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.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The defendant, the Milwaukee Board of School Directors of the Milwaukee Public School District ("MPS"), by its attorney, Grant F. Langley, City Attorney, represented by Calvin V. Fermin and Naomi E. Gehling, Assistant City Attorneys, hereby provides this brief in support of its motion for summary judgment.

This action arises out of the plaintiff's, St. Joan Antida High School ("SJA"), following allegations: (1) MPS's pupil transportation policy as applied to pupils of SJA violates the Equal Protection Clause of the Fourteenth Amendment; and (2) MPS's pupil transportation policy as applied to pupils of SJA violates applicable Wisconsin statutes regarding pupil transportation.

The parties in this case do not dispute the material facts related to the plaintiff's allegations.

FACTUAL BACKGROUND

This case concerns the denial of pupil transportation services for the plaintiff, SJA, and SJA's pupils by the defendant, MPS. SJA is an independent female-only private high school located in the City of Milwaukee. (Defendant's Proposed Findings of Fact ("DPFF") ¶ 1). SJA participates in the Milwaukee Parental Choice Program. (DPFF ¶ 2). SJA has an attendance area, and its attendance area encompasses the entire City of Milwaukee. (DPFF ¶ 7). In the 2016-2017 school year, SJA had an enrollment of 145 pupils. (DPFF ¶ 19).

MPS is a first class city school district in the state of Wisconsin. (DPFF ¶ 3). In the 2016-2017 school year, MPS had an enrollment of approximately 76,234 pupils in 159 schools. (DPFF ¶ 20). MPS has broken down the City of Milwaukee into attendance areas (both for elementary schools and for high schools), with one school as the designated attendance area school (or neighborhood school). (DPFF ¶ 8). MPS's attendance areas do not overlap (within the respective elementary or high school breakdown). (DPFF ¶ 8). Additionally, MPS has Citywide Specialty high schools that do not have an attendance area. (DPFF ¶ 9). MPS's Citywide Specialty high schools have special programs or areas of study such as the arts, International Baccalaureate (IB), Montessori, language immersion, or gifted and talented programs. (DPFF ¶ 10). MPS does not offer these special programs in all of its high schools. (DPFF ¶ 10).

In Wisconsin, pupil transportation services provided by a school district are governed by Wis. Stat. § 121.54. Generally, a school district must provide transportation services to all public and private school pupils who live two or more miles from the school they attend. Wis. Stat. § 121.54(2)(a) & (b)1. However, under the City Option, a

first class city school district, like MPS, is exempt from the requirements of providing pupil transportation where a common carrier of passengers operates within the city. Wis. Stat. § 121.54(1)(c). Here, MPS has exercised the City Option and, therefore, is not required to provide pupil transportation services. (DPFF ¶ 21). Because MPS is operating under the City Option, it can determine its own transportation policies subject to the requirements of Wis. Stat. § 121.54(1)(b). (DPFF ¶ 22).

MPS has established a pupil transportation policy as set forth in MPS Administrative Policy 4.04. (DPFF ¶ 25; Complaint, Ex. A). MPS's pupil transportation policy governs the transportation services MPS provides to public and private school pupils who reside within the Milwaukee Public School District. (DPFF ¶¶ 25-31). For high school pupils, the general rule is that if the pupil is enrolled in his/her designated attendance area school, the pupil will receive transportation services if the pupil lives two or more miles from the school and more than one mile from public transportation. (DPFF ¶¶ 26-27). The general rule applies to both public school pupils, (DPFF ¶ 26), and private school pupils. (DPFF ¶ 27). Because Milwaukee County has a robust bus transit system, especially within the City of Milwaukee, the effect of the general rule is that MPS generally does not provide transportation to pupils attending their attendance area high school[1]. (DPFF ¶ 29). MPS's pupil transportation policy further states that if a public school pupil is enrolled at another attendance area high school (not the school in his/her attendance area), the pupil will receive transportation services if the pupil lives two or more miles from the school. (DPFF ¶ 30). The pupil transportation policy also

[1] MPS's policy for elementary schools removes the "within one mile of public transportation" requirement within the attendance area. (MPS Administrative Policy 4.04(2)(a)1. & (b)1.; Complaint, Ex. A). As such, MPS does provide transportation to some public and private elementary school pupils within their attendance area. While not at issue here, MPS makes this distinction because it has concerns about the safety of these younger pupils even on a public transit bus.

states that if a public school pupil is enrolled at a Citywide Specialty high school (non-attendance area school), the pupil will receive transportation services if the pupil lives two or more miles from the school. (DPFF ¶ 31). MPS's pupil transportation policy also requires a private school to submit the names, grade levels, and locations (addresses) of eligible pupils to MPS no later than the third Friday in September. (DPFF ¶ 34).

However, in practice, MPS actually requires private schools to submit the roster of eligible pupils to MPS by July 1st of each year. (DPFF ¶ 35). Only those pupils on the roster submitted by the private school may receive transportation services if otherwise eligible. (DPFF ¶ 34). MPS does not apply the same July 1st deadline (or any deadline) on itself with respect to providing transportation for its own pupils. (DPFF ¶ 37).

In the 2016-2017 school year, SJA sought transportation services from MPS for 68 of its pupils. (DPFF ¶¶ 44-46). MPS declined to provide transportation services to SJA's 68 pupils. (DPFF ¶ 47). Of the 68 pupils, 61 pupils were denied transportation by MPS because they live within one mile of a public bus stop, six pupils were denied transportation by MPS because they were not on SJA's July 1st roster, and one pupil was denied transportation by MPS because the pupil lives within two miles of SJA. (DPFF ¶ 48). However, all 68 SJA pupils that were denied transportation services by MPS also live within one mile of a public bus stop. (DPFF ¶ 49). SJA challenges MPS's pupil transportation policy as it applies to SJA's 68 pupils who were denied transportation services by MPS.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *See Anderson*, 477 U.S. at 248. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*.

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

On summary judgment, courts must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *See CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014).

ARGUMENT

MPS moves for summary judgment in its favor on all claims and requests that this Court dismiss the plaintiff's complaint in its entirety. MPS supports its request for summary judgment with the following arguments.

I. MPS's pupil transportation policy as applied to pupils of SJA does not violate the Equal Protection Clause of the Fourteenth Amendment.

"The Equal Protection Clause of the Fourteenth Amendment 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 Center*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440.

"The general rule gives way, however, when a statute classifies by a suspect class such as race, alienage, or national origin." *Id*. "[T]hese laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Id*. "Similar [strict scrutiny] oversight by the courts is due also when state laws impinge on fundamental rights protected by the Constitution." *Id*.

A. MPS's pupil transportation policy does not classify based on a suspect class or fundamental right.

Here, MPS's pupil transportation policy does not classify on the basis of race, alienage, or national origin. SJA is challenging MPS's pupil transportation policy's impact on its private school pupils, but private school pupils are not a suspect class. S*ee, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) ("[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful

unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"). There are no facts in the record to show that private school pupils have been relegated to a position of political powerlessness due to being saddled with such disabilities or subjected to such a history of purposeful unequal treatment. *See, e.g., Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 675 (7th Cir. 1987) (Applying rational basis standard to private school plaintiffs, in part, because private schools are not a suspect class).

Similarly, the classification of private school pupils does not impinge upon a fundamental right. SJA does present the fact that it is a religious school, (Complaint ¶ 12), but "[t]he fact that this statute affects a religious group or institution does not necessarily mean that the policy classifies on the basis of religion." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 639 (7th Cir. 2007). MPS's pupil transportation policy does not classify on the basis of religion because it applies equally to all private schools. In Wisconsin, a private school is an institution whose primary purpose of its educational program "is to provide private *or* religious-based education." Wis. Stat. § 118.165(1)(a) (emphasis added). Thus, a private school need not be a religious-based school and may be secular in its programming. S*ee, e.g., Jackson v. Benson*, 218 Wis.2d 835 (1998) (discussing the involvement of sectarian and non-sectarian private schools in the Milwaukee Parental Choice Program). Thus, the classification of private schools in MPS's pupil transportation policy is not a religious-based classification, and, therefore, there is no classification that impinges on a fundamental right.

B. Plaintiff's Equal Protection claim does not satisfy the requirements of the "Class of one" test.

"The Equal Protection Clause of the Fourteenth Amendment prohibits state action that discriminates on the basis of membership in a protected class or irrationally targets an individual for discriminatory treatment as a so-called 'class of one.'" *Reget v. City of La Crosse*, 595 F.3d 691, 695 (7th Cir. 2010). Here, because SJA is not being discriminated against based on membership in a protected class, the class-of-one theory applies. *See, e.g., Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677 (7th Cir. 2005) (Applying the class-of-one analysis to a charter school's equal protection claim challenging the denial of pupil transportation services by a Wisconsin school district). "A plaintiff alleging a class-of-one equal-protection claim must establish that (1) a state actor has intentionally treated him differently than others similarly situated, and (2) there is no rational basis for the difference in treatment." *Reget*, 595 F.3d at 695 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

i. SJA is not similarly situated to MPS Citywide high schools, and pupils of SJA are not similarly situated to pupils of MPS Citywide high schools.

"To be similarly situated for a class-of-one equal-protection claim, the persons alleged to have been treated more favorably must be identical or directly comparable to the plaintiff in all material respects." *Reget*, 595 F.3d at 695; *see also Racine Charter One*, 424 F.3d at 680. "While this is not a 'precise formula,' it is nonetheless 'clear that similarly situated individuals must be very similar indeed.'" *Reget*, 595 F.3d at 695 (quoting *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004).

"Various factual traits, circumstantial nuances, and peculiarities can set entities apart, rendering them, by virtue of their differences, amenable to disparate treatment."

Racine Charter One, 424 F.3d at 681. SJA is not similarly situated to MPS schools for many reasons. First, SJA has enrollment discretion as a private school because it has no legal requirement to provide educational services to any particular child. *See, e.g., Benson*, 218 Wis.2d at 894, ¶ 87 ("[W]e conclude that the mere appropriation of public monies to a private school does not transform that school into a district school under art. X, § 3," a reference to the provision in the Wisconsin Constitution that requires district schools to be as nearly uniform as practicable and free and without charge for tuition to all children). As such, it may turn away pupils, to include if it has reached capacity at its school. Conversely, MPS must educate all district pupils that choose to enroll at MPS. Wis. Const. art. X, § 3; *see also Vincent v. Voight*, 236 Wis.2d 588, 624, ¶ 51 (2000) ("The legislature has articulated a standard for equal opportunity for a sound basic education in Wis. Stat. §§ 118.30(1g)(a) and 121.02(L)"). MPS may not turn away any pupils who reside in the school district; even if a particular attendance area high school has reached its capacity, MPS must still educate any other pupils in that attendance area that seek to enroll in MPS. Next, SJA can – and does – charge tuition, (DPFF ¶ 60), and SJA can charge for pupil transportation services as a private school with a privately controlled program. Wis. Stat. § 118.165(1). MPS cannot charge tuition, Wis. Const. art. X, § 3, nor can MPS charge for pupil transportation services. *Id.*; Wis. Stat. § 121.54(8)(a). Thus, these differences show that SJA and MPS schools are not identical or directly comparable in all material respects.

SJA also, and more specifically, is not similarly situated to MPS Citywide Specialty high schools. SJA is a single, independent school. MPS Citywide Specialty high schools are part of the collective MPS school district system. SJA has an attendance

area as mandated by Wis. Stat. § 121.51(1). (DPFF ¶ 7). MPS Citywide Specialty high schools do not have an attendance area. (DPFF ¶ 9). MPS Citywide Specialty high schools do not have attendance areas primarily because they provide special programs to the entire district that are not available in all attendance area high schools. (DPFF ¶ 9). Thus, SJA is not similarly situated to MPS Citywide Specialty high schools. To the extent that SJA is similarly situated to an MPS school, it is similarly situated to an MPS attendance area high school and not an MPS Citywide Specialty high school.

This distinction is important because MPS's pupil transportation policy treats those pupils who are attending their private attendance area high school the same as those pupils who are attending their public attendance area high school. (DPFF ¶ 28). Pupils of SJA are enrolled in the private attendance area high school they normally would attend (are entitled to attend). Wis. Stat. § 121.51(1). Likewise, pupils of MPS attendance area high schools are enrolled in the public attendance area school they normally would attend. Wis. Stat. § 121.845(1); *see also State ex rel. Vanko v. Kahl*, 52 Wis.2d 206, 215 (discussing the history of Wisconsin attendance areas and the private school attendance area statute and finding that "it is clear that the intent, effect and result is to establish an area or proximity basis as the general rule for determining which schools pupils are to be assigned to, public, private or parochial"). Thus, because MPS's pupil transportation policy treats pupils of SJA (an attendance area high school) the same as it treats pupils of MPS attendance area high schools, there is no differing treatment between these two groups, and, therefore, there is no equal protection violation.

Likewise, SJA's pupils are not similarly situated to pupils of MPS Citywide Specialty high schools by virtue of the differences in the schools they attend. *See, e.g.,*

Racine Charter One, 424 F.3d at 681 ("Indeed, a student's situation is, at least in part, a product of the school that he or she attends."). To further flesh out the distinctions, SJA's pupils generally are paying tuition for their education as they are attending a tuition-based private school, (DPFF ¶ 60), whereas, pupils of MPS are provided tuition-free education. Wis. Const. art. X, § 3. SJA's pupils elect to go to SJA. Wis. Stat. §§ 118.165(1)(b) & 119.23(2)(a); *see, e.g., Benson*, 218 Wis.2d at 883, ¶ 66 (Discussing how the Milwaukee Parental Choice Program does not require a student to attend class at a private school). Conversely, MPS pupils are attending their state-sponsored and state-mandated public school. Wis. Const. art. X, § 3; Wis. Stat. § 119.16(2). Thus, SJA's pupils should not be considered similarly situated because they are not "identical or directly comparable in all material respects." *See Reget*, 595 F.3d at 695. Again, to the extent that SJA's pupils may be similarly situated to MPS pupils, they are similarly situated to those MPS pupils who are enrolled in the attendance area high school they normally would attend, just as SJA's pupils are enrolled in the attendance area high school they normally would attend; MPS's pupil transportation policy does not treat these groups of pupils differently. (DPFF ¶ 28).

SJA might argue that SJA and its pupils are similarly situated to MPS Citywide Specialty high schools and its pupils because some of the pupils at each school have to travel the same distance (up to the entire City of Milwaukee), but such an argument overlooks the key differences between these groups of pupils discussed above. As such, the similarity in the distance *some* of SJA's pupils travel in comparison to the distance *some* of MPS's pupils travel should not transform these groups of pupils into similarly situated groups. In fact, a similar argument was raised in *Racine Charter One* – a case

first heard by this Court before being appealed to the Seventh Circuit Court of Appeals – where the plaintiff pointed to the similarity in the distance traveled to show that the different groups of pupils were "similarly situated." 424 F.3d at 681. The Seventh Circuit summarized the argument there as follows:

> More accurately, the comparison pits RUSD public and private school students who reside within the RUSD, who live one and one-half miles or more from their school or encounter hazardous conditions along the school route, and who do receive busing, against Charter One students who reside within RUSD, who live one and one-half miles or more from their school or encounter hazardous conditions along the school route, and who do *not* receive busing.

Id. (emphasis in original). The court ultimately found the two groups of pupils not to be similarly situated despite the similarity in the distance traveled because of various other differences between the two groups. *Id*. at 683 (Accordingly, we affirm the district court's finding that Charter One has failed to show that its students are similarly situated to those students who do receive the busing benefit). Thus, the mere fact that some of SJA's pupils travel the same distance as some of the pupils at MPS Citywide Specialty high schools should not make the two groups similarly situated.

Furthermore, the distance SJA's pupils travel is a situation entirely within SJA's control as it sets the size of its own attendance area. Wis. Stat. § 121.51(1). The fact that SJA has set its attendance area to encompass the entire City of Milwaukee should not mean that it now becomes equivalent to an MPS Citywide Specialty high school. Such a conclusion actually creates an Equal Protection violation from those private schools that either do not or cannot set their attendance area to encompass the entire city. For example, those private school entities that operate multiple schools cannot have their attendance areas overlap. Wis. Stat. § 121.51(1); *see also Vanko*, 52 Wis.2d at 215 ("In such establishment of an 'attendance area' approach, there is no authorization of

overlapping boundary lines, and no reason to read such into the statute. We read the statute as not authorizing or permitting overlapping in attendance area boundary lines as to all private schools affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious.").

Thus, if a private school operates two or more schools, then it is not able to have an attendance area that covers the entire City of Milwaukee because there would be no geographic area left for the other school(s) if it tried to do so. There are private school operators with multiple schools within the City of Milwaukee. (DPFF ¶ 18). Thus, following SJA's logic, these private schools would not be "similarly situated" to MPS Citywide Specialty high schools, but independent private schools such as SJA would be "similarly situated" so long as they have set the entire city as their attendance area. This would truly create an Equal Protection violation where one private attendance area school is receiving a different treatment than another private attendance area school. The more common sense conclusion is that all private schools are similarly situated to each other, but a private school (with an attendance area) is not similarly situated to an MPS Citywide Specialty school (without an attendance area).

ii. There is a rational basis for MPS's differing treatment of pupils of MPS Citywide schools and pupils of SJA.

"'A classification neither involving fundamental rights nor proceeding along suspect lines … cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319-320 (1993)); *accord F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (holding that in areas of social and economic policy, a statutory

classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification). Courts are not to pronounce a "classification 'unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.'" *Armour*, 566 U.S. at 681 (quoting *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

"To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15 (1992); *see also Beach Commc'ns*, 508 U.S. at 315 (Under rational-basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Courts are "compelled under rational-basis review to accept a legislature's generalizations even where there is an imperfect fit between means and end," *Heller*, 509 U.S. at 321, and a classification "does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id*. (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). Because the statute (or policy) is presumed constitutional, "'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller*, 509 U.S. at 320 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). Here, MPS has a number of legitimate governmental purposes that support the rational basis of the classification.

Essentially, the classification that is being made by MPS's pupil transportation policy is as follows: pupils who attend their attendance area high school versus pupils who attend a school other than their attendance area high school, either in another attendance area or in a Citywide (non-attendance area) Specialty high school. SJA argues that the Citywide Specialty high school classification treats SJA and its pupils differently without a rational basis because MPS is excluding SJA from the benefits of the Citywide policy provision. Stated more precisely, SJA is alleging that MPS's policy concerning pupils who attend a Citywide Specialty high school should apply to them, but that simply is contrary to Wisconsin law. SJA's exclusion from this policy provision is principally a result of the requirements of Wis. Stat. § 121.51(1). Private schools are required to have an attendance area, which is "the geographic area designated by the governing body of the private school as the area from which its pupils attend." Wis. Stat. § 121.51(1). Thus, SJA (as a private school) must have an attendance area, and SJA can only accept pupils from within its attendance area. As such, unlike MPS, SJA cannot encounter the situation where it may or must send its pupils to another attendance area high school or to a non-attendance area school.

SJA focuses its comparison to MPS Citywide Specialty high schools because these Specialty high schools accept pupils from throughout the City of Milwaukee and SJA has set an attendance area that encompasses the entire City of Milwaukee. However, SJA's comparison ignores that MPS also has attendance areas as required by law. Wis. Stat. § 119.16(2) & § 121.845(1). MPS has broken down the city into attendance areas (within categories of elementary schools and high schools) and has an attendance area school within each attendance area. (DPFF ¶ 8). Thus, the more proper comparison is

pupils attending SJA (their attendance area high school) to those pupils attending their designated MPS attendance area high school. The Citywide Specialty high school concept is an exception to the general attendance area requirement that allows MPS to meet certain obligations and to address certain problems that SJA does not face.

First, for example, MPS pupils may have to attend another attendance area high school (or Citywide school) if the capacity of their attendance area high school is insufficient to accept all the pupils within that attendance area. SJA tries to argue that this is not a problem for MPS, but then it acknowledges that there are some MPS high schools where space could have been a problem in terms of accepting all pupils who reside within the school's attendance area (DPFF ¶ 53; Flanders Decl. ¶ 15), and provides as an example the capacity issue South Division would have if all attendance area pupils had to go to that school. (DPFF ¶ 54; Flanders Decl. ¶¶ 16-18). Similarly there are three other attendance area high schools with a similar capacity issue. (DPFF ¶ 55). As such, overload is a rational basis for MPS having some of its pupils attend another attendance area high school (or a Citywide Specialty high school), particularly since MPS is required to provide education to all children within the school district. Wis. Const. art. X, § 3.

Second, Wis. Stat. § 121.85 allows a school district to have "minority group pupils" attend a public school other than the pupil's attendance area high school, Wis. Stat. § 121.85(2)(b)1, and the school district receives additional state aid under this "Special Transfer" statute. Wis. Stat. § 121.85(6). SJA goes to great lengths to show that racial balance is not a rational basis as it applies to MPS's pupils by analyzing the racial composition of the MPS attendance area high schools after the transfers to MPS Citywide

Specialty high schools. But, SJA overlooks that the Special Transfer provisions allow for transfers as follows:

> "By minority group pupils who reside in an attendance area where minority group pupils constitute 30 percent or more of the number of pupils enrolled in the school serving that attendance area and which the pupil normally would attend, from that school to another school within the district where minority group pupils constitute less than 30 percent of the number of pupils enrolled in that school *or to a school serving the entire district*."

Wis. Stat. § 121.85(2)(b)1. (emphasis added). MPS high schools are minority-majority schools, meaning that minority group pupils make up the majority of the population within an attendance area high school, (DPFF ¶ 23), and, therefore, MPS high schools meet the first criteria of the minority group pupils constituting 30 percent or more of the pupils enrolled in the attendance area high school. Thus, the Special Transfer provisions allow MPS to transfer pupils from their attendance area high school to a Citywide Specialty high school (a school serving the entire district) without concern for the composition of the receiving Citywide Specialty high school. There are two bases for that distinction. The first basis is that the Citywide Specialty high school is offering special programs that are not available in every attendance area high school (such as gifted and talented programs as required under Wis. Stat. § 118.35(3)), (DPFF ¶ 10), and, therefore, the special transfer is providing these minority group pupils access to these special programs that they might not otherwise receive at their neighborhood school. The second basis is that the Citywide Specialty high school does not have an attendance area, and, therefore, there is no pre-transfer racial composition of the Citywide Specialty high school for such an analysis (one would have to use the racial composition of the entire school district, which would not make much sense). Thus, racial balance – or more aptly,

racial equality – as governed by Wis. Stat. § 121.85 is a rational basis for MPS's classification of its Citywide Specialty high schools.

Third, and as alluded to above, MPS Citywide Specialty high schools provide special programs that MPS cannot offer at every attendance area high school, such as the arts, International Baccalaureate (IB), Montessori, language immersion, or gifted and talented programs. (DPFF ¶ 10). While in a perfect world MPS would offer these special programs in all of its schools, currently MPS cannot offer these special programs in all attendance area high schools because there are limited qualified teachers and limited resources that do not allow MPS to offer all programs in all 159 of its schools. (DPFF ¶¶ 13-17). For example, heading into the 2017-2018 school year, MPS had to cut 96 teacher positions due to budget constraints. (DPFF ¶ 16). But, given MPS's teacher recruitment and retention issues, those cuts did not result in any lay-offs due to vacancies and turnover in the teacher positions. (DPFF ¶ 16). As such, MPS must maximize the teachers and resources it has for these special programs by offering these programs in the Citywide Specialty high schools that serve the entire district.

The Citywide Specialty high school programs are essential to providing the best education possible to all pupils, and MPS seeks to remove barriers to these special programs for all pupils. (DPFF ¶ 11). Additionally, MPS Citywide Specialty high schools are a means to closing the achievement gap, both the achievement gap between low-income pupils and all pupils, Wis. Stat. § 118.44(1)(a), as well as the achievement gap between minority pupils and all pupils[2]. (DPFF ¶ 12). MPS's Citywide Specialty

[2] A discussion of the minority achievement gap can be found in the Wisconsin Department of Public Instruction's report, "Promoting Excellence for All: A Report from the State Superintendent's Task Force on Wisconsin's Achievement Gap" https://dpi.wi.gov/sites/default/files/imce/excforall/exc4all-report.pdf

high schools help to directly address these achievement gaps by not restricting these special programs to particular attendance areas, thereby allowing access to pupils regardless of where in the school district they reside. (DPFF ¶ 12). Thus, MPS has as a rational basis the need to make available to all district pupils the special programs available at MPS Citywide Specialty high schools. *See, e.g., Heller*, 509 U.S. at 321 ("The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.") (quoting *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913)).

The many listed rational bases serve the legitimate governmental purpose of providing equal access to the highest quality education. 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. (DPFF ¶ 32).

Lastly, a rational basis for the difference in treatment is cost. "[S]ignificant expense is a sufficient rational basis that justifies disparate treatment." *Srail v. Village of Lisle, Ill.*, 588 F.3d 940, 948 (7th Cir. 2009) (citing *Racine Charter One*, 424 F.3d at 687 ("We need only recognize that extending the busing benefit will come at a significant enough expense to [the school district], and that is rational basis enough to justify its transportation policy decision.")).

Here, for the 2016-2017 school year, MPS paid approximately $41,513,258 for regular education pupil transportation. (DPFF ¶ 65). While MPS receives state aid for

transportation provided pursuant to Wis. Stat. § 121.54, MPS received only $2,322,123 for the 2016-2017 school year. (DPFF ¶ 66). That results in approximately $39,191,135 in pupil transportation costs that were not covered by the state aid provided for transportation services pursuant to Wis. Stat. § 121.54 in the 2016-2017 school year. (DPFF ¶ 67).

SJA may try to argue that the cost to provide transportation to SJA's pupils will only result in a nominal increase since the claimed amount for the 2016-2017 school year is $108,200, but such an amount is not nominal. In fact, in *Racine Charter One*, the court found cost as a rational basis for denying pupil transportation services to a single charter school. 424 F.3d at 687 ("But the defendant's financial straits need not be dire for us to find its refusal to extend transportation services to Charter One rational."). The court so found even where "[t]he record does not provide a hard number on exactly how much more it would cost," aside from Charter One's estimate of $124,000 that the court determined to be "in all likelihood over-inflated." *Id*. at 686. Thus, cost is a rational basis as it applies to the provision of transportation services to SJA's pupils.

Additionally, such an argument regarding a nominal cost increase would overlook the fact that MPS's transportation policy treats similarly all pupils who attend their attendance area high school, public or private. If SJA's arguments are accepted and MPS has no rational basis for its current pupil transportation policy, then MPS would need to provide similar transportation benefits not just to SJA's pupils, but at the very least to all other private schools with an attendance area covering the entire city, and more likely to pupils of all private high schools and to pupils of all MPS attendance area high schools in order to avoid any possible differing treatment among "similarly situated" pupils. *Racine*

Charter One did not involve such a scenario because in that case "Charter One is the only independent charter school within the geographic boundaries of the RUSD," *id*. at 685, and the court still found cost as a rational basis. *Id*. at 687. Here, given that MPS only received state aid for roughly 5.6% of its pupil transportation costs in the 2016-2017 school year, (DPFF ¶ 68), the added cost for providing transportation to these additional public and private high school pupils would add a significant cost to MPS that mostly would go uncompensated by any additional state aid. Therefore, cost is a rational basis in the instant case (and even more so than it was in *Racine Charter One*).

II. MPS's pupil transportation policy as applied to pupils of SJA does not violate applicable Wisconsin statutes regarding pupil transportation.

MPS advances several arguments for why summary judgment in favor of MPS on the state law claim is warranted.

A. Neither SJA nor its pupils have a private right of action under Wisconsin law.

In Wisconsin, a determination of whether a statute creates a private right of action "is dependent on whether there is a clear indication of the legislature's intent to create such a right." *Grube v. Daun*, 210 Wis.2d 681, 689, ¶ 12 (1997); *see also Miller Aviation v. Milwaukee County Bd. of Supervisors*, 273 F.3d 722 (7th Cir. 2001) (applying *Grube* private right of action analysis). The general rule is that "a statute which does not purport to establish civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to construction establishing a civil liability." *McNeill v. Jacobson*, 55 Wis.2d 254, 258 (1972). A private right of action "is only created when (1) the language or the form of the statute evinces the legislature's intent to

create a private right of action, and (2) the statute establishes private civil liability rather than merely providing for protection of the public." *Grube*, 210 Wis.2d at 689, ¶ 12.

The *Grube* case dealt with the violation of a statute regulating the disposal of hazardous waste at a landfill that resulted in a hazardous waste spill. *Id*. at 688, ¶ 11. In *Grube*, the Court found that the "language and form of Chapter 144 do not suggest that the legislature intended to create a private right of action, but instead illustrate that this chapter was designed to provide general protection to the public." *Id*. at 689, ¶ 12. The Court noted that evidence of this intent included the fact that the statute's declaration of policy "unequivocally illustrates that the intent of the hazardous waste management provisions was to protect the public in general," the fact that the statute "establishes the powers and duties of the department" in regulating this area, and the fact that there are "provisions providing for enforcement by the state." *Id*. at 689-690, ¶¶ 13-14.

The statutory framework in *Grube* is analogous to the statute at issue. Here, the intent for the pupil transportation statute in Wis. Stat. § 121.54 can be derived from the provision in the Wisconsin Constitution that has authorized it, which states that "[n]othing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning." Wis. Const. art. I, § 23; *see also Cartwright v. Sharpe*, 40 Wis.2d 494, 501-502 (1968) (This enabling legislation was created by chs. 68 and 313, Laws of 1967. Section 1 of ch. 68 provides: 'Purpose. The intent of this act is to provide for the safety and welfare of children by providing for their transportation to and from public and private schools.'). Thus, it is clear that the intent of the pupil transportation statute is one of public safety and protection.

Additionally, the pupil transportation statute is in the School Finance chapter, Chapter 121, of the Wisconsin Statutes, and the State Superintendent and the Wisconsin Department of Public Instruction (DPI) are given the powers and duties of regulating the provisions of this chapter. For example, the State Superintendent may withhold state aid from a school district for a variety of reasons, Wis. Stat. § 121.006, the State Superintendent hears the appeal and makes a final determination when a private school and a school board cannot agree on the private school's attendance area, Wis. Stat. § 121.51(1), DPI hears the appeal and determines the amount of compensation in a contract for pupil transportation between a school board and a parent, Wis. Stat. § 121.55(1)(b), and so on.

Finally, Wisconsin statutes provide for enforcement of the pupil transportation statute by the state (particularly the State Superintendent), which is primarily through the provision of state aid. Regarding state aid for transportation, the statutes dictate that "[n]o state aid of any kind may be paid to a school district which charges the pupil transported or his or her parent or guardian any part of the cost of transportation provided under ss. 121.54 (1) to (3), (5), (6) and (10) and 121.57 or which willfully or negligently fails to transport all pupils for whom transportation is required under s. 121.54." Wis. Stat. § 121.58(2)(am). The statutes further state that "[i]f the state superintendent is satisfied that transportation or board and lodging was provided in compliance with law, the state superintendent shall certify to the department of administration the sum due the school district," and that "[i]n case of differences concerning the character and sufficiency of the transportation or board and lodging, the state superintendent may determine such matter and his or her decision is final." Wis. Stat. § 121.58(5). Thus,

given the constitutional intent of public safety and welfare, the establishment of the powers and duties of the department, and the enforcement provisions, it is clear that there is no private right of action regarding the pupil transportation statute at issue. Therefore, since there is no private right of action, this Court should dismiss plaintiff's state law claim with prejudice.

B. While we acknowledge that the Court can remand the matter to state court if the federal claims are dismissed, we assert that it is proper for the Court to retain jurisdiction and dismiss the entire claim as a matter of law because there is no private right of action.

This Court may decline to exercise supplemental jurisdiction over the state law claim if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). "[A] district court's decision to 'relinquish pendent jurisdiction before the federal claims have been tried is … the norm, not the exception, and such a decision will be reversed only in extraordinary circumstances.'" *Miller Aviation*, 273 F.3d at 731 (quoting *Contreras v. Suncast Corp.*, 237 F.3d 756, 766 (7th Cir. 2001)).

However, this Court should analyze the state law claim to determine whether there is a private right of action under Wisconsin law before choosing to remand it to state court. For if this Court rules in favor of MPS on the Equal Protection Claim and finds that SJA does not have a private right of action, then this Court should retain jurisdiction and dismiss it as a matter of law. *See Miller Aviation*, 273 F.3d at 731 ("Because neither Wis. Stat. § 114.14 nor 49 U.S.C. § 40116 provide for a private right of action, the district court erred in failing to retain jurisdiction over this claim and dismissing it as a matter of law.").

C. Assuming *arguendo* that SJA does have a private right of action and this Court retains jurisdiction, MPS's pupil transportation policy does not violate Wisconsin law because the policy applies to pupils of SJA with reasonable uniformity as to pupils of MPS.

It is undisputed that MPS has exercised the "City Option" as set forth in Wis. Stat. § 121.54(1). (DPFF ¶ 21; Complaint ¶ 22). MPS has elected under the City Option to provide pupil transportation, pursuant to Wis. Stat. § 121.54(2)(c), to some of its pupils. (DPFF ¶¶ 25-26, 30-31). As such, the City Option requires that "there shall be reasonable uniformity in the transportation furnished to the pupils, whether they attend public or private schools." Wis. Stat § 121.54(1)(b). At issue is the "reasonable uniformity" requirement in the City Option. SJA alleges that MPS's pupil transportation policy violates the reasonable uniformity requirement in the City Option. MPS contends that it has not violated the reasonable uniformity requirement.

The Wisconsin Court of Appeals has stated that the reasonable uniformity requirement is ambiguous. *St. John Vianney School v. Bd. of Educ. of School Dist. of Janesville*, 114 Wis.2d 140, 154 (Ct. App. 1983). In *St. John Vianney*, the court noted as follows:

> Diversity, however, rather than uniformity, characterizes school transportation. Diversity is unavoidable because pupils live at different points and may not attend the same schools. It is impractical, to say the least, to transport all city pupils from a single pickup point over the same route at the same time to the same school. We conclude that the "reasonable uniformity" requirement is ambiguous.

Id. The private schools in *St. John Vianney* were asserting that the reasonable uniformity provision required the school district to use the same means of transportation for private and public school pupils. *Id*. However, the court disagreed and concluded that "the 'reasonable uniformity' requirement is directed at the distance pupils are transported and not the means of transportation chosen." *Id.* at 155.

The court, in continuing its analysis of the reasonable uniformity requirement, acknowledged that "[u]nless a school board decides to transport every pupil to and from school, the board probably must choose a distance standard when deciding which pupils are eligible for free transportation." *Id*. at 156. The Court then noted the following:

> Public schools usually serve neighborhoods. Private schools may serve much larger areas, even entire municipalities. As a result, the average distance that pupils live from their public schools may be substantially less than the average distance pupils live from their private schools in the same city. This characteristic disparity might, but for the reasonable uniformity provision in sec. 121.54(1), appear to justify separately classifying public and private school pupils for transportation purposes on the basis of distance.

Id. The court then concluded that "[t]he reasonable uniformity provision in sec. 121.54(1), Stats., 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*. (emphasis added). Essentially, the court is saying that the reasonable uniformity requirement is designed to prevent a school board from setting small transportation perimeters that will benefit primarily public school pupils. For example, if the attendance areas in a school district have no more than a 4-mile radius from the school and a school district provides transportation to pupils who live within four miles of their school, then the school district will be providing transportation to all or substantially all public school pupils versus a small subset of private school pupils. Such a scenario would run afoul of the reasonable uniformity requirement because the school board's policy distinguishes based on the distance the pupil lives from the school. As the court noted, "whatever the distance standard the board chooses, the distance standard must be reasonably uniform in its application to public and private school pupils." *Id*.

Here, MPS's pupil transportation policy does not distinguish between public and private school pupils based on the distance they live from school because MPS's pupil transportation policy applies to attendance areas. (DPFF ¶¶ 26-28). The general provision in MPS's pupil transportation policy applies to all public and private school pupils enrolled in their attendance area high school and provides that MPS will provide transportation if the pupil lives two or more miles from the school and more than one mile from public transportation. (DPFF ¶¶ 26-28). Thus, the general policy provision does not distinguish based on the distance the pupil lives from school.

SJA will point to the provision concerning transportation to a Citywide Specialty high school, but this is the exception and not the rule. The court in *St. John Vianney* acknowledged that diversity characterizes school transportation and is unavoidable. *Id*. at 154. The holding in *St. John Vianney* does not stand for the proposition that the pupil transportation policy must affect all pupils equally. There are situations where there may be differences in treatment, between public and private school pupils, between groups of public school pupils, and between groups of private school pupils. However, such differences do not run afoul of the reasonable uniformity requirement in the City Option of Wis. Stat. § 121.54 and as discussed in *St. John Vianney*. For these reasons, this Court should find that MPS has not violated the provisions of Wis. Stat. § 121.54 and, therefore, grant summary judgment in favor of MPS on the state law claim.

CONCLUSION

For the reasons set forth above, MPS asks this Court to grant summary judgment in its favor both on the Equal Protection Claim and the state law claim and to dismiss plaintiff's complaint in its entirety.

Dated and signed in Milwaukee, Wisconsin this 15th day of November, 2017.

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