January 27, 2015

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VIA FAX

Dear Representatives Pocan, Moore, and Loebsack:

Our organization, the Wisconsin Institute for Law & Liberty (WILL), is a law and policy center based in Milwaukee that advocates for individual liberty, constitutional rights, limited government, the rule of law, and a robust civil society, including education reform that seeks to serve children rather than the adults employed in the system. Our staff includes attorneys and a Ph.D. dedicated to school choice and education policy. We also provide legal advice to private schools in the Milwaukee Parental Choice Program (MPCP).

Last month, based upon the U.S. Department of Justice’s investigation into the Wisconsin school choice program, you requested that the U.S. Government Accountability Organization (GAO) conduct a federal review of the Milwaukee Parental Choice Program – a program that is funded by state and local dollars. You raise numerous, serious allegations against the MPCP. In response, our policy brief (enclosed) answers your questions by highlighting existing research on the MPCP and school choice. We hope you find it helpful.

In your letter, you state: “independent studies . . . reveal that the voucher schools do not deliver on the promise of significantly improved academic performance.” With all due respect, that statement is wrong. In 2012, the state-mandated School Choice Demonstration Project, completed its five-year longitudinal study. It concluded that, among other things, “achievement growth of MPCP students compared to MPS students is higher in reading but similar in math” (SCDP conclusions enclosed). Furthermore, a voucher in the MPCP “increases the likelihood of a student graduating from high school” but has “no discernible effect on racial segregation of schools.” It is worth pointing out that these successes with vouchers were obtained even though the voucher amount is $3,600 less per pupil than what the Milwaukee public schools receive.

Whether it was a purposeful omission or neglect in performing the research, the findings of the SCDP were not discussed in your letter. Instead, in raising questions about the performance of the MPCP, you cite to other, less comprehensive, reports. Yet, as our brief explains, the conclusions you make from those reports are either wrong or very misleading.

In addition, the SCDP’s conclusions are similar to other studies on school vouchers. To date, at least thirteen studies based on random assignment, widely acknowledged as the “gold standard” of research methods, have
been conducted on the school voucher programs. *All but one of these studies found that vouchers benefit, in multiple ways, some or all of the students who used a voucher* (the other study showed that vouchers had no impact). These studies were also missing from your letter to the GAO.

In justifying your letter, you mention the U.S. DOJ’s investigation into the MPCP and say that “alarming allegations of potentially discriminatory practices occurring within the program continue to surface.” You may be interested to know that even though the investigation is well into its fourth year, the government has made no allegations and produced no evidence of actual discrimination. In fact, the DOJ is attempting to use an unprecedented legal theory to force private schools in the MPCP to abide by Title II of the Americans with Disabilities Act – a statute applicable only to public entities. It is doing so even though Congress has expressly excluded private religious schools (85% of schools in the MPCP are religious) from the ADA. This theory has been soundly and routinely rejected by the U.S. Department of Education and the U.S. Supreme Court.

The so-called “alarming allegations” – made by left wing advocacy groups – appear to be efforts to fault the schools participating in the MPCP for being unable to offer the same level of services that might be available in public schools. But this inability, where it exists, is attributable to the fact that public schools have access to federal funds to educate children with special needs, but these funds are denied – through the actions of the Milwaukee Public Schools – to private schools.

We have attached an executive summary of a legal memorandum we wrote in responding to the U.S. DOJ. If the DOJ’s legal theory would hold true, it would likely bankrupt the school choice program, causing tens of thousands of children from low-income families to be forced out of their schools. This would be a disaster for Milwaukee and Congresswoman Moore’s constituents.

While the GOA did study the MPCP in 2001, that was at a time when there was no rigorous longitudinal evaluations of the MPCP. But, today, as we explain in our brief, there is a wealth of highly-respected studies on school choice, such as the SCDP. It is extremely rare for the GAO, the “congressional watchdog,” to investigate a state-based program funded by state dollars. The GAO, in its own words, “investigates how the federal government spends taxpayer dollars.” As a result, because the vouchers in the Milwaukee Parental Choice Program are funded 100% by state and local taxpayers, perhaps you will want to save the GAO’s time and resources by first looking over the studies on school choice that already exist.

Sincerely,

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Enc:
Policy brief on school choice research
Executive Summary of WILL’s Memo on the U.S. Department of Justice’s Investigation
*Comprehensive Longitudinal Evaluation of Milwaukee Parental Choice Program*, February 2012, Dr. Patrick J Wolf, pgs 4-5.
A response to members of Congress regarding their letter to the U.S. Government Accountability Office requesting a review of the Milwaukee Parental Choice Program

Introduction

On December 11, 2014, United States Representatives Mark Pocan, Gwen S. Moore, and David Loebsack sent a letter to the U.S. Government Accountability Office (GAO) requesting a federal review of the Milwaukee Parental Choice Program (MPCP). The study was requested in order to address the allegedly “alarming allegations of potentially discriminatory practices occurring within the program [that] continue to surface.” The Members’ letter asks the GAO to answer questions about the effectiveness of, and laws surrounding, the Milwaukee Parental Choice Program (MPCP).

Given the wording of their questions and the incongruity of a GAO study of a state-funded program, we fear the request is more about politics than policy. But we want to take the Members’ questions seriously. Fortunately, the answers to their questions are readily available – although perhaps not to their liking. We address the Members’ concerns in the brief below so the GAO does not have to spend any federal dollars on it.

What is the Milwaukee Parental Choice Program?

The MPCP is the oldest school voucher program in the country – and one of the largest. Established in 1990, the MPCP allows low-income Milwaukee families to use a state-funded voucher to attend a private school of their choosing. Under current law, a students’ family’s income must not exceed 300% of the federal poverty limit, although the income of most families using vouchers in Milwaukee is markedly below this cap. For the school year 2014-2015, the voucher amount was $7,210 for grades K-8 and $7,856 for 9-12.

The MPCP is immensely popular. Over 25,000 children use vouchers to attend private schools in Milwaukee. The successes (see next section) and popularity of the MPCP have led Wisconsin policymakers to expand the voucher program to children living in Racine (in 2011) and throughout the entire state (in 2013), albeit with caps and, in the case of the statewide program, a lower income cap. In total, over 30,000 children in Wisconsin are taking advantage of a state-funded voucher.
In asserting that “independent studies . . . reveal that the voucher schools do not deliver on the promise of significantly improve academic performance,” the Members neglect to even acknowledge the findings of the School Choice Demonstration Project (SCDP), which is widely-recognized as the most respected study of school choice in Wisconsin. The state legislature mandated this five-year longitudinal evaluation of the MPCP from 2007-2012.

The analytic tools used by the SCDP provide sound research methods for evaluating a school choice program, given the longitudinal data collected. The SCDP team matched students between MPS and MPCP on a set of observable characteristics, including (importantly) baseline scores, and compared outcome differences between the two groups over time. This data allows individual students to be identified and tracked. In the absence of a controlled or natural experiment, longitudinal methods such as those used by the SCDP offer the best way to assess the impact of a school on pupil outcomes (Gronberg & Jansen, 2009).

The SCDP was conducted by an able team. Researchers on the SCDP, based at the University of Arkansas, were also chosen by the United States Department of Education to lead an evaluation of another voucher program in Washington D.C., the Opportunity Scholarship Program.1 Of the research conducted to date on the MPCP, the SCDP’s series of reports provide the highest quality available.

The findings were made public in 36 reports that analyzed the impact of the MPCP.2 According to the final report in 2012, which compiled the findings of all the other reports, the longitudinal evaluation of the program “revealed a pattern of school choice results that range from neutral (no significant differences between Choice and MPS) to positive (clear benefit to Choice)” (Wolf, 2012).3 In light of exhaustive and rigorous research of the program it was legislatively tasked with evaluating, the SCDP research team “found no evidence of any harmful effects of choice” (ibid, p. 4).

Below is what was learned from the longitudinal evaluation about school choice programs in Milwaukee (quoted from Wolf, 2012, pp. 4-5; bold indicates benefits to students).

- ‘Participation in MPCP continues to grow even as both MPCP and MPS have succeeded in closing or at least denying public funds to a substantial number of low-performing schools over the past five years (Report #33).

- Enrolling in a private high school through MPCP increases the likelihood of a student graduating from high school, enrolling in a four-year college, and persisting in college by 4-7 percentage points (Report #30).

- When similar MPCP and MPS students are matched and tracked over four years, the achievement growth of MPCP students compared to MPS students is higher in reading

1 These reports are available at http://www.uaedreform.org/evaluation-of-the-dc-opportunity-scholarship-program/.
2 Reports on the MPCP are available at http://www.uaedreform.org/milwaukee-parental-choice-program-evaluation/
but similar in math. The MPCP achievement advantage in reading is only conclusive in 2010-11, the year a high-stakes testing policy was added to the MPCP (Report #29).

- When a snapshot of all MPCP students who took the state accountability test is compared to a snapshot of the performance of MPS students with similar income disadvantages, the MPCP students are performing at higher levels in the upper grades in reading and science but at lower levels in math at all grade levels examined and in reading and science in 4th grade (Report #32).

- Based on MPCP and MPS administrative data on MPCP students as well as parent surveys, between 7.5 and 14.6 percent of MPCP students have a disability, a rate at least four times higher than previously reported by DPI (Report #35).

- Visits to 13 MPCP schools revealed that many Choice students come to the schools behind by 1-2 years academically; the MPCP schools use various strategies to try to “catch them up” and prepare them for college and succeed with some but not all of them (Report #34).

- MPS students themselves are performing at somewhat higher levels as a result of competitive pressure from the school voucher program (Report #11).

- The MPCP saves the state money -- nearly $52 million in fiscal year 2011 -- although not all types of Wisconsin taxpayers benefit from the savings (Report #22).

- The MPCP has had no discernible effect on the racial segregation of schools or housing costs across neighborhoods (Reports #20 & #12).”

(Wolf, 2012, pp. 4-5).

While three years have passed since the conclusion of the SCDP longitudinal evaluation, there is little reason to believe that the results would be different today. Indeed, it is unclear what reason there is for the federal government to investigate the MPCP, a program funded by state and local tax dollars, when the state of Wisconsin already funded and concluded its own independent evaluation of the MPCP (the SCDP). Notably, the GAO’s 2001 investigation of the MPCP occurred at a time when no rigorous longitudinal evaluation of the program existed.

Rather than acknowledge any of the other overall findings from the SCDP’s comprehensive longitudinal evaluation, the congressional letter instead cites to three reports – by the Public Policy Forum (PPF), State Legislative Audit Bureau, and the National Education Policy Center (NEPC) – as evidence that “the voucher schools do not deliver on the promise of significantly improved academic performance, enroll a demographically different student body, and have been accompanied by a lack of transparency and accountability for public funding.” But, the Representatives draw conclusions from these reports that are either wrong or misleading.

The NEPC report is simply a review of one of the SCDP’s 36 reports (Witte et al., 2012). This amounts to the Representatives cherry-picking one of the SCDP’s reports, while ignoring the conclusions of the other 35. Nonetheless, it is amusing to note that the NEPC states that the SCDP report’s research methods are “sound” and the findings “appropriately qualified.”
The Wisconsin Legislative Audit Bureau report conducted an audit of pupil test data used in the fifth-year evaluation by the SCDP. Given that this was an audit, which did not find anything that differed substantially from the findings and conclusions of the SCDP, it is again unclear how the Members drew their conclusions from this report.

The third study (PPF, 2012) presents the results of the PPF’s annual census of private schools in the Wisconsin school choice programs and includes a comparison of test score results between schools in the choice program and MPS. However, comparisons between the average proficiency rates of all MPS schools and all MPCP schools does not provide an “apples-to-apples” comparison. The PPF study does not account for an important difference between the two groups of schools, perhaps because of data limitations. Almost all MPCP students are economically disadvantaged – something that, particularly for some of the years in question, may be less true of MPS test takers. Therefore, the Representatives draw inaccurate conclusions about MPCP from the PPF study.

More fundamentally, policymakers need to keep in mind that a snapshot of the Wisconsin Knowledge and Concept Exams (WKCE) scores tells us little about what impact the school – as opposed to numerous other factors – has had upon those scores. Not all students who take the WKCE at a particular school have attended that school long enough for us to say that the school itself has had much to do with the outcome. This is why the research methods used in the SCDP longitudinal evaluation are far superior to simply comparing proficiency rates in aggregate.

Overall, it makes little sense to draw conclusions about the MPCP by lumping all MPCP schools together. While MPS has a common administrative structure, schools participating in the MPCP are diverse and, unlike MPS schools, many have little or nothing in common. MPCP schools include long-time school operators and novices. They include Lutheran, Catholic, Jewish, Islamic, non-denominational religious and secular schools. Because of the question that families do – and policymakers should – care about is whether the MPCP offers valuable opportunities to kids, the proper unit of analysis is individual schools participating in the MPCP and not all such schools lumped together.4

Children attend schools, not “sectors.” Even with the flawed “snapshot” comparison of annual WKCE scores, when we conduct this proper form of comparison, we find that some MPCP schools – most Catholic and Lutheran schools (which are under a form of common management) – outperform traditional MPS schools.

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4 The PPF study does disaggregate MPCP results by school religion, but it compares these schools to the overall MPS average. To get a more accurate sense of the voucher program’s effectiveness, a more nuanced comparison is desirable and would compare how MPS and MPCP schools educate economically disadvantaged students.
random assignment research methods, widely acknowledged as the “gold standard” of research. All but one of these studies found that vouchers improve the academic outcomes for some or all of the students who used a voucher (Forster, 2013). Only one study was unable to detect any effect from school vouchers. Again, out of all the “gold-standard” studies conducted on the impact of vouchers on students’ academic outcomes, none found that voucher programs harm student learning.

Furthermore, a very recent random-assignment study by Chingos and Peterson (2015) looked at the long-term effects of the voucher program in New York City. These researchers found that “[m]inority students who received a school voucher to attend private elementary schools in 1997 were, as of 2013, 10 percent more likely to enroll in college and 35 percent more likely than their peers in public school to obtain a bachelor’s degree.” This is not surprising. Studies on school voucher programs across the country generally find that disadvantaged students, in particular, benefit from choice programs.

Response to the Questions Raised by Reps. Pocan, Moore, and Loebtsack

The congressional letter asks the GAO to investigate seven questions. We believe that the GAO, if it chooses to answer their questions, must consider the following:

1. **Has the MPCP significantly increased academic achievement for students who use the voucher to attend private schools when compared to students with like characteristics in public settings?**

As we discussed in the previous section, according to the SCDP longitudinal evaluation, there was no significant difference in gains in math achievement after the final year between students in private schools in the MPCP and a matched group of students in MPS. With respect to reading, students in the MPCP showed significantly higher gains than their matched comparisons. But there is a potential complication. Researchers noted that there was a policy change in accountability measures that may have added noise to the estimate. For the first time, all schools in the MPCP were required to take the WKCE and publicly report the results on a school-name basis. This might cast uncertainty about whether the effect was due to the voucher program or the policy change. On the other hand, this change in policy affected MPS schools as well. In other words, the policy change may have done no more than place both sets of schools on the same footing. Only more longitudinal study – something that the GAO is in no position to do – could resolve all uncertainty. For now, what we know is that MPCP students benefited from the program, and this is consistent with findings elsewhere. Again, out of the thirteen “gold standard” studies ever done on

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5 A brief summary of each of these studies’ results is located at http://www.edchoice.org/Research/Gold-Standard-Studies.

6 Notably, this study was criticized for using unconventional research methods. See Forster (2013) for a discussion. http://www.edchoice.org/Research/Reports/A-Win-Win-Solution--The-Empirical-Evidence-on-School-Choice.aspx

7 http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG15_01_Chingos_Peterson.pdf

8 http://educationnext.org/school-vouchers-help-low-income-minority-students-earn-college-degree/

9 Conducting such a study would require tracking individual students and measuring relevant individual characteristics that might affect performance. While the SCDP had access to such data, current publicly available data does not permit this.
vouchers, all but one showed that vouchers had a positive impact on students, and none indicates these programs ever harmed students.

MPCP schools do at least as well as MPS but with far fewer resources because spending on public schools is substantially greater than spending on the student vouchers. The gap between the two has been widening; in 1999 the difference was $2,000 per pupil and in 2014 it grew to $3,600.\textsuperscript{10} The gap is even greater after accounting for federal revenue. As a result, the voucher program has resulted in substantial taxpayer savings. According to the Friedman Foundation, since the start of the MPCP, taxpayers have saved $238 million with children leaving public schools for a voucher.\textsuperscript{11} Therefore, if private schools in Wisconsin school choice programs perform, at least, on par with their traditional public school counterparts, then the case can be made that they are more efficient.

2. \textit{How does academic achievement data reported by MPCP voucher schools differ from reporting requirements for public school counterparts? Specifically, how are student characteristics such as socioeconomic status, special education and ELL accounted for in MPCP academic achievement data?}

As you may have heard, this issue is currently being debated in the Wisconsin state legislature. An “Accountability” bill is likely to be passed in the winter or spring that would make the reporting requirements between MPCP and MPS very similar. It is, to be blunt, a waste of the GAO’s time to answer this question until the bill is signed into law.

Both MPCP and public schools must give their students the WKCE and report the data. While we feel that WKCE test scores are a poor indicator of success, Catholic or Lutheran MPCP schools outperform traditional MPS schools when compared to similar MPS schools that educate low-income, minority students.

\begin{table}
\centering
\caption{Percent proficient in math and reading at schools with at least 80\% low-income, 80\% minority students}
\begin{tabular}{l c c c c c c c}
\hline
& \multicolumn{4}{c}{Percent Proficient or Advanced in Math and Reading, 80/80 public and MPCP schools in 2014} \\
& \% proficient or advanced &\multicolumn{3}{c}{\% proficient or advanced} & \% proficient or advanced \\
\hline
School type & Reading & Math & Catholic or Lutheran & Other religions & No religious affiliation \\
MPS schools & 9.0\% & 6.0\% & 18.0\% & 7.4\% & 2.9\% \\
JR charters & 28.8\% & 17.6\% & 10.9\% & 5.6\% & 3.3\% \\
Catholic or Lutheran & 10.9\% & 17.6\% & 10.9\% & 3.3\% & 2.7\% \\
Christian, non-denominational & 7.4\% & 18.0\% & 7.4\% & 3.5\% & 2.9\% \\
\hline
\end{tabular}
\end{table}

\textsuperscript{10} Based on financial data from the Wisconsin Department of Public Instruction and enrollment data from the U.S. Department of Education, National Center for Education Statistics.
3. **What, if any, demographic changes in the enrolled MPS student population have occurred since the inception of the MPCP?**

The Wisconsin Department of Public Instruction, which stores this data, does not keep publically-available demographic data going back to the inception of the MPCP (1990). However, demographic data is available from the U.S. Department of Education since 2001. Enrollment trends, by race and economic disadvantaged status, are reflected in the following table:

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2014</th>
<th>change</th>
</tr>
</thead>
<tbody>
<tr>
<td>All students</td>
<td>97,985</td>
<td>78,516</td>
<td>-19,469</td>
</tr>
<tr>
<td>Economically disadvantaged</td>
<td>68.9%</td>
<td>82.7%</td>
<td>13.8%</td>
</tr>
<tr>
<td>English Language Learner</td>
<td>5.4%</td>
<td>9.5%</td>
<td>4.1%</td>
</tr>
<tr>
<td>Black</td>
<td>60.8%</td>
<td>55.3%</td>
<td>-5.5%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>15.1%</td>
<td>24.1%</td>
<td>9.0%</td>
</tr>
<tr>
<td>White</td>
<td>18.7%</td>
<td>13.7%</td>
<td>-5.0%</td>
</tr>
<tr>
<td>Students with disabilities</td>
<td>16.4%</td>
<td>20.6%</td>
<td>4.2%</td>
</tr>
</tbody>
</table>

Enrollment data for 2013-14 from WI Department of Public Instruction; 2000-01 data obtained from the National Center for Education Statistics, Common Core of Data

In 2014, the demographics are very similar between MPS and MPCP. According to the Public Policy Forum (2014), MPS schools serve a slightly higher proportion of minority students than private schools (86.3% versus 82.6%) while MPCP schools serve a slightly higher proportion of economically disadvantaged students (84.8% to 82.8%). The proportion of economically disadvantaged students served in MPS has increased by 14 percentage points since 2001. The proportion of students with disabilities, plus ELL and Hispanic students, in MPS has increased by 4 and 9 points, respectively.

4. **How many students with disabilities does the MPCP serve and how are students with disabilities identified? How does this identification process differ from how students are identified in the public school system?**

What records to participation MPCP schools keep on disciplinary measures (suspension and expulsion)? How many students (disaggregated by disability) are suspended or expelled annually?

The SCDP longitudinal evaluation analyzed this question (Wolf, Witte, & Fleming, 2012). While MPCP schools do not report the number of children with disabilities, the SCDP was able to estimate the rate for students with disabilities in MPCP schools by examining students that were observed in both MPCP and MPS schools during the sample period and seeing how they were classified in

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12 For details, see http://winss.dpi.wi.gov/
MPS. The researchers found that **14.6% of students in MPCP schools were classified as special education students.**

Federal law mandates that each child at a public school receive a “free, appropriate public education.” This comes with a substantial amount of federal funding to fulfill the child’s Individualized Education Plan (IEP). Federal funds *should* be similarly made available to children in the MPCP through the “child find” laws.

But, as a report by the Wisconsin Policy Research Institute has noted, “[e]ach individual child’s chance of receiving public funding or services while enrolled in a private school, even if identified as having a disability, is dependent upon specific circumstances, the decisions and actions of the local public school district in which he or she lives, and the amount of money available — something in and of itself determined by local public school officials through a federally mandated process known as ‘child find.’” In other words, MPS, as the local education agency (LEA), is federally mandated to seek out children with disabilities at private schools for funding purposes. Unfortunately, likely because MPS views MPCP as a competitor, MPS often does not fully participate in the child find process. According to a WPRI survey of private schools, 44% of school administrators said that the local LEA very rarely – less than once a year – participated in the child find process.

Private schools are not required to collect and report data on suspensions and expulsion. Yet, a recent study by School Choice Wisconsin examined school safety among the three types of schools and found that MPCP schools had significantly fewer 9-1-1 calls than MPS schools (School Choice Wisconsin, 2014). In addition, MPS had over 27 times as many juvenile arrests as MPCP schools.

5. **What is the rate of “churn” or turnover among students attending voucher schools? Where do these students return to school and within what timeframe?**

SCDP Report #16 (2010) examined student mobility across schools and sectors in Milwaukee. High rates of student mobility is a common feature in urban areas, and Milwaukee is not an exception. The SCDP researchers found a higher incidence of switching within the public sector (i.e. students moving from one public school to another public school) than within the MPCP, though this is partly explained by the public sector having more terminal grade-5 schools while most MPCP schools terminate at grade 8. Students who left MPCP schools were more likely to move to a public school than another MPCP school.

6. **How do the program’s internal controls ensure accountability for publically funded vouchers? Have there been instances of fraud or misuse of public voucher monies? If so, how much money? How have the agencies responsible for implementing and overseeing the program performed their stated roles and responsibilities?**

A recent WILL (2014) report ([found here](http://www.wpri.org/WPRI/Reports/2013/How-Wisconsin-is-Failing-to-Help-Students-with-Disabilities.htm)) concluded that state laws on school accountability for the MPCP are at least as rigorous – and enforced more aggressively – than anything imposed on

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14 *Id.*
15 MPS had almost 3 times more calls for service per student than schools in the MPCP.
Milwaukee Public Schools. Every year, each school in the MPCP must meet at least one of four standards that relates to grade advancement, daily attendance, academic progress, and parental involvement. If one of those standards are not met, then the Department of Public Instruction (DPI) will end public funding to the school. Whether this measure is too weak or too strong is missing the point; there is no comparable accountability measures for the public schools.

In addition, the state DPI is heavily involved in the choice program, ensuring that schools have proper financial audits, teacher certification, and other things. As we note in our report:

“Fifty-five regulations have been enacted since the program’s inception, covering topics such as the certification and licensure of teachers, curriculum, testing, and reporting. Schools must submit to an independent audit and provide “comprehensive evidence of sound fiscal practices.” They must “apply for and obtain accreditation from an approved agency within three years of participation in the MPCP.” Among other requirements, they must employ teachers that meet the state’s requirements for teacher credentials, provide at least 1,050 hours of pupil instruction, and adopt state academic standards in math, reading, writing, geography, and history."

Overall, the MPCP is the most regulated school choice program in the country (Catt, 2014).17,18

As with any program or profession, there are a few people who try to game the system.19 They should be held accountable. But, the wording of the Representatives’ question makes it seem as if only schools in the MPCP are misusing public money. According to the state DPI, nearly three out of every four Milwaukee Public Schools earned either an “F” or “D” on the latest Report Card – with over 31,000 children in failing schools. Taxpayers have spent over $446 million on failing schools at MPS.20 21

7. To what extent does the transparency and accountability for public funds, or lack thereof, in the MPCP contribute to or impede the public’s ability to knowledgeably evaluate both the pros and cons of the program?

This is a question that reflects a stark policy difference between the members of Congress who wrote the letter and the state legislators who enacted the school choice laws. Since 1990, Madison lawmakers – both Democrats and Republicans – have expanded the school choice program, empowering parents to make decisions on where to send their children to school. Parents make this

17 http://www.schoolchoicewi.org/files/6214/0424/77286/The_Impact_of_Regulation_on_the_MPCP.pdf
20 Figure is based on our estimates from school-level financial data in 2014-2015 Superintendent’s Proposed District Budget, FY15, http://mps.milwaukee.k12.wi.us/MPS-English/CFO/Budget--Finance/FY15Schools.pdf
21 Overall, state data, as reported by the MacIver Institute, show that Wisconsin taxpayers in 2013-2014 spent nearly half a billion dollars on chronically failing traditional public schools
decision on a variety of factors, such as the schools’ academics, graduation rate, religious affiliation, and geographical location. And this choice is often very hard to evaluate.\textsuperscript{52}

But, we know that it occurs. Parents exercising school choice has contributed to a decline in enrollment at traditional Milwaukee public schools by 20\% since 2001. Alternatively, the enrollment at MPCP schools increased \textit{nearly} four-fold.\textsuperscript{23} These decisions are made for significant reasons, and the wording of this question seems to second guess these enrollment decisions made by parents in Milwaukee.

\textbf{The Department of Justice’s Investigation into the School Choice Program}

In justifying a federal review of the MPCI, the congressional letter cites the U.S. Department of Justice’s investigation into the Wisconsin school choice program. The investigation focuses on whether the Wisconsin school choice program and private schools in the choice program violate federal disability laws, including Title II of the Americans with Disabilities Act (ADA). It has been on-going for nearly four years without any evidence of actual discrimination or an actual lawsuit. The investigation has been incredibly troublesome for the choice program as the DOJ is commandeering the state’s Department of Public Instruction and forcing it to enforce a (legally erroneous) federal regulatory scheme by doing things that it has no authority under state law to do. This was all the subject of a recent column by George Will (\textit{found here}).

Above all, the biggest concern is how the DOJ’s legal theory is completely unprecedented and, in our opinion, very flawed. The DOJ is treating private schools in the choice program as public entities because they receive public dollars. Therefore, the schools, the DOJ argues, should be regulated under Title II of the ADA instead of Title III, which is for private schools. In short, this would mean that private schools in the choice program would have to provide the same special education services as public schools do – yet without the same amount of public funding.

If the DOJ’s legal theory would hold true, then the school choice program would likely collapse because private schools in the choice program, who primarily educate low-income children, simply cannot afford to provide those services. This would cause 30,000 low-income children currently in the choice program to go elsewhere for an education. It would be a disaster for Milwaukee and the constituents of Congresswoman Gwen Moore.

We released a legal memo that responds to the U.S. Department of Justice. The executive summary of our memo is attached and the full memo \textit{is here}.


\textsuperscript{23} Based on DPI enrollment data. For more, see also http://www.jsonline.com/news/education/amid-signs-of-life-mps-piece-of-the-pie-keeps-shrinking-b99403015z1-284982751.html.


The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Final Reports

Patrick J. Wolf
University of Arkansas

SCDP Milwaukee Evaluation
Report #36
February 2012
Their contributions of information, advice, and encouragement have improved our research process and products substantially.

Summary of What We Learned About School Choice in Milwaukee

Our research revealed a pattern of school choice results that range from neutral (no significant differences between Choice and MPS) to positive (clear benefit to Choice). Although we have examined virtually every possible way that school choice could systematically affect people, schools, and neighborhoods in Milwaukee, we have found no evidence of any harmful effects of choice. The major findings from this last set of seven topical reports are that:

- Participation in MPCP continues to grow even as both MPCP and MPS have succeeded in closing or at least denying public funds to a substantial number of low-performing schools over the past five years (Report #33).
- Enrolling in a private high school through MPCP increases the likelihood of a student graduating from high school, enrolling in a four-year college, and persisting in college by 4-7 percentage points (Report #30).
- When similar MPCP and MPS students are matched and tracked over four years, the achievement growth of MPCP students compared to MPS students is higher in reading but similar in math. The MPCP achievement advantage in reading is only conclusive in 2010-11, the year a high-stakes testing policy was added to the MPCP (Report #29).
- When a snapshot of all MPCP students who took the state accountability test is compared to a snapshot of the performance of MPS students with similar income disadvantages, the MPCP students are performing at higher levels in the upper grades in reading and science but at lower levels in math at all grade levels examined and in reading and science in 4th grade (Report #32).
- Based on MPCP and MPS administrative data on MPCP students as well as parent surveys, between 7.5 and 14.6 percent of MPCP students have a disability, a rate at least four times higher than previously reported by DPI (Report #35).
- Visits to 13 MPCP schools revealed that many Choice students come to the schools behind by 1-2 years academically; the MPCP schools use various strategies to try to “catch them up” and prepare them for college and succeed with some but not all of them (Report #34).
- When similar independent public charter and MPS students are matched and tracked over four years, the achievement growth of the charter students compared to MPS students is similar in both reading and math, though conversion charters, which used to be private schools, clearly deliver higher achievement growth than MPS (Report #31).
Findings from previous topical reports in our study, relevant to interpreting these recent findings, show that:

- MPS students themselves are performing at somewhat higher levels as a result of competitive pressure from the school voucher program (Report #11).
- The MPCP saves the state money -- nearly $52 million in fiscal year 2011 -- although not all types of Wisconsin taxpayers benefit from the savings (Report #22).
- The MPCP has had no discernible effect on the racial segregation of schools or housing costs across neighborhoods (Reports #20 & #12).
- Students switch schools frequently in Milwaukee, with MPS students typically changing from one MPS school to another MPS school and MPCP students typically changing from an MPCP school to an MPS school (Report #16).

**Finding 1: MPCP Continues to Expand While Excluding Underperforming Schools (Report #33)**

The opportunity to select a private school through the voucher program continues to grow in popularity. The MPCP remained a small pilot program limited to secular private schools and subject to a strict enrollment cap during its first eight years of operation. After the enrollment cap was raised from 1 percent to 15 percent of Milwaukee K-12 students and the courts ruled that religious schools could participate in the program, the MPCP expanded dramatically, doubling in size 11 times between 1997-98 and 2006-07 (Figure 3). Enrollments continued to grow throughout the five years of our evaluation, increasing by 18 percent from 17,749 students during the 2006-07 school year to 20,996 students in 2010-11. After our study was completed and the program was expanded to middle-income families and schools outside of Milwaukee enrollment grew an additional 12 percent to 23,426 students in 2011-12 (Public Policy Forum 2012).

Over the five-year period of our study the number of different private schools participating in the program declined from 120 to 107. The drop in the number of schools was especially steep from 2008-09 to 2009-10, a net loss of 14 schools. The 2009 school year brought a new set of accountability regulations for schools in the MPCP as well as a maximum voucher value of $6,442 which was 2.5 percent lower than the previous ceiling. The new regulations included a requirement that MPCP schools administer the state test—the Wisconsin Knowledge and Concepts Examinations (WKCE)—
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.

EXECUTIVE SUMMARY

Background: 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”) has engaged in any form of discrimination against students with disabilities.

**Choice Schools are not “public entities”:** 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. If that sounds contrived, it is because it is:

- Choice Schools are not “public” schools or entities under state or federal law.
- 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. Title II does not become “applicable” to a private school simply because the state funds a voucher to families who choose to use it at that school.
- Thus, Title II has never been applied to private entities (including schools), save for the situation when a public body has “contracted out” its responsibilities to a private entity. But, contrary to DOJ’s allegation, Wisconsin has not “delegated” the public education “function” to Choice Schools. Public schools remain fully available and, as the Wisconsin Supreme Court has recognized, school choice only provides an alternative to public education for low income families who remain free to use public schools if they so desire.

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1 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”).
• The legal ADA standard urged by DOJ has never 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. As DPI itself - along with the federal Department of Education - recognizes, private schools, given their different position in the educational landscape, need only make “minor adjustments” to accommodate students with disabilities. In fact, Congress has determined that religious schools – currently comprising approximately 85% of Milwaukee Choice Schools – are completely exempt from the Americans with Disabilities Act.

• 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.

**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.

**DOJ’s demands will hurt families and private schools**: 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 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.

**Public schools still exist:** 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 and failed to do so. But that, too, is not the case.

**DOJ is hijacking state education policy:** 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.

- Its objective is to impose extra-legal obligations on these schools for which they, unlike their public school counterparts, receive no funding and which may be inappropriate for a private school.
- The foreseeable result is to force DPI to depart from state law and push schools out of the program because they cannot provide services for which they receive no funding.
- 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.

**WILL’s conclusions:** 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.

The full legal memo is on the WILL website and is available upon request.