

**BEFORE THE UNITED STATES DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION**

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION RACIAL JUSTICE
PROGRAM, ACLU OF WISCONSIN
FOUNDATION, DISABILITY RIGHTS
WISCONSIN, D.E. ON BEHALF OF K. S. &
S. E., AND D. J. ON BEHALF OF B.J.,

Complainants,

v.

STATE OF WISCONSIN, WISCONSIN
DEPARTMENT OF PUBLIC INSTRUCTION,
MESSMER PREPARATORY CATHOLIC
SCHOOL AND CONCORDIA UNIVERSITY
SCHOOL,

Respondents.

COMPLAINT UNDER § 504 OF THE
REHABILITATION ACT OF 1973
AND TITLE II OF THE AMERICANS
WITH DISABILITIES ACT

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I. INTRODUCTION

This Complaint is brought against the State of Wisconsin, the Wisconsin Department of Public Instruction (“DPI”), Messmer Catholic Preparatory School (“Messmer”), and Concordia University School (“Concordia”) by the American Civil Liberties Union Foundation Racial Justice Program (ACLU), the ACLU of Wisconsin Foundation (ACLU-WIF), Disability Rights Wisconsin (DRW), individual parents D. E. and D.J. on behalf of their children with disabilities, K.S, S.E. and B.J., and as representatives of city of Milwaukee students with disabilities and their families. Each respondent is a recipient of federal financial assistance and is named as a respondent because they have discriminated against students with disabilities and segregated those students in one portion of the publicly funded educational system.

Twenty years ago, Wisconsin passed laws creating, and DPI began implementing, a private school voucher system in the city of Milwaukee. The program provides public tax dollars for low-income students who live in the city to attend private religious and non-sectarian schools, at an estimated cost of \$130.8 million for the 2010-11 school year.¹ In 1990, when the voucher program began, it had only seven schools, enrolling just 337 students.² In the last two decades it has grown to include more than 100 schools and now enrolls approximately 20% of the city’s students.³

¹ Wis. Legislative Fiscal Bureau, Milwaukee Parental Choice Program 12 (Jan. 2011) (Informational Paper 28), http://legis.wisconsin.gov/lfb/Informationalpapers/28_Milwaukee%20Parental%20Choice%20Program.pdf, Exhibit 1 [hereinafter Wis. Legislative Fiscal Bureau, Informational Paper 28]; Wis. Dep’t of Pub. Instruction, MPCP Facts and Figures for 2010-2011, at 1 (Nov. 2010), http://dpi.state.wi.us/sms/doc/mpcp_10-11fnf_2010_11.doc, Exhibit 2 [hereinafter DPI, MPCP Facts and Figures for 2010-2011].

² Wis. Dep’t of Pub. Instruction, Milwaukee Parental Choice Program: Membership and Payment History (Nov. 2010), http://www.dpi.state.wi.us/sms/xls/mpcp_histmem_2010_11.xls, Exhibit 3.

³ *Id.* According to DPI, 105 schools have signed up to participate in the program next year. Press Release, Wis. Dep’t of Pub. Instruction, 105 Schools Plan to Participate in Milwaukee Parental Choice Program

Today, nearly 21,000 Milwaukee students attend private schools with these public vouchers. Although an average of 83% of the students in voucher schools attend with a tuition voucher, and in many private schools all of the students attend on taxpayer-funded vouchers, the State of Wisconsin asserts that the voucher schools are “private” schools. The state’s implementing agency, DPI, fails to meaningfully enforce anti-discrimination laws against these schools; as a result, the voucher schools tend not to admit or accommodate students with disabilities in a non-discriminatory manner. The two individual parent complainants are examples of the voucher schools’ discrimination against students with disabilities. D.E. attempted to enroll her two children with disabilities in a voucher school this year and they were never admitted. D.J.’s daughter, who has been diagnosed with a disability, was enrolled in a voucher school but expelled after her disability was not accommodated.

Milwaukee Public School District (“MPS”), the largest public school district in the state, receives fewer and fewer state resources to educate its approximately 81,000 students — including approximately 16,000 students with disabilities — while the state diverts a significant portion of MPS funding to a voucher program serving an almost exclusively non-disabled population.⁴ The result is that MPS is serving a student population of which almost 20% have disabilities.

Wisconsin’s creation, implementation and expansion of a private school voucher program in Milwaukee has resulted in a dual system of education in the city. There is essentially one option for students with disabilities: MPS. Students without disabilities

(Mar. 23, 2011), http://dpi.wi.gov/eis/pdf/dpinr2011_29.pdf, Exhibit 4. There are approximately 110,000 public and private students enrolled in Milwaukee, 21,000 of whom are in the voucher program. *See infra* Part.II.

⁴ In the 2010-11 school year, the general aid that would otherwise be paid to MPS was reduced by \$58.8 million to partially fund the voucher program. Wis. Legislative Fiscal Bureau, Informational Paper 28, Exhibit 1, *supra* note 1, at 12.

have a publicly-funded “choice:” they can attend private schools with a publicly-funded voucher or choose to stay in public schools. The decision to treat almost entirely publicly-funded schools as private and to exempt them from anti-discrimination laws, the exclusion of the otherwise qualified students with disabilities from the Wisconsin’s publicly-funded voucher program, and the resulting segregation of students with disabilities within MPS, violates the rights of children with disabilities under both §504 of the Rehabilitation Act (§ 504) and the Americans with Disabilities Act (ADA). Proposed legislation to substantially expand the voucher program, if implemented, will exacerbate the discrimination against and segregation of students with disabilities by permitting more schools to participate in the program.

Complainants therefore ask the Department of Justice to:

- fully investigate these claims;
- ensure that the voucher program ceases operating in a way that leads to the segregation of Milwaukee students with disabilities in MPS;
- ensure that DPI monitors the schools participating in the voucher program to ensure that students with disabilities are given equal access;
- halt expansion of the voucher program unless and until the segregation and discrimination issues are remedied; and
- grant any other relief it deems just and proper.

II. STATEMENT OF FACTS

A. Milwaukee School Information and Structure

Families in Milwaukee have a number of government-funded educational options, the largest of which is the Milwaukee Public Schools (MPS) system. Students may also

attend charter schools and the voucher program formally known as the “Milwaukee Parental Choice Program” (“MPCP” or “voucher program”).⁵

MPS enrolled 80,934 students during the 2010-11 school year.⁶ Of those students, approximately 19.2% are students with disabilities whom MPS serves with Individualized Education Programs (IEPs).⁷ This is far above the state average for Wisconsin, where children with disabilities⁸ represent only 14.3 % of the overall public school enrollment.⁹

In total, there are 29,024 students enrolled in private schools in the city of Milwaukee.¹⁰ Of these private school students, during the 2010-11 academic year, 20,996 attended using vouchers.¹¹ Thus more than 72% of all the students in Milwaukee private schools attend on taxpayer-funded vouchers. Moreover, in 2010-11, for 22 private schools participating in the voucher program, 100% of their students use tax-funded vouchers,¹² and half of voucher program schools had 94% or more of their students on vouchers.¹³ On average, 83% of the student population at any given MPCP

⁵ Wis. Stat. § 119.23 (2009) (Milwaukee Parental Choice Program).

⁶ Wis. Dep’t of Pub. Instruction, Public Enrollment by District by School by Gender (2011), <http://www.dpi.state.wi.us/lbstat/xls/peg11.xls>, Exhibit 5 [hereinafter DPI, Public Enrollment 2011]. This figure is based on a one-time count on the third Friday in September.

⁷ See Milwaukee Pub. Sch., Historical Trends in Special Education Enrollment (2010), <http://www.milwaukee.k12.wi.us/portal/server.pt/doc/64291/Historical+Trends+in+Special+Education+Enrollment>, Exhibit 6 (reporting 19.2% in the 2009-2010 school year); see also *infra* note 32 and accompanying text.

⁸ Aged 3-21.

⁹ See Nat’l Ctr. Educ. Statistics, Digest of Education Statistics, Number and Percentage of Children Served Under Individuals with Disabilities Education Act, Part B, by Age Group and State or Jurisdiction: Selected Years, 1990–91 through 2008–09 (2010), http://nces.ed.gov/programs/digest/d10/tables/dt10_047.asp?referrer=list, Exhibit 7 [hereinafter NCES statistics].

¹⁰ Wis. Dep’t of Pub. Instruction, Non-Public Enrollment by District by School by Gender (2011), <http://dpi.state.wi.us/lbstat/xls/neg11.xls> (third worksheet), Exhibit 8.

¹¹ DPI, MPCP Facts and Figures for 2010-2011, Exhibit 2, *supra* note 1, at 1.

¹² Wis. Dep’t of Pub. Instruction, Fiscal Year 2011 Milwaukee Parental Choice Program Enrollment by School 1 (May 2011), Exhibit 9.

¹³ *Id.* at 2.

school attends with a publicly-funded voucher,¹⁴ and most MPCP schools are dependent on state voucher payments to operate.¹⁵

Moreover, Milwaukee voucher schools receive federal funds through services paid for with Title I funding and nutrition funding.¹⁶ To be eligible to enter the voucher program, families are required to live in the city of Milwaukee and have a household income equal to 175% of the poverty line or less,¹⁷ if a student is already attending a private school with a voucher and the family income exceeds 175% of the poverty line but is still less than 2.2 times poverty levels, then the student remains voucher-eligible.¹⁸ However, a key Wisconsin legislative committee has voted to increase the income limit to 300% of the poverty level and the governor has proposed entirely eliminating the income limit.¹⁹

As the program has expanded, the state has repeatedly made it easier for non-disabled children to receive vouchers. Proposed legislation would allow an even greater expansion of the program.²⁰ For instance, the voucher schools were originally limited in the proportion of their students who could attend on vouchers, but there is no longer any

¹⁴ Wis. Dep't of Pub. Instruction, Analysis of MPCP Data and Implications for Program Expansion 2 (May 23, 2011), http://dpi.state.wi.us/pb/pdf/budget_voucher_memo.pdf, Exhibit 10 [hereinafter DPI Voucher Memo]; see also Anneliese Dickman & Jeffrey Schmidt, Public Policy Forum, Research Brief, *Slight Decline in Use of Private School Tuition Vouchers in 2010-2011*, at 3 (Feb. 2011) (Vol. 99, Number 2), <http://www.publicpolicyforum.org/pdfs/2011VoucherBrief.pdf>, Exhibit 11 (stating that 81% of students in MPCP schools use vouchers).

¹⁵ DPI Voucher Memo, Exhibit 10, *supra* note 14, at 6.

¹⁶ See Wis. Dep't of Pub Instruction, Program Statistics: Child Nutrition Programs – Enrollment Participation Report October 2010, <http://www.dpi.state.wi.us/fns/progstat.html> (private schools worksheet) (last visited June 6, 2011), Exhibit 12 [hereinafter Federal Nutrition Funding Spreadsheet], for nutrition distribution to private schools in Wisconsin.

¹⁷ Wis. Stat. § 119.23(2)(a)(1) (2009).

¹⁸ Wis. Stat. § 119.23(2)(a)(1) (2009).

¹⁹ Wis. Leg. J. Finance Comm., Motion 458 – Changes to Milwaukee Parental Choice Program and Creation of Racine Parental Choice Program, Exhibit 24 (adopted 11-4, June 2, 2011); see *infra* note 20.

²⁰ Fast-tracked proposals from the Governor's 2011-13 budget plan would eliminate the enrollment caps, expand it to include schools in all of Milwaukee County, and phase out income limits, thus opening the plan to middle- and high-income families. *Editorial: Voucher Expansion Is Threat to Public Education*, Post Crescent, May 15, 2011, <http://www.postcrescent.com/apps/pbcs.dll/article?AID=2011105150534>, Exhibit 25; see also Assemb. B. 92, 2011-2010 Leg., Reg. Sess. (Wis. 2011), Exhibit 15.

limit on the percentage of voucher students in individual MPCP schools.²¹ In addition, the state has permitted increasing numbers of students to receive vouchers. For instance, while the program originally only permitted non-sectarian schools to participate, in 1998 the state expanded it to allow religious school participation.²² Originally, voucher students could comprise only 1% of MPS population, a limit that was subsequently increased to 15% of the MPS population, or about 15,000 students.²³ In 2006, the cap was increased to 22,500 students.²⁴ Moreover, proposed legislation would completely eliminate the cap.

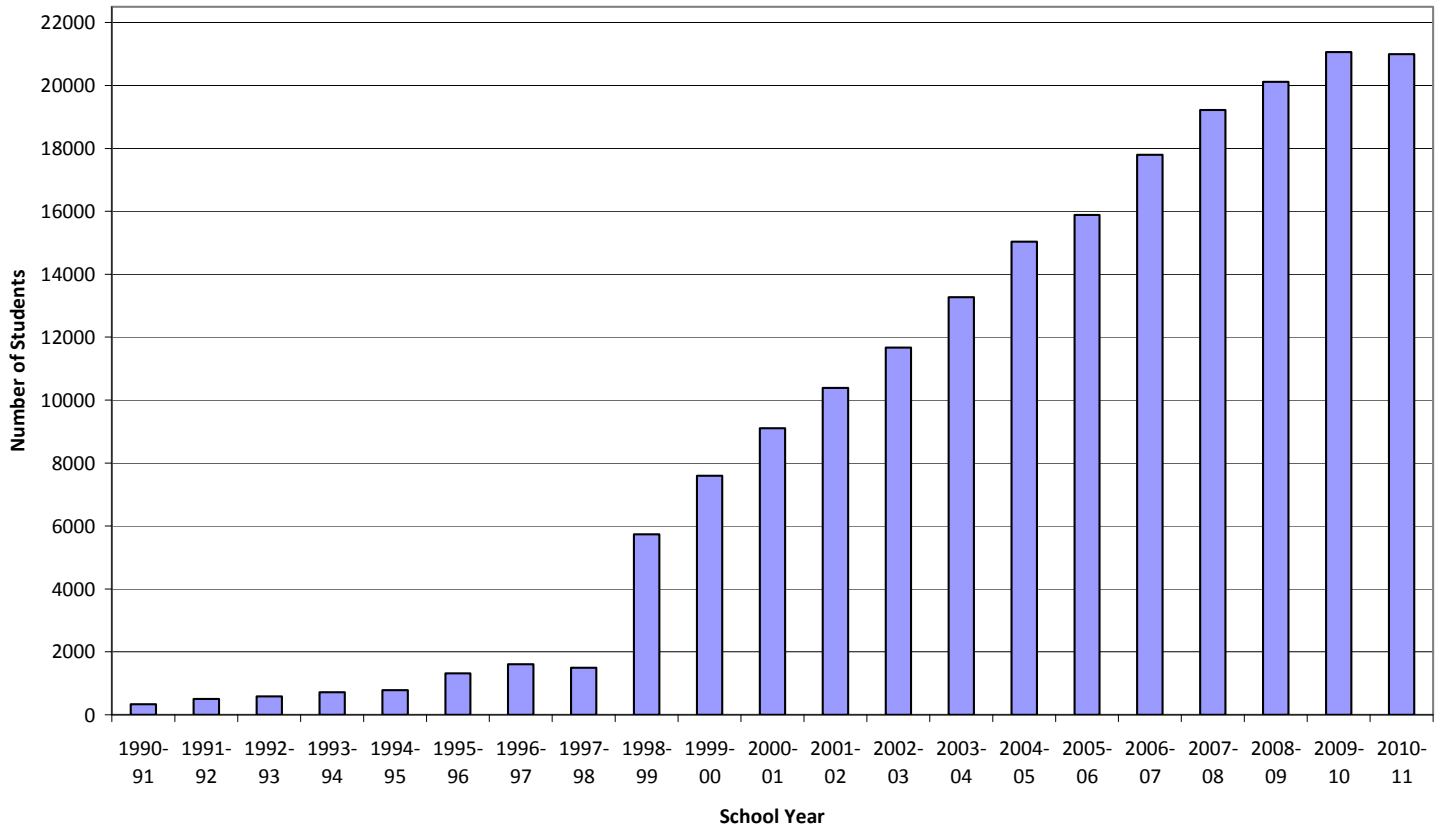
²¹ Initially no more than 49% of an individual MPCP school's students could be enrolled with a voucher. 1989 Wis. Act 336, § 228, *available at* <http://legis.wisconsin.gov/acts89-93/89Act228.pdf> (creating § 119.23). The proportion cap was raised to a 65 percent limit in 1993 and eliminated in 1995. 1993 Wis. Act 16, § 2300, *available at* <http://legis.wisconsin.gov/acts89-93/93Act16.pdf> (amending § 119.23(2)(b)(2)); 1995 Wis. Act 27, § 4003, *available at* <http://legis.wisconsin.gov/1995/data/acts/95Act27.pdf> (repealing and recreating § 119.23(2)(b) without proportion cap).

²² Anneliese Dickman et al., Public Policy Forum, *Exploring Parents' Educational Choices*, at 5 (Apr. 2000), <http://www.publicpolicyforum.org/pdfs/explparchoices.pdf>.

²³ 1995 Wis. Act 27, § 4003, *available at* <http://legis.wisconsin.gov/1995/data/acts/95Act27.pdf> (repealing and recreating § 119.23(2)(b)) (calling for a 15% cap beginning in the 1996-97 school year).

²⁴ 2005 Wis. Act 125, § 7 (amending § 119.23(2)(b)) (signed by Gov. Jim Doyle March 2006).

Voucher School Enrollment 1990-2011



Additionally, legislators also have voted to allow any private school in Milwaukee County — not just in the city of Milwaukee — to participate in the voucher program, and a legislative committee has also voted to expand the program to other Wisconsin cities. The voucher program has grown over the years, and it stands to grow exponentially in the next five to ten years with the implementation of these changes, with the likely effect of increasing the segregation of students with disabilities.

The voucher schools are separate, but not necessarily better, than the public schools. Despite the voucher program's near-total exclusion of children with disabilities, results from the 2010-11 Wisconsin Student Assessment System (WSAS) statewide exam

showed higher test scores from MPS students than similarly-situated voucher students.²⁵

The major way the voucher schools differ from the public schools is in their almost total exclusion of students with disabilities.

B. Disability in Schools

On average, approximately 20% of the population has one or more disabilities,²⁶ and in Wisconsin children with disabilities²⁷ represent 14.3 % of the overall public school enrollment.²⁸ Of the almost 21,000 students attending voucher schools, only 444 voucher students have services plans pursuant to Individuals with Disabilities Education Act provisions allowing them to receive supplemental special education services²⁹ from the public school district because they are identified as students with disabilities.³⁰ In 2010-11, the voucher schools self-reported that students with disabilities accounted for a mere 1.6% of their student population,³¹ while in MPS, 19.5% of the students have disabilities.³² The growth of the voucher program combined with the exclusion of students with disabilities from that program has led to an increasing concentration of students with disabilities within MPS, as the following table and graph demonstrate.

²⁵ DPI Voucher Memo, Exhibit 10, *supra* note 14, at 3-4; *see also* Press Release, Wis. Dep't of Pub. Instruction, Overall MPS Results Higher than Choice Schools on Statewide Exams 2 (Mar. 29, 2011), http://dpi.wi.gov/eis/pdf/dpinr2011_30.pdf, and associated data, Exhibit 14 [hereinafter DPI, March 29, 2011 Press Release].

²⁶ *See* U.S. Census Bureau, Disability Status: 2000 1, 2 (Mar. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-17.pdf>, Exhibit 16. Census 2000 shows 19.3% of the population 5 and older has a disability. *Id.*

²⁷ Aged 3-21.

²⁸ *See* NCES statistics, Exhibit 7, *supra* note 9.

²⁹ "Service plans" for students with disabilities in private schools described in IDEA's enacting regulations at 34 C.F.R. § 300.137-139.

³⁰ Milwaukee Public Schools, Special Services Dep't, Private School Service Plan Factor (March 2011), Exhibit 13.

³¹ *See* DPI, March 29, 2011 Press Release, Exhibit 14, *supra* note 25, at 2, and associated data.

³² Wis. Dep't of Pub. Instruction, Enrollment by Disability: Milwaukee: 2010-11 Compared to Prior Years (2011), <http://data.dpi.state.wi.us/Data/GroupEnroll.aspx?OrgLevel=di&GraphFile=GROUPS&S4orALL=1&SRegion=1&SCounty=47&SAthleticConf=45&SCESA=05&Qquad=demographics.aspx&Group=Disability&FULLKEY=01361903````&DN=Milwaukee&SN=None+Chosen> [hereinafter DPI, Enrollment by Disability: Milwaukee: 2010-11].

Table 1

	% of Students with Disabilities in MPS ³³	Number of Students in MPS ³⁴	Number of Voucher Schools ³⁵	Voucher School Cap	Voucher School Enrollment ³⁶
1999-2000	--	99,729	91 ³⁷	15% of MPS Enrollment ³⁸	8,007 ³⁹
2000-01	--	97,985	100 ⁴⁰	15%	9,619 ⁴¹
2001-02	--	97,762	103 ⁴²	15%	10,882 ⁴³
2002-03	15.8%	97,293	102 ⁴⁴	15%	11,670 ⁴⁵
2003-04	16.0%	97,359	106 ⁴⁶	15%	13,268 ⁴⁷
2004-05	16.0%	93,654	117 ⁴⁸	15%	15,035 ⁴⁹
2005-06	16.2%	92,395	121 ⁵⁰	15%	15,887 ⁵¹
2006-07	17.1%	89,912	121 ⁵²	22,500 ⁵³	17,795 ⁵⁴

³³ *Id.*

³⁴ Wis. Dep't of Pub. Instruction, Milwaukee Public Schools - District Enrollments, 1991-1992 – 2009-2010 (May 13, 2010), http://dpi.state.wi.us/lbstat/mps_enr.html. These figures are based on a one-time count on the third Friday in September in each school year.

³⁵ All data for this column is provided by the Wisconsin Department of Public Instruction, *available at* <http://www.dpi.state.wi.us/sms/geninfo.html>.

³⁶ All figures in this column are based on September headcounts. All data for this column is available at <http://www.dpi.state.wi.us/sms/geninfo.html>.

³⁷ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 1999-2000, at 1 (Nov. 2001), <http://www.dpi.state.wi.us/sms/pdf/mpcfnf99.pdf> (as of January 2000), Exhibit 17 [hereinafter DPI, MPCP Facts and Figures for 1999-2000].

³⁸ 1995 Wis. Act 27, § 4003, *available at* <http://legis.wisconsin.gov/1995/data/acts/95Act27.pdf> (repealing and recreating § 119.23(2)(b)) (calling for a 15% cap beginning in the 1996-97 school year).

³⁹ DPI, MPCP Facts and Figures for 1999-2000, *supra* note 37, at 2 tbl. 3 (headcount held third Friday in September 1999).

⁴⁰ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2000-2001, at 3 (Nov. 2001), <http://www.dpi.state.wi.us/sms/pdf/mpc00nos.pdf>.

⁴¹ *Id.* at 3.

⁴² Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2001-2002, at 1 (Feb. 2002) <http://www.dpi.state.wi.us/sms/doc/mpc01fnf.doc>.

⁴³ *Id.* at 2, tbl. 3.

⁴⁴ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2002-2003, at 1 (Feb. 2003) <http://www.dpi.state.wi.us/sms/doc/mpc02fnf.doc>.

⁴⁵ *Id.* at 2, tbl. 3.

⁴⁶ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2003-2004, at 1 (Feb. 2004) <http://www.dpi.state.wi.us/sms/doc/mpc03fnf.doc>.

⁴⁷ *Id.* at 2, tbl. 3.

⁴⁸ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2004-2005, at 1 (Feb. 2005) <http://www.dpi.state.wi.us/sms/doc/mpc04fnf.doc>.

⁴⁹ *Id.* at 2, tbl. 3.

⁵⁰ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2005-2006, at 1 (Jan. 2006) <http://www.dpi.state.wi.us/sms/doc/mpc05fnf.doc>.

⁵¹ *Id.* at 2, tbl. 3.

	% of Students with Disabilities in MPS ³³	Number of Students in MPS ³⁴	Number of Voucher Schools ³⁵	Voucher School Cap	Voucher School Enrollment ³⁶
2007-08	17.9%	86,819	120 ⁵⁵	22,500	19,223 ⁵⁶
2008-09	18.5%	85,381	125 ⁵⁷	22,500	20,113 ⁵⁸
2009-10	19.4%	82,096	111 ⁵⁹	22,500	21,062 ⁶⁰
2010-11	19.5%	80,934 ⁶¹	102 ⁶²	22,500	20,996 ⁶³

⁵² Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2006-2007, at 1 (Feb. 2007) <http://www.dpi.state.wi.us/sms/doc/mpc06fnf.doc> [hereinafter DPI, MPCP Facts and Figures for 2006-2007].

⁵³ The 15% cap was reached in October 2005. Letter from Anthony S. Evers, Deputy State Superintendent, to 2005-06 Participating MPCP Schools (Oct. 25, 2005), <http://www.dpi.state.wi.us/sms/doc/mpc10252005.doc>. Governor Jim Doyle signed Senate Bill 618, *see* S.B. 618, 2005-2006 Leg., Reg. Sess. (Wis. 2006) (enacted), *available at* <http://legis.wisconsin.gov/2005/data/SB-618.pdf>, into law on March 10, 2006, raising the enrollment cap to 22,500. 2005 Wis. Act 125, § 7, *available at* <http://legis.wisconsin.gov/2005/data/acts/05Act125.pdf>; *see also* Wis. Stat. § 119.23(2)(b)(8).

⁵⁴ DPI, MPCP Facts and Figures for 2006-2007, *supra* note 52, at 1 tbl. 3

⁵⁵ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2007-2008, at 1 (Mar. 2008), <http://www.dpi.state.wi.us/sms/doc/mpc07fnf.doc>.

⁵⁶ *Id.* at 2, tbl. 3

⁵⁷ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2008-2009, at 1 (May 2009), http://www.dpi.state.wi.us/sms/doc/mpcp_09fnf_2009_07.doc.

⁵⁸ *Id.* at 2, tbl. 3

⁵⁹ Wis. Dep't of Pub. Instruction, MPCP Facts and Figures for 2009-2010, at 1 (Nov. 2009), http://www.dpi.state.wi.us/sms/doc/mpcp_10fnf_2009_11.doc (September count).

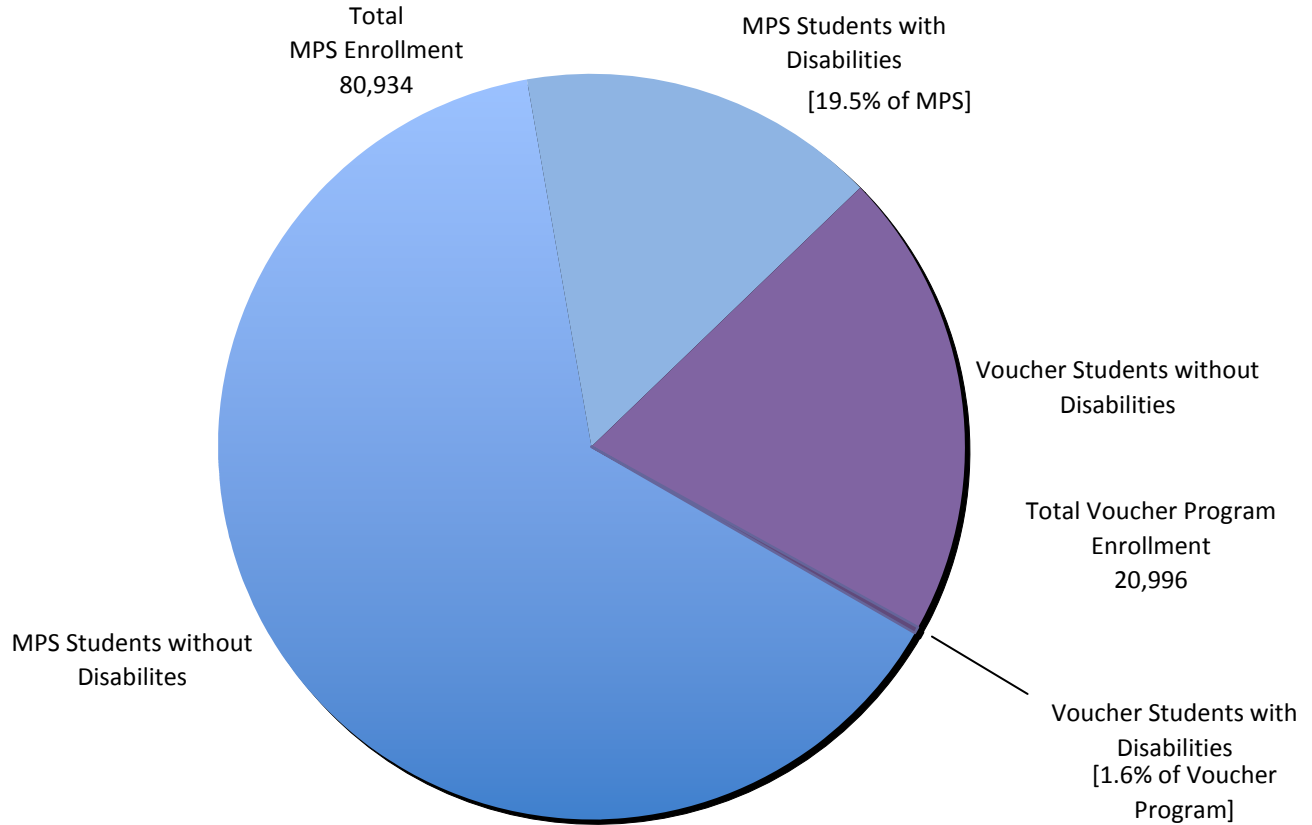
⁶⁰ *Id.*

⁶¹ DPI, Public Enrollment 2011, Exhibit 5, *supra* note 6. As above, this figure is based on a one-time count on the third Friday in September.

⁶² DPI, MPCP Facts and Figures for 2010-2011, Exhibit 2, *supra* note 1, at 1.

⁶³ *Id.*

2010-2011 Milwaukee K-12 Enrollment



C. The Complainants

The Complainants are civil rights organizations whose members include children with disabilities and parents of children with disabilities attending public school in Milwaukee and two individual parents of children with disabilities. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union-Wisconsin Foundation (ACLU-WIF) is the state affiliate of the national ACLU and is a non-profit, non-partisan, private organization dedicated to defending the civil liberties

and civil rights of all Wisconsin residents. Disability Rights Wisconsin (DRW) is a private, non-profit organization founded in 1977 to ensure the rights of all state citizens with disabilities through individual advocacy and system change. DRW is part of a national system of federally mandated independent disability agencies, which has the responsibility under federal and state law to protect and advocate for people with disabilities throughout the state of Wisconsin.

D.E. is the parent of S.E., a 4 year-old student with a developmental delay, and K.S., an 8 year-old student diagnosed with ADHD. S.E. is eligible for an IEP and receives special education where he currently attends school in MPS. K.S. does not have an IEP in MPS. In January 2011, D.E. attempted to enroll her children in Messmer for the 2011-12 school year. She was told to fill out the enrollment applications and return them, which she did. She asked if placement tests were given and Messmer staff initially told her that they were not.

D.E. informed Messmer of S.E.'s IEP, and Messmer responded by saying that D.E. should give them a copy of it and someone would call her about placement testing. On February 1, 2011, Suzanne Brown called from Messmer and left D.E. a message stating that S.E. would need to be screened. On March 14, 2011, Ms. Brown called again to speak to D.E. about S.E. When D.E. returned her call, Ms. Brown informed D.E. that MPS was providing S.E. with one hour per week of speech therapy and that he would only get a half hour per week of speech therapy at Messmer. She also told D.E. to give some serious thought to whether or not Messmer would be the right place for S.E. because it would not be able to give him what MPS was giving him. Ms. Brown wanted D.E. to release S.E. from his IEP and get him screened. D.E. agreed to get S.E. screened, but did not release him from his IEP. On May 20, 2011, D.E. took S.E. for his screening

and after 40 minutes, she was told that he did not know his name, address, and body parts, among other things. D.E. was surprised because she knows that he knows these things already. She was again asked by Messmer to provide his speech plan and told that Messmer could not make a decision until it received that plan. Messmer staff told D.E. that if S.E. had academic problems, they did not want D.E. to blame them. Ms. Brown also asked D.E. whether K.S. was on medication for ADHD and emphasized that Messmer had a fast-paced academic program. Messmer also informed D.E. that K.S. could only attend school there if his doctor put him on medication for his ADHD, even though to date no doctor has prescribed such medication, and his mother does not believe that he needs it. Although D.E. was emphatic about wanting her sons to attend Messmer with a voucher and although she began the admissions process in January, as of the date of this complaint, Messmer has still not told D.E. whether or not S.E. or K.S. will be admitted to the school.

D.J. is the parent of B.J., a 14 year-old 8th grade student diagnosed with Oppositional Defiance Disorder (ODD) and an unspecified mood disorder. B.J. was found eligible for services under the Individuals with Disabilities Education Act (IDEA) by MPS at the end of her 5th grade school year.⁶⁴ She received special education services as a 6th grader at an MPS Middle School. For 8th grade, at the beginning of the 2010-2011 school year, D.J. enrolled B.J. in Concordia University School on a voucher through the MPCP program. Concordia obtained B.J.'s educational records and was therefore aware of her mental health disability and resulting behavioral issues, which had

⁶⁴ Prior to being identified as a student with a disability by MPS, B.J. was enrolled in voucher school Parklawn Christian Leadership Academy through the MPCP program for her 2nd and 3rd school years. When the school administration changed halfway through B.J.'s 3rd grade year, a zero tolerance policy for misbehavior was practiced by B.J.'s teacher and the teaching assistant who had accommodated B.J. during the previous three semesters was removed. As a result, D.J. was called almost every day and sometimes more than once per day regarding B.J.'s behavior and she had to enroll B.J. back into MPS for the 4th grade.

previously included physical fights. B.J. initially did well at Concordia in that she did not have any physical fights, but staff complained about her defiance and put her on a behavioral contract without accommodations for her disability in late October or early November, 2010, which stated that if she had a physical fight or used curse words, she could be suspended or expelled. In November, 2010, B.J. had a verbal disagreement with another student at Concordia and Concordia expelled B.J. The disagreement occurred during a parent tour of the school and despite D.J.'s belief that B.J.'s behavior had been improving, Concordia expelled B.J. Consequently, she returned to MPS.

D. The Respondents

1. The State of Wisconsin and The Wisconsin Department of Public Instruction

The Wisconsin Department of Public Instruction is Wisconsin's state education agency (SEA). DPI is a substantial recipient of federal financial assistance. In the last four fiscal years (2008, 2009, 2010, 2011), DPI received 111 federal grants from the U.S. Department of Education totaling approximately \$2.2 billion.⁶⁵ The state spent an estimated \$130.8 million in the 2010-11 school year to fund the voucher program.⁶⁶ The funding for the program comes from several sources, including the state's general purpose revenue and funds diverted from MPS. In the 2010-11 school year, by operation of statute, the general aid that would otherwise be paid to MPS was reduced by \$58.8 million to partially fund the choice program.⁶⁷ The voucher schools themselves also receive and benefit from federal funding. For example, in 2009-10, the majority of

⁶⁵ U.S. Dep't of Education, Grant Award Pick-List (Search Report), accessed April 2011, Exhibit 18.

⁶⁶ Wis. Legislative Fiscal Bureau, Informational Paper 28, Exhibit 1, *supra* note 1, at 12; DPI, MPCP Facts and Figures for 2010-2011, Exhibit 2, *supra* note 1, at 1.

⁶⁷ Wis. Legislative Fiscal Bureau, Informational Paper 28, Exhibit 1, *supra* note 1, at 12.

voucher schools received Title I funded services through MPS. They also received federal nutrition funding of close to \$9.7 million, or \$474 per pupil.⁶⁸

2. Concordia University School

Concordia University School (“Concordia”) is a privately run, co-educational, K4-8 MPCP school that is managed by the Lutheran Urban Mission Initiative (LUMIN), in partnership with the South Wisconsin District of The Lutheran Church-Missouri Synod (“District”), Concordia University Wisconsin, and the Lutheran High School Association of Greater Milwaukee. The physical facility has recently expanded. LUMIN purchased property from MPS in 2007 and completed a major expansion and renovation of the building in 2008. For the 2009-2010 school year, Concordia had a total enrollment of 215 students with student capacity at 250 students.⁶⁹ Concordia has participated in the MPCP program for 13 years.⁷⁰ For the 2010-2011 school year, 100% of Concordia’s students were funded by vouchers.⁷¹ The school also receives federal funds through Title I services and federal nutrition programs.⁷²

3. Messmer Catholic Preparatory School

Messmer Preparatory Catholic School (“Messmer”) is a privately-run, co-educational, K4-8, voucher school in Milwaukee, Wisconsin. Messmer, along with Messmer High School, St. Rose and St. Leo Catholic School (K4-8), which are also

⁶⁸ See Federal Nutrition Funding Spreadsheet, Exhibit 12, *supra* note 16, for nutrition distribution to private schools in Wisconsin.

⁶⁹ Public Policy Forum, Milwaukee Voucher Schools 2010-2011, <http://www.publicpolicyforum.org/2011voucherposter.htm> [hereinafter Voucher Poster] (last visited June 6, 2011). Data is drawn from Public Policy Forum, Milwaukee Parental Choice Program: School Information Sheet for 2010-2011 School Year: Concordia University School, Exhibit 19, <http://www.publicpolicyforum.org/pdfs/voucher/2011Concordia.pdf> [hereinafter Information Sheet, Concordia] (statistics are self-reported via survey administered by the Public Policy Forum; total number of voucher students is DPI reported). Although the Voucher Poster is clearly for the 2010-2011 school year, the data regarding total school enrollment and total number of students receiving vouchers drawn from Information Sheet, Concordia, which is used to populate the Voucher Poster, are for the 2009-2010 school year.

⁷⁰ Information Sheet, Concordia, Exhibit 19, *supra* note 69.

⁷¹ *Id.* For discussion of broader trends in MPCP enrollment, see *supra* Part I.

⁷² Federal Nutrition Funding Spreadsheet, Exhibit 12, *supra* note 16.

voucher schools, serve over 1,500 students between the three campuses.⁷³ They are educational programs administered by Messmer Catholic Schools, a 501(c)(3) charitable organization established in 2000 to oversee what was then Messmer and Messmer High School.⁷⁴ In 2007, at the request of the Archdiocese of Milwaukee, Messmer Catholic Schools took over the Catholic Urban Academies, which have since been renamed St. Rose and St. Leo Catholic School.⁷⁵

According to DPI enrollment data from the 2009-2010 school year, Messmer had 437 students, under its 475-student enrollment capacity.⁷⁶ Out of 437 students at Messmer, 397, or 90.8%, are voucher students.⁷⁷ Messmer has participated in MPCP for 11 years⁷⁸ and receives federal financial assistance through Title I services and nutrition funding.

Messmer's admissions procedure is as follows. During the announced open enrollment period, students desiring to attend a Messmer elementary school may submit an admissions application. If the maximum class size is reached, additional names will be placed on a waiting list at the desired school or given the options to apply at the other

⁷³ Messmer Catholic Schools: Donate Now [hereinafter Messmer Catholic Schools website], <http://www.messmerschools.org/page.cfm?p=426> (last visited June 6, 2011). Messmer's website states that it has over 1,400 student enrolled; DPI-reported enrollment data for the 2009-2010 school year has enrollment at 1516. Voucher Poster, *supra* note 69.

⁷⁴ Messmer Catholic Schools website, *supra* note 73.

⁷⁵ Karen Mahoney, *Messmer Catholic Schools Grows*, Catholic Herald, Jan. 19, 2011, <http://www.chnonline.org/news/local/10075-messmer-catholic-schools-grows-.htm>.

⁷⁶ Public Policy Forum, Milwaukee Parental Choice Program School Information Sheet for 2010-2011 School Year, Messmer High School, <http://www.publicpolicyforum.org/pdfs/voucher/2011MessmerHigh.pdf>; Public Policy Forum, Milwaukee Parental Choice Program School Information Sheet for 2010-2011 School Year, Messmer Preparatory Catholic School, <http://www.publicpolicyforum.org/pdfs/voucher/2011MessmerPrep.pdf>, Exhibit 20 [hereinafter Information Sheet, Messmer] (statistics are self-reported via survey administered by the Public Policy Forum; total number of voucher students is DPI reported, which is also true for the aforementioned information sheet for Messmer High School).

⁷⁷ Voucher Poster, *supra* note 69. Out of 419 students enrolled at St. Rose and St. Leo, 395 students, or 94% of students are choice. Out of 660 students enrolled at Messmer High, 578 students, or 87.5% of enrolled students are choice students. *Id.*

⁷⁸ *Id.*

Messmer grade school.⁷⁹ The Messmer website states that students eligible for Choice (voucher) funding are given priority in the admissions procedure, which includes an open enrollment period followed by a random selection process.

As part of the admission process, in addition to asking parents to fill out the application for admission, low-income families must fill out the Milwaukee Parental Choice Program Student Application.⁸⁰ Messmer has also posted on its website DPI's MPCP brochure, which, with respect to students with disabilities, states:

A Choice [voucher] school may not discriminate against a child with special needs in the admission process or elsewhere. However, as a private school, the Choice school is only required to offer those services to assist students with special needs that it can provide with minor adjustments. **Parents should contact Milwaukee Public Schools (MPS) for more information on the services provided to children with special needs enrolled in the public schools and the lesser services that MPS provides these children enrolled in private schools.**⁸¹

Although the brochure includes the following *pro forma* anti-discrimination language, "The Wisconsin Department of Public Administration does not discriminate on the basis of sex, race, color, religion, creed, age, national origin, ancestry, pregnancy, marital status or parental status, sexual orientation, or disability,"⁸² the bold-faced language above is clearly likely to have the effect of discouraging or dissuading families of children with disabilities from even seeking to enroll in Messmer.

E. Timeliness

Wisconsin's administration of the voucher program, which has failed to ensure that children with disabilities are served by voucher schools and which has led to the

⁷⁹ 2010-11 Messmer Preparatory Catholic School, St. Rose and St. Leo Catholic School Parent/Guardian and Student Handbook (2011), Exhibit 21, at 12.

⁸⁰ See Wis. Dep't of Pub. Instruction, Milwaukee Parental Choice Program Student Application, http://www.messmerschools.org/uploaded/School_Choice_Program/MPCPapp2011-12.pdf, Exhibit 22.

⁸¹ Wis. Dep't of Pub. Instruction, The Milwaukee Parental Choice Program: Information for Parents: 2011-2012 School Year, http://www.messmerschools.org/uploaded/School_Choice_Program/mpcp_brochure_2011-12.pdf, Exhibit 23.

⁸² *Id.*

increasing segregation of children with disabilities within MPS, has the effect of discriminating against students with disabilities and represents an ongoing violation of students' rights. In addition, data first released on March 29, 2011, showed that only 1.6% of the students served by the voucher program were students with disabilities, while a far greater percentage of MPS students were children with disabilities.

III. APPLICABLE LAW

Generally, public institutions may not discriminate against people with disabilities. Section 504⁸³ and Title II of the ADA⁸⁴ prohibit “recipients of federal financial assistance” or “public entities” from discriminating against individuals with disabilities. “Recipients” means “any state or its political subdivision” under § 504,⁸⁵ and public entities are defined as “any state or local government” under the ADA.⁸⁶ DPI qualifies under both definitions as an entity that is prohibited from discriminating against people with disabilities. The voucher schools also receive federal Title I and nutrition funding, and thus are covered by § 504’s anti-discrimination mandates.

The definition of disability is broader under federal anti-discrimination laws than it is under the IDEA,⁸⁷ which requires a student to have a condition that affects his or her ability to learn. The ADA and § 504 only require that a person have a condition that “affects [or substantially limits] a major life activity” to be considered disabled within the meaning of the law.⁸⁸ Therefore, students previously identified as students with disabilities under § 504 or IDEA in MPS who attempted to attend voucher schools and were rejected and/or expelled, students receiving Supplemental Security Income (SSI),

⁸³ 29 U.S.C. § 794 (2006).

⁸⁴ 42 U.S.C. § 12131 *et seq.* (2006).

⁸⁵ 34 C.F.R. § 104.3 (2010).

⁸⁶ 42 U.S.C. § 12131(1)(A) (2006).

⁸⁷ 20 U.S.C. § 1400 *et seq.* (2006).

⁸⁸ 34 C.F.R. § 104.3(1)(1) (2010).

and students with impairments such as ADHD, would all fall into the definition of “handicapped persons” under § 504 and the ADA.

The language of § 504’s enacting regulations (34 CFR § 104.4) provides in relevant part:

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under *any program or activity* which received Federal financial assistance.....

(4) A recipient may not, *directly or through contractual or other arrangements*, utilize criteria or methods of administration (i) *that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap*, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient’s program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.⁸⁹

It is therefore clear that the purpose of both § 504 and the ADA is not to just prohibit intentional discrimination by the state against people with disabilities. As the explicit language of the enacting regulations makes clear, states are forbidden from “*directly or through contractual or other arrangements*” using “methods of administration (i) *that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap.*”⁹⁰ Federal law also clearly prohibits the involuntary segregation of persons with disabilities,⁹¹ and requires that recipients of federal funding ensure that academic and non-academic services are provided “with persons who are not

⁸⁹ *Id.* § 104.4 (emphases added). The enacting regulations of Title II of the ADA are identical. *See* 28 C.F.R. §§ 35.130(b)(3)(i)-(iii) (2010).

⁹⁰ 34 C.F.R. § 104.4(b)(4) (2010) (emphasis added); *see also, e.g., id.* § 104.4(b)(1)(v) (prohibiting the aiding or perpetuation of “discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap”); *id.* § 104.4(b)(5) (prohibiting the site or location selections of facilities “that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons”).

⁹¹ *See, e.g., id.* § 104.4(b)(3) (“Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.”).

handicapped to the maximum extent appropriate to the needs of the handicapped person.⁹²” “[M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by discriminatory intent.”⁹³

The ongoing policy of the state of Wisconsin to set up and maintain, through contractual arrangements, an educational system in Milwaukee that excludes children with disabilities from most of the participating voucher schools and that leads to their segregation within MPS with the clear effect of subjecting children with disabilities to discrimination.

IV. ARGUMENT

There is no question that the State of Wisconsin and its Department of Public Instruction are “recipients” of federal funding for purposes of civil rights laws. The voucher system they perpetuate is discriminatory. Furthermore, the voucher schools themselves receive federal funds through Title I and nutrition assistance. Nevertheless, the private school voucher program and its individual schools discriminate against students with disabilities by refusing to admit those who could be accommodated and by segregating students with disabilities and their peers within MPS. The experiences of K.S., S.E., and B.J. demonstrate this pattern and practice. The state’s actions in establishing and maintaining this program which has the effect of discriminating against qualified students with disabilities violates both the ADA and § 504 of the Rehabilitation Act. Further, the practical and actual effect of the voucher school program is to create a

⁹² *Id.* § 104.34(a); *see also id.* § 104.34(b).

⁹³ *Alexander v. Choate*, 469 U.S. 287, 296-97 (1985) (holding that in order for an otherwise qualified handicapped individual to be provided meaningful access to a grantee’s benefit, the benefit cannot be defined in a way that “effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled [, and] to assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made”).

dual system of education in Milwaukee, concentrating large numbers, and increasing proportions, of students with disabilities in MPS, while giving non-disabled students the option of choosing either a private voucher school or staying in a public school, leading to the increasing segregation of children with disabilities in MPS.⁹⁴

As a public entity and a recipient of federal assistance, Wisconsin has a responsibility to ensure that students with disabilities have meaningful access to its programs. It has failed to do so. As recipients of federal financial assistance, the voucher schools themselves have an obligation to accommodate qualified students with disabilities to the extent their program will not be significantly altered; they too have failed to do so.

While some voucher schools are willing to accept a few students with disabilities, the data shows that students with disabilities are significantly underrepresented in MPCP. Just 1.6% of voucher students have a disability, compared to nearly 20% of MPS students. This, coupled with the voucher schools' discouragement of parents attempting to enroll their children with disabilities in private voucher schools, demonstrates the program's disproportionate and discriminatory effect on the children with disabilities in Milwaukee.

A. Federal Law Prohibits Actions that Have the Effect of Segregating Children with Disabilities.

The administration and operation of the voucher program has had, and will continue to have, the effect of discriminating against students with disabilities in

⁹⁴ Moreover, even with the state's program that ghettoizes students with disabilities into MPS, the MPCP schools are doing no better academically. Therefore, there can be no argument that Wisconsin's voucher program has created a separate and better system. To the contrary, the state's voucher program has created a totally separate system that does not provide a better education but violates the letter and the spirit of the anti-discrimination laws.

Milwaukee by creating and maintaining a dual system that segregates children with disabilities in part of the system. By knowingly and intentionally creating and maintaining a system that allows — and pays for — large and increasing numbers and proportions of non-disabled children to leave public schools for while pushing children with disabilities into MPS, the State of Wisconsin is taking actions that have the undisputed effect — and possibly the intent — of segregating children with disabilities and restricting their ability to interact with non-disabled children. If, as the Wisconsin legislative committees have already voted to permit, the numerical cap on the number of children attending voucher schools is eliminated, allowing an unlimited number of non-disabled children to attend the voucher schools, the segregation will worsen. As greater percentages of children with disabilities are excluded from the expanding voucher system, their segregation and their inability to interact with non-disabled students will increase because there will simply be fewer non-disabled children in MPS with whom they can interact.

The Supreme Court has held that the isolation and segregation of persons with disabilities constitutes unlawful discrimination by the state.⁹⁵ The “integration mandate” of the ADA and § 504, as expressed in federal regulations and *Olmstead v. L.C.*⁹⁶ requires that when a state provides services to individuals with disabilities, it must do so “in the most integrated setting appropriate to their needs.” The Supreme Court explicitly held in *Olmstead* that “[u]njustified isolation ... is properly regarded as discrimination based on disability,” observing that “institutional placement of persons who can handle

⁹⁵ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁹⁶ *Id.*

and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable of or unworthy of participating in community life.”⁹⁷

The Supreme Court’s rationale for holding that the unjustified isolation of people with disabilities is discriminatory was based upon two “judgments.” The first, stated above, is that “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”⁹⁸ The second judgment is that “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”⁹⁹

While *Olmstead* addressed the institutionalization of persons with disabilities, not their education, its anti-segregation principles apply here. Denying students with disabilities the opportunity to participate in the voucher programs because of their disabilities perpetuates negative stereotypes about them. Given minor supports, many students with disabilities are capable of competing with their non-disabled peers. Further, students with disabilities receive the benefit of observing and working with those who are not disabled, which can provide the student with a disability with both educational and non-academic benefits.¹⁰⁰ At the same time, children without disabilities are given the opportunity to become better acquainted with their disabled peers, which may help avoid stereotyping, lessen prejudice, and prepare all students to

⁹⁷ *Id.* at 597, 600.

⁹⁸ *Id.* at 600.

⁹⁹ *Id.* at 601.

¹⁰⁰ Alan Gartner & Dorothy K. Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 Harv. Educ. Rev. 367, 375 (1987) (concluding that there is a “substantial and growing” body of evidence that supports the academic and emotional developmental value of educating students with disabilities with their non-disabled peers).

work together in society.¹⁰¹ Conversely, when students are provided only limited opportunities or excluded from portions of a system — as is the case with the voucher program— stereotypes are reinforced and economic opportunities, cultural enrichment, educational advancement and social options are limited. Further, in *Griffin v. Prince Edward County* the Supreme Court has held that a government’s use of private school vouchers to support segregation is unconstitutional.¹⁰² Although *Griffin* addressed racial segregation arising from a county’s decision avoid integration by providing vouchers to enable white students to attend private schools, the underlying principles are the same.

Even if the state’s program was not designed with the intent to discriminate against students with disabilities, § 504 forbids recipients of federal financial assistance — including both the state *and* the voucher schools,¹⁰³ and the ADA forbids state actors, from putting into place programs that have the effect of barring people with disabilities from participation or limit or preclude the ability of disabled children to receive academic and non-academic services with non-disabled persons to the maximum extent appropriate *to the needs of the child with a disability*.¹⁰⁴ Thus the state cannot legally establish or maintain a system that has the effect of restricting the ability of disabled students to

¹⁰¹ *Id.*

¹⁰² *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty, et. al.*, 377 U.S. 218, 232 (1964).

¹⁰³ See 34 C.F.R. § 104.3(f) (2010) (“Recipient means any state or its political subdivision, any instrumentality of a state or its political subdivision, *any* public or *private* agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.” (emphasis added)). Arguably, 34 C.F.R. § 104.3(k) covers all the activities of the voucher schools. (See *id.* (“Program or activity means all of the operations of— (3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship— (B) Which is principally engaged in the business of providing education”)).

¹⁰⁴ See, e.g., *id.* § 104.34 (A recipient “shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person.”); see also *id.* § 104.4(b)(1) (“A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap: (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others[.]”).

interact with non-disabled students. That is, however, precisely the effect the voucher program has created.

Unjustified segregation of people with disabilities through state action is precisely what the ADA and § 504 prohibit. The Supreme Court's decision in *Olmstead*, and federal law and regulations, make it clear that to the extent appropriate to the needs of children with disabilities, not to the extent desired by the state or voucher schools, the state cannot systematically segregate persons with disabilities from its non-disabled population.

B. The Voucher Schools Are Publicly Financed and Receive Federal Financial Assistance; They are Private in Name Only.

As discussed above, the voucher program has led to a situation where the majority of participating “private” schools are mostly or exclusively funded with public dollars, including federal dollars. Wisconsin, however, allows these nominally private (but effectively public) entities to refuse to provide special education services.

When, in 1992, it was originally asserted that parents who unilaterally placed their children in voucher schools relinquished their IDEA rights to receive a free and appropriate public education (FAPE),¹⁰⁵ only 1,000 students were participating, state law limited participation to 1% of the MPS student population, and the maximum percentage of students in an individual voucher school on a voucher was by law limited to 49%.¹⁰⁶ Therefore, when an OCR official labeled the voucher schools as “private schools” and

¹⁰⁵ In an unpublished state circuit court decision in *Davis v. Grover*, a memorandum from OCR written by former Deputy Assistant Secretary for Policy, Richard Komer, was used to support DPI's assertion that placement in voucher schools relinquished IDEA rights. See William N. Myhill, *No FAPE for Children with Disabilities in the Milwaukee Parental Choice Program: Time to Redefine a Free Appropriate Public Education*, 89 Iowa L. Rev. 1051, 1069 (2004).

¹⁰⁶ *Davis v. Grover*, 480 N.W.2d 460, 463-64 (Wis. 1992) (“The [MPCP] program limits the number of students that may participate in the program to no more than 1 percent of the school district's membership. This limitation makes the program available to approximately 1,000 Milwaukee students. . . . This narrowly defined and carefully monitored program provides that no private school may enroll more than 49 percent of its total enrollment under this program.” (citations omitted)).

referred to them as partially subsidized, it was making an accurate statement. As discussed in detail above, these facts have radically changed. A program that was an experiment limited to 1,000 students in a district of about 100,000 students now uses public dollars to pay tuition for nearly one-quarter of the public school district's non-disabled students and about 20% of all school-age children in the district. A program that was not permitted to have a majority of children on vouchers in any one school now operates so that many of the participating schools are funded mostly by public voucher dollars. DOJ cannot continue to allow the State of Wisconsin to permit these nominally private, but practically public, institutions to be absolved of any responsibility to provide reasonable accommodations to children with disabilities under § 504 and the ADA. Needless to say, DOJ should also put a halt to overt discrimination in the voucher program against students with disabilities such as K.S., who neither need nor have they requested any form of accommodation but are barred from admission due to discriminatory notions of what the voucher schools believe these children need.

C. The Private Voucher Schools Are Not Providing Reasonable Accommodations.

The voucher schools ought to be treated like public schools given the nature of their funding from the state. As such, they ought to accept IDEA-eligible students and provide them with appropriate services, at the same rate as public schools. But even assuming *arguendo* the voucher schools are private schools, the state is permitting voucher schools to screen out “qualified individuals with disabilities” in violation of federal anti-discrimination laws.¹⁰⁷ Any type of seemingly neutral, yet harmful conduct

¹⁰⁷ 28 C.F.R. § 35.130(b)(8) (2010) (“A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”).

is precisely what Congress sought to address with the enactment of the ADA.¹⁰⁸ In this case, the voucher program as a whole lacks policies and procedures to attempt to accommodate students with disabilities. Students with disabilities are certainly not recruited for participation in the program. Rather, parents of students with disabilities are encouraged by the state and by the voucher schools to enroll their children in MPS. The dissuasion faced by D.E. when she attempted to enroll her children at Messmer and the explicit exclusion of B.J. after she was forced to sign a behavior contract limiting her right to have her mental health condition accommodated, exemplify these forms of discrimination.

The voucher schools and Wisconsin explicitly state to families of children with disabilities that the voucher schools provide “lesser services” for disabled students, information that is clearly intended to discourage families of children with disabilities from even seeking to participate in the program. Further, while truly private schools are not required to provide IDEA services, they are not permitted to discriminate against students with disabilities by failing to provide reasonable accommodations which will not change the nature of their program. Specifically, with regard to a private school’s refusal a student with a disability, Assistant Attorney General Thomas E. Perez recently stated “[s]chools have a responsibility to make reasonable modifications to policies so that all

¹⁰⁸ In 1990, Congress enacted the ADA to address pervasive discrimination against persons with disabilities. Congress stated that the purpose of the ADA was “(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.” 42 U.S.C. §§ 12101(b)(1)-(4).

students with disabilities can enjoy their programs and activities, unless doing so would result in a fundamental alteration in the program.”¹⁰⁹

In the cases of B.J., S.E., and K.S., all of these students could have been easily accommodated with minor adjustments. For example, B.J. could have been permitted to change classes slightly before or after the other students in order to avoid conflict, an accommodation that in no way would have altered the program at Concordia. K.S.’s ADHD was not so significant that he qualified for an IEP in MPS, yet Messmer discouraged his mother from enrolling him due to the “fast-paced” nature of their academic program even though it is unclear that he could not have competed. Worse yet, it insisted that, as a condition of his admission to Messmer, he be medicated, contrary to his doctor’s orders and his mother’s wishes. Finally, S.E. could have received speech therapy services through MPS. The state has not defined what voucher schools must do for students with disabilities, but has instead focused on what voucher schools do *not* need to do for student with disabilities. The schools themselves have opted to create barriers for parents and children to their enrollment and their success in the voucher program. These actions help create and exacerbate the segregated system for students with disabilities.

Further, policies that discourage the enrollment of children with disabilities in the voucher schools undermine the language and purpose of non-discrimination laws. For example, under § 504, private schools receiving federal financial assistance “may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments [or reasonable accommodations under the ADA], be provided an

¹⁰⁹ Press Release, Dep’t of Justice, Office of Pub. Affairs, Justice Department Reaches Agreement with Louisiana Private School to Ensure Effective Diabetes Care for Students (June 1, 2011), *available at* <http://www.justice.gov/opa/pr/2011/June/11-crt-713.html>.

appropriate education...”¹¹⁰ The issue is whether with “reasonable accommodations” the program can meet its needs and the needs of the student.¹¹¹ A court’s determination of whether or not an individual is a “qualified individual with a disability” is a fact-intensive inquiry related to the extent of accommodations necessary.¹¹² The policies here, which do not even mention, much less require that fact-based individualized inquiry by each school in the case of each child who may have a disability, are also criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.¹¹³

When students with disabilities do apply to voucher schools, they are faced with a “sink or swim” situation in which they are forced to overcome their disabilities, no matter how minor, major, or easily accommodated, without any assistance whatsoever.¹¹⁴ If students cannot compete without any accommodations, they are pushed out and back into MPS. B.J.’s case is a prime example of this scenario.

The current state of the voucher program does not create “meaningful access” for individuals with disabilities.¹¹⁵ The state has an affirmative duty to address the voucher program’s bias against students with disabilities. One court, in response to a school district’s argument that the ADA requires the individual with the disability to request a specific accommodation in order to receive it, called the defense “ludicrous.”¹¹⁶ The court went on to state “[t]he ADA requires that any program or activity held at a school be made accessible to the handicapped. The burden is not on the disabled to create

¹¹⁰ 34 C.F.R. § 104.39(a) (2010).

¹¹¹ *Choate*, 469 U.S. at 300 (holding that a federal “grantee need not be required to make ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped, it may be required to make ‘reasonable’ ones”).

¹¹² *Id.*

¹¹³ See 28 C.F.R. § 35.130(b)(3)(i) (2010) (ADA Regulations); 34 C.F.R. § 104.4(b)(4) (2010).

¹¹⁴ See *supra* Part.II.c, discussing facts of B.J.’s enrollment at Concordia.

¹¹⁵ *Wynne*, 932 F.2d at 24 (describing meaningful access for a student with a disability to a graduate level program).

¹¹⁶ *Bacon v. City of Richmond*, 386 F. Supp. 2d 700, 707 (E.D. Va. 2005).

accommodation solutions, but on those that provide services or facilities which hinder their participation.”¹¹⁷ The burden is on the state of Wisconsin and DPI to address the disproportionality between its voucher program and MPS. The burden is on the individual voucher schools receiving federal financial assistance to provide reasonable modifications to their programs so that students with disabilities may enjoy them.

CONCLUSION

For the above stated reasons, DOJ should fully investigate this complaint and direct the State of Wisconsin, the Wisconsin Department of Instruction, and the voucher schools themselves to discontinue or remedy their actions with respect to qualified Milwaukee students with disabilities.

¹¹⁷ *Id.* (addressing physical inaccessibility).

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Respectfully submitted by

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