UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

St. Joan Antida High School, Inc.
1341 North Cass St.
Milwaukee, WI 53202,

Plaintiff,

v. Case No. 17-CV-413

Milwaukee Public School District
5225 W. Vliet St.
Milwaukee, WI 53208,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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 opposition to plaintiff's, St. Joan Antida High School ("SJA"), motion for summary judgment.

ARGUMENT

I. MPS has not violated SJA's and its pupils' Fourteenth Amendment Right to Equal Protection.

First, SJA argues – in a footnote – that the strict scrutiny standard should apply to this case based on the decision in *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*. 268 U.S. 510 (1925). The *Pierce* case dealt with a compulsory attendance statute that required a student to attend a public school. *Id*. at 530. The Court

in *Pierce* found that the compulsory attendance statute requiring attendance in a public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" and was, therefore, a violation of their fundamental rights. *Id*. at 534-535. SJA argues that the *Pierce* case is applicable here because SJA alleges that MPS is denying transportation benefits to pupils of SJA directly contrary to the law, and that such denial is somehow unreasonably interfering with the parents' right to control over their children.

However, SJA's argument overlooks the fact that MPS operates under the City Option of the applicable Wisconsin statute, (PPFF[1] ¶¶ 7-8; DPFF ¶ 21), and under the City Option MPS is not required to provide transportation to any pupils, public or private. Wis. Stat. § 121.54(1)(a) & (c). It is only because MPS has opted to provide transportation to some public school pupils that it must provide transportation to private school pupils with "reasonable uniformity." Wis. Stat. § 121.54(1)(b). Thus, MPS is not interfering with any core statutory rights of the private school pupils. The provision of transportation services certainly is not a prerequisite to attendance at a private school. Therefore, SJA has failed to show how MPS's pupil transportation policy interferes with parents' right to control over their children. *See, e.g., Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 675 (7th Cir. 1987) (Declining to extend *Pierce* strict scrutiny to state athletic association's by-law provision allowing a transferring student to be eligible for athletics only if the transfer is from private to public schools because plaintiff's "chain of causation is too attenuated and speculative to support the conclusion that the new transfer policy unreasonably interferes with the freedom of parents to direct

[1] Throughout this brief, "PPFF" refers to Plaintiff's Proposed Findings of Fact, and "DPFF" refers to Defendant's Proposed Findings of Fact.

their children's upbringing.") MPS's pupil transportation policy simply does not impinge on any fundamental right, and, therefore, this Court should apply the rational basis analysis.

"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 and because there is no impingement of a fundamental right, the class-of-one theory applies[2]. *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)).

A. SJA has failed to show that SJA and its pupils are similarly situated to MPS Citywide Specialty high schools and their pupils.

"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

[2] SJA makes a distinction between the class-of-one theory and a legislative classification, but SJA appears to use the same standard: the legislation will be upheld so long as there is a rational basis for the difference in treatment of similarly situated groups.

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 a private attendance area high school. (PPFF ¶¶ 1 & 5; DPFF ¶¶ 1 & 7). MPS has attendance area high schools, (PPFF ¶ 13; DPFF ¶ 8), and MPS has non-attendance area Citywide Specialty high schools. (PPFF ¶ 14; DPFF ¶ 9). MPS's pupil transportation policy treats those pupils attending their designated private attendance area high school the same as those pupils attending their designated public attendance area high school. (MPS Administrative Policy 4.04(2)(a)3. & (2)(b)2.; Pl. Brief, p. 4; DPFF ¶ 28). SJA does not compare itself to MPS attendance area high schools; rather, SJA asserts that SJA and its pupils are similarly situated to MPS Citywide Specialty high schools and their pupils. SJA presents three main arguments to show these groups to be similarly situated[3].

First, SJA alleges that *Deutsch v. Teel* 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. (Pl. Brief, p. 13) (citing *Deutsch v. Teel*, 400 F. Supp. 598 (E.D. Wis. 1975)). However, this is a mischaracterization of which groups were similarly situated in the *Deutsch* case, primarily because while the court did acknowledge that there were similarly situated groups in that case, the court did not fully delineate which groups were

[3] One argument for finding the two groups of pupils similarly situated can be found largely in the "Factual Background" of SJA's Memorandum of Law in Support of Its Motion for Summary Judgment.

similarly situated. In *Deutsch*, the plaintiffs were parents of private elementary school pupils who were receiving busing from MPS until their private school moved 400 feet outside the limits of the City of Milwaukee and MPS subsequently stopped providing busing to them. 400 F. Supp. at 599. The court acknowledged that there was no "rationale as to why *the particular Milwaukee residents that are the plaintiffs herein* are denied the benefit of state-financed busing while their similarly-situated neighbors receive it." *Id*. at 604 (emphasis added). In doing so, the court appeared to rely on the fact that "excluding the children of these plaintiffs, it appears that some 763 children who are enrolled in kindergarten or grades one through six *are now bused to private and public schools* located within the City of Milwaukee." *Id*. (emphasis added). Thus, the "similarly situated" groups in *Deutsch* are those private elementary school pupils who were receiving busing compared to the plaintiffs' private elementary school pupils who now were not receiving busing.

MPS does not dispute that private high school pupils are similarly situated to each other. But, MPS asserts that private high school pupils are not similarly situated to all public high school pupils. To the extent that private high school pupils may be similarly situated to public high school pupils, pupils of a private high school (all attendance area schools) are similarly situated to only pupils of a public attendance area high school. The court in *Deutsch* did not deal with the situation of comparing pupils attending a private attendance area high school to pupils attending a public non-attendance area Citywide Specialty high school, *see id.*, and, therefore, *Deutsch* should not be read as finding these groups of pupils similarly situated.

Second, SJA alleges that the court in *Racine Charter One* found that "public and private school students in the first category were in fact 'similarly situated' but that charter school students were not," partly because "[p]rivate schools and private school students are expressly referenced in § 121.54" and, as such, are similarly situated. (Pl. Brief, p. 15). Here, SJA is misstating the holding in *Racine Charter One* because the court never actually stated that public and private school pupils were similarly situated to each other, only that Charter One charter school (a public school) pupils were not similarly situated to those public and private school pupils who were receiving the busing benefit. *See Racine Charter One*, 424 F.3d at 683. ("Charter One has failed to show that its students are similarly situated to those students who do receive the busing benefit.") In fact, the court seems to suggest that Charter One (or any public school) would clearly lose the "similarly situated" argument as compared to a private school. *See Id*. ("Charter One concedes – indeed insists – that it is a public school. Under no construction would it or any other party argue it was a private school. Thus, its charter-prescribed ability to contract for transportation, while akin to the powers of those private schools which receive the RUSD busing benefit, does nothing to liken this unique public school to RUSD public schools that receive busing.").

But, the instant case is analogous to *Racine Charter One*. There, the court found that pupils of Charter One charter school (a public school) who were not receiving busing from the Racine Unified School District (RUSD) were not similarly situated to pupils attending public schools of RUSD and private schools located within the district who were receiving busing. *Id*. The court noted that "Charter One is a public school, no one contests," *id*. at 681, and that "[w]hile it is true that Section 121.54 does require RUSD to

transport public school students, it does not mandate the transportation of *all* such students. Rather, it obliges the district to transport only those public school students who reside within its geographical boundaries." *Id*. at 682 (emphasis in original). Thus, *Racine Charter One* shows that pupils are not similarly situated merely because they are pupils, and that even pupils of different public schools are not necessarily similarly situated. *See Id*. at 681 ("Indeed, a student's situation is, at least in part, a product of the school that he or she attends."). *A fortiori*, pupils of private schools are not necessarily similarly situated to pupils of public schools merely because both groups are pupils.

It is important to note that the court was analyzing RUSD's statutory requirement pursuant to Wis. Stat. § 121.54(2) to provide busing to public and private school pupils. *Id*. at 681 ("Wisconsin Statute § 121.54(2) requires school districts like RUSD to transport 'public' school students.") Here, however, MPS is exempt from the requirements of Wis. Stat. § 121.54(2) because MPS operates under the City Option, (PPFF ¶¶ 7-8; DPFF ¶ 21), and, therefore, is not required to provide busing to any students. Wis. Stat. § 121.54(1)(c). It is only because MPS has opted to provide transportation to some MPS pupils that it must provide transportation to private school pupils with "reasonable uniformity." Wis. Stat. § 121.54(1)(b). MPS still can provide transportation to less than all pupils in the district. Wis. Stat. § 121.54(2)(c). Thus, Wis. Stat. § 121.54 alone should not be a basis for finding private school pupils similarly situated to public school pupils for purposes of pupil transportation.

In fact, at the district court level in the *Racine Charter One* case, this Court declined to find two groups of pupils similarly situated merely based on the requirements of Wis. Stat. § 121.54. *See Racine Charter One v. Racine Unified School District*, Case

No. 03-C-0484, pp. 13-14, aff'd 424 F.3d 677 (7th Cir. 2005). There, this Court noted the following:

> The plaintiffs have failed to show that Charter School students are similarly situated to all other public school students for equal protection purposes. Instead of addressing any of the distinctions between the groups of students, the plaintiffs merely declare that RUSD has a statutory obligation to transport all public school students, including Charter School students […] First, this argument appears to collapse the plaintiffs' equal protection claim into their state law claim, demonstrating that the state law claim is the engine driving this litigation. Second, even if RUSD has some common statutory obligation to the Charter School students and other public school students, the plaintiffs have not shown that the Charter School's students are similarly situated to other public school students in all relevant respects for the purpose of supporting an equal protection claim.

Id. This Court's finding was upheld on appeal to the Seventh Circuit Court of Appeals. *Racine Charter One*, 424 F.3d 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.") This Court should similarly find that SJA has failed to show that SJA and its pupils are similarly situated to MPS Citywide Specialty high schools and their pupils in all relevant respects for the purpose of supporting an equal protection claim.

Third, SJA alleges the two groups of pupils are similarly situated because SJA has an attendance area that encompasses the entire City of Milwaukee and MPS Citywide Specialty high schools take students from the entire City of Milwaukee. (Pl. Brief, p. 11). However, this argument ignores the significant difference between these types of schools – that SJA has an attendance area, (PPFF ¶ 5; DPFF ¶ 7), and MPS Citywide Specialty high schools do not have an attendance area. (PPFF ¶ 14; DPFF ¶ 9). Also, mere distance alone does not make two groups of pupils similarly situated. *See, e.g., Racine*

Charter One, 424 F.3d 677 (Declining to find two groups of pupils similarly situated despite the similarity in the distance they live from their respective school). The court in *Racine Charter One* faced this similar argument, which it summarized 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 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 *not* receive busing.

Id. at 681 (emphasis in original). Despite this similarity in distance traveled, the court declined to find the two groups of pupils similarly situated because of other factors that set their schools apart. *See Id*. Thus, this Court should also find in the instant case that the similarity in distance alone is not sufficient to make SJA and its pupils similarly situated to MPS Citywide Specialty high schools and their pupils because SJA fails to show how the two groups are "identical or directly comparable in ***all material respects***." *See Reget*, 595 F.3d at 695 (emphasis added).

As an extension of the distance argument above, SJA alleges that a hypothetical involving identical twin sisters shows that SJA and its pupils are similarly situated to MPS Citywide Specialty high schools and their pupils. (Pl. Brief, p. 6). SJA's hypothetical has both twin sisters living in the same house in the City of Milwaukee. (*Id*.). One sister attends an MPS Citywide Specialty high school located 8.8 miles from the house, and the other sister attends SJA which is 6.1 miles from the house. (*Id*.). SJA then concludes: "The two students are similarly situated. It is hard to be more similarly situated than identical twins living in the same house."[4] (*Id*.).

[4] SJA also alleges that the only difference between the twins is that one goes to a public city-wide school and the other goes to a private city-wide school. (Pl. Brief, p. 6; PPFF ¶ 18-19). However, this again

SJA's hypothetical played out almost exactly in the *Racine Charter One* case. *See Racine Charter One*, 424 F.3d at 681. There, the court noted the following situation:

> Charter One thinks […] that we should look only to – and see patent similarities in – both class' residence and attendance within the district, and their distance from school or their proximity to hazardous conditions along the way. Indeed, if this were all to our comparison, the students of both classes would clearly be similarly situated, as the James family illustrates. Two of the James children attend Charter One, and one attends an RUSD public school. All live in the same house and face the same hazardous condition in getting to school (there is no sidewalk on their road). But while the RUSD student gets free busing, the Charter One students do not.

Id. The court declined to end the comparison there, and instead looked to other differences between the groups of pupils, primarily in the schools they attend. *See Id*. Ultimately, the court found the two groups of pupils not to be similarly situated despite the similarities both in the distance traveled and in them living in the same house. *See Id*. at 683. Thus, this Court should also not use SJA's hypothetical as a basis for finding SJA and its pupils to be similarly situated to MPS Citywide Specialty high schools and their pupils because doing so would overlook the differences between the schools and by extension their pupils. Therefore, this Court should decline to find in favor of SJA on its Equal Protection claim because SJA failed to show that SJA and its pupils are similarly situated to MPS Citywide Specialty high schools and their pupils.

B. Assuming *arguendo* that SJA and its pupils are similarly situated to MPS Citywide Specialty high schools and their pupils, SJA failed to negate every conceivable basis which supports the difference in treatment in MPS's pupil transportation policy.

"'A classification neither involving fundamental rights nor proceeding along suspect lines … cannot run afoul of the Equal Protection Clause if there is a rational

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overlooks the facts that SJA is an attendance area school, (PPFF ¶ 5; DPFF ¶ 7), and the MPS Citywide Specialty high school is a non-attendance area school. (PPFF ¶ 14; DPFF ¶¶ 9).

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 v. Hahn*, 505 U.S. 1, 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)).

SJA argues that for MPS's pupil transportation policy 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."[5] (Pl. Brief, p. 11) (emphasis in original). But, this misstates the burden of proof on an equal protection claim under rational basis review. *See Heller*, 509 U.S. at 320 ("'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'") (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Here, SJA does not negate every conceivable basis which supports the differing treatment of pupils attending an MPS Citywide (non-attendance area) Specialty high school and pupils attending their designated public or private attendance area high school.

First, SJA attacks the stated purpose in MPS's pupil transportation policy of overload at an attendance area high school. SJA asserts that MPS has no overload problem because there is no overall capacity problem across all high schools. (Pl. Brief, p. 19; PPFF ¶ 65). SJA points to the fact that there were 4,996 empty high school seats across all MPS high schools. (PPFF ¶ 65; DPFF ¶ 50). However, SJA ignores the undisputed fact that there are some MPS high schools where space could have been a problem. (PPFF ¶ 59; DPFF ¶ 53). The parties agree that South Division High School (an MPS attendance area high school) would have had a capacity problem if MPS were not able to bus pupils either to another attendance area high school or to a Citywide Specialty high school. (PPFF ¶¶ 59-62; DPFF ¶¶ 54). Additionally, an analysis by Mr. Will Flanders on behalf of SJA shows that three other MPS attendance area high schools

[5] SJA's labels are inaccurate here. SJA's reference to a "public city-wide school" refers to a non-attendance area Citywide Specialty high school, and its reference to "private city-wide school" refers to a private attendance area high school with an attendance area that encompasses the entire city.

would have had a similar capacity problem if MPS were not able to bus pupils either to another attendance area high school or to a Citywide Specialty high school. (Flanders Decl. ¶ 7, Ex. C; DPFF ¶ 55). This is important because a pupil generally is entitled to go to the designated school within his or her attendance area. Wis. Stat. § 121.845(1); *see also State ex rel. Vanko v. Kahl*, 52 Wis.2d 206, 215 (1971) (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, a capacity problem at any particular attendance area high school is a rational basis for busing pupils to either another attendance area high school or a Citywide Specialty high school[6]. This is especially true given that 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)").

SJA further alleges that "any over-crowding at an individual school was simply a matter of line-drawing" and that "it would be relatively simple to draw attendance area lines such that no school was overcrowded." (Pl. Brief, p. 19; PPFF ¶ 66). MPS disputes that this is a relatively simple process. (Solik-Fifarek Opp. Decl. ¶ 3). First, MPS does not redraw attendance area boundaries every year. (Solik-Fifarek Opp. Decl. ¶ 2).

[6] SJA also asserts that if there is a capacity problem, then MPS's pupil transportation policy should allow for MPS to bus pupils to SJA. (Pl. Brief, pp. 18-19). But, this argument ignores the fact that MPS may not compel a pupil to attend a religious private school. Wis. Const. art. I, § 18; *see, e.g., Jackson v. Benson*, 218 Wis.2d 835, 883, ¶ 66 (1998) ("Since the amended MPCP neither compels students to attend sectarian private schools nor requires them to participate in religious activities, the program does not violate the compelled support clause of art. I, § 18.").

Second, MPS would not know if there was an overload problem at any particular school until after the enrollment numbers come in for that year, which would leave very little time for MPS to redraw attendance area lines before the start of the school year. (Solik-Fifarek Opp. Decl. ¶ 4). Third, pupils are assigned to an attendance area before they enroll so that the pupils know which school is their designated attendance area school, (Solik-Fifarek Opp. Decl. ¶ 5), and the process that SJA suggests would change a pupil's attendance area *after* he/she has made his/her enrollment choices with knowledge of his/her designated attendance area school. (Solik-Fifarek Opp. Decl. ¶ 6). Finally, in suggesting that MPS must redraw attendance area lines whenever an overload situation appears, SJA seeks to hold MPS to a higher standard than is required under rational basis review. *See, e.g., Heller*, 509 U.S. at 321 (Courts are "compelled under rational-basis review to accept a legislature's generalizations even where there is an imperfect fit between means and end," 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.'"). Therefore, SJA has failed to adequately negative this legitimate governmental purpose.

Second, SJA attacks the stated purpose in MPS's pupil transportation policy of "racial balance" and alleges that this is not a rational basis because "[n]or did the transfers of public school students from their neighborhood schools to City-wide [Specialty] high schools achieve racial balance." (Pl. Brief, p. 20). MPS concedes that "racial balance" may not have been the best term for its legitimate governmental purpose, but rather "racial equality" in education. However, the imprecision in MPS's stated purpose is not detrimental to MPS in a rational basis review. *See, e.g., Nordlinger*, 505

U.S. at 15. ("[T]he 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."). MPS uses transfers to MPS Citywide Specialty high schools to help achieve the legitimate governmental purpose of racial equality because MPS Citywide Specialty high schools offer special programs or areas of study that are not available at all MPS attendance area high schools, (DPFF ¶ 10), and MPS believes that these transfers remove barriers to these special programs. (DPFF ¶ 11). MPS is more concerned about access to these special programs for all pupils (especially minority groups) than the racial balance of a particular school, (DPFF ¶¶ 11-12), especially given the fact that minorities make up the majority population at MPS high schools. (PPFF ¶¶ 10 & 70; DPFF ¶ 23). Additionally, MPS is legally obligated to offer some special programs to all pupils in the MPS district, such as the requirement to ensure that "all gifted and talented pupils enrolled in the school district have access to a program for gifted and talented pupils." Wis. Stat. § 118.35(3). MPS meets it "gifted and talented" obligations by providing such special programs at MPS Citywide Specialty high schools which are open to all pupils in the school district.

Similarly, a way for MPS to achieve racial equality in education is through transfers under the Special Transfer provisions in § 121.85 of the Wisconsin Statutes. But, SJA fails to include in its analysis MPS's ability to transfer "minority group pupils" under the Special Transfer provisions. Wis. Stat. § 121.85. It is undisputed that MPS high schools are minority-majority schools, meaning that minorities make up the majority population of a particular school. (PPFF ¶¶ 10 & 70; DPFF ¶ 23). Under the Special Transfer provisions, MPS may make transfers "[b]y 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 a school serving the entire district*."[7] Wis. Stat. § 121.85(2)(b)1. (emphasis added). Thus, the Special Transfer provisions allow MPS to transfer pupils from their designated attendance area high school to an MPS Citywide Specialty high school (a school serving the entire district) without regard for the racial balance of the school. This advances the legitimate governmental purpose of racial equality because the Special Transfer is providing these minority group pupils access to these special programs that they might not otherwise receive at their neighborhood high school because they are only available at a Citywide Specialty high school. (DPFF ¶¶ 11-12). Thus, SJA failed to adequately negate this rational basis for the transfer of pupils from their designated attendance area high school to an MPS Citywide Specialty high school.

Third, SJA indirectly attacks cost as a rational basis by relying on the decision in *Deutsch*. SJA notes that in *Deutsch*, "MPS argued that the cost of providing such transportation constituted a rational basis for its decision but the court disagreed." (Pl. Brief, p. 13). SJA further notes that the court concluded that "MPS's disparate treatment did not implement any 'legitimate state objective and to be without the rational basis necessary to withstand an attack under the provisions of the equal protection clause of the fourteenth amendment to the United States Constitution.'" (Pl. Brief, pp. 13-14) (quoting

[7] The Special Transfer provisions only apply to public schools and not private schools. For the Special Transfer provisions, a "school" is defined as "an organized educational activity *operated by the school board* and approved by the department." Wis. Stat. § 121.845(3) (emphasis added). A private school is not operated by the school board; a private school is privately controlled. Wis. Stat. § 118.165(1)(b); *see also 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.").

Deutsch, 400 F. Supp. at 605). SJA then notes that "MPS will be hard-pressed to come up with a supposed legitimate state interest that was not rejected in that case." (Pl. Brief, p. 14).

SJA's analysis of *Deutsch* ignores the fact that the court was applying the rational basis review to a very particular set of plaintiffs with a very particular set of facts. The court summarized the issue in *Deutsch* as follows:

> The controversy at issue here concerns the recent relocation of Hillel Academy, a private [elementary] school in the Milwaukee metropolitan area: formerly located within the City of Milwaukee, it has since moved to facilities at a point some 400 feet beyond the city limits […] Although [the Hillel Academy pupils] were provided with state-financed school bus service prior to the change in situs, this service has been denied them since that move.

400 F. Supp. at 599. Thus, the court in *Deutsch* was analyzing the denial of transportation services based on the location of the private elementary school. In *Deutsch*, the record showed that MPS was busing pupils to other private and public elementary schools within the City of Milwaukee. *Id*. at 604. The court repeatedly rejected any proffered purpose as to the particular distinction affecting the particular plaintiffs in that case. *See Id*. For example, the court noted that "we find that *the facts of this case* demonstrate that no rational basis whatsoever stands to support the classifications effected by this Wisconsin statute and the local transportation policy, *as applied to these plaintiffs*." *Id*. at 603 (emphasis added). Additionally, the court noted the following:

> While we would agree that the facts adduced by the defendants here tend to prove that students residing in the City of Milwaukee may indeed have what is generally an effective and efficient bus transportation system, the Court must find that this circumstance in no way provides a rationale as to why *the particular Milwaukee residents that are the plaintiffs herein* are

> denied the benefit of state-financed busing while their similarly-situated neighbors receive it.

Id. at 604 (emphasis added). As to the cost argument, the court in *Deutsch* noted that "it is clear that in some circumstances, fiscal or monetary considerations may support distinctions made by the state as to social welfare programs it may wish to promulgate," *id*., but then noted the following:

> *Under the facts of this case*, however, the Court must conclude that no fiscal goals whatsoever are implemented by the manner in which the Board of School Directors of the City of Milwaukee has chosen to exercise the discretionary power conferred by the statute at issue here.

Id. (emphasis added).

Again, the court in *Deutsch* was analyzing the distinction that treated pupils of the Hillel Academy private elementary school differently from pupils of other Milwaukee private and public elementary schools, and the court could not find a rational basis for that distinction because "the sole basis for this distinction is the fact that the school in which the children of these plaintiffs are enrolled is located some 400 feet beyond the limits of the City of Milwaukee." *Id*. at 605. Thus, the *Deutsch* case is wholly distinguishable from the instant case. First, MPS's pupil transportation policy treats all pupils of private high schools (including SJA's pupils) the same. (DPFF ¶ 27). Next, MPS's pupil transportation policy treats pupils attending their designated private attendance area high school the same as pupils attending their designated public attendance area high school. (DPFF ¶¶ 26-28). The MPS Citywide Specialty high school concept is an exception to the general rule that allows MPS to meet certain obligations and to address certain issues that SJA does not face, such as offering gifted and talented programs to the entire district pursuant to Wis. Stat. § 118.35(3) or ensuring capacity at

all attendance area high schools for all pupils in the respective attendance area. Here, MPS does assert that cost is a rational basis in the instant case. *See, e.g., 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."). Therefore, SJA failed to adequately negate cost as a rational basis with its reliance solely on the decision in *Deutsch*.

Fourth, SJA alleges that MPS does not have a rational basis for requiring private schools to submit a roster with the names and locations (addresses) of its pupils by July 1st for purposes of providing transportation services. (Pl. Brief, p. 22). SJA takes issue with MPS denying transportation to those six SJA pupils not on the July 1st roster. MPS asserts that this argument is a moot point because absent the July 1st deadline MPS would still apply its general policy rule, and MPS has confirmed that all six SJA pupils also lived within one mile of a public bus stop. (DPFF ¶ 49). As to the merits of the argument, SJA acknowledges that MPS is entitled to create its own transportation rules. (PPFF ¶ 8). But, SJA argues that "in creating those rules MPS was required to treat public school and private school students with reasonable uniformity" pursuant to Wis. Stat. § 121.54(1)(b), (Pl. Brief, p. 22), and that "[a]pplying a deadline to one set of students that does not apply to another similarly situated set of students violates this requirement." (*Id.*) Essentially, SJA is injecting a state law argument into its Equal Protection claim and asks this Court to apply a state law standard to conclude that there is no rational basis.

MPS does have a rational basis for applying a deadline for private schools to submit such pupil information to MPS. First, the roster notification allows MPS the relevant information concerning which private school pupils are eligible for transportation and allows MPS to begin making provisions for such transportation. (DPFF ¶¶ 36-41). MPS need not set a deadline for its own pupils because MPS has immediate access to such information within its own records. (DPFF ¶ 38). If SJA does not submit such information to MPS, there would be virtually no way for MPS to know which private school pupils need transportation services. (DPFF ¶ 36).

Additionally, MPS staff goes through the information provided by all private schools and compares that information to the readily available public school information. (DPFF ¶ 39). For example, MPS compares the information to see if a pupil on the private school's roster is also listed as enrolled in MPS's system; if so, MPS must do additional work to determine where the child is actually enrolled. (DPFF ¶ 39). Similarly, MPS compares the private school information against MPS's pupil transportation policy to determine transportation eligibility. (DPFF ¶ 40). For example, MPS must determine if the pupil lives less than or more than two miles from the school, or less than or more than one mile from public transportation. (DPFF ¶ 40).

Lastly, MPS begins to make provisions for pupil transportation in accordance with Wis. Stat. § 121.55, whether that be setting up yellow bus service, entering into a contract with the private school, or entering into a contract directly with parents. (DPFF ¶¶ 41-43). Thus, the rational basis is that MPS staff must undertake all this administrative work with information not otherwise readily available to them, on top of doing similar administrative tasks for MPS pupils. (DPFF ¶¶ 41-42); s*ee, e.g., Armour*,

566 U.S. at 682 (City that chose to forgive all tax assessments still owed under a former system while declining to give a refund to homeowners who already had paid their assessments under the former system had as a rational basis for its distinction administrative considerations, including complexity and expense associated with continuing to collect the unpaid debts and the additional administrative costs of providing refunds.). This administrative work takes time and resources, and, therefore, provides a rational basis for MPS setting a submission deadline for private school notifications. Because SJA failed to adequately negate the rational basis for the roster notification deadline, this Court should find in favor of MPS as to the roster notification deadline.

Finally, SJA asserts that MPS's legitimate governmental purposes are not conditions for providing transportation to pupils of Citywide Specialty high schools because every pupil who lives two or more miles from the school "was eligible for transportation without regard to any other factor." (Pl. Brief, p. 17). But, this ignores the fact these factors are considered when enrolling pupils. (Solik-Fifarek Opp. Decl. ¶ 7). For example, MPS will not continue to enroll pupils in a school that has met its capacity. (*Id*.). Additionally, MPS enrolls pupils into the special programs at Citywide Specialty high schools during the enrollment phase and based on certain select criteria. (*Id*.). MPS does not need to then reassess the pupils attending a Citywide Specialty high school against these factors when MPS makes provision for transportation services because that analysis will have occurred in the enrollment phase. (McGrath Decl. Ex. C, Solik-Fifarek Dep. at 37, lines 1-12; Solik-Fifarek Opp. Decl. ¶ 8). Additionally, cost is a factor that is considered on the policymaking level, taking into consideration available funds and historical enrollment trends, and is done even before enrollment or the provision of

transportation services in a particular year. (Solik-Fifarek Opp. Decl. ¶ 9). Thus, SJA's assertion that these are not legitimate governmental purposes for transportation of MPS Citywide Specialty high school pupils is simply not true. Therefore, MPS asks this Court to rule in favor of MPS on the plaintiff's Equal Protection claim.

C. SJA cites two other cases that are inapplicable to its Equal Protection analysis.

SJA cites two other cases in support of it Equal Protection claim, but those cases are inapplicable to the rational basis analysis in the instant case. First, SJA alleges that the decision in *Plyler v. Doe* stands for the proposition that MPS cannot have a legitimate governmental purpose for the classification in its pupil transportation policy. (Pl. Brief, p. 14) (citing *Plyler v. Doe*, 457 U.S. 202 (1982)). *Plyler* concerned a Texas statute that withheld state aid for the public education of children who were in the country illegally. 457 U.S. at 202. There, the Court found that children who were in the country illegally were "within the jurisdiction" of the state, *id*. at 211, and that there was no rational basis for excluding them from participating in public education. *Id*. at 230. Relying on *Plyler*, SJA asserts that "[*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." (Pl. Brief, p. 14). In essence, SJA's conclusion is that no classification that concerns either education or pupils can withstand a rational basis review based on the decision in *Plyler*, but such a conclusion would carelessly expand the scope of the *Plyler* decision far beyond the particular facts of that case.

The decision in *Plyler* is not applicable to the instant case. First, *Plyler* dealt with a different classification than the instant case: *Plyler* dealt with the classification of

illegal immigrants compared to legal residents/citizens, whereas, MPS's pupil transportation policy's classification is pupils (public or private) of attendance area high schools compared to pupils of non-attendance area Citywide Specialty high schools. Second, *Plyler* dealt with access to a free public education, whereas this case deals with the provision of pupil transportation. SJA wants this Court to create a mash-up of the *Pierce* decision and the *Plyler* decision to somehow find that MPS is denying SJA's pupils access to private school education and, as such, is interfering with their parents' right to control over their children. However, SJA fails to adequately show how MPS's denial to provide transportation services to SJA's pupils is interfering with their access to private school education. There are no facts on the record to support the conclusion that MPS's provision of transportation services is a prerequisite to private school education. This is especially true given that MPS is not required to provide transportation to any pupils, public or private, under Wisconsin law. Wis. Stat. § 121.54(1)(c). Therefore, this Court should not rely on *Plyler* in analyzing SJA's Equal Protection claim.

Second, SJA asserts that *U.S. Dep't of Agric. v. Moreno* is analogous to the instant case. (Pl. Brief, p. 15) (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). *Moreno* concerned an amendment to the Food Stamp Act which rendered ineligible any household containing an individual unrelated to any other member of the household. *Moreno*, 413 U.S. at 529. The Court struck down the amendment under a rational basis review, primarily because the amendment interfered with the Act's purpose rather than furthered it as it applied to the ineligible households. *Id*. at 534. SJA asserts that "[d]enying 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," (Pl. Brief, p.

16), but cost was not offered as a rational basis in *Moreno*, and, therefore, the Court never analyzed cost as a rational basis in that case. *See Moreno*, 413 U.S. 528.

The Court in *Moreno* found that the primary purpose of the classification was to prevent "hippies" and "hippie communes" from participating in the food stamp program, and the Court held that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id*. at 534. Fraud was also offered as a rational basis, but the Court also rejected fraud as a rational basis because there were various other provisions in the Act that specifically addressed the problems of fraud and of the voluntarily poor. *Id*. at 535-537. SJA fails to adequately show how the facts in *Moreno* are analogous to the instant case. Moreno concerned an amendment to a welfare program that arbitrarily disfavored a particular group (hippies), and the amendment was contrary to the purpose of the original Act. *See Id*. Here, MPS's pupil transportation policy does not arbitrarily disfavor any group; MPS's pupil transportation policy's classification is pupils attending a non-attendance area Citywide Specialty high school as compared to pupils (public and private) attending their designated attendance area high school. SJA simply has not shown how the *Moreno* decision is applicable to the instant case. Therefore, this Court should not rely on *Moreno* in analyzing SJA's Equal Protection claim.

II. MPS has not violated Wis. Stat. § 121.54 with its pupil transportation policy.

As to the merits of the state law claim, at issue is the "reasonable uniformity" requirement in the City Option of Wis. Stat. § 121.54(1)(b). SJA alleges that MPS's pupil transportation policy violates the reasonable uniformity requirement in the City Option, but MPS disagrees. 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 states 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 points to the provision concerning transportation to a Citywide Specialty high school, but this is the exception and not the general 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.

Regarding the pupil roster July 1st deadline, SJA alleges that this violates Wis. Stat. § 121.54 because the statute does not allow for such a practice. SJA acknowledges that where a school district is required to provide transportation, the private schools are required to provide such information by May 15 of each year (unless the school board extends the notification deadline). Wis. Stat. § 121.54(2)(b)4; (Pl. Brief, p. 22). SJA argues that this statutory requirement does not take away transportation rights of pupils, but that is an incorrect interpretation of the statutory provisions. Section 121.54, Wis. Stats., concerns a school district's obligation to provide pupil transportation, and a private school not meeting this notification requirement does absolve the school district from its transportation obligation under the statute. Any other reading of that statutory provision would render the entire notification provision meaningless, and would run contrary to Wisconsin's rules of statutory construction requiring that, wherever possible, language should be read "to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 663.

SJA further argues that because MPS is not required to provide transportation to all pupils, the time deadline in the statute does not apply. While true given the

construction of the statute, the statute also does not prohibit MPS from requiring the same pupil information from a private school within the same deadline (or in this case a later deadline). The proposition that if a school district is required to provide transportation to all pupils then it can require information necessary for the provision of such services within a certain deadline, but if a school district is not required to provide such transportation to all pupils then it may not set *any* deadline for submission of critical information is rather absurd. Without such information, MPS will not know which pupils attending the private schools need transportation, nor will MPS know where to pick up or drop off such pupils. (DPFF ¶ 36). Thus, clearly MPS can set a reasonable time deadline that is similar to the deadline provided for in the statute.

SJA also relies on the "reasonable uniformity" requirement in the City Option provision as a basis for why MPS may not impose such a time deadline. However, it has already been established that the reasonable uniformity requirement applies only to the distance pupils are transported, and not to an ancillary component of pupil transportation. *See St. John Vianney*, 114 Wis.2d at 155 (We conclude that the "reasonable uniformity" requirement is directed at the distance pupils are transported and not the means of transportation chosen). Therefore, this Court should find that MPS has not violated Wis. Stat. § 121.54 with its pupil transportation policy.

Finally, MPS acknowledges that 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). Because this Court should rule in MPS' favor on the Equal Protection claim, this Court could remand the state law claim to state court. *See Miller Aviation v. Milwaukee County Bd. of Supervisors*, 273 F.3d 722, 731

(7th Cir. 2001) (quoting *Contreras v. Suncast Corp.*, 237 F.3d 756, 766 (7th Cir. 2001)) ("[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.'").[8]

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 28th day of November, 2017.

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1071-2017-639:245039

[8] MPS has filed its own Motion for Summary Judgment with a Brief in Support. There, MPS asserts that there is no private right of action for violations of Wis. Stat. § 121.54. *See, e.g., Grube v. Daun*, 210 Wis.2d 681, 689, ¶ 12 (1997) (A private right of action "is only created when (1) the language or 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 the protection of the public."). Therefore, this Court should dismiss SJA's state law claim with prejudice as a matter of law.