UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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

v. Case No. 17-CV-413

Milwaukee Public School District,
Defendant.

PLAINTIFF'S REPLY BRIEF
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Wisconsin law requires that if a school district like MPS that is relieved of its statutory obligation to transport all otherwise eligible students due to the "City Option" nevertheless chooses to provide transportation to its own students, it must treat students attending private and public schools with reasonable uniformity. This mandate of reasonable uniformity has implications for both state law and equal protection analyses. It means that MPS cannot claim that private school students are not similarly situated because they do not attend MPS and, therefore, transporting them cannot serve any educational purpose of the district.

For example, MPS cannot claim that it can treat private school students differently than public school students because transporting them would not serve MPS' interest in providing specialized service at a citywide high school. But transporting private school students is one of MPS' purposes under state law. The requirement of reasonable uniformity prohibits differential treatment. State law requires that what MPS chooses to do for its own students, it must do for private school students as well.

But it is undisputed that MPS' Rules treat students who attend private city-wide high schools differently than students who attend public city-wide high schools in two ways. First,

MPS provides transportation to students who live anywhere in the City of Milwaukee and attend its city-wide high schools if they live more than two miles from the school. (MPS Rule 4.04(5)(a)2.) It does not do the same for students who attend private city-wide high schools. They get transportation only if they live more than two miles from school **and** more than one mile walking distance from public transportation. (MPS Rule 4.04 (2)(b)2.) The "one mile from a bus" rule does not apply to students who attend MPS city-wide schools. (MPS Resp. to PPFF ¶15.)

Second, MPS imposes a deadline on private school students that it does not impose on MPS students. MPS requires each private school to submit a roster for each student for whom the school is seeking transportation by July 1st of each year. Students who are not on the July 1st roster are considered ineligible by MPS for transportation benefits in the following school year. MPS does not apply the "July 1st deadline" rule (or any deadline) to its own students. (MPS Response to PPFF ¶¶20-24.)

Based upon these rules, MPS denied transportation to 68 SJA students. They would have received free transportation if they attended an MPS public city-wide high school. To justify this differential treatment, MPS cannot simply point to the reason that it establishes city-wide schools for its students and then make the obvious (but irrelevant) point that those interests could not be served by transporting students to private schools. It must accept its state-imposed obligation to treat both groups with reasonable uniformity and then justify treating one group differently than another.

ARGUMENT

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

MPS advances two legal arguments to defend its transportation rules. First, it says that SJA and the 68 disfavored students are not similarly situated to an MPS city-wide high school or the students who attend them. Second, it says there is a rational basis for the MPS rules. Both arguments fail under federal law.

A. MPS Confuses Class of One Cases and Legislative Classification Cases.

First, MPS argues that SJA and its students are not "similarly situated" for purposes of a class of one claim. (MPS Resp. Br., Dkt. #30, at 3-10.) But this is not a "class of one" case.[1] Such claims arise when the government has not classified its citizens but has nevertheless treated similarly situated persons differently. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). In this case, MPS has drawn a classification. In its transportation rules it has distinguished between students attending public city-wide schools and students attending private city-wide schools.

Neither of the two cases relied upon by MPS – *Reget v. City of La Crosse*, 595 F. 3d 691 (7th Cir. 2010)[2] and *Racine Charter One, Inc. v. Racine Unified School District*, 424 F. 3d 677 (7th Cir. 2015) – have any bearing on this case because they are both class of one cases. In those cases the plaintiffs had to prove that they were similarly situated to a group of other people, but treated differently by the government than everyone else in that group. In such cases, the courts do look at the relevant characteristics of the group and of the individual to determine if they are in fact similar. But that is <u>not</u> what the courts do in Equal Protection cases based on a legislative classification.

[1] The Plaintiff has specifically stated that it is not making a class of one claim. (SJA Br., Dkt. #17, at 15.)
[2] The defendants pull language from *Reget* to suggest that there are only two kinds of equal protection claims – those involving heightened scrutiny and "class of one" cases. That would be a revolutionary transformation of the law – essentially abolishing standard rational basis scrutiny – and it is unreasonable to think that is what the *Reget* opinion intended to do.

As explained by the U.S. Supreme Court in *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982), a claim based on a legislative classification involves a determination about the classification itself – whether the government can show that its decision to treat two groups differently is "precisely tailored to serve a compelling governmental interest" (in cases involving strict scrutiny) or is rationally related to a legitimate government interest (in cases calling for greater deference). The focus is on the justification for the legislative classification.

This makes perfect sense when one considers the different nature of the two kinds of equal protection claims. In a "class of one" case the plaintiff must prove that, although the government has not acted with respect to a class or group, she has nevertheless been singled out and treated differently – putting her in a "class of one." But a classification claim is different. The government itself has *already identified two groups* and has expressly decided to treat them differently. The legal issue in legislative classification cases – including this one – is whether the government is justified in making the classification.

Plyler is instructive. There, the State of Texas treated students who were in the U.S. legally differently from students who were here illegally. MPS would say that the plaintiffs in *Plyler* should have had no equal protection claim because, after all, they were not similarly situated to students who were in the county legally. The Supreme Court acknowledged that there were differences between the two groups. 457 U.S. at 219-220. But the differences did not justify the government's decision to treat them differently.

That is of course consistent with *Deutsch v. Teel*, 400 F. Supp. 598, 602 (E.D. Wis. 1975), in which a three-judge panel (Chief Circuit Judge Fairchild, Judge Reynolds and Judge Warren) specifically held that private school students in the City of Milwaukee are similarly situated to public school students in the city for transportation purposes. *Id.* at 604.

MPS tries to avoid this ruling, and the facts, by saying that the *Deutsch* court held only that the private elementary school students who it refused to transport were similar to other private elementary school students who it did. (Dkt. #30 at 5.) But that is false. The question in *Deutsch* was whether students who lived in the City of Milwaukee and attended a private school 400 feet outside of the boundaries of the City of Milwaukee were entitled to transportation from MPS. The court held that they were because MPS provided transportation to both public and private school students within the City and many times at distances greater than MPS would have had to transport the plaintiffs. The legislative classification in *Deutsch* was between public and private students who lived in the City and attended schools located within the City, and private school students who lived within the City and attended a school 400 feet outside of the city limits. The court held that there was no rational basis for the different treatment of these two groups. The issue was not whether there were differences between them (and there most certainly were) but whether there was a justification for the classification that treated them differently. The court held that there was not.

The same is true for the Equal Protection cases cited at pages 10-11 of SJA's Opening Brief. In all of them there were differences between the favored group and the disfavored group, but the courts upheld the plaintiffs' Equal Protection claim in each of them. Everyone understands that the two groups are different in legislative classification cases, but the question is whether the differences provide a compelling justification for treating them differently. Here, there is no legally acceptable justification.

B. There Is No Rational Basis for MPS' differing treatment of private school and public school students.

To justify its legislative classifications, MPS must show some legitimate state purpose that is furthered by its transportation rules which treat students differently if they attend a public

city-wide school instead of a private city-wide school. MPS treats this as if it is an extremely low bar. It is not. The State of Wisconsin has already declared in Wis. Stat. § 121.54(1)(b) that there must be reasonable uniformity between these two groups. There can be no state purpose that is furthered by the MPS Rules given that they flout the State policy expressed in § 121.54(1)(b).

1. MPS has treated public school students attending city-wide schools more favorably than private students attending city-wide schools.

MPS seems to argue, without explanation, that Rule 4.04 creates two classes – schools with attendance areas and schools without attendance areas – and that MPS treats all of the schools with attendance areas the same for transportation purposes. (Dkt. #30 at 4.) In MPS' view, MPS Neighborhood Schools and SJA fall into the first group (schools with attendance areas) and MPS city-wide high schools fall into the second group (schools without attendance areas). But this is an exercise in obfuscation.

If "attendance area" simply means the geographic area in which a student must live to qualify for transportation, then all of the MPS schools have an attendance area.[3] The attendance area for some – MPS Neighborhood Schools – might be smaller than the city boundaries, but for others, the city-wide schools (both public and private), the attendance area is obviously the entire City of Milwaukee. Applying this definition uniformly would mean that all schools have an attendance area and the attendance area for SJA for transportation services is the same as the attendance area for an MPS city-wide high school.

MPS does not apply any definition of attendance area consistently across all kinds of schools. Instead, MPS says that a school has an "attendance area" if MPS says it does and does not have an attendance area if MPS says that it does not. According to MPS, if it calls its

[3] The statutory definition of "attendance area" in Wis. Stat. § 121.51(1) does not work because it applies only to private schools and not public schools.

Neighborhood Schools and SJA "attendance area schools" then they have an attendance area, and if it calls its city-wide high schools "non-attendance area schools" then they do not have attendance areas. In other words, like Humpty Dumpty, when MPS uses a word, "it means just what [MPS] choose[s] it to mean – neither more nor less."[4]

But MPS is not Humpty Dumpty, and its corporate designee has already acknowledged that the argument that SJA is different than MPS city-wide high schools for transportation purposes is wrong. He testified that for transportation purposes there is no practical difference between a private school with a city-wide attendance area (like SJA) and a public school with, in MPS' words, "no limiting attendance area" (*i.e.*, a city-wide high school). (Solik-Fifarek Dep. at 45-46, Dkt. #21 at 29; PPFF ¶18.)

> A What's the difference between a public school without an attendance area and a private school with an attendance area?
>
> Q With a city-wide attendance area.
>
> A Well, nothing for that particular points.
>
> Q Practically they amount to the same thing, correct?
>
> A Except that – yes, except that we define attendance-area schools and city-wide schools differently. We break them up differently for specific reasons that I don't really know. But they are – they're not the same kinds of schools.
>
> Q I understand that. But my question was limited to are there any practical differences between a public school with no attendance area and a private
>
> school with a city-wide attendance area from a transportation standpoint?
>
> A No.

The whole purpose of the amendment to the Wisconsin Constitution in 1967 and the enabling legislation was to put private school students and public school students on the same footing – to make them similarly situated for transportation benefits because they face the same

[4] Lewis Carroll, THROUGH THE LOOKING GLASS.

transportation risks. Here, MPS by legislative classification has decided to treat them differently, but the classification does not further any legitimate state interest.

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

MPS first argues that over-crowding may be a justification for its "one mile from a bus stop rule." (Dkt. #30 at 12-14.) But, MPS misses the mark. As pointed out above, MPS' purported "justifications" are merely the reasons why MPS buses its own students to its city-wide high schools, but they do not explain why MPS denies the same benefit to students who attend private city-wide high schools. They do not set forth any legitimate state interest for treating private school students differently from the way MPS treats its own students.

With respect to the asserted "over-crowding" justification, MPS admits that its total capacity for all MPS high schools in 2016-2017 was 24,860 and that its actual attendance was only 19,864. (MPS Resp. to PPFF ¶64.) That means 20% of its available high school seats were empty. There was no actual over-crowding problem. Nevertheless, MPS argues that overcrowding "could have been a problem" at some schools. But it does not limit transportation to students whose neighborhood schools are actually overcrowded.

MPS suggests South Division is an example. (Dkt. #30 at 12.) But the undisputed facts show that South Division could have accepted 356 of the 899 students that were bused out of that neighborhood. (MPS Resp. to PPFF ¶ 62.) At a minimum, at least those 356 students were treated differently and better than the SJA students – they got transportation and the SJA students did not. Moreover, 38 of the 68 SJA students involved in this case also live in the South Division attendance area. (MPS Resp. to PPFF ¶63.) If the bare possibility of over-crowding was an issue, MPS should have been equally willing to transport them to SJA in order to avoid

having them enroll at South Division. They could just as easily have gone to South Division as the public school students that MPS transported out of the South Division attendance area.

MPS also argues that "racial balance" provides a rational basis for its classification but SJA explained why that is not the case at pages 20-22 of its Opening Brief. MPS' busing students from its Neighborhood Schools to its public city-wide high schools resulted in more racial imbalance at each of its Neighborhood Schools rather than less. On this issue, MPS also points to Wis. Stat. § 121.85, which allows a school district to have "minority group pupils" attend a public school other than the pupil's neighborhood school. That is certainly what the statute allows, but it is not a rational basis for MPS imposing the "one mile from a bus stop" rule on public students but not private students. MPS could both allow minority group pupils to attend a public school other than their neighborhood school (including a city-wide high school) and provide transportation to private school students with reasonable uniformity to public school students. The two programs are not mutually exclusive.

Finally, MPS argues that cost is a rational basis for denying transportation benefits to private school students. (Dkt. #30 at 16-19.) But the Supreme Court has expressly said that when a state distributes benefits unequally, that discrimination will survive only if the distinction rationally furthers a legitimate state purpose. In *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 618 (1985), the Supreme Court struck down on Equal Protection grounds a New Mexico statute that granted a tax exemption limited to those Vietnam veterans who resided in the state before May 8, 1976. By limiting the benefit to a smaller group the government reduced its cost, but that was not a basis to save the statute. Denying benefits to one group will always save money.

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

Deutsch is also instructive because the court in that case rejected MPS' argument regarding costs. The court noted that MPS provided free transportation for many public school students who lived further from their schools than the plaintiffs did from their private school and that obviously meant that cost was not the issue. The court noted that "the distance over which a student is bused bears a direct relationship to the cost" and said that based upon the fact that MPS was willing to spend more to transport its own students, MPS "will not be heard to claim that the children of these plaintiffs have been denied state-financed busing for fiscal considerations." 400 F. Supp. at 604-605. Here, MPS could eliminate its city-wide schools if cost were the driving concern.

Finally, MPS' attempt to rely on this Court's discussion of the cost issue in *Racine Charter One, Inc. v. Racine Unified School District*, 424 F.3d 677 (7th Cir. 2005) (Dkt. #30 at 19), is misplaced. In *Racine Charter One*, this Court was discussing a cost that the Racine Unified School District was not obligated to incur – *i.e.*, the cost of transporting students who resided in a school district other than Racine Unified – and not a cost for transporting students that Racine Unified was legally obligated to transport.

Here, MPS had a legal obligation to transport the SJA students. The State of Wisconsin provides state aid to MPS to provide transportation to both public and private school students. It is undisputed that MPS has elected under the City Option to provide transportation to its own students. Under Section 121.54(1)(b), that means that MPS was eligible for state aid under § 121.58. It is further undisputed that MPS received state aid under § 121.58 for the 2016-2017 school year in the amount of $2,322,123. (McGrath Decl. ¶20, Ex. J, Dkt. #21 at 60; PPFF ¶72.) Under the very statute pursuant to which it became eligible for that aid (§ 121.54(1)(b)) the State required that there must be "reasonable uniformity in the transportation furnished to the pupils, whether they attend public or private schools." MPS should not be allowed to accept the state aid without fulfilling the conditions for the aid and then contend that it is serving some compelling government interest through such conduct.

MPS' asserted concern for the public fisc, if a proper concern in an Equal Protection case, could be used to justify any and every form of discrimination in the distribution of benefits. It is always the case that denying a benefit to some disfavored class will save money. The law is clear, however, that such cost savings are not a legitimate justification.

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

With respect to the MPS rule imposing a July 1st deadline on private school students that it does not impose on public school students, MPS argues that it needs the rule for what amounts to logistical reasons. (Dkt. #30 at 19-20.) But the asserted logistical reasons do not explain why no such deadline is in place for public school students. The logistical issues, whatever they are, would be the same whether the students attend a private or a public school. (Solik-Fifarek at 52-53, Dkt. #21 at 31; PPFF ¶26.) But public school students receive transportation from MPS even if their names are not on a school roster by July 1st. (*Id.*)

MPS also argues that this issue is moot because each of the SJA students who was denied transportation on this basis would also have been denied transportation under the "one mile from a bus stop" rule. (Dkt. #30 at 19.) That places the cart before the horse. By MPS' own admission there were six SJA students denied transportation based on the July 1st deadline rule. (MPS Resp. to PPFF ¶40.) Those students are entitled to a declaration as to whether that denial was a violation of their rights. If MPS subsequently denies them benefits for some other reason, that can be addressed in the future.

This Court should rule on the controversy that currently exists. The impact of MPS' policy is as follows: public school students attending a city-wide high school can enter the district – or be admitted to a school – at any time and still be transported. Private school students attending a city-wide high school may not. To be sure, a private school must inform MPS of who its students are and where they live. But that doesn't justify the non-uniform deadline. If MPS can accommodate public school latecomers, it can accommodate those attending private schools.

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

II. MPS HAS VIOLATED STATE LAW.

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

A. SJA Has a Private Cause of Action.

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

Second, MPS ignores the history of litigation under this statute. The following cases were brought and fully litigated in state court under § 121.54: *Young v. Mukwanago Bd. of Educ.*, 74 Wis. 2d 144, 246 N.W.2d 230 (1976) (action by parents and students to enforce transportation rights under § 121.54); *Morrissette v. DeZonia*, 63 Wis. 2d 429, 217 N.W.2d 377 (1974) (action by parents and students to enforce transportation rights under § 121.54); *Vanko v. Kahl*, 52 Wis. 2d 206, 188 N.W.2d 460 (1971) (original action by parents under Wis. Stat. §§ 21.51(4) and 121.54(2)(b)1.); *Providence Cath. Sch. v. Bristol Sch. Dist. No. 1*, 231 Wis. 2d 159, 605 N.W.2d 238 (Ct. App. 1999) (action by school and parents to enforce transportation rights under § 121.54); *St. John Vianney Sch. v. Janesville Bd. of Educ.*, 114 Wis. 2d 140, 336 N.W.2d 387 (Ct. App. 1983) (action by private schools and parents to enforce reasonable uniformity provision of § 121.54); *Hahner v. Wis. Rapids Bd. of Educ.*, 89 Wis. 2d 180, 278 N.W.2d 474 (Ct. App. 1979) (action by students under § 121.54).

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

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

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

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

Applying that rule here, whatever distance rules that MPS applies to public school students it must also apply to private school students. Under Rule 4.04(5), MPS has chosen a rule that all public school students who attend city-wide schools and live more than two miles from their school are entitled to free transportation without regard to whether or not they live within one mile from a bus stop. Under *St. John Vianney*, MPS must apply this same distance

rule to private school students who attend a private city-wide school. It is undisputed that all of the SJA students in issue live more than two miles from SJA. As a result, under the distance rule created by MPS, they are also entitled to free transportation without regard to whether or not they live within one mile of a bus stop.

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

MPS argues that *St. John Vianney* holds that "reasonable uniformity" means only that a "city option" school not set transportation in a way that substantially excludes private school students. But the case says that exactly nowhere and "reasonable uniformity" cannot be recast as "not illusory." Not every distinction will be unreasonable. As the *St. John Vianney* court noted, since not all students can be picked up at the same place and the same time, there will always be differences in treatment. Practical considerations may warrant providing transportation contracts to some and yellow bus service to others. But providing no transportation at all to students who would receive it if they attended a comparable public school is not uniform.

CONCLUSION

SJA respectfully requests that this Court grant it summary judgment on the merits of its claims. SJA also requests that this Court set this case for a trial to determine damages, and that this Court determine costs and attorneys' fees under 42 U.S.C. § 1988.

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