act and its regulations.”). But see *Baird ex rel. Baird v. Rose*, C.A.4 (Va.) 1999, 192 F.3d 462. (“[W]hile the [ADA and RA] should be construed to impose the same requirements when possible, there are situations in which differences between the statutory provisions dictate different interpretations.”).

Medicaid reimbursement for hospital stays to fourteen days discriminated against persons with disabilities because such individuals are more likely to require a longer stay. The Court rejected it, concluding that the obligation of nondiscrimination “[d]oes not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical need.”).

*D. DPI Administration of the Choice Program Consists of the Provision of Vouchers - and not Public Education*

Because, in order to comply with Title II, the Supreme Court has required public entities to *only* “provide equal access to its core services,” it is necessary to define just what those services are. The DOJ Letter argues that the choice program delegates “the education function to private voucher schools,” which implies that the service provided by the DPI in the choice program is a public education for eligible students. This is flat-out wrong.

In describing the choice program as “delegating” public education, DOJ describes a program that does not exist and declares that Wisconsin has done something which state law and the facts make clear it has not. As we have seen, the State has simply provided financial assistance to certain low income families who seek an alternative to public schools. *Jackson v. Benson, supra*, 218 Wis. 2d at 895 (“By enacting the amended MPCP, the State has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities *in addition* to those provided by the State under art. X, § 3.”) (emphasis added). Indeed, the Wisconsin Supreme Court has made clear that the choice program does not “delegate” the “education function.” *Davis, supra*, 166 Wis. 2d at 538-539 (“[T]he MPCP in no way deprives any student the opportunity to attend a public school with a uniform character of education. Even these students participating in the program may withdraw at any time and return to a public school.”); *Jackson v. Benson, supra*, 218 Wis. 2d at 894 (“We apply the same reasoning in this case.”).

DOJ’s consideration of the actual nature of the choice program and the limitations on DPI’s role consists of ignoring them. The way it does this is to pump up the level of abstraction. Rather than acknowledging that the choice program is limited to the provision of a voucher that families choose to use at a school that they select (while public schools remain available), it falsely claims that the choice program involves the provision of public education or, as it puts it in atmospheric terms, “the education function.” By recasting a limited voucher program at this

level of abstraction, it elides the limited nature of the DPI's authority and the private nature of Choice Schools.

But, as we have seen, the courts have rejected the aggressive application of Title II by way of broad and unspecific descriptions of the benefits provided by a public program. Providing a service does not require that it be expanded to provide greater benefits to disabled benefits. The provision of rental housing vouchers is not the provision of affordable public housing. *Liberty Resources, supra*. Providing assistance for particular medical services is not the provision of "adequate health care." *Alexander, supra; Rodrigues, supra*. Providing capital funds for school buildings is not the provision of public education. *Bacon, supra*.

And the choice program is not the provision of public education. Public schools remain open and free to all – including those who enter the choice program but wish to re-enter public schools. No one disputes that a full panoply of educational services are available, including those necessary to ensure access to the "free appropriate public education" for disabled students required by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et. seq.* Implementing school choice in Wisconsin does not displace or "contract out" public education. It merely offers low income families who wish to forgo public education assistance in doing so.<sup>3</sup> *See Jackson v. Benson, supra*, 218 Wis. 2d at 857 ("The purpose of the [choice] program is to provide low-income parents with an opportunity to have their children educated outside of the embattled [public school system].").

As noted earlier, the provision of a limited financial benefit, such as vouchers, does not make the vendors from whom recipients purchase services "public entities" or compel a state or local government to expand that benefit by, for example, assuming control over these private entities, funding additional services or removing otherwise eligible vendors from the program. In *Liberty Resources, supra*, the plaintiffs argued that an agency administering Section 8 rental assistance vouchers was obligated to ensure that the private properties at which vouchers were spent conformed to Title II's requirements of non-discrimination and accommodation. 528 F.Supp. 2d at 558. The plaintiffs defined the benefit as having access to "affordable housing." They claimed that, because the city was providing public money to be used with private

---

<sup>3</sup> There is, in fact, no "contracting" in the choice program between DPI and private schools at all. Eligible private schools accept vouchers from parents; there is no contract, direct or indirect, between DPI and private schools in the choice program. In fact, the Wisconsin State Statutes distinguish between "Contracts with Private Schools and Agencies," § 119.235, and the Choice Program, § 119.23.

landlords, those landlords were subject to the requirements of Title II and had to alter their buildings to accommodate persons with disabilities.

But the court held that, much like the choice program, the rental voucher program was a “package of services that provide assistance . . . in locating affordable housing.” *Id.* at 568. Recipients would “select units that already meet individual needs and quality standards based on their existing state.” *Id.* at 569. There was no ADA violation because both disabled and non-disabled voucher holders had access to this benefit. Significantly for this case, the *Liberty* court held that the housing voucher program is “not responsible and cannot control the actions of private landlords” and, thus, the program is not liable under ADA if for the failure of private landlords to not provide enough accessible housing units. *Id.* at 570.

Likewise, parents enrolling their children in the choice program “select schools that already meet individual needs and quality standards.” *Davis v. Grover, supra*, 166 Wis. at 544. If all private schools do not provide the services that the family of a disabled child desires, there is no Title II violation, like in *Liberty Resources*. In fact, Wisconsin provides more robust opportunities for disabled students than Philadelphia provided for disabled tenants. If private schools, individually or in the aggregate, do not provide the desired services, a child can continue to attend a public school. Wisconsin is not required to provide additional funding for choice students with disabilities or to provide DPI with authority over private schools that it does not possess. Because it does not become responsible for the actions of schools where parents choose to use vouchers, it need not ban Choice Schools who do not comply with the more intrusive standard of Title II from the program.

*E. The State of Wisconsin Has Not “Contracted out” the “Educational Function”*

That Wisconsin has not “contracted out” the “education function” is confirmed by comparing the choice program to circumstances where such “contracting out” has been found. There are times when an agency might contract with a private vendor to perform a function for the agency. For example, it might engage private schools to provide education for children with disabilities. Under IDEA, this is known as a “public agency placement.” *See* 34 CFR § 300.325. Because it truly does involve a “delegation” of public education to a private entity, obligations imposed on public schools, such as the right to a “free appropriate public education” under IDEA, are not – and could not – be forfeited. *See* Memorandum from Robert R. Davila,

Assistant Secretary Office of Special Education to Wisconsin Governor Tommy G. Thompson, U.S. Department of Education, 4-5, (Sept. 2, 1990); 34 C.F.R. §§ 300.400, 300.401(b).

But “public agency placement” is not what’s happening here. Students whose parents take them out of an available and appropriate public school and enroll them in a private school are “parentally placed” and, therefore, waive their IDEA and FAPE rights. *Id.*; *see St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 173 (2d Cir. 2001) (“Public agencies are the only entities directly responsible under IDEA.”); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 153 (1st Cir. 1998) (“[T]he ADA imposes no requirement on [a private college prep school] to devise an individualized education plan such as the IDEA requires of public school.”).

Thus, private schools, even in the choice program, are not required to provide a “free appropriate public education” (FAPE) to every disabled student in the school district. This is true even if the family receives state financial assistance to enroll in the private alternative. The U.S. Department of Education (“ED”) has, at least twice, written that students with disabilities who voluntarily enter into the choice program waive their IDEA rights, including a free, appropriate public education, during their time at the private school. *See* Memorandum from Robert Davila, ED, 1 (1990); Memorandum from Susan Bowers, ED, 1-2 (2001).

Indeed, *DOJ itself recognizes this* in conceding – contrary to the allegations in the Complaint – that the independent choice of parents to forego public schools and obtain a private education for their child forfeits their rights under IDEA. *DOJ Letter*, p. 2. And DOJ’s own 2009 Guide to ADA Compliance requires only public schools make available a free, appropriate education to children with disabilities.

This concession undercuts its own argument. DOJ does not explain why private placement exempts Choice Schools from FAPE requirements but requires them to become Title II compliant or turn away students who wish to use vouchers to attend. If parental choice into a private school is not “contracting out the public education function” for purposes of IDEA, there is no rational reason that it is “contracting out” for Title II purposes.

The cases relied on by DOJ do not suggest otherwise. Each involved a contract between government and a private (or other public) entity to provide a service that the government chose not to provide directly.<sup>4</sup> In *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010), for

---

<sup>4</sup> It also is worth mentioning that two of the cases the DOJ cites are unpublished opinions, and another was later vacated by the court of appeals – which the DOJ fails to mention.

example, the State of California housed many of its prisoners in jails operated by the counties. The court held that the State violated Title II because its prisoners, in county jail, were being discriminated against on account of their various disabilities. *Id.* at 1063. Prisoners were not given a voucher to attend an institution of their choice. In *Kerr v. Heather Gardens Association*, 2010 WL 3791484 (D. Colo. Sept. 22, 2010), a disabled plaintiff resided at a senior living facility (Heather Gardens) that had a contract with a public entity (the Metropolitan District) to provide senior living care in which it assumed all of the public entities' duties at a facility owned by the public entity. Seniors were not given a voucher to reside at the living center of their choice. Similarly, in *James v. Peter Pan Transit*, 1999 WL 735173 (E.D.N.C. Jan. 20, 1999), the City of Raleigh contracted with Peter Pan transit to operate its bus system. The Plaintiff, a wheelchair passenger on city buses, filed a complaint that the wheelchair lifts were not operable in many buses and the judge denied the City's motion for summary judgment because public entities are prohibited from contracting out their Title II obligations. Bus passengers were not being given vouchers to ride the transit system of their choosing.

Likewise, in *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 318 (E.D.N.Y. 2009), it appears that a state agency was using private vendors to provide public services, although there is a larger problem with DOJ's citation of the case. The decision DOJ relies on ultimately resulted in a judgment and remedial order that was *vacated* because the Court of Appeals determined that the plaintiffs did not have standing to bring the suit. *Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 154 (2d Cir. 2012) ("The District Court's March 1, 2010 judgment and remedial order is therefore VACATED and the action is DISMISSED for lack of jurisdiction.). We assume that this was an oversight, but it is significant. A vacated decision "has no precedential authority." *Newdow v. Congress*, 383 F.Supp.2d 1229, 1240 (E.D. Cal. 2005), *rev'd* on other grounds, *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (2010); *Durning v. Citibank, NA*, 950 F.2d 1419, 1424 n. 2 (9<sup>th</sup> Cir. 1991) ("A decision may be reversed on other grounds and still have precedential value, whereas a vacated decision has no precedential authority."); *U.S. v. Michael*, 645 F.2d 252, 254 n. 2 (vacated opinion is as if it never existed); *see also O'Connor v. Donaldson*, 422 U.S. 563, 577 n. 12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect ....").

Indeed, these cases and the DOJ's own Technical Compliance Manual demonstrate that Title II standards are not applicable to choice schools. The manual makes clear that "[p]ublic entities are not subject to title III of the ADA, which covers only private entities" and "[c]onversely, private entities are not subject to title II." See The Americans with Disabilities Act – Title II Technical Assistance Manual ("TAM"), II-1.3000 (available at <http://www.ada.gov/taman2.html#II-1.3000>). While it notes that there are situations in which a contract with a private entity may have Title II implications, the illustrations that it provides (contracting for operation of a restaurant in a public park, leasing part of a public building, building a publicly owned stadium through use of a private contractor, contracting with a private vendor to operate group homes) make clear that Title II applies when government uses a private vendor to provide government services. *Id.* No illustration suggests that providing financial assistance to persons to purchase a private service implicates Title II.

That the service provided is one that is also provided publicly makes no difference just as Title II was not applicable to Section 8 housing because government also provides public housing directly. The state does not have a monopoly on public education and, as we have seen, Title II does not follow vouchers and financial assistance.

Although not mentioned by DOJ, the Complaint alleged that Wisconsin has set up a "dual school system" because there are fewer students with disabilities in Choice Schools in Milwaukee than there are in the Milwaukee Public Schools. The complainants rely on the Supreme Court's decision in *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1963).

It is not surprising that DOJ would ignore this argument. In *Prince Edward County*, the local school authorities closed the public schools and provided vouchers to be used at private schools that would not admit black students. This was done to avoid a remedial integration order based upon a finding of intentional *de jure* segregation. Here, the public schools remain open (in fact, the overwhelming majority of students in Milwaukee still attend them) and Choice Schools may not turn away disabled students. There has been no finding of discrimination and there is no remedial order.

Beyond that, the disparity is not as great as the Complaint alleges. Because MPS, as the Local Education Agency ("LEA"), does not make federal funding available to Choice Schools at

the same rate as it does for itself, parents in Choice Schools are less likely to seek evaluation and their children are less likely to be identified as disabled. Moreover, because funding for disability services is not as readily available to private schools, some parents may gravitate towards the school that can provide greater resources for their children.

**II. Under the Law, Private Schools Are Treated Differently than Public Schools and, thus, Are Subject to a Less Exacting Standard**

This is not to say that the DPI could never be liable under Title II for its own discrimination regarding the choice program. A Title II violation might be shown if the vouchers were not made equally available to students with disabilities – if, say, DPI refused to permit parents of children with disabilities to enroll their children in a Choice School.

But the Choice Schools themselves – either directly or by DOJ’s theory of “osmotic transfer” – are not subject to Title II. That conclusion is buttressed by the structure of federal disability law. For example, under section 504 of the Rehabilitation Act, even where private schools are direct recipients of public funding, they are subject to a different standard.<sup>5</sup> In other words, even if the vouchers were funded by the federal government, they would not be subject to the more intrusive “fundamental alteration” standard of Title II. To the contrary, private schools who are direct recipients of federal funds are subject only to the less exacting standard of 34 C.F.R. 104.39, providing that a private school “may not, on the basis of handicap, exclude a qualified handicapped person if the person can, *with minor adjustments*, be provided an appropriate education, as defined in § 104.33(b)(1), within that recipient’s program or activity.” (Emphasis added.) A private school that has no program for the mentally handicapped is not required to admit a mentally handicapped student if establishing such a program would be more than a *minor adjustment*. 34 C.F.R. 104 App. A, 404.

It would be bizarre if schools that accept payments from parents who receive state funded vouchers are subject to more exacting federal standards than they would be if the vouchers were federally funded. Even when it has considered the obligations that Title II might place upon the limited role played by public entities like DPI in administering programs like Wisconsin’s, the

---

<sup>5</sup> Notwithstanding allegations in the Complaint, DOJ does not argue that the Choice Schools are recipients of federal funding subject to Section 504 of the Rehabilitation Act of 1973. For reasons that are beyond the scope of this memorandum, it is correct to reject such an approach. *See* Bowers Memorandum, ED, 1-2; Memorandum from Richard D. Komer, Deputy Assistant Secretary for Policy, to Ted Sanders, Under Secretary, U.S. Department of Education, 6 (Jul. 27, 1990).

U.S. Department of Education has not applied such a high standard to participating private schools themselves. At most, ED has stated that a public entity must only assure itself that schools in the choice program do not exclude a student with a disability “if the person can, with minor adjustments, be provided an appropriate education within the school’s program.” Memorandum from Susan Bowers, Acting Deputy Assistant Secretary for Civil Rights to John W. Bowen, School Board Attorney, U.S. Department of Education, 2, (Mar. 30, 2001) (emphasis added).<sup>6</sup>

The argument against application of the more aggressive standard urged by DOJ is even stronger today. But there is certainly no warrant for the aggressive “pass through” theory advanced here. In other contexts, DOJ recognizes that. Subsequent to the ED’s adoption of this position in 1990, Congress adopted the ADA, including Title III prohibiting discrimination in “public accommodations,” 42 U.S.C.A. § 12182. If they meet the definition of a “public accommodation,” private schools might be subject to Title III. But this suggests they would not be subject to Title II. DOJ’s own technical assistance manual for ADA makes clear that “public entities are not subject to title III of the ADA, which covers only private entities . . . [and] private entities are not subject to title II.” *See* The Americans with Disabilities Act – Title II Technical Assistance Manual, II-1.3000, available at <http://www.ada.gov/taman2.html#II-1.3000>.

More fundamentally, the ADA exempts most Choice Schools. Title III expressly exempts “religious organizations or entities controlled by religious organizations.” 42 U.S.C. § 12187. According to the U.S. DOJ regulations, the religious exemption “is very broad ... [e]ven when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage.” *Id.* at 605-606 (citing 28 C.F.R. Part 36, Appendix B (interpreting the statutory exemption)). Over 85% of Choice Schools are religious<sup>7</sup> – so the DOJ’s Title II/Title III mix-up is no small matter.

DOJ’s attempt to “pass through” the requirements of Title II is an end-run around that exemption – and it cannot work. It is a cardinal principle of statutory construction that the

---

<sup>6</sup> It is not clear that even the “minor adjustment” obligation recognized by the ED survives enactment of the Americans with Disabilities Act. If Congress has determined what is and is not to be considered unlawful discrimination in private schools in the enactment of Title III, there is little warrant even for the less onerous duty identified by ED. See pp. \_\_, *infra*.

<sup>7</sup> Wolf, Patrick J. “Milwaukee Parental Choice Program: Descriptive Report on Participating Schools 2010-11,” School Choice Demonstration Project, Milwaukee Evaluation Report #33, 1, February 2012.

specific controls the general. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment). The express exemption of Title III cannot be trumped by a protean reading of the general language of Title II. This is particularly so given that Title II purports to cover only public entities and contains no language extending its scope to religious or secular private schools or, as DOJ seems to suggest, to anyone that provides a service in exchange for a benefit provided by a public entity.

As to the remaining secular Choice Schools, neither the Complaint nor the DOJ Letter alleges that the choice program – or any of participating private schools – has violated Title III of the ADA prohibiting discrimination in public accommodations. In any event, DPI lacks the authority to enforce Title III to which it is not subject.

### III. The DPI Lacks the Authority to Implement the DOJ’s “Requirements”

A long-time principle in Wisconsin law has been that state agencies have only those powers that are expressly granted to it, or necessarily implied, by the state legislature. See *Brown v. State*, 230 Wis. 2d 355, 377, 602 N.W.2d 79, 90 (Ct. App. 1999); see *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335, 339 (1974) (“[I]f the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.”). Administrative agencies, such as DPI, only have those powers that are “expressly conferred or necessarily implied from the statutory provisions.”<sup>8</sup> *Brown Cnty. v. Dep’t of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247, 250 (1981).

The Wisconsin state legislature recently confirmed and re-enforced this understanding by enacting Wis. Stat. § 227.10(2m), which provides that “[n]o agency may implement or enforce any standard, requirement, or threshold . . . 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.” (Emphasis added). State agencies may not implement regulations based on a power “necessarily implied” by the state legislature. If the state

<sup>8</sup> The Superintendent of Public Instruction does have constitutional power as well. According to Article X, “the supervision of *public instruction* shall be vested in a state superintendent.” (emphasis added) Wis. Const. Art X, sec 1.

legislature does not specifically bestow a regulatory power to the DPI, the DPI does not have that power.

As noted above, DPI's authority with respect to schools receiving voucher students is carefully circumscribed. Private schools are not within the state Superintendent of Public Instruction's general supervisory authority over public education which is, in any event, limited to whatever powers have been "prescribed by law." *See* Wis. Const. Art. X, Sec 1. It has no authority to field and adjudicate complaints against private schools. It is required to accept due process complaints and state complaints related to equitable services under IDEA, but, according to the DPI, none have been filed in relation to children with disabilities. In addition, the DPI has no authority to collect data on disabilities.<sup>9</sup> According to Wis. Stat. § 119.23(6m)(b), the DPI has the power to collect certain information from private schools about their students, yet this power is enumerated and states nothing relating to disabled students.<sup>10</sup>

The DPI cannot control the curriculum or programming of private schools. It cannot "require" ADA training. It has no general authority to conduct "monitoring" or "oversight" of Choice Schools. In short, it has no authority to do anything (save perhaps public outreach or offering voluntary training) that DOJ wants it to do. Even Superintendent Evers, certainly no strong ally of school choice,<sup>11</sup> has admitted that the DPI cannot legally implement the DOJ's requirements. *See* DPI Letter to DOJ, 3-6.

We have been down this road before. DPI once tried to do precisely the type of things that DOJ asks it to do now, only to be stopped by the courts. When the original Milwaukee

<sup>9</sup> *DPI Letter to DOJ*, 6, September 2011 ("DPI is not involved in the operation of individual schools" besides ensuring financial viability and other statutes").

<sup>10</sup> "Annually, by August 1st, provide to the department the material specified in par. (a) and all of the following information: 1. The number of pupils attending the private school under this section in the previous school year. 2. The number of pupils attending the private school other than under this section in the previous school year. 3. For each of the previous 5 school years in which the private school has participated in the program under this section, all of the following information: a. The number of pupils who attended the private school under this section and other than under this section in the 12th grade and the number of those pupils who graduated from the private school. b. The number of pupils who attended the private school under this section and other than under this section in the 8th grade and the number of those pupils who advanced from grade 8 to grade 9. c. The number of pupils who attended the private school under this section and other than under this section in the 4th grade and the number of those pupils who advanced from grade 4 to grade 5. d. To the extent permitted under 20 USC 1232g and 43 CFR part 99, pupil scores on all standardized tests administered under sub. (7) (e). 4. A copy of the academic standards adopted under sub. (7) (b) 2."

<sup>11</sup> In January 2013, Superintendent Evers called school choice expansion "morally wrong." Morrell, Alex. *Wisconsin superintendent Tony Evers calls school choice expansion morally wrong*, Appleton Post-Crescent, May 24, 2011, available at <http://www.postcrescent.com/article/20110524/APC0101/105240434/Wisconsin-superintendent-Tony-Evers-calls-school-choice-program-morally-wrong>.

Parental Choice Program<sup>12</sup> was enacted into law in 1990, Superintendent Herbert Grover – a vocal opponent of the law – tried to prevent implementation of the program with rules and regulations. He required all participating schools to comply with disability laws exactly as the public schools, *i.e.*, each private school had to allow access to and provide free education to all disabled students. *Davis v. Grover*, Trial Court Opinion, Dane County (8-6-90). A Dane County Circuit Court judge held that the Superintendent’s burdensome regulations against school choice were invalid because the regulations “deviat[ed] from, exceed[ed] or change[ed] the language of the statute.” *Id.* DPI chose not to appeal from that aspect of the judgment and may well be judicially estopped from asserting a broader authority today.

#### **IV. The DOJ Lacks the Legal Authority to Order the DPI to Take the Actions Mandated in the DOJ Letter**

The aggressive approach taken by DOJ raises significant federalism concerns. While Congress might prohibit discrimination by public entities, forcing states to apply federal anti-discrimination norms to private parties simply because they provide services in exchange for state-funded vouchers, raises questions of “commandeering.” The federal government is constitutionally prohibited from enlisting state officials to enforce federal statutes. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot force local law enforcement officers to perform background checks on handgun owners). It may “neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Id.* at 935; *New York v. U.S.*, 505 U.S. 144 (1992) (holding that the federal government cannot require States to provide for the disposal of radioactive waste generated within their borders).

While DOJ will undoubtedly argue that the obligation it seeks to impose is a direct – and permissible – regulation of the state itself, the limitations of the commandeering cases cannot be evaded by asserting that the existence of some connection between a public and private entity – say the administration of a voucher program or some limited form of regulation – empowers federal agencies to direct states to adopt an extensive regulatory and monitoring scheme directed at those private agencies. It does not empower federal agencies to require state agencies to do

<sup>12</sup> The original program provided 1,000 low-income students in the Milwaukee public school district with a \$2,500 voucher to enroll in private nonsectarian schools.

what state legislatures have not empowered them to do. DOJ's actions are particularly problematic in the absence of any finding – or even charge of – discrimination by private schools. It is not seeking to remedy a violation, but to force a sovereign state to enact its preferred prophylactic regulatory scheme. DOJ does not say that it has conducted the investigation required under 28 CFR § 35.172, issued findings of fact and conclusions of law, or taken any of the other steps necessary to resolve such a complaint as required by the applicable federal regulations. The mere existence of a complaint, the allegations of which have never been proven, does not justify the DOJ skipping right to the remedy phase and ordering DPI to take the steps mandated in the DOJ Letter.

Perhaps that is because it is not even clear that the DOJ is the appropriate agency to be conducting an investigation relating to that complaint. Pursuant to 28 CFR 35.190(b)(2) the “Designated Agency” for all complaints of discrimination on the basis of disability by a public entity relating to programs and services involving the operation of elementary and secondary education systems is the Department of Education – not the Department of Justice. And even though the complaint was filed with DOJ, pursuant to 28 CFR 35.171(a)(2)(ii) when the DOJ receives a complaint for which it is not the designated agency, it shall refer the complaint to the appropriate agency designated in 28 CFR 35.190(b)(2).

#### **CONCLUSION**

DOJ seeks to use authority it does not have to commandeer a state agency to enforce a law against private schools that does not apply to them through means that the state agency has no authority to employ. Its objective is to require these schools to provide services for which they, unlike their public school counterparts, receive no funding and which may be inappropriate for a private school. The foreseeable result would be to force schools out of the program and restrict the choices available to low income families and their children. As such, the DOJ Letter is not about “opening access” to the Choice Schools or preventing discrimination against certain disabled students in a manner prohibited by the law. It – like the Complaint – is not about students with disabilities or discrimination. It is about educational choice. The DOJ does not like it and wants to make its continued success as difficult as possible.



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.  
1159 E. Knapp Street, Milwaukee, WI 53202-2828  
414-727-WILL  
Fax 414-727-6385  
www.will-law.org

June 12, 2014

To: Interested Parties

From: Rick Esenberg, President and General Counsel  
CJ Szafr, Associate Counsel and Education Policy Director  
Wisconsin Institute for Law and Liberty (WILL)

School Choice Wisconsin has asked the Wisconsin Institute for Law & Liberty for a public comment on DPI's new and unprecedented request for detailed information from private schools participating in the choice program regarding their students with disabilities. Below is our public comment for those interested:

On June 10, 2014, the Wisconsin Department of Public Instruction ("DPI") sent a notice to all administrators in the private school choice program reminding them of the deadlines for submitting various existing reports. However, DPI's notice also asks each of the schools to submit a *new* report by June 30, 2014, one that is not required by state law or any previous DPI rule. This new report would provide certain information regarding students with disabilities:

**New Report – Disability Data Report:** As required by the United States Department of Justice (USDOJ), starting with the 2013-14 school year the department is collecting information on how choice students with disabilities are served in voucher schools. Whereas the Department of Public Instruction cannot require you to submit this data, we request private schools that participated in the choice program during the 2013-14 school year, complete the "Disability Data" report in OAS by June 30, 2014. Additional information on the disability areas can be found in the report in OAS. To access the disability data report, please click "Disability Data" under the "Other Reports" section of the left navigation bar in OAS.

DPI says that this "new report" – which it concedes is voluntary – has been "required" by the United States Department of Justice ("DOJ"). It does not tell the private schools that DOJ has no authority to "require" such a report and that DOJ is trying to impose unprecedented and improper legal requirements on these schools regarding students with disabilities – requirements which are not imposed by law and for which schools in the choice program receive little to no funding.

DPI's unacknowledged decision to assist DOJ in this effort raises several serious legal issues that schools must take into account in considering their response to DPI. Each school should consult its own legal counsel before deciding to turn over the requested information.

1) *Private schools in the choice program cannot be compelled to provide the requested data.*

Administrative agencies, such as DPI, have only those powers that are "expressly conferred or necessarily implied from statutory provisions." See *Brown Cnty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247, 250 (1981). The Superintendent of Public Instruction has constitutional power under the Wisconsin Constitution, Article X, section 1, but this power is limited to the administration of public education. DPI has no power over schools in the choice program, except to the extent the legislature has said so.

Nothing in the Wisconsin statutes empowers DPI to collect data on children with disabilities or requires private schools to provide it. DPI agrees with us on this point. In a November 25, 2013 letter to DOJ, DPI stated that: "it currently lacks the statutory authority to force choice schools to submit the information required" in responding to DOJ's request for information on disabled students in the choice program. Indeed, DPI's June 10 notice itself confirms that DPI **"cannot require you to submit this data."**

It is, therefore, indisputable that DPI cannot require private schools to provide DPI with any of the information that it seeks in this new disability report unless authorized by a future action from the Wisconsin legislature. In other words, **schools do not have to comply.**

In fact, it is doubtful that DPI has the authority even to "request" disability related information from private schools in the choice program. In 2011, DOJ wrote to DPI, asking for the "total number of students in the school, the total number and the percentage of students with disabilities in the school, the number of students in each disability category represented at the school." DPI Letter to DOJ, November 25, 2011, 5. DPI responded in August 2011 by saying that "Wisconsin Statute § 119.23, the statute governing the MPCP, *neither authorizes DPI to request* nor requires MPCP schools to provide [disability] data." (emphasis added) *Id.* at 4. In other words, as recently as 2011, DPI did not believe that it has the statutory authority to request the information that it is now requesting. Nothing about the pertinent statutes has changed.

2) *DOJ cannot require private schools in the choice program to provide this information or DPI to request it.*

This extraordinary request has its origins in a complaint filed with DOJ by the American Civil Liberties Union and Disability Rights Wisconsin in 2011. That complaint alleges that private schools in the choice program discriminate against students with disabilities. In response, DOJ sent a letter to DPI stating that it must ensure these private schools comply with certain onerous legal standards regarding students with disabilities that are applied to public schools.

Last year, we wrote a public memo demonstrating that DOJ's legal theory – which is the functional equivalent of stating that private schools in the choice program are public entities because they receive state dollars – is directly contradicted by U.S. Supreme Court and Wisconsin Supreme Court precedent, U.S. Department of Education policy, and even DOJ's own guidance for complying with federal disability law. As we noted in our memo, holding these private schools to this improper standard does

not help children. It may require private schools in the choice program to provide services for which they, unlike public schools, do not receive funding. It may force them to abandon distinctive and valuable alternative methods for addressing behavioral problems. The full memorandum can be found by clicking [here](#). In its November 25, 2013 letter to DOJ, DPI actually agreed with us on this.

This is important because it establishes that DPI has no authority to require private schools in the choice program to comply with the improper and unlawful standard insisted upon by DOJ. For that reason, DOJ has no authority to compel – or, as the US Supreme Court has said, “commandeer” a sovereign state to collect data on its behalf. In other words, DPI’s suggestion that DOJ can “require” the collection of this data is wrong.

3) *By turning the data over, schools are actually exposing themselves to potential violations of state and federal law.*

The new Disability Data Report section of the OAS asks for the name or other identifier for each disabled student. It also asks if that student was denied admission, enrolled during the school year, left for a public school, and/or was suspended or expelled. Finally, the form asks for the school to identify each disability that the student has. **This student information could be confidential.** Because a school’s decision to complete this part of the form is voluntary and DPI has no power to compel a school to report the requested information, filling out this report and returning it to DPI would present a variety of privacy-related legal concerns for the schools. Consider:

A. Family Education Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g)

Federal student privacy law – FERPA – prohibits a school from disclosing personally identifiable information about a student’s education records without the consent of the parent unless one of the specific FERPA exceptions applies. FERPA applies to private schools that receive funds under any program administered by the Department of Education. Therefore, it may not apply to all private schools in the choice program but, were it to apply, it prohibits the school from supplying the requested information to DPI. None of the FERPA exceptions are applicable. There is no court order, subpoena, or federal or state statute which authorizes the nonconsensual disclosure of this information to DPI.

B. Wisconsin Medical Records Privacy Act (Wis. Stats. §§ 146.81- 146.84)

The information being requested would likely require schools to disclose information contained in a student’s healthcare records. Wis. Stat. § 146.82 provides that “[a]ll patient health care records shall remain confidential.” Depending on how a school has obtained information regarding a student’s disability, disclosing the personal health information of such student on the new report may violate this requirement.

Moreover, Wisconsin law defines records kept even by private schools as pupil records. While state law governing the confidentiality of pupil records does not apply to private schools, it does say that all pupil records that relate to the pupil’s health and that are not a pupil’s physical health record shall be treated as a patient health record under Wis. Stats. § 148.81 to 146.84. *See* Wis. Stat. § 118.125(2m). For that reason, as well, information on students’ health status would appear to be subject to the confidentiality provided by § 146.82.

### C. Student and Parent Handbooks

Many private schools in the choice program issue a handbook to parents and students relating to a variety of topics. These handbooks can contain “privacy” statements in which the school promises to keep the student’s records confidential and promises that such records will not be disclosed without the parent’s consent. These promises may be enforceable under Wisconsin law and would be breached by a voluntary disclosure to DPI.

### D. This information might become a public record once it is sent to DPI

If the information is provided to DPI, then it may become a public record subject to general disclosure under Wisconsin’s Open Records Act. Remember that the confidentiality of student records guaranteed under Wis. Stat. 118.125 only applies to records maintained by public schools.

#### 4) *Compliance with DPI’s Request May Create Additional Forms of Exposure for Schools.*

The “Instructions for Entering Disability Data” for DPI’s request for information on children with disabilities specifically requires the school to “accept responsibility for the data being correct.” At first blush, this may seem odd. How can DPI compel that the information provided to it be accurate, when it concedes that it does not have the power to compel production of the information in the first instance and, in fact, may even lack authority to ask for it? Our concern, however, is that if schools voluntarily provide the requested information they will be deemed to have warranted its accuracy. This leads to two potential problems.

First, the form and questions asked are so vague that, by answering them, private schools could be at risk of inadvertently providing wrong data. The Disability Data Report lists 11 types of disabilities and instructs the school to “check all that apply.” It is unclear that a school would have accurate and up-to-date data regarding disabilities for each of its students – even if it were permitted to divulge it. This is particularly so for students who were not admitted or enrolled at the school, yet the new report calls for information about them as well.

Furthermore, DPI provides no guidance as to how private schools in the choice program are supposed to identify children with disabilities. Where are these schools supposed to get the expertise to determine whether the specific diagnoses that match these disabilities actually apply to a particular student? What if a school defines a disability in a manner that does not conform to DPI’s definition? Because DPI has not provided sufficient definitions or guidance, it is unclear how schools are supposed to know what is requested.

Second, the new Disability Data Report has four boxes to check either “yes” or “no” about the child’s status with the school and choice program. It allows no option to qualify or explain an answer. For example, it asks if a student was denied admission. Does this include students who were not admitted because the school did not have enough spots and the student did not win the lottery? How would the school know if such a student had a disability or what the disability was? If it did know, would a positive response inaccurately imply that the student was rejected because he or she was disabled? The new report also asks whether the child was “suspended or expelled.” Yet, without allowing

schools to provide a reason for the suspension or expulsion, DPI's form may create the appearance that schools are discriminating based on a disability.

This might not be as concerning if we did not know that this information is being gathered at the behest of an agency that has announced its intent to force DPI to hold private schools to an improper standard.

*4) Conclusion*

DPI cannot force – and should not be asking for – private schools in the choice program to turn over data on children with disabilities. It is attempting to facilitate U.S. DOJ's investigation into Wisconsin's school choice program, an investigation that is not supported by existing law. In other words, DOJ is seeking to enforce inapplicable laws against private schools by commandeering DPI to ask for enrollment data that DOJ is unable or unwilling to ask for on its own.

Each school must decide for itself, after consulting with its own counsel, whether to provide the data requested by DPI. We at WILL want to make sure that the school choice community is aware of the above issues as it goes through the decision-making process.

Rick Esenberg, President and General Counsel  
CJ Szafr, Associate Counsel and Education Policy Director  
Wisconsin Institute for Law and Liberty (WILL)

