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 MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This case involves the transportation of school children who live within the Milwaukee Public School District ("MPS") and attend a private, city-wide high school in the City of Milwaukee. Under both state and federal law, MPS must transport private and public school students with reasonable uniformity. *See* Wis. Stat. §121.54(1)(b); U.S. Const. Amend. XIV. But MPS does not do so. It treats students who attend MPS public schools differently and better than it treats similarly-situated students who attend private schools. This lawsuit seeks to correct that inequity.

FACTUAL BACKGROUND

Wisconsin law relating to transportation.

Prior to 1967, children who attended private schools in Wisconsin were not entitled to public transportation to their schools.[1] This created health and safety hazards for these children, which were resolved by an amendment to the Wisconsin Constitution. In 1967, the people of Wisconsin amended the Constitution to provide that "Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the

[1] The historical facts set forth in the first two paragraphs of this subsection are all explained in *Cartwright v. Sharpe*, 40 Wis. 2d 494 (1968).

transportation of children to and from any parochial or private school or institution of learning." Wisconsin Constitution, Art. 1, § 23.

The amendment to the Constitution was followed by legislation requiring public school districts to transport children living within their districts to private schools. Specifically, the legislature amended existing public transportation statutes to mandate that private school students be transported on a reasonably uniform basis with public school students. "What the constitutional amendment and the enabling legislation accomplished was to provide that the same consideration of safety and welfare should apply to public and private students alike." *Cartwright v. Sharpe*, 40 Wis. 2d 494, 506 (1968) The enabling legislation remains in effect (although it has been amended from time to time) and is contained in Wis. Stat. §121.54.

Wis. Stat. §121.54(2)(a) provides that school districts must provide transportation to all children attending public school who reside more than two miles from the public school they are entitled to attend. Wis. Stat. §121.54(2)(b) provides that public school districts must provide transportation to children who live in the district and attend private school, so long as the private school is within the district (or not more than five miles from the district boundaries), the child lives more than two miles from the private school, and the child lives within the private school's attendance area.

Wis. Stat. §121.54(1), however, has an exception to both sections 121.54(2)(a) and (2)(b) referred to as the "City Option." In certain cases, students who live within a city are not entitled to transportation from the school district to either public schools or private schools if public bus transportation is available. However, under Section 121.54(1)(b), if a school district that is not obligated to provide transportation because of the City Option elects to do so, then "*there shall*

be reasonable uniformity in the transportation furnished to the pupils, whether they attend public schools or private schools." (emphasis added)

The parties.

St. Joan Antida High School ("SJA") is an independent private female-only high school in the Milwaukee Parental Choice Program operating at 1341 N. Cass Street, Milwaukee, Wisconsin. (Gessner Decl. ¶2; PPFF[2] ¶1.) SJA's approved transportation attendance area under §121.54 is city-wide. (Gessner Decl. ¶6; PPFF ¶5.) For the 2016-2017 school year, SJA had an enrollment of 145 students, at least 68[3] of whom have residences that are within the City of Milwaukee and more than two miles walking distance from SJA. (Gessner Decl. ¶7; PPFF ¶6.) Mr. Paul Gessner is head of SJA. (Gessner Decl. ¶1; PPFF ¶3.)

SJA is a high-performing school. (Gessner Decl. ¶3; PPFF ¶4.) It provides an intellectually challenging college preparatory International Baccalaureate program. (*Id.*) One hundred percent of its 2016-2017 graduates were accepted at colleges. (*Id.*) Like MPS high schools, SJA is a minority-majority school. (Gessner Decl. ¶5; PPFF ¶10.) In 2016-2017 33.1% of its students were African-American, 60% were Hispanic, 6.2% were white, and 0.6% were Asian. (*Id.*)

SJA applied to MPS for transportation for each of these 68 students for the 2016-2017 school year. (Gessner Decl. ¶9; PPFF ¶27.) MPS denied transportation to all 68. (Gessner Decl. ¶13; PPFF ¶31.) SJA then arranged and paid for transportation for each of these 68 students. (Gessner Decl. ¶14; PPFF ¶32.) As consideration for receiving transportation from SJA, the parents of each of the 68 students assigned their transportation rights and benefits to SJA. (*Id.*)

[2] All references to "PPFF" are to the Plaintiff's Proposed Findings of Fact.

[3] The complaint alleges 70 such students. (Complaint ¶¶30-33.) But discovery has shown that MPS denied one of these 70 students because her address was actually in West Allis (and not Milwaukee) and that one of them lived 1.9 miles from SJA (which is inside the 2 mile limitation). SJA does not dispute MPS's decision with respect to these two students. (Gessner Decl. ¶8, PPFF ¶6.)

The Defendant Milwaukee Public School District ("MPS") is a "school district" as that term is used in Chapters 115 through 121 of the Wisconsin Statutes. MPS has its central offices and principle place of business at 5225 W. Vliet St., Milwaukee, WI 53208. (Complaint ¶13; Answer ¶13; PPFF ¶2.) MPS has exercised the City Option as described in §121.54(1). (Complaint ¶22; Answer ¶22; PPFF ¶7.) Because MPS is acting under the City Option it can determine its own transportation policies, but under Section 121.54(1)(b) it must provide transportation with *reasonable uniformity* to students in public and private schools. (PPFF ¶8.)

MPS Transportation Policies

MPS (through its Board of Directors) has created and published a set of administrative policies that address specific issues designed to achieve the policies set forth by the MPS Board. (McGrath Decl. ¶¶7-8, Ex D; PPFF ¶11.)[4] Only the Board may adopt new administrative policies or revise existing policies, but the administration may develop procedures to implement the administrative policies created by the Board. (*Id.*) The administrative policies are organized under nine major sections, each identified by a numeric code. (*Id.*) Each policy is further cataloged by a decimal code to give each policy its own unique identification. (*Id.*) Section 4 of the of the administrative policies deals with "Support Services." MPS's transportation policies are set forth in MPS Administrative Policy 4.04. (McGrath Decl. ¶9, Ex. E; PPFF ¶12.)

With respect to students in both public and private high schools, MPS Policy 4.04 states that they will receive transportation from MPS only if they live more than two miles from school **and** more than one mile walking distance from public transportation. *See* Rule 4.04 (2)(a)3[5] and(2)(b)2.[6] However, MPS Policy 4.04(5)(a)2 has an exception for public high school students

[4] http://mps.milwaukee.k12.wi.us/en/District/About-MPS/School-Board/Policies--Procedures/Administrative-Policies.htm.
[5] The rule for public high school students (contained in McGrath Decl. Ex. E).
[6] The rule for private high school students (contained in McGrath Decl. Ex. E).

who attend so-called "city-wide schools." According to the exception, "Transportation service shall be provided to the public secondary school students whose residences are two miles or more walking distance from assigned city-wide schools." Under the exception, the requirement that the student live more than one mile from public transportation is eliminated, but only for such students attending public city-wide schools.

MPS has two types of high schools when it comes to transportation. It has a group of district high schools that have defined attendance areas within the City of Milwaukee. An MPS map showing the identity and attendance area of each of those schools is attached to the McGrath Declaration as Exhibit F. The map was produced by MPS in discovery and authenticated at the deposition of an MPS witness produced at a Rule 30(b)(6) deposition. (McGrath Decl. ¶10; Ex. F, Solik-Fifarek Dep. at 42[7]; PPFF ¶13.) SJA will refer to these high schools as "Neighborhood Schools" hereinafter. On the map, the names of the Neighborhood Schools are printed in red as are the boundary lines of their attendance areas. (*Id.*)

MPS also has a group of high schools that have no limiting attendance area. These high schools are the "city-wide" high schools that are the subject of Rule 4.04(5)(a)2. (McGrath Decl. ¶11; Ex. G, Solik-Fifarek Dep. at 42-43; PPFF ¶14.) MPS provides transportation to students who live anywhere in the City of Milwaukee to its "city-wide" high schools so long as they live more than 2 miles from the school (without regard to the requirement in Rule 4.04(2)(a)3) limiting transportation to students who live within one mile of public transportation). (Solik-Fifarek Dep. at 39-41; McGrath Ex. E, PPFF ¶15.) MPS does not do the same thing for private schools that have city-wide attendance areas such as SJA.

[7] All of the excerpts from the Solik-Fifarek deposition referred to herein are contained in Exhibit C to the McGrath Declaration.

This is best exemplified by a hypothetical that was the subject of testimony by the representative of MPS at a Rule 30(b)(6) deposition. 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; PPFF ¶16.) If her identical twin sister attended SJA, a private city-wide high school located 6.1 miles from her home, MPS will not provide her with any transportation benefits. (Solik-Fifarek Dep. at 33-35; PPFF ¶17.)

The two students are similarly-situated. It is hard to be more similarly situated than identical twins living in the same house. Rufus King and SJA are similarly situated. Both are high performing high schools with International Baccalaureate programs. (Gessner Decl. ¶4; PPFF ¶9) Both schools are city-wide schools. 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. MPS's witness admitted that there is no practical difference between a private school with a city-wide attendance area (like SJA) and a public school with no limiting attendance area (like Rufus King). (Solik-Fifarek Dep. at 45-46; PPFF ¶18.) The only difference in the hypothetical is that one of the identical twins attends an MPS public city-wide school and the other attends a private city-wide school. (Solik-Fifarek Dep. at 39-41; PPFF ¶19.)

A second MPS transportation policy is also relevant to this dispute. Under MPS Rule 4.04(2)(b)4, private students are eligible for transportation only if "the private school submits the names, grade levels, and location of eligible students [to MPS] no later than the third Friday of September." (McGrath Decl. Ex. E, PPFF ¶20.) Despite the deadline set forth in the rule, MPS actually requires each private school to submit the roster described above for each student for

whom the school is seeking transportation by July 1st of each year. (Solik-Fifarek Dep. at 51; Gessner Decl. ¶22, Ex. D; PPFF ¶21.) If a student's name is not on the private school's roster by July 1st, MPS considers the student to be ineligible for transportation in the following school year. (Solik-Fifarek Dep. at 50-52; PPFF ¶22.) MPS does not apply the same deadline (or any deadline) to its own students. (Solik-Fifarek Dep. at 50-51; PPFF ¶23.) Rule 4.04 contains no deadline for public school students and the MPS representative at the Rule 30(b)(6) deposition acknowledged that there was no deadline for public school students. (Solik-Fifarek Dep. at 50-51; PPFF ¶24.)

The 68 SJA Students

In the summer of 2016, SJA applied to MPS for transportation for SJA students for the 2016-2017 school year. (Gessner Decl. ¶9; PPFF ¶27.) SJA submitted its original roster to MPS with a letter on May 14, 2016. (*Id.*) That list contained 62 of the 68 SJA students involved in this case. (*Id.*) SJA updated its roster on September 29, 2016, including all 68 names. (Gessner Decl. ¶10, Ex. B; PPFF ¶28.) SJA has not put the names of those 68 students into the Court record because the students have privacy rights and are entitled to confidentiality under both state and federal law.[8] (Gessner Decl. ¶11; PPFF ¶29.) SJA has supplied their names and addresses to MPS both when it applied for transportation on their behalf and in the context of this lawsuit. (Gessner Decl. ¶12; PPFF ¶30.)

All of these 68 students attended SJA for the 2016-2017 school year, lived in the City of Milwaukee, and lived more than two miles from SJA. (Gessner Decl. ¶15; PPFF ¶33.) MPS did not provide transportation benefits of any kind for any of these 68 students. (Gessner Decl. ¶13; PPFF ¶31.) Because of MPS's failure to provide transportation for these students, SJA provided

[8] Wis. Stat. §118.125(2), Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. § 1232g.

transportation to these students at a cost of $108,200 for the 2016-2017 school year. (Gessner Decl. ¶14; PPFF ¶32.)

MPS's Reasons for Denying Transportation

Of the 68 SJA students, 61 of them were denied transportation under Rule 4.04(2)(b)2 because they lived within one mile of a public bus stop. (McGrath Decl. ¶15; Ex. H; Gessner Decl. ¶18; PPFF ¶39.) Six of the students were denied transportation because they were not on the SJA roster by July 1st. (McGrath Decl. ¶16; Ex. H; Gessner Decl. ¶19; PPFF ¶40.)[9] The last one was denied transportation because MPS contends that the student lives within 2 miles of SJA, but MPS is wrong about the distance. (Gessner Decl. ¶20; PPFF ¶41.) Standard mapping software establishes that the student lives 2.1 miles from SJA. (Gessner Decl. ¶21; PPFF ¶42.) However, even if the student lived more than two miles from SJA, the student would still have been denied transportation because the student lives within one mile of a public bus stop. (McGrath Decl. ¶17; Ex. H; PPFF ¶43.) Neither the "within one mile of a public bus stop" nor the "July 1st rule" apply to public school students

SJA's Claim

SJA makes this claim on behalf of these 68 students and their families (based on its Assignments from the parents of each of them) and on its own behalf. (Gessner Decl. ¶23; PPFF ¶76.) SJA is harmed in at least two ways. (Gessner Decl. ¶25; PPFF ¶78.) First, it is harder for SJA to recruit students because of the difficulties caused by MPS's failure to provide transportation. (Gessner Decl. ¶26; PPFF ¶79.) This results in SJA having fewer students than it would have if MPS met its legal obligations. (*Id.*) Second, as set forth above, SJA partially

[9] There is an obvious discrepancy between the "July 1st deadline" actually imposed by MPS and Rule 4.04(2)(b)4 which sets the deadline as the third Friday in September, but because the names of the 6 students at issue were not forwarded to MPS until September 29, 2016, the submission was after either deadline. For purposes of simplicity, SJA will refer to the MPS rule as the "July 1st deadline."

makes up for MPS's failure to provide transportation to its students by providing such transportation on its own at a cost of $108,200 for the 2016-2017 school year. (Gessner Decl. ¶27; PPFF ¶80.)

Students and their families are also harmed by MPS's failure to meet its legal obligations because part of the money they pay in tuition must be used to provide transportation rather than for other educational programming. (Gessner Decl. ¶28; PPFF ¶81.) If SJA did not have to spend $108,200 for transportation in the 2016-2017 school year, SJA could have purchased 54 new computers for their STEM programs. (Gessner Decl. ¶29; PPFF ¶82.) Alternatively SJA could have added two additional special needs teachers and still had $20,000 left over. (*Id*.) Alternatively SJA could have created a graduate support program with two staff people to develop additional college relationships to benefit our college seniors and had $18,000 left over. (*Id*.) All of these items were on SJA's "wish list" but they could not afford to do any of them. (*Id*.) Students and their families are also harmed because they are being denied a benefit that MPS is legally obligated to provide them, with the harm being measured, at least in one way, by the cost of substitute services which in this case was $108,200 for the 2016-2017 school year. (Gessner Decl. ¶30; PPFF ¶83.)

On November 16, 2016, SJA sent a Notice of Claim to MPS under Wis. Stat. §893.80 arising out of the facts that underlie this complaint. (McGrath Decl. ¶18, Ex. I; PPFF ¶74.) MPS denied the claim on March 16, 2017. (McGrath Decl. ¶19; PPFF ¶75.)

SUMMARY JUDGMENT STANDARD

Summary judgment is required "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion;

"the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). For a dispute to be genuine, the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." *Id.* For the fact to be material, it must relate to a disputed matter that "might affect the outcome of the suit." *Id.* There are no genuine issues of material fact here.

ARGUMENT

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

The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (striking down on Equal Protection grounds a state law that denied education benefits to students who were illegal aliens). It "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (striking down on Equal Protection grounds an ordinance that restricted group homes for the mentally disabled); *see also Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 913 (1986) (Burger, C.J., concurring) (striking down a New York statute granting preferences for state employment for veterans who were New York residents when they enlisted to the exclusion of veterans who resided in a state other than New York when they enlisted).[10]

The Equal Protection Clause is fully applicable to a public school district established and maintained under the laws of one of the States. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)

[10] The 2nd Circuit struck down the statute on both Equal Protection and Right to Travel grounds. *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 278 (2d Cir. 1985). At the Supreme Court, four justices voted to strike down the statute under the Right to Travel clause and two justices (Chief Justice Burger and Justice White) voted to strike down the statute under the Equal Protection clause.

(Fourteenth Amendment applies to local boards of education); *see also Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017). Under the above cases, MPS is a state actor for equal protection purposes. A plaintiff stating an Equal Protection claim against a school district via §1983 must show that the conduct by the district was the result of district custom, policy, or practice. *Fitzgerald v. Barnstable*, 555 U.S. at 257–58 (citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978)).

SJA's equal protection claim is based on a legislative classification by MPS under its official transportation rules, specifically the disparate treatment of public school students and private school students under the "within one mile of a bus stop" and "July 1st deadline" Rules. Such discrimination violates the Equal Protection Clause unless the classification itself is rationally related to a legitimate governmental interest. *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (striking down on Equal Protection grounds an amendment to the Food Stamp Act which rendered ineligible any household containing an individual unrelated to any other member of the household). Moreover, when a state distributes benefits unequally, that discrimination will survive only if the distinction rationally furthers a legitimate state purpose. *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 618 (1985) (striking 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).

Thus, to pass muster 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. This is an impossible lift given that the State of Wisconsin, itself, has declared in Wis. Stat. §121.54(1)(b) that State policy is that there must be reasonable uniformity between these two groups. As noted by the Wisconsin Supreme Court in *Cartwright*

v. Sharpe, 40 Wis. 2d at 505, under Wisconsin law "where transportation is furnished, either mandatory or permissive, it must be on a reasonably uniform basis to children attending either public or private schools." There can be no state purpose that is furthered by the MPS policy given that, in fact, it flouts the state purpose expressed in §121.54(1)(b).

Violations of the Fourteenth Amendment's Equal Protection Clause are enforceable under 42 U.S.C. §1983, which provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

As noted above, state and municipal entities like MPS are proper defendants under §1983 and can be sued for monetary, declaratory, and injunctive relief when the implementation of an official district policy is responsible for the constitutional deprivation. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690-91 (1978). The deprivations in this case were directly caused by MPS's implementation of its "within one mile of a bus stop" and "July 1st deadline" rules.

The Seventh Circuit has established the elements of a §1983 claim as follows: (1) the plaintiff held a constitutionally protected right; (2) the plaintiff was deprived of that right in violation of the Constitution; (3) the defendants intentionally caused the deprivation; and (4) the defendants acted under color of state law. *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989). These elements are met here.

A. SJA and the 68 SJA students denied transportation by MPS held a constitutionally protected right and that right was violated by MPS.

As set forth above, SJA and the 68 students who were denied transportation had the constitutional right under the Equal Protection clause to be treated the same as those similarly situated to them.[11] They had the right to the same public benefit (transportation) as the public schools and students attending public schools, absent some legitimate state purpose to the contrary. Indeed, in *Deutsch v. Teel*, 400 F. Supp. 598 (E.D. Wis. 1975) a three-judge panel specifically held that private school students have a right under the Equal Protection clause to be treated the same as similarly situated public school students when it comes to transportation benefits under Wis. Stat. §121.54. In *Deutsch*, the court found an equal protection violation when MPS refused to provide transportation benefits to private school students who attended a school 400 feet outside the city limits of the City of Milwaukee. MPS argued that the cost of providing such transportation constituted a rational basis for its decision but the court disagreed. The court held that such students were similarly situated to public school students who attend schools located within the City of Milwaukee (some of whom MPS transported greater distances than the plaintiffs in *Deutsch*). *Id.* at 602. The court concluded that MPS's disparate treatment did not implement any "legitimate state objective and to be without the rational basis necessary

[11]As part of analyzing SJA's equal protection claim, this Court must determine the applicable level of scrutiny – strict scrutiny or rational basis. In *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35, (1925) the Supreme Court held that the right of parents to send their children to a private school (as opposed to a public school) was a fundamental right (the violation of which would require strict scrutiny). While subsequent cases have said that the existence of that fundamental right does not mean that the state must subsidize the parents' exercise of that right by, for example, providing free text books to students attending private schools, those cases are not applicable here because the State of Wisconsin has chosen to provide the same transportation benefits to public and private school students. Here, MPS is choosing to interfere with parents' fundamental right to choose a private school by denying them transportation benefits directly contrary to the law. Thus, *Pierce* remains applicable and strict scrutiny is called for. But SJA should prevail in this case whether this Court applies rational basis or strict scrutiny and in the remainder of this brief SJA will analyze it as a rational basis case and show why it prevails under that standard. *A fortiori*, if this Court applies strict scrutiny SJA prevails.

to withstand an attack under the provisions of the equal protection clause of the fourteenth amendment to the United States Constitution." *Id*. at 605.

MPS will be hard-pressed to come up with a supposed legitimate state interest that was not rejected in that case, especially given the U.S. Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982). In that case, the Supreme Court struck down a Texas statute that provided that children who were in the county illegally were not entitled to a free public education. The Supreme Court concluded that under the Equal Protection clause (applying rational basis scrutiny) there was no rational basis for treating children who were in the country illegally differently than children who were in the county legally when it came to access to educational programs. Although the Supreme Court noted that "[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct," *Id.* at 219, it nevertheless concluded that denying educational programs to children based on their legal status was not rational.

The Supreme Court acknowledged that "[p]ublic education is not a "right" granted to individuals by the Constitution" *Id.* at 221, but the Court concluded that neither cost, nor legal status, nor enforcing immigration laws, nor the burdens of educating certain categories of children provided a rational basis to exclude children who were in the county illegally from participation in public education. *A fortiori*, treating students differently who are in the country legally but whose parents have exercised their fundamental right to have their children attend a private school rather than a public school cannot be justified by any rational basis.

This case is easily distinguished from this Court's holding in *Racine Charter One, Inc. v. Racine Unified School District*, Case No. 03-C-0484, aff'd 424 F.3d 677 (7th Circuit 2005). In that case, this Court considered (and denied) an equal protection claim against the Racine

Unified School District ("RUSD") by a charter school under Wis. Stat. §121.54 for transportation to and from the charter school. This Court pointed out that charter schools are not specifically covered by §121.54 and held that charter schools constitute their own school districts and, thus, another school district (in that case RUSD) had no obligation to transport their students for them. But that is a far different circumstance from a private school. Private schools and private school students are expressly referenced in §121.54 and 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.

Moreover, both this Court and the Seventh Circuit held that the plaintiffs' equal protection claim in *Racine Charter One* was a "class of one" claim and not based on a legislative classification. This case is based on legislative classifications (found in Rule 4.04). Finally, in its decision, the Seventh Circuit regularly 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.

This case is actually very similar to *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). That is the case in which the U.S Supreme Court struck down an amendment to the Food Stamp Act which rendered ineligible any household containing an individual unrelated to any other member of the household on Equal Protection grounds. In that case, individuals were entitled to a benefit by statute (food stamps) and the government tried to distinguish between eligible

beneficiaries by creating a disfavored (ineligible) class of households containing someone unrelated to the other members of the household. Denying benefits to the disfavored class would have saved money, but the Supreme Court found that that was not a rational basis as a matter of law. The purpose of the law was to provide nutritional assistance to people that needed it. *Id.* at 533-34. Excluding the disfavored class interfered with rather than furthering that purpose. As a result, the law was stricken down under the Equal Protection Clause (applying a rational basis analysis). This case is the same.

The purpose of Wisconsin's constitutional amendment and the follow-up enabling legislation was to provide that the same considerations of safety and welfare that support providing transportation to public school students also apply to private school students. *Cartwright*, 40 Wis. 2d at 506. Excluding certain private school students from this benefit interferes with rather than furthers that purpose. Here, under *Deutsch* and *Racine Charter One*, public school students and private school students who live in the City of Milwaukee are similarly situated with respect to receiving transportation benefits from MPS. Nevertheless, MPS by rule treats them differently. MPS has no rational basis for doing so.

1. Neither space considerations nor racial balancing justify MPS's preferential treatment of public school students.

MPS may assert that MPS Rule 4.04(5), itself, provides the rational basis for treating public school students more favorably than private school students. That subsection of the rule is entitled "Racial Balance, Modernization, Overload and Lack of Facility." (McGrath Decl. Ex. E., PPFF ¶44.) MPS will likely argue that the rule was adopted in order to further the purposes or deal with the problems asserted in the title, and MPS will argue that dealing with those problems allegedly provides a rational basis for the rule. But the undisputed facts show that any such argument is without merit.

First, MPS made it clear through the testimony of its designated deposition representative that every public school student who went to an MPS city-wide high school was eligible for transportation without regard to any other factor (Solik-Fifarek Dep. at 36, 117-122; PPFF ¶45) – meaning that racial balance, overcapacity, modernization, etc., were not necessary conditions for providing transportation to public students. As a result, those things do not explain and do not justify the difference in treatment between public school students and private school students.

Second, even without this fact these items do not justify discriminating against private school students with respect to transportation. Three of the matters listed in the title all overlap (modernization, overload, and lack of facility). All of these three deal with the capability of accommodating students at their neighborhood high schools and none of them justify MPS's policy. Modernization was not a factor. MPS has produced in discovery a list of all of the students it transported to its city-wide high schools in the 2016-2017 school year which reflects the zip code where the student lives, their race, their gender, and the name of their neighborhood high school. (Flanders Decl. ¶2, PPFF ¶47.) There were 6,702 such students in the 2016-2017 school year. (Flanders Decl. ¶4; PPFF ¶48.) All of them came from a neighborhood school that was open (not closed for modernization). (Flanders Decl. ¶5; PPFF ¶50.)

"Overload" and "lack of facility" do not justify the policy either. For example, the information supplied by MPS in discovery reflects that 319 students who lived in the attendance area for Bay View High School were transported by MPS to an MPS city-wide high school for the 2016-2017 school year. (Flanders Decl. ¶10; PPFF ¶54.) Pursuant to MPS documents, the capacity for Bay View was 1,478 and its actual attendance for 2016-2017 was 763 students. (Flanders Decl. ¶11; PPFF ¶55.) That means that each and every student that MPS transported out of the Bay View neighborhood could have gone to their neighborhood school. (Flanders

Decl. ¶12; PPFF ¶56.) That is also true for Madison High School, Obama School of Career and Technical Education, and Vincent High School. (Flanders Decl. ¶13; PPFF ¶57.) The numbers are as follows:

Neighborhood School	#of students transported	Capacity	Attendance
Bay View	319	1,478	763
Madison	636	1,731	732
Obama	699	1,559	657
Vincent	343	1,498	1,059
Total	1,997	6,266	3,211

(Flanders Decl. ¶14; PPFF ¶58.)

These 1,996 students were not transported because of any space or capacity problems. All of them could have been accommodated at their neighborhood high schools.

There are some MPS high schools where space could have been a problem. (Flanders Decl. ¶15; PPFF ¶59.) South Division is a good example of this. (*Id.*) MPS transported 899 students out of the South Division neighborhood and into city-wide schools. (Flanders Decl. ¶16; PPFF ¶60.) The capacity of South Division is 1,559 and its actual attendance in 2016-2017 was 1,203. (Flanders Decl. ¶17; PPFF ¶61.) That means that while there was room for 356 of the 899 students who were transported out, there could have been a space problem for the remaining 543 students. (Flanders Decl. ¶18; PPFF ¶62.) This space problem, however, does not justify MPS' transportation policy for three separate reasons.

First, it does not justify transporting 356 of the 899 students. They could have been accommodated at South Division. Second, 38 of the 68 SJA students involved in this case also lived in the South Division attendance area. (Gessner Decl. ¶16; PPFF ¶63.) MPS should have been equally willing to transport them to SJA in order to avoid any capacity problem at South Division, their neighborhood public school. As shown in the chart attached to the Gessner

Declaration as Exhibit C, the same thing is true for all of the remaining SJA students. They each lived in the attendance area of an MPS neighborhood school from which MPS transported students to one of its city-wide schools. (Gessner Decl. ¶16; PPFF ¶34.)

These private school students (just like the students who attend the MPS city-wide schools) have the option to attend their neighborhood MPS high school. Thus, if these schools had space problems, MPS should want to transport these students to either an MPS or a private city-wide school. Transporting them to either achieves exactly the same benefit from a space consideration. Space concerns at the neighborhood schools are not addressed by discriminating against private school students.

Third, it ignores that MPS has no overall capacity problem. The total capacity of all MPS high schools in 2016-2017 was 24,860 excluding alternative schools. (Flanders Decl. ¶19; PPFF ¶64.) The total attendance at all MPS high schools for that year was 19,864. (*Id.*) That means that there was no over-crowding problem – MPS had 4,996 empty high school seats for that school year. (Flanders Decl. ¶20; PPFF ¶65.) Unless there was some truly unique distribution of the student population (like all of the students lived south of the Menomonee River and none lived north of the Menomonee River leaving all of the schools on the south side over-populated and all of the schools on the north side empty) then any over-crowding at an individual school was simply a matter of line-drawing. Given the over-all number of vacant seats (20% of the total available high school seats were vacant), it would be relatively simple to draw attendance area lines such that no school was overcrowded. (Flanders Decl. ¶21; PPFF ¶66.)

"Modernization, overload and lack of facility" do not justify Rule 4.04(5). Thousands of MPS students were transported from their neighborhood school who could have been easily accommodated at their neighborhood high school and, thus, those students were treated

differently and better than the similarly situated students attending SJA. Moreover, if a particular MPS neighborhood high school actually had a capacity problem then MPS should have been equally willing to transport students out of that neighborhood to private city-wide schools as well as public city wide schools, but it refused to do so.

Nor did the transfers of public school students from their neighborhood schools to City-wide high schools achieve racial balance. Each of their neighborhood high schools became more segregated after the transfers than they were before the transfers. (Flanders Decl. ¶22; PPFF ¶67.) The minority population of each neighborhood school increased as follows:

School Name	% Minority w/o Transportation	% Minority w/ Transportation
BAY VIEW HS	71.09%	86.96%
HAMILTON HS	82.91%	87.40%
MADISON ACADEMIC HS	95.77%	97.53%
MORSE MARSHALL MS & HS	92.39%	97.21%
NORTH HS	98.08%	99.49%
OBAMA SCTE	97.16%	98.66%
PULASKI HS	86.38%	94.29%
RIVERSIDE UNIVERSITY HS	89.86%	95.83%
SOUTH DIVISION HS	93.71%	95.15%
VINCENT HS	96.51%	97.75%
WHS OF INFORMATION TECHNOLOGY	95.28%	97.87%

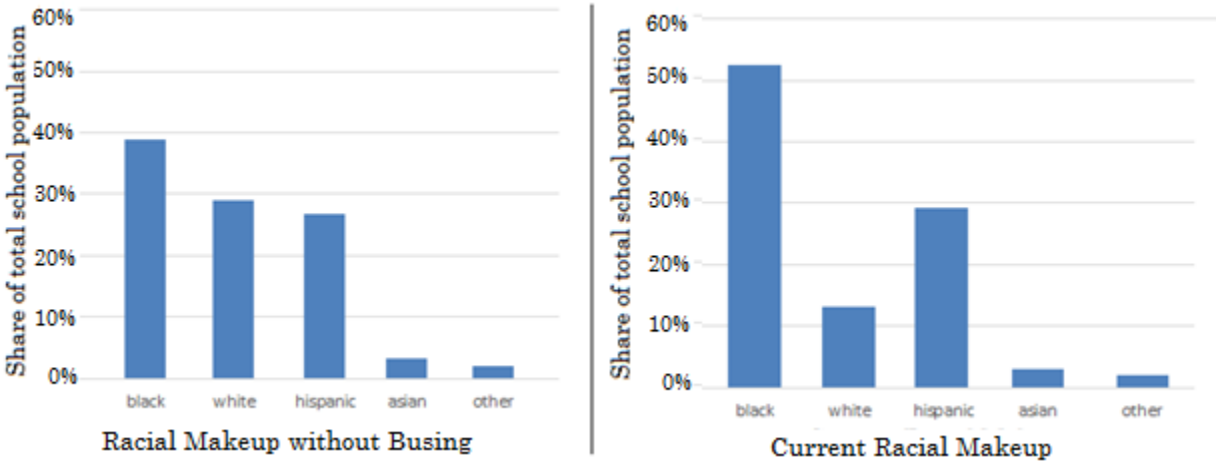
(Flanders Decl. ¶23; PPFF ¶68.) Similarly, the white population of each neighborhood school decreased and each school became more segregated. (Flanders Decl. ¶24; PPFF ¶69.)

Most emblematic of the problem is the case of Bayview High School. The chart below shows the racial composition of the school currently and under a scenario where busing to city-wide schools did not occur.[12] The left-hand side of the chart depicts a school that is relatively racially balanced given the constraints of Milwaukee demographics. African Americans would represent approximately 38% of the school's population, with whites and Hispanic students each

[12] The Chart is based on the data in Flanders Decl. Ex. D.

representing just over 25%. After busing, however, the racial balance of the school changes dramatically. The number of white students in the school is cut in half – from 28% to 13%. The percentage of African American students in the school increases from 38% to 52%. The school changes from being racially balanced to racially imbalanced.

Figure 1. Racial Makeup of Bayview High School, Without Busing and Currently



Because MPS is a majority-minority school district, meaning that minorities make up the majority of the population of MPS, the clearest way to show the segregation level of a school is to look at the minority percentage of the population at the school. (Flanders Decl. ¶25; PPFF ¶70.) If the minority percentage goes up then the white percentage must go down and the school is more segregated. (Flanders Decl. ¶26; PPFF ¶71.) For example, a school with a population of 600 African-American students, 100 other minority students and 300 white students would be 70% minority. If you transported out 50 of the African-American students, 50 of the other minority students and 100 of the white students to city-wide schools (leaving 550 African-American students, 50 other minority students and 200 white students) you would increase the minority population to 75%. That is what MPS has done under Rule 4.04(5).

By disproportionately transporting more white students than other students under Rule 4.04(5), MPS has increased the minority population of the neighborhood high schools. This is the exact opposite of racial balancing. And if racial balance was one of the goals of Rule 4.04(5), why would it justify denying transportation benefits to SJA which, like MPS high schools, is a minority-majority school? (Gessner Decl. ¶5; PPFF ¶10.)

2. The July 1st deadline does not justify MPS's preferential treatment of public school students.

MPS may argue that its July 1st deadline is necessary to make the logistical arrangements necessary to provide transportation to students for the school year that starts in the Fall. That was certainly the position of the MPS representative at his Rule 30(b)(6) deposition. (Solik-Fifarek at 52-56; PPFF ¶25.) But it does 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 or by the third Friday in September[13]. (*Id.*)

It is the case that Wis. Stat. §121.54(2)(b)4 obligates private schools to provide a roster to school districts by May 15th each year. But that statute does not take away the transportation rights from students and their families granted under the statute if that deadline is not met, and that section of the statutes does not apply to MPS because MPS has exercised the City Option (which means that none of subsection 121.52(2) applies to MPS). Rather, MPS was entitled to create its own rules, but in creating those rules MPS was required to treat public school and private school students with reasonable uniformity. Applying a deadline to one set of students that does not apply to another similarly situated set of students violates this requirement. It

[13] The deadline for private school students under Rule 4.04(2)(b)4.

certainly does not further any state policy in such a way so as to provide a rational basis for discrimination under the Equal Protection Clause.

The undisputed facts show that MPS treats similarly situated students differently if they attend private schools versus public schools, both under the "one mile from a public bus stop" and the "July 1st deadline" rules. That is a violation of the Equal Protection Clause.

B. MPS intentionally violated the rights of SJA and the 68 SJA students.

MPS knew when it denied transportation benefits to the 68 SJA students that it was treating them differently than similarly situated public school students and it was doing so because of a rule that MPS, itself, created. Moreover, prior to this action, the Plaintiff sent a Notice of Claim to MPS under Wis. Stat. §893.80. (McGrath Decl. ¶18, Ex. I; PPFF. ¶75.) The Notice of Claim stated, among other things, that:

> Although St. Joan Antida has asked MPS to provide a written explanation as to why MPS is not providing transportation for these students, MPS has not done so. MPS provides transportation for public school students in the same circumstances that it is denying transportation to these students. In that regard, we point out that MPS provides transportation to all Milwaukee public high school students who attend a city-wide school so long as they live more than 2 miles from the school. All 70 students involved here meet those requirements. By discriminating against these students who attend a private religious school, *MPS is violating its statutory obligation to treat them with reasonable uniformity with public school students as required by Wis. Stat. §121.54(1)(b) and violating their rights to Equal Protection under the Wisconsin and U.S. Constitutions.* (emphasis added)

Despite having this specific information, MPS did nothing to address the problem of the 68 SJA students, and did nothing to change its policies or to change Rule 4.04. Knowledge of the law and the failure to follow the law is proof of intent. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (holding that a public official's violation of clearly established statutory or constitutional rights is sufficient to establish intent). *See also Anderson v. Creighton*, 483 U.S. 635, 649, n. 2 (1987) (government officials can be expected to have basic knowledge of

constitutional rights (even in the absence of those rights being brought to their attention)); *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988) (public officials are charged with knowledge "if the appropriate legal standard is, by objective standards, clearly established at the time the official undertook the activity at issue").

Moreover, the MPS Superintendent was the defendant (the losing defendant) in *Deutsch v. Teel* and, as a result, MPS knew that it was obligated under the Equal Protection clause to treat private school students the same as public school students when it came to transportation benefits. Thus, it would be preposterous to argue that MPS's conduct here was some type of innocent mistake based upon lack of knowledge.

C. MPS acted under color of state law.

"'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" *Schreiber v. Joint School Dist. No. 1, Gibraltar*, Wis., 335 F. Supp. 745, 747 (E.D. Wis. 1972) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). Here, under the City Option created by Wis. Stat. §121.54(1), MPS had the discretion to set its own transportation policies (subject to the requirement that it treat public and private students with reasonable uniformity). It took action to exercise its authority under that statute by adopting Rule 4.04. It was "clothed with authority of state law" to create that policy – that is action taken under color of state law.

Under federal law, a municipality that makes a discretionary decision under the authorization of a state statute is liable under §1983. *Snyder v. King*, 745 F.3d 242, 247 (7th Cir. 2014). Choosing a particular action that is permitted by state law is a "deliberate choice [by the municipality] to follow a course of action . . . made from among various alternatives." *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986). By choosing an unconstitutional method of following

§121.54, MPS has adopted its own policy, making it liable under §1983. *See N.N. ex rel. S.S. v. Madison Metro. Sch. Dist.*, 670 F. Supp. 2d 927, 937 (W.D. Wis. 2009).

All of the elements of a §1983 violation are present in this case. SJA and its students had a constitutional right to equal protection that was violated by MPS. The violation was intentional and it was done under color of law. As a result, SJA is entitled to summary judgment on its claim under §1983.

II. MPS HAS VIOLATED WIS. STAT. §121.54

In addition to SJA's federal Equal Protection claim, SJA has also asserted a state law claim under Wis. Stat. §121.54. This Court has supplemental jurisdiction under 28 U.S.C. §1367 to rule on that claim as well.

It is undisputed that MPS has exercised the "City Option" as set forth in Wis. Stat. §121.54(1) (Complaint ¶22; Answer ¶22; PPFF ¶7.) It is also undisputed that MPS has elected under the City Option to provide transportation to its own students. *See* Rule 4.04. (McGrath Decl. Ex. E.) Under Section 121.54(1)(b), therefore, MPS is entitled to state aid under §121.58 and there must be "reasonable uniformity in the transportation furnished to the pupils, whether they attend public or private schools." MPS received state aid under §121.58 for the 2016-2017 school year in the amount of $2,322,123. (McGrath Decl. ¶20, Ex. J; PPFF ¶72.) That included aid under §121.58 for transporting students to its city-wide schools. (McGrath Decl. Ex. C; Solik-Fifarek Dep. at 82; PPFF ¶73.) But MPS did not treat students that attend private schools with reasonable uniformity to those that attend public schools.

In *St. John Vianney Sch. v. Bd. of Educ. of Sch. Dist. of Janesville*, 114 Wis. 2d 140, 154 (Ct. App. 1983) the Wisconsin Court of Appeals held that the meaning of "reasonable uniformity" under the statute was ambiguous. It held, however, that at a minimum it "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 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*.

Thus, whatever distance rules that MPS applies to public school students it must also apply to private school students. Under Rule 4.04(5), MPS has chosen a rule that all public school students who live more than two miles from a city-wide school are entitled to free transportation. Under Wisconsin law, MPS must apply the same distance rule to private school students who attend a city-wide school.

Logically, the same thing is true for time deadlines. Nothing in Wis. Stat. §121.54 allows MPS to impose a deadline on private schools that it does not impose on public schools, 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.

Even if MPS has a rational basis for its policy of discrimination (which SJA disputes), that is not a defense to the state law claim. There is no exception in the statute. The statute does not say that there must be "reasonable uniformity" unless the public school district can come up with a reason for not doing so. It is a blanket rule.

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 with reasonable uniformity with public school students, as required by Wis. Stat. §121.54(1)(b), and SJA is entitled to summary judgment on its state claim.

CONCLUSION

SJA respectfully requests that this Court grant it summary judgment on the merits of its claim, grant SJA a declaratory judgment stating that MPS violated Wis. Stat. §121.54 and 42 U.S.C. §1983 by refusing to transport the 68 students to SJA, and an injunction prohibiting MPS from discriminating against students who attend private schools with respect to transportation benefits. SJA also requests that this Court set this case for a trial to determine damages, and that this Court determine costs and attorneys' fees under 42 U.S.C. §1988.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff

Date: _____

/S/ RICHARD M. ESENBERG

Richard M. Esenberg, WI Bar No. 1005622
414-727-6367; rick@will-law.org
Charles J. Szafir, WI Bar No. 1088577
414-727-6373; cj@will-law.org
Brian W. McGrath, WI Bar No. 1016840
414-727-7412; brian@will-law.org
Libby Sobic, WI Bar No. 1103379
414-727-6372; libby@will-law.org
Wisconsin Institute for Law & Liberty
1139 East Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385