UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

St. Joan Antida High School, Inc.,
Plaintiff,

v. Case No. 17-CV-413

Milwaukee Public School District,
Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Milwaukee Public School District ("MPS") needs this court to accept two assumptions in order for any of its arguments to work. First, that the proper comparison for both constitutional and statutory claims is between St. Joan Antida High School ("SJA") and MPS's neighborhood schools (not its city-wide schools). Second, that MPS is allowed to treat students differently for transportation purposes solely because they attend a private school. Neither of those assumptions hold up.

MPS argues that because SJA has an "attendance area" under Wis. Stat. § 121.51(1), it needs to be compared to MPS' neighborhood schools, which also have an "attendance district" authorized by Wis. Stat. § 119.16(2) and recognized (for another purpose) by Wis. Stat. § 121.845(1), rather than MPS' city-wide schools. The basis for this distinction is that, although only students living in the city are eligible for transportation to these city-wide schools, MPS doesn't call the city (which is coterminous with its own boundaries) an "attendance area" for its city-wide schools.

MPS' proposed distinction is unrelated to its obligation to provide transportation, or to any legitimate reason to decline to provide it, to children who attend private schools. Wis. Stat. § 121.51(1) requires private schools to establish an attendance area because they are not part of a school district and have no set boundaries. In order to delimit the obligation to transport otherwise eligible students (*i.e.*, those who live more than two miles from school), some boundaries must be established. School districts already have boundaries and are obligated to transport otherwise eligible students unless relieved of that obligation under the City Option created by Wis. Stat. § 121.54(1). The statutory provision that authorizes MPS to establish "attendance districts" is a general grant of authority and has nothing to do with private schools' attendance areas.

By arguing that SJA's "attendance area" should be treated the same as its neighborhood schools' "attendance districts," MPS is elevating form over substance. City-wide MPS schools effectively have the exact same attendance zone that SJA has – the entire City of Milwaukee. For city-wide schools and SJA, the boundaries of the City set the outer limits for transportation. SJA is directly comparable to MPS city-wide schools. In fact, all the reasons MPS gives why SJA is different enough from its neighborhood schools to not be "similarly situated" in reality show how SJA is just like an MPS city-wide school.

MPS also argues that it is justified in treating students who attend private schools differently solely because they attend private schools. After all, the district contends, transporting private school students wouldn't further any of its *own* interests or serve the students who attend *its* schools, so it is rational for the district not to transport students to private schools. It argues that it transports students to city-wide schools because having such schools serve MPS objectives – alleviating overcrowding (even though it doesn't), promoting racial balance or

equality (although that doesn't happen either), or making a program of instruction available to its own students that would not be possible at neighborhood schools. Whether or not any of these claims are true, they do not justify differential treatment of private school students. To be sure, establishing city-wide schools to accomplish these objectives is a legitimate thing for MPS to do. But that is not the question before the court. The question is whether, having chosen to establish such schools *and* having chosen to provide transportation to its own students who attend them, is there a justification for failing to provide reasonably uniform transportation to private school students attending similar schools.

MPS argues that it transports students to its own city-wide schools because, having chosen to establish them, it would be unfair to expect the students who attend them to navigate the public transport system over a substantial distance with the resulting transfers and inconvenience. But a private school student attending a city-wide school faces the same challenges. MPS is claiming that it can, nevertheless, refuse to transport those children because it has no reason to do so. Transporting a young woman to SJA's International Baccalaureate program, for example, cannot serve MPS' purpose in establishing its own International Baccalaureate at Rufus King. So it is "rational" to leave her to fend for herself.

But Wisconsin has taken that justification away. MPS ignores that, by the law and public policy of the State of Wisconsin, one of the district's fundamental purposes is to provide transportation for <u>all children</u>, regardless of what school they go to (save for some exceptions, so long as those exceptions are applied even handedly to public and private schools). It ignores that the State has decreed that whatever the district does for its own students, for whatever reason it chooses to do it, must be done with reasonable uniformity for private school students.

Transporting private school children doesn't have to further some other interest of MPS, it is one of MPS' interests that the Legislature has tasked it with performing.

For the district to offer any justification based in the desire to avoid that obligation or rooted in an argument that doing so will not serve MPS or its students undermines state law and policy. It is simply not a legitimate interest for equal protection purposes. To say otherwise would be to say that MPS will always have an interest in refusing to transport students it does not educate as long as it can say that it has some particular reason to transport them that is not applicable to its own. Such a justification is permissible only if the way in which that reason distinguishes private school students is rooted in something other than the fact that those students do not attend MPS and that transporting them is not necessary for MPS to achieve its own objectives or to serve its students.

This is true without regard to what reasonable uniformity would require in this case. While it is hard to see how it would be reasonably uniform for MPS to transport a student who chooses to attend the IB program at Rufus King and not at SJA, the governing principle is that differential treatment can never be justified by the fact that a student does not attend MPS and, therefore, is not served by any of its programs.

MPS cannot avoid the conclusion that its city-wide schools are the proper comparison for SJA. And it cannot argue that its own interests justify treating private school students differently, because state law dictates that transporting private school students is one of MPS' interests.

ARGUMENT

The Defendant, Milwaukee Public School District ("MPS") through its published Administrative Policy 4.04 for Student Transportation Services ("MPS Rule 4.04") treats

students who attend private city-wide high schools differently than students who attend public city-wide high schools. As demonstrated in previous briefs, there are two differences. First, private high school students will only receive transportation from MPS if they live more than two miles from school **and** more than one mile walking distance from public transportation. (MPS Rule 4.04(2)(b)2). But the "one mile from a bus stop" rule does not apply to public high school students who attend city-wide schools. They get a ride. (MPS Resp. to PPFF ¶15.) Private school students who attend city-wide schools are on their own.

Second, MPS imposes a time deadline for transportation requests on students who attend private schools that it does not impose on students who attend public schools. If a student's name is not on a private school's roster for transportation requests by July 1st, MPS considers the student to be ineligible for transportation benefits in the following school year. MPS does not apply the "July 1st deadline rule" (or any deadline) to its own students. (MPS Resp. to PPFF ¶¶20-24.)

SJA, on its own behalf and on behalf of its students,[1] has challenged both the "one mile from a bus stop rule" and the "July 1st deadline rule" under the Equal Protection Clause and as violations of state law. MPS has moved for summary judgment dismissing SJA's complaint. MPS' summary judgment motion should be denied.

ARGUMENT

I. MPS HAS VIOLATED SJA'S AND THE STUDENTS' FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION.

MPS agrees that Rule 4.04 treats private school students and public school students differently as described above. It advances three arguments as to why it is lawful for it to do so despite the Equal Protection Clause. None of MPS' arguments has merit.

[1] SJA has an Assignment of Transportation Benefits from each of the 68 students involved in this case and their parents.

A. This Is Not a "Class of One" Case.

Before addressing the justifications offered by MPS for treating private school students differently, the Court must determine what methodology to employ. MPS spends much time discussing what "similarly situated" means in so-called "class of one" cases, arguing that SJA and its students are not "similarly situated" for purposes of a class of one claim. (Dkt. #23, MPS Br. at 8-13.) MPS is wrong about that for reasons that will become clear, but the entire undertaking is misdirected because it is the wrong analysis. As SJA plainly stated in its Opening Brief, it is not making a class of one claim. (Dkt. #17 at 15.) These claims are made when the government has not categorized its citizens but has nevertheless treated similarly situated persons differently. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 562 (2000). But here, MPS has categorized. It has drawn a legislative classification between public and private school students attending schools that draw students from the entire city of Milwaukee. Because SJA's equal protection claim is based on a legislative classification (Dkt. #17 at 11, 15), the two Equal Protection cases that MPS relies upon, *Reget v. City of La Crosse*, 595 F. 3d 691(7th Cir. 2010), and *Racine Charter One, Inc. v. Racine Unified School District*, 424 F. 3d 677 (7th Cir. 2015), which are both class of one claims, have no bearing on this case.

Reget was a typical class of one claim. It was brought by the owner of an auto body shop who alleged that he was singled out for enforcement of the city's junk dealer ordinance and that his property was selectively rezoned. He lost because he never produced any evidence that the ordinance had been selectively enforced against him, nor was his property actually ever rezoned. 595 F. 3d at 696.

Reget's selective enforcement claim has nothing to do with this case. SJA is not saying that the other private high schools with city-wide attendance areas are receiving transportation and it is not. It is saying that MPS has made a legislative classification that discriminates against

all private schools with city-wide attendance areas and denies them transportation benefits that are available to public schools with city-wide attendance areas. As will be shown below, SJA's claim based on a legislative classification is judged under a different standard than the one that would apply in a class of one claim.

Racine Charter One was also a class of one case. In its decision, this Court said, "To be clear, the plaintiffs never take issue with any *legislative* classification." *Racine Charter One, Inc. v. Racine Unified School District*, Case No. 03-C-048, *8 (E.D. Wis., December 6, 2004). This Court further said that although there may be hundreds of students attending charter schools, the case still fell within the class of one framework. *Id.* at *8, n. 1. The Seventh Circuit said that this Court "properly construed Charter One's complaint as alleging a class of one equal protection claim." 424 F.3d at 680.

The fact that this Court and the Seventh Circuit had to determine whether the case was a class of one case or one involving a legislative classification speaks to the fact that the law to be applied in those two different types of Equal Protection cases is different. In a class of one claim, the plaintiff must prove that she is similarly situated to a group of other people but she is treated differently by the government than everyone else in that group. *Id.* In class of one cases, the courts do look at the relevant characteristics of the group and of the individual to determine if they are in fact similar, and they then look at whether the treatment was different. *See generally Id.* But that is <u>not</u> what the courts do in Equal Protection cases based on a legislative classification.

The reason for this is simple. In a "class of one" case, the plaintiff must prove that she is similarly situated to some group of persons that should be given equal treatment but has been singled out and treated differently – putting her in a "class of one." But a legislative

classification claim is different. There, the government itself has *already identified two groups* and has expressly decided to treat them differently. A court need not discern differential treatment; it is presented with it. Because, in cases like this one, a legislative classification has been drawn, the court focuses on the legislative classification itself and asks whether the decision to treat two groups differently survives the applicable level of scrutiny, *e.g.*, whether (in a rational basis case) it is rationally related to a legitimate governmental interest. *Plyler v. Doe*, 457 U.S. 202, 216–18 (1982). This makes perfect sense when one considers the different nature of the two kinds of equal protection claims. The legal issue in legislative classification cases – including this one – is whether the government is justified in making the classification which results in the unequal treatment.

Plyler is an excellent example of how the courts review Equal Protection cases based upon a legislative classification (versus a class of one claim). In that case, Texas treated students who were in the U.S. legally differently than students who were in the country illegally. Based upon MPS' argument, the plaintiffs in *Plyler* (who were in the country illegally) should have had no claim because they were not similarly situated to students who were in the county legally. There is no doubt that there is a significant difference between a U.S. citizen and an illegal alien. But the plaintiffs won. The Supreme Court acknowledged the differences between the two groups, 457 U.S. at 218-20, but those differences were not relevant because the State could not justify treating the two admittedly different groups differently.

The same is true in all of the Equal Protection cases cited at pages 10-11 of SJA's Opening Brief. (Dkt. #17.)[2] In all of them there were differences between the favored group and

[2] MPS also suggests that a ruling in favor of SJA would create an Equal Protection violation (although without addressing whether any government interest would justify allowing some schools to have larger attendance areas than others). (Dkt. #23 at 12-13.) It says that some independent private high schools like SJA could have city-wide attendance areas for transportation purposes while others who may be

the disfavored group, but the courts nevertheless upheld the plaintiffs' Equal Protection claims. That is because the question in a legislative classification case is not whether the two groups are different, but whether the difference between them justifies the State's differential treatment.

B. The Denial of Transportation Based on the Decision to Attend a Private School Violates a Fundamental Right.

In assessing the proffered justifications, the court must decide what level of scrutiny to apply. The Plaintiff believes that this case implicates "fundamental rights" equal protection and strict scrutiny. Strict scrutiny applies not only when a right is completely deprived, but even when it is impinged. *City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 440 (1985). SJA bases this argument not, as the Defendant suggests, on the fact that SJA is a religious school. The freedom of parents to choose a private education is a fundamental right. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).[3] In *Pierce*, the Supreme Court said that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535. Here, MPS has made an otherwise available benefit – transportation to a city-wide school – turn on whether a family has chosen public or private education.

MPS does not address SJA's fundamental right argument in its own summary judgment brief,[4] but it does attempt to address *Pierce* in its brief in opposition to SJA's motion for

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sponsored by an entity (*e.g.*, the Archdiocese of Milwaukee) who operate multiple high schools within the city would not. This is because entities that operate multiple private schools cannot have overlapping attendance areas. But that prohibition exists because a statute permits it and cannot be readily compared to this case where the law and state policy requires reasonable uniformity. Whether, in the absence of that mandate, it would be constitutionally acceptable to allow public school districts and not private ones to have overlapping attendance areas goes well beyond the briefing and arguments presented here.

[3] SJA is asserting the rights of its children's parents under assignation. (Dkt. #17 at 3.)

[4] It could have. And it should have. MPS had SJA's brief (Dkt. # 17) in hand when it prepared its brief. SJA's brief was filed and served on October 24th, 22 days before MPS submitted its own summary

summary judgment. (Dkt. #30.) In that brief MPS acknowledges that, under *Pierce*, compelling a student to attend a public school in lieu of a private school was a violation of the parents' fundamental right. (Dkt. #30 at 2.) It argues, however, that there was no violation of that fundamental right here because MPS is operating under the City Option under Wis. Stat. § 121.54(2), which means that it was not obligated to provide transportation to anyone. But that is a *non sequitur*.

MPS is correct that under the City Option it had the option to refuse to provide transportation to any students – public or private. But MPS did not exercise that option. Instead, MPS chose to provide transportation to its own public school students at a cost of $41,259,437 for the 2015-2016 school year (DPFF #62) and $41,513,258 for the 2016-2017 school year (DPFF #65).

Once MPS chose to provide transportation to its own students, it was required to do the same for private school students. That reflects another decision, one made by the citizens of State of Wisconsin. Through a constitutional amendment and implementing legislation, Wisconsin requires that private school students be offered the same transportation benefits that public school districts offer to their own students. Whenever "transportation is furnished, either mandatory or permissive, it must be on a reasonably uniform basis to children attending either public or private schools." *Cartwright v. Sharpe*, 40 Wis. 2d 494, 505, 162 N.W.2d 5, 10-11 (1968). That is because the same considerations of safety and welfare apply to public and private students alike. *Id* at 506.

As noted above, this is true because state law mandates reasonable uniformity. Because of that mandate, MPS may not avoid an equal protection attack by offering as a "legitimate state

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judgment brief. But for unexplainable reasons MPS simply chose to ignore SJA's fundamental rights argument and contends only that no suspect class is involved.

interest" the argument that MPS provides transportation to its own students in order to provide a service to them or to further its own interests as a school district – neither of which can be served by transporting private students whom it does not educate. But there is another problem and it relates to the level of scrutiny to be applied. By making the availability of transportation turn on how a family has exercised its fundamental right to choose private education, MPS has impaired that right. Under these facts, *Pierce* is applicable and strict scrutiny is called for.

C. There Is No Rational Basis for MPS' Differing Treatment of Private School and Public School Students.

But as demonstrated in SJA's own summary judgment brief and as shown below, SJA should prevail in this case even if the Court applies the more lenient rational basis standard to the MPS rules. In the remainder of this brief SJA will analyze the case under the rational basis test and show why MPS' summary judgment motion should be denied under that standard. *A fortiori,* if this Court applies strict scrutiny MPS' motion must be denied.

That MPS flunks the rational basis test is illustrated in *Deutsch v. Teel*, 400 F. Supp. 598 (E.D. Wis. 1975). The question is *Deutsch* was whether MPS violated the Equal Protection Clause by refusing to provide transportation to students who lived in the City of Milwaukee and attended a private school 400 feet outside of the boundaries of the City of Milwaukee. *Id.* at 599. The court found that the plaintiffs' Equal Protection rights had been violated. *Id.* at 605. Because MPS provided transportation to both public and private school students within the City (and many times at distances greater than MPS would have had to transport the plaintiffs), MPS' transportation policy[5] denying transportation to those students was without rational basis[6] and violated the Equal Protection Clause. *Id.* The issue was not whether there were differences

[5] The 1973 equivalent of Rule 4.04.

[6] The court considered whether the case should be determined under the strict scrutiny or the rational basis standard but ended up not deciding that question because the legislative classification failed even under the rational basis test. 400 F. Supp. at 602-03.

between them (and there most certainly were – particularly that the plaintiffs did not attend a school within the boundaries of MPS) but whether there was a justification for the classification that treated them differently. The court held that there was not. The court noted that these private school students faced exactly the same "facets of urban existence" and urban public transportation as the public school students to whom MPS provided busing and yet were denied the benefits made available to others. *Id.*

The *Deutsch* Court also rejected MPS' argument regarding costs. The court noted that MPS provided free transportation for many public school students who lived further from their schools than the plaintiffs did from their private school and that obviously meant that cost was not the issue. The court noted that "the distance over which a student is bused bears a direct relationship to the cost" and said that based upon the fact that MPS was willing to spend more to transport its own students, MPS "will not be heard to claim that the children of these plaintiffs have been denied state-financed busing for fiscal considerations." *Id.*

The same is true here, as essentially admitted by the representative of MPS at its Rule 30(b)(6) deposition. In a hypothetical, the witness was asked to assume identical twin sisters that are both high school sophomores and live at 2820 S. 20th Street in Milwaukee (20th and Cleveland). If one of the sisters attended Rufus King High School, an MPS city-wide high school located 8.8 miles from her home, MPS would provide her with free transportation to and from school. (Solik-Fifarek Dep. at 35, Dkt. #21 at 27; PPFF ¶16.) If her identical twin sister attended SJA, a private city-wide high school located 6.1 miles from her home, MPS would not provide her with any transportation benefits. (*Id.* at 33-35; PPFF ¶17.)

The two students are similarly situated. Rufus King and SJA are similarly situated. Both students live more than two miles from their school (the distance requirement under MPS Rule

4.04 (5)(a)2) and the private school is closer than the public school. But under the MPS "one mile from a bus stop" rule, MPS will absorb the greater cost of transporting one of the identical twins to a public school but not the lesser cost of transporting the other identical twin to SJA.

A different result is not compelled by *Racine Charter One* (even aside from the fact that its class of one analysis has no application here). As pointed out most clearly by the Seventh Circuit, under Wisconsin law a charter school is not only a public school but is the legal equivalent of being its own public school district. 424 F. 3d at 682. There was no reason to expect that one public school district (Racine Unified) would be obligated to provide transportation to the students of a different public school district. Moreover, the Seventh Circuit further pointed out that charter schools are not specifically covered by § 121.54. *Id.* at 681. Thus, it was possible for Racine Unified to argue that it was rational – and legitimate – for it to decline to bear the cost of transporting children that it does not educate and, therefore, had no reason to transport.

Those are not the circumstances here. Private schools and private school students are expressly referenced in § 121.54 and private schools are not separate school districts under the Wisconsin statutes. Indeed, the Seventh Circuit specifically held that charter schools were not similarly situated to private schools under the statute. 424 F. 3d at 683. Finally, the Seventh Circuit distinguished between public school and private school students on the one hand, and charter school students on the other hand. *See, e.g.*, *Id* at 685. It considered the students in the first category (public school and private school students) as those whom RUSD was required to transport by statute, and students in the second category (charter school students) as those whom RUSD was not required to transport by statute – meaning that the public and private school

students in the first category were in fact "similarly situated," but that charter school students were not. *Id.*

To justify its legislative classification here, MPS must show some legitimate state purpose that is furthered by its transportation rules which treat students differently if they attend a public city-wide school instead of a private city-wide school. MPS treats this as a low bar, but that cannot be the case given that the State of Wisconsin has plainly declared in Wis. Stat. §121.54(1)(b) that State policy is that there must be reasonable uniformity between these two groups. There can be no State purpose that is furthered by the MPS Rules given that, in fact, they flout the State purpose expressed in § 121.54(1)(b).

1. There is no rational basis for the "one mile from a bus stop" rule.

a. The proper comparator is the treatment of MPS students attending city-wide schools.

As explained above, the proper comparison here is between private and public school students who attend city wide schools. MPS argues that Wis. Stat. § 121.51(1), which requires private schools (but not public schools) to establish an attendance area that they would otherwise not have (because they are not school districts with boundaries), "means" that SJA has an attendance area and that MPS' city-wide schools do not. Never mind that SJA draws a diverse student body from throughout the City of Milwaukee to attend its International Baccalaureate program just as, for example, Rufus King does. Instead it must be compared to a neighborhood school that does none of those things. But this is nothing more than a function of what MPS chooses to call the limits placed upon who may attend its city-wide and neighborhood schools. Neither group of schools is open to all comers from everywhere. The first may be attended only by city residents while the second may only be attended by city residents living in particular

places.[7] MPS calls the later restriction an "attendance area" (although the proper legislative term is "attendance district") while calling the former nothing. Equal protection analysis is not bounded by the labels that MPS chooses to use.

"Attendance area," as a matter of common sense, simply means the geographic area in which a student must live to qualify for transportation. Under that definition, all of the MPS schools have an attendance area. The attendance area for some – MPS Neighborhood Schools – are smaller than the city boundaries, but for others – the city-wide schools – the attendance area is obviously the entire City of Milwaukee. Applying this definition uniformly would mean that all schools have an attendance area and the attendance area for SJA for transportation services is the same as the attendance area for MPS city-wide high schools.

But MPS does not apply that definition – or any definition of attendance area – consistently across all kinds of schools. Instead, MPS says that a school has an "attendance area" if MPS says it does, and does not have an attendance area if MPS says that it does not. According to MPS, if it calls its neighborhood schools and SJA "attendance area schools," then they have an attendance area, and if it calls its city-wide high schools "non-attendance area schools," then they do not have attendance areas.

But MPS' corporate designee has already acknowledged that this argument is wrong. MPS' corporate designee testified that for transportation purposes there is no practical difference between a private school with a city-wide attendance area (like SJA) and a public school with, in MPS' words, "no limiting attendance area" (*i.e.*, a city-wide high school). (Solik-Fifarek Dep. at 45-46, Dkt. #21 at 29; PPFF ¶18.) The precise testimony was as follows:

[7] If MPS chooses to participate in Wisconsin's Open Enrollment program – something that it need not do – then other students might be permitted to attend. *See* Wis. Stat. 118.51. But that doesn't change the fact that only students in the city have a right to attend city schools.

A What's the difference between a public school without an attendance area and a private school with an attendance area?

Q With a city-wide attendance area.

A Well, nothing for that particular points.

Q Practically they amount to the same thing, correct?

A Except that -- yes, except that we define attendance-area schools and city-wide schools differently. We break them up differently for specific reasons that I don't really know. But they are – they're not the same kinds of schools.

Q I understand that. But my question was limited to are there any practical differences between a public school with no attendance area and a private school with a city-wide attendance area from a transportation standpoint?

A No.

Thus, by admission of MPS' own corporate designee, SJA and its students are similarly situated to MPS city-wide high schools and their students. The whole purpose of the amendment to the Wisconsin Constitution in 1967 and the follow-up enabling legislation was to put private school students and public school students on the same footing – to make them similarly situated for transportation benefits because they face the same transportation risks. *See Cartwright v. Sharpe*, 40 Wis. 2d 494, 505-06, 162 N.W.2d 5, 10–11 (1968). Here, MPS by legislative classification has decided to treat them differently, but the classification has no rational basis.

As noted above, the statute relied on by MPS does not turn on or create any distinction that would justify differential treatment of private and public school students attending city-wide schools. In fact, Section 121.54(1)(b) imposes an obligation of uniformity with respect to all private and public school students within a school district. A school district cannot avoid that obligation – either under state law or, given the implications of state law, for equal protection purposes – by creating a favored class of public school students who it can then claim are different from everyone else.

MPS' suggestion that SJA's students are like students in MPS neighborhood schools because they are enrolled in the school "they normally would attend" or "are entitled to attend" (Dkt. #23 at 10) is nonsensical. SJA's students would not "normally" attend SJA, they would "normally" attend whatever neighborhood public school they would go to based on their home address (which is not, as MPS erroneously claims), necessarily within the City of Milwaukee). SJA's students elect to go to SJA instead of their normal neighborhood school, just as MPS city-wide school students elect to go to a city-wide school instead of their normal neighborhood school.

A simple hypothetical question demonstrates that this is the correct legislative comparison. In a parallel universe where the facts are exactly the same, but SJA is a public MPS school, would it be classified as a neighborhood school or a city-wide school? Of course it would be a city-wide school. It draws students from all over the city (or even outside it, just as public schools can do with open enrollment) and has an attendance zone covering the entire city, just like the rest of MPS' city-wide schools.

b. MPS cannot treat private school students attending city-wide schools differently than public school students attending city-wide schools because the former charge tuition or might have "enrollment discretion."

MPS suggests that the fact that some children pay tuition makes them not similarly situated. It does not explain why that matters and it would be a distinction that state law forecloses because it would justify treating all private school students differently rather than with reasonable uniformity. Even were that not so, the distinction is irrelevant. From the child's point of view, whether her parents pay the school directly for education or not, the child and her family still face the same hardships involved with getting to school in a dense, urban area. And from the schools' point of view, both the private school and the public school are being paid to

furnish an education. The public school is being paid with federal, state, and local tax dollars, and the private school may be paid by a combination of federal, state, and local tax dollars as well as tuition and donations. The source of the funding is not relevant, especially where the public school is provided tax dollars specifically for the purpose of transporting public **and private** school children.

MPS also suggests that because SJA has enrollment discretion[8] and can choose which students to enroll, it is not similarly situated to MPS schools. What MPS fails to tell this Court is that the schools SJA is comparing itself to – MPS city-wide schools – do have enrollment discretion and can choose which students to enroll.[9] That makes SJA and its students comparable to MPS city-wide schools and their students.

c. MPS cannot treat private school students attending city-wide schools differently than public school students attending city-wide schools because it wishes to alleviate overcrowding in its own schools.

MPS next argues that over-crowding may be a justification for its "one mile from a bus stop rule." (MPS Br. at 16.) But, MPS misses the mark not only for this proposed justification, but for all the others that it mentions as well. All of its purported "justifications" are merely the reasons why MPS buses its own students to its city-wide high schools. They may in fact provide a good reason for doing that. So what? None of those reasons can possibly explain why MPS *denies* the same benefit to students who attend private city-wide high schools, especially when MPS has an obligation to provide such transportation under state law. They do not set forth any legitimate government interest for treating private school students differently from the way it

[8] Ironically, as for any students SJA enrolls under the voucher program, it has no almost no discretion and must accept all applicants or hold a lottery if it has more applicants than available spots. *See* Wis. Stat. § 119.23(3)(a).

[9] For example, Rufus King itself grants admission based on "portfolio or admissions assessment." *See* About Rufus King, http://www5.milwaukee.k12.wi.us/school/rufusking/about/rufus-king/; *see* F.R.C.P § 201 (judicial notice of readily-determinable facts).

treats its own students. Instead the rules violate the State of Wisconsin's expressed public policy.

There are two more problems. First, MPS is not overcrowded. With respect to the asserted "over-crowding" justification, MPS admits that its total capacity for all MPS high schools in 2016-2017 was 24,860 and that its actual attendance was only 19,864. (MPS Resp. to PPFF ¶64.) That means 20% of its available high school seats were empty.

Second, even if MPS were overcrowded, transporting students to SJA would actually help alleviate overcrowding at MPS. MPS suggests South Division as an example of "spot overcrowding." (Dkt. #23 at 16.) But the undisputed facts show that South Division could have accepted 356 of the 899 students that were bused out of that neighborhood. (MPS Resp. to PPFF ¶62.) At a minimum, then, at least those 356 students were treated differently and better than the SJA students – they got transportation and the SJA students did not. Moreover, 38 of the 68 SJA students involved in this case actually live in the South Division attendance area. (MPS Resp. to PPFF ¶63.) If the possibility of over-crowding at South Division was an issue, MPS should have been more than willing to transport some students in the area to SJA in order to avoid having them enroll at South Division, their neighborhood public school. Over-crowding does not explain the "one mile from a bus stop" rule.

But regardless, any overcrowding that might exist does not justify treating all private school students attending city-wide schools differently than all public school students attending city-wide schools. MPS does not offer any evidence – or even argue – that it has established city-wide schools to alleviate overcrowding or transports only those students whose neighborhood schools are overcrowded. Nevertheless, MPS argues that overcrowding "could have been a problem" at some schools *given its current attendance boundaries for its*

neighborhood high schools. MPS can certainly choose to alleviate this "spot overcrowding" by creating (or using) city-wide schools as opposed to changing those attendance boundaries, but that cannot justify departing from reasonable uniformity. MPS' decision to transport students to city-wide schools creates an obligation to treat private school students with reasonable uniformity.

d. MPS cannot treat private school students attending city-wide schools differently than public school students attending city-wide schools because it wishes to engage in racial balancing

Third, MPS argues that Wis. Stat. § 121.85 – which allows a school district to have "minority group pupils" attend a public school other than the pupil's neighborhood school – provides a rational basis for the "one mile from a bus stop" rule. (Dkt. #23 at 16-17.) The statute certainly allows MPS to permit "minority group pupils" to attend a public school other than the pupil's neighborhood school. Again, so what? MPS could encourage minority group pupils to attend a public school other than their neighborhood school (including a city-wide high school) and provide transportation to private school students at the same time. The two programs are not mutually exclusive.[10]

Moreover, it is clear that the MPS' busing rules have nothing to do with "racial balance." As SJA explained at pages 20-22 of its Opening Brief (Dkt. # 17), MPS' decision to bus students from Neighborhood School areas to its public city-wide high schools resulted in more racial imbalance at each of its Neighborhood Schools rather than less. MPS admits that its transfers do not improve racial balance. (MPS Resp. to PFF ¶67.) And even if there was evidence that

[10] MPS has not argued in its briefs but might yet claim that it can obtain state aid for transfers under Wis. Stat. § 121.85. There is no record evidence that it does. MPS actually complains that the aid it receives for transportation is a fraction of what it spends for that purpose. In any event, there is no "cost defense" to the requirement of reasonable uniformity. *See* Section I.C., *supra*.

transporting children to city-wide schools somehow improves racial balance, SJA's city-wide attendance area can similarly serve the interest of improving diversity.

e. MPS cannot treat private school students attending city-wide schools differently than public school students attending city-wide schools because it offers specialized programming at its city-wide schools.

MPS argues that the fact that its city-wide high schools provide special programs that its Neighborhood Schools do not provide could establish a rational basis for a rule that discriminates against private school students. How? SJA does not dispute that MPS city-wide high schools provide programs that its Neighborhood Schools do not. The International Baccalaureate program at Rufus King High School is a good example of that. But how does MPS's decision to have a special program at Rufus King justify discrimination against the students who attend SJA which, of course, has a similar International Baccalaureate program. (MPS Resp. to PPFF ¶¶4, 9.) The fact that MPS might have a good reason to transport students to its city-wide high schools does not mean that it is justified in refusing to transport students to city-wide private high schools.

f. MPS cannot treat private school students attending city-wide schools differently than public school students attending city-wide schools because it would save money.

Finally, MPS argues that cost is a rational basis for denying transportation benefits to private school students. (Dkt. #23 at 19-21.) Of course not transporting one group – any group – of students would save money. But yet again, MPS confuses so-called class of one cases from cases based on a legislative classification. The two cases it cites – *Strail v. Village of Lisle, Ill.*, 588 F.3d 940 (7th Cir. 2009) and *Racine Charter One, Inc. v. Racine Unified School District*, 424 F.3d 677 (7th Cir. 2005) – are both class of one cases.

This is not a class of one claim – it is a case about a decision to distribute government benefits unequally. In such a case, the Supreme Court has expressly said that a discriminatory distribution of benefits will survive only if the distinction rationally furthers a legitimate state purpose. Saving some money does not fit that bill. In *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 618 (1985), the Supreme Court struck down on Equal Protection grounds a New Mexico statute that granted a tax exemption limited to those Vietnam veterans who resided in the state before May 8, 1976. By limiting the benefit to a smaller group the government reduced its cost, but that was not a basis to save the statute.

The same was true in *Zobel v. Williams*, 457 U.S. 55, 60 (1982). In that case, Alaska created a statutory scheme by which the State distributed income derived from its natural resources to the adult citizens of the State in varying amounts, based on the length of each citizen's residence. Newer residents received less money than long-term residents, thus reducing costs. But the Supreme Court struck down the law under the Equal Protection Clause, concluding that a State may not distribute benefits unequally unless the distinction furthers a legitimate state purpose. Saving some money by paying some people less does not qualify.

This point was most clearly articulated by the Supreme Court in *Plyler*, 457 U.S. at 227. In attempting to establish a rational basis for denying education benefits to children who were in the country illegally, Texas argued that the "preservation of the state's limited resources for the education of its lawful residents" established a rational basis for the law. *Id.* That is exactly the argument made by MPS here. The Supreme Court rejected it out of hand stating that: "Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Id.*

But even if saving money might be a rational basis for treating persons differently in some cases, it cannot when state law requires that private and public students be treated with reasonable uniformity. As described above, *Deutsch* disposes of this argument. In *Deutsch*, the court found that by being willing to provide more expensive transportation to public school students than that requested by the private school plaintiffs (by busing the public school students greater distances), MPS transportation rules could not "be said to implement any fiscal or monetary goals." 400 F. Supp. at 604.

Perhaps understandably, MPS' tries to bootstrap this Court's discussion of the cost issue in *Racine Charter One* (Dkt. #23 at 20) to fit the facts of this case. It's a poor fit. In *Racine Charter One*, this Court was discussing a cost that the Racine Unified School District was not obligated to incur – the cost of transporting students who resided in a school district other than Racine Unified – and not a cost for transporting students that Racine Unified was legally obligated to transport. Because Wisconsin requires reasonable uniformity (which was not at issue in *Racine Charter One*), cost is not a defense here.

In any event, it is not clear what – if any – cost burden MPS would bear. The State of Wisconsin provides state aid to MPS to provide transportation to both public and private school students. It is undisputed that MPS has elected under the City Option to provide transportation to its own students. Under Section 121.54(1)(b), that means that MPS was eligible for state aid under § 121.58. It is further undisputed that MPS received such aid for the 2016-2017 school year in the amount of $2,322,123. (McGrath Decl. ¶20, Ex. J; PPFF ¶72.) Under the very statute pursuant to which MPS became eligible for that aid (§ 121.54(1)(b)), the State required that there must be "reasonable uniformity in the transportation furnished to the pupils, whether they attend public or private schools."

So MPS accepts the state aid but then says it won't spend that money to do what the State requires. That is not a legitimate government interest. It is always the case that denying a benefit to some disfavored class will save money. The law is clear, however, that such cost savings are not a legitimate justification.

In the end, none of these arguments, taken at face value, even provide a reason for MPS to treat private schools differently than public schools. They provide reasons for MPS to have city-wide schools and bus children from all over the city to attend them. But not transporting children to private city-wide schools doesn't further any of those interests. Access to unique programs, racial diversity, and alleviating overcrowding actually becomes easier when MPS can transport students to more city-wide schools, regardless of whether they are public or private. SJA has space, racial diversity, and unique programs not available at MPS neighborhood schools. That MPS does not care whether it furthers those interests at SJA does not matter. State law does not allow it to privilege its own students.

MPS sums up its rationale for providing transportation to students attending its own city-wide schools:

> As to the pupil transportation distinction, MPS believes that when a pupil has to go to a school other than his or her designated attendance area school, it is not fair to require that pupil to either walk the extended distance or navigate public transportation for that distance, which may mean many transfers and far more stops along the way than a pupil transportation service.

(Dkt. #23 at 19.) Put aside for a moment that no student "has to" attend a city-wide school. A young woman attending SJA is in precisely the same position. She must "either walk the extended distance or navigate public transportation for that distance, which may mean many transfers and far more stops along the way than a pupil transportation service." She may have chosen SJA for the same reason that a public school student might choose a city wide school,

e.g., to escape an overcrowded neighborhood school, to attend a school with a more diverse student body, or to enroll in a more focused program. Having determined that it is "unfair" to require its own students to get to school on their own, MPS cannot claim that it is any less "unfair" to impose the same burden on a young lady residing in the city of Milwaukee who attends SJA.

2. There is no rational basis for the July 1st deadline for private school students.

Nowhere in its brief does MPS even attempt to explain the rational basis for its "July 1st deadline rule" that it applies solely to private school students. In its brief in opposition to SJA's motion for summary judgment (Dkt. # 30) MPS says it imposes this rule for what amounts to logistical reasons. (Dkt. #30 at 19-20.) But the asserted logistical reasons do not explain why no such deadline is in place for public school students. The logistical issues, whatever they are, would be the same whether the students attend a private or a public school. (Solik-Fifarek at 52-53; PPFF ¶26.) But public school students receive transportation from MPS even if their names are not on a school roster by July 1st. (*Id.*)

Further, the MPS rule imposing the July 1st deadline lacks a rational basis because it penalizes the wrong person. Private school students and their families have transportation rights under § 121.54. The rule does not impose a deadline on these students and their families that they have somehow missed, but on a different entity – private schools. There is no compelling government interest served by penalizing the intended beneficiaries under § 121.54 for an omission by a third party. MPS certainly offers no such justification.

The undisputed facts show that MPS treats similarly situated students differently if they attend private schools versus public schools, both under the "one mile" and the "July 1st deadline" rules. Those legislative classifications violate the Equal Protection Clause.

II. MPS HAS VIOLATED STATE LAW.

MPS asserts two defenses to SJA's state law claim: (1) that SJA allegedly does not have a private cause of action under Wisconsin law; and (2) that MPS has provided transportation benefits to SJA and its students with reasonable uniformity to the benefits provided to public school students. Neither argument has merit.[11]

A. SJA Has a Private Cause of Action.

MPS' argument that SJA's complaint should be dismissed because there is no private cause of action under Wis. Stat. § 121.54 is misplaced for two reasons. First, SJA has a cause of action under Wis. Stat. § 806.04. That statute expressly states that any person may obtain a declaration of their rights under a statute. That is clearly part of what SJA is asking for here. In its complaint, SJA expressly asks for "a declaratory judgment stating that MPS violated Wis. Stat. § 121.54." Likewise, SJA has a cause of action for injunctive relief under Wis. Stat. § 813.01. This proceeds from § 813.01, itself, but also based on § 806.04(8), which states that supplemental relief based on a declaration may be granted whenever necessary or proper. Certainly, if this Court were to declare that MPS was in violation of § 121.54, it would be necessary and proper to stop that violation by granting injunctive relief.

Second, MPS ignores the history of litigation under this statute. The following cases were brought and fully litigated in state court under § 121.54: *Young v. Mukwanago Bd. of*

[11] MPS also tries to get two kicks at the can by suggesting that if this Court rules in MPS' favor on the constitutional claim, the Court should remand the state law claim to state court, unless of course this Court would also dismiss SJA's state law claim – in that situation, MPS is just fine with this Court retaining jurisdiction. Such gamesmanship is inappropriate. There is no rule that a federal court must determine whether there is a private cause of action under state law before remanding a supplemental claim to state court. The *Miller Aviation* case cited by MPS does not say that, but rather affirms that a refusal to exercise supplemental jurisdiction after dismissal of a federal claim is reviewed for abuse of discretion. Given the fact that Wisconsin courts have repeatedly entertained actions by private parties to enforce their transportation rights, this Court should not dismiss the claim on grounds that state law would not permit those courts to do what they did. If this Court is uncertain, it should decline to exercise supplemental jurisdiction over the state claim and allow the state courts to resolve that issue.

Educ., 74 Wis. 2d 144, 246 N.W.2d 230 (1976) (action by parents and students to enforce transportation rights under § 121.54); *Morrissette v. DeZonia*, 63 Wis. 2d 429, 217 N.W.2d 377 (1974) (action by parents and students to enforce transportation rights under § 121.54); *Vanko v. Kahl*, 52 Wis. 2d 206, 188 N.W.2d 460 (1971) (original action by parents under Wis. Stats. §§ 21.51(4) and 121.54(2)(b)1); *Providence Cath. Sch. v. Bristol Sch. Dist. No. 1*, 231 Wis. 2d 159, 605 N.W.2d 238 (Ct. App. 1999) (action by school and parents to enforce transportation rights under § 121.54); *St. John Vianney School v. Janesville Bd. of Educ.*, 114 Wis. 2d 140, 336 N.W.2d 387 (Ct. App. 1983) (action by private schools and parents to enforce reasonable uniformity provision of § 121.54); *Hahner v. Wis. Rapids Bd. of Educ.*, 89 Wis. 2d 180, 278 N.W.2d 474 (Ct. App. 1979) (action by students under § 121.54).

Each of these cases involved a claim by a private school and/or individual plaintiffs to enforce their rights under Wis. Stat. § 121.54, precisely the same claim made by SJA in this case. If MPS were correct that SJA has no cause of action under the statute, then each of the above cases should have been dismissed. None of them were.

That these claims were not blocked by cases like *Grube v. Daun*, 210 Wis. 2d 681, 563 N.W.2d 523 (1997), is not surprising. The question in *Grube* was whether the imposition of certain obligations with respect to hazardous spills creates a duty of care to particular individuals who might be harmed by a failure to meet them such that those individuals could sue for damages. *See* 210 Wis. 2d at 692-93. Here the statute in question creates an obligation to transport students as opposed to a law that "merely makes provision to secure the safety or welfare of the public as an entity." *McNeill v. Jacobsen*, 55 Wis. 2d 254, 258, 198 N.W.2d 611 (1972).

B. MPS Has Not Provided Transportation Benefits to SJA and its Students with Reasonable Uniformity to the Transportation Benefits Provided to MPS Public School Students.

MPS agrees that it treats students who attend private city-wide high schools differently than students who attend public city-wide high schools under the "one mile from a bus stop" rule and the "July 1st deadline" rule. But MPS says that neither of these rules violate the requirement regarding "reasonable uniformity." MPS bases its argument on *St. John Vianney School v. Janesville Board of Education*, 114 Wis. 2d 140, 336 N.W.2d 387 (Ct. App. 1983). (Dkt. #23 at 25-26.) That does not work, because that case requires public districts to apply the same distance-related rules to private schools as it does to its own schools.

In *St. John Vianney*, the Wisconsin Court of Appeals held that at a minimum the "reasonable uniformity" requirement "prevents a school board from distinguishing for transportation purposes between public and private school pupils on the basis of the distance they live from school." *Id.* at 156. According to the *St. John Vianney* court, § 121.54(1) means "that whatever the distance standard the board chooses, the distance standard must be reasonably uniform in its application to public and private school pupils." *Id*.

So applying that requirement here, we see that under Rule 4.04(5), MPS has chosen a rule that all public school students who attend city-wide schools and live more than two miles from their school are entitled to free transportation without regard to whether or not they live within one mile from a bus stop. Under *St. John Vianney*, MPS must apply this same distance rule to private school students who attend a private city-wide school. It is undisputed that all of the SJA students in issue live more than two miles from SJA. As a result, under the distance rule created by MPS, they are also entitled to free transportation without regard to whether or not they live within one mile of a bus stop.

Logically, the same requirement should apply to deadlines. Nothing in Wis. Stat. § 121.54 allows MPS to impose a deadline on private school students that it does not impose on public school students, and nothing in the statute allows MPS to disqualify students and their families from a public benefit they are entitled to by statute if the school they attend does not meet a deadline imposed on the school by MPS. Using the rule in *St. John Vianney* as the model, whatever deadlines that MPS imposes – or does not impose – on public school students, it must apply the same rules to private school students. That is the essence of "reasonable uniformity."

Finally and importantly, there is no "rational basis" defense to SJA's state law claim. There is no such exception in the statute. The statute does not say that there must be "reasonable uniformity" unless the public school district can come up with some plausible reason for avoiding the law. It is a blanket requirement. By discriminating against the 68 SJA students and treating them differently and worse than similarly situated public school students, MPS is violating its statutory obligation to treat them and its own students with reasonable uniformity, as required by Wis. Stat. § 121.54(1)(b). SJA is entitled to summary judgment on its state law claim.

CONCLUSION

For the reasons set forth above, SJA respectfully requests that this Court deny MPS' motion for summary judgment.

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