UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Appeal No. 18-1673

St. Joan Antida High School, Inc.,

Plaintiff-Appellant,

v.

Milwaukee Public School District,

Defendant-Appellee.

Appeal from a Judgment of the United States District Court
for the Eastern District of Wisconsin
Honorable J.P. Stadtmueller, Case No. 17-CV-413-JPS

REPLY BRIEF OF PLAINTIFF-APPELLANT ST. JOAN ANTIDA HIGH SCHOOL, INC.

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INTRODUCTION

For the last 50 years, the law of Wisconsin has been that public school districts must provide transportation to private school students and their own students on a reasonably uniform basis and with the same considerations of health and safety. *Cartwright v. Sharpe*, 40 Wis. 2d 494, 501-506, 162 N.W.2d 5 (1968). And if a city school district, like the Milwaukee Public School District ("MPS"), is relieved of its obligation to transport all otherwise eligible students due to the existence of public transportation but nevertheless chooses to provide transportation to its own students, the law provides that it must treat students attending private and public schools with reasonable uniformity. Wis. Stat. § 121.54(1)(b).

These provisions of state law are central to the equal protection analysis in this case. They mean that MPS must accept that public school and private school students are similarly situated for all transportation purposes relevant to this case. Moreover, under the Equal Protection doctrine, MPS *cannot* provide constitutionally-sufficient justification for discriminatory treatment of private city-wide high school students if its justifications actually frustrate a clearly articulated state policy of uniformity. *See Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County*, 488 U.S. 336, 345 (1989).

It is undisputed that MPS's transportation 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 stop" rule does not apply to students who attend public city-wide schools.

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.

Based upon these rules, MPS denied transportation to 68 students attending St. Joan Antida High School ("SJA") – a private school with a city-wide attendance area. These students would have received free transportation if they attended an MPS public city-wide high school. To justify this differential treatment, MPS must accept its state-imposed obligation to provide both groups with safe and reasonably uniform transportation and then somehow justify treating one group differently than the other. It has not.

ARGUMENT

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

Generally speaking, under the Equal Protection Clause a court will reject a legislative classification unless it bears an appropriate relationship to a legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). And when a state distributes benefits unequally, that discrimination will survive only if the distinction rationally furthers a legitimate state purpose. *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 618 (1985). But courts "treat[] as presumptively invidious those classifications . . . that impinge upon the exercise of a 'fundamental right,'" requiring a state actor instead "to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S.at 216-17.

Here, the first thing the Court must do is determine which of these two standards applies. But as shown in SJA's Opening Brief and as shown below, MPS's discriminatory transportation rules fail under either standard.

A. The Denial of Transportation Based on the Decision to Attend a Private School Violates a Fundamental Right.

This case implicates fundamental rights and, as a result, requires strict scrutiny. This is because the freedom of parents to choose a private education (whether religious or non-religious) is a fundamental right. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925). In *Pierce*, the Supreme Court said that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

MPS contends that *Pierce* and strict scrutiny do not apply because MPS's transportation rules – in contrast to the laws involved in *Pierce* – will not actually lead to the inevitable destruction of private schools. (MPS Br. 9-11.) But MPS's argument goes too far. MPS ignores that strict scrutiny applies not only when a fundamental right is completely destroyed, but even when it is impinged. *See, e.g., City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 440 (1985). Here, MPS has made an otherwise-available benefit – transportation to a city-wide school – turn on whether a family has chosen public or private education. There is no question that the rule impinges on a fundamental right: the parents' right to choose a private school for their children.

In *Davis v. District of Columbia*, 158 F.3d 1342, 1347 (D.C. Cir. 1998), the court held that "for legislation to impinge on a right sufficiently to require strict scrutiny, it must 'directly and substantially' interfere with the right." MPS's discrimination against students attending

private schools by denying them transportation benefits – benefits that the State of Wisconsin has itself said are important to their health and safety – meets this standard.

First, the undisputed evidence was that the Head of School at SJA was "aware of specific instances in which a family has declined to enroll their daughter at SJA because we could not promise free transportation." (Dkt. #19, Gessner Decl. ¶2.) In other words, some parents were making the choice not to send their children to a private school because of the MPS rule denying them transportation benefits. MPS attempts to downplay this undisputed evidence (MPS Br. at 11), but does not refute it. MPS points to no contrary evidence in the record.

Second, the people of Wisconsin considered the safe transportation of all children to school to be so important that they amended the Wisconsin Constitution to make transportation even of children attending private schools possible at public expense. They did so because of the health and safety risks that private school students were exposed to when not provided with such transportation. Amending the Constitution is not a trivial thing. It would be a hard argument – and one that MPS does not actually make – to say that putting your child at risk when you make the decision to send her to a private school does not affect your decision-making process.

Third, the Wisconsin Legislature considered transportation to be important enough to private school students that it mandated the provision of transportation on a reasonably uniform basis to private school students whenever a district like MPS chooses to provide such transportation to its own students. Further, the Legislature provided state aid to public school districts for transportation purposes but tied that aid to the school district's compliance with the reasonable uniformity requirement. *See,* Wis. Stat. § 121.54(1)(b). In fact, the Legislature provided that no state aid of any kind may be paid to a school district which willfully or negligently fails to provide transportation to <u>all</u> the students it is required to transport under state

law. *See* Wis. Stat. § 121.58(2)(am). The Wisconsin Legislature's decision to mandate safe transportation, provide state aid for it, and tie that state aid to a school district's compliance with the state public policy of safe and uniform transportation for all students shows how important transportation is to children and their parents.

Fourth, MPS considered transportation to be such an important service that it decided to provide it to many of its own students even though by statute (under the "City Option") it was not required to do so. In fact, MPS acknowledges that for the 2016-2017 school year it spent $41,513,258 to provide transportation to its students. (Dkt. #27, Solik-Fifarek Decl. ¶44.) MPS must believe that transportation of students is important. It was worth 41 million dollars to MPS to keep these students in public schools and persuade them to attend city-wide schools by providing them the incentive of safe and free transportation to and from school.

Nowhere in its brief does MPS dispute or in any way take issue with these facts. MPS does not refute that the availability of transportation is of substantial importance to parents and students and affects their decision-making process regarding school selection. All it does is cite several Supreme Court cases that stand for the proposition that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983) (*see* MPS Br. 9). That argument betrays a fundamental misconception both of SJA's position and of state and federal law.

SJA does not contend that the Wisconsin Legislature is *required* to subsidize transportation for SJA's students (or for public school students for that matter). The 1967 constitutional amendment only made such payments possible (by saying that they were not unconstitutional). But the Legislature has decided to both require and subsidize the benefit.

That means that MPS, as a creature of the Legislature, must comply with this policy rather than flout it. MPS may not make a benefit that would otherwise be available turn on whether a fundamental right has been exercised. *Cf. Trinity Lutheran Church of Columbia Inc. v. Comer*, 137 S. Ct. 2012, 2022, 2024 (2017) ("Trinity Lutheran is not claiming any entitlement to a subsidy. . . . The State . . . expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny." (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

MPS has put parents in the position of having to decide between receiving transportation benefits to a public school or exercising their fundamental right to choose private education for their children. Such a direct and substantial interference with exercise of the right is sufficient to trigger strict scrutiny. A total ban is not required. Were it otherwise, the state could freely engage in many types of unconstitutional behavior as long as it stopped just short of an outright prohibition on the exercise of a fundamental right. *Cf., e.g.*, *Jones v. Helms*, 452 U.S. 412, 419-20 (1981) (discussing the fundamental right to travel between states and explaining that even a tax or penalty on the exercise of that right is impermissible); *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978) (discussing "the fundamental character of the right to marry," and explaining that while "reasonable regulations that do not *significantly interfere* with decisions to enter into the marital relationship may legitimately be imposed," "the statutory classification at issue . . . does *interfere directly and substantially* with the right to marry" (emphasis added) (citation omitted)).

Under these facts, *Pierce* is applicable and strict scrutiny is called for. But whether strict scrutiny or rational basis scrutiny is applied, as shown below and in SJA's Opening Brief, MPS's

classification fails the equal protection test.

B. Regardless of the Level of Scrutiny, MPS's Policy Is Unconstitutional.

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 the MPS city-wide high schools or the students who attend them. Second, it says there is a rational basis for the MPS rules. Both arguments fail.[1]

1. Public City-Wide Schools and Private City-Wide Schools Are Similarly Situated with Respect to their Attendance Areas.

MPS contends 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. (MPS Br. 4-5.) In MPS's 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). This is simply an exercise in obfuscation.

First, MPS mixes apples and oranges. MPS relies on two statutes that deal with "attendance areas" but the two statutes are unrelated to one another. The first statute that MPS refers to is Wis. Stat. § 121.845(1) which defines "attendance area" for public schools as the area in which students must live to attend a particular school. The statute has nothing to do with transporting or not transporting students to a particular school.

The second statute to which MPS refers is Wis. Stat. § 121.51(1), which defines "attendance area" for private schools specifically in the transportation context. These two definitions are not yin and yang for transportation (one applying to public schools and the other

[1] MPS has abandoned its argument, rejected by the district court below, that this is a "class of one" equal protection claim. (Dkt. #49, Order at 11-12; A. App at 111-112.)

to private schools) but rather are independent definitions of the term "attendance area" in different statutes for different purposes.

Second, even if, as MPS suggests (MPS Br. 2-3), "attendance area" means the geographic area in which a student must live to qualify for transportation, then all of the MPS schools have an attendance area. 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" for transportation purposes 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 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."[2]

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's words, "no limiting attendance area" (*i.e.*, a city-wide high school). (Solik-Fifarek Dep.

[2] Lewis Carroll, *Through the Looking-Glass, and What Alice Found There*, 124 (Macmillan and Co. 1872).

at 45-46, Dkt. #21 at 29.[3]) MPS certainly explains no meaningful difference in its brief.

2. There Is No Rational Basis for MPS's 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 private city-wide school instead of a public 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). *See Allegheny Pittsburgh*, 488 U.S. at 345 (where relevant state constitution and related laws mandated uniformity, otherwise legitimate justifications for different treatment are unavailable); *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 687 (2012) (discussing the reasoning applied in *Allegheny Pittsburgh*).

Tellingly, MPS generally tries to avoid discussion of *Allegheny Pittsburgh* in its brief. What attempts it does make to refute the legal propositions in *Allegheny Pittsburgh* are unpersuasive. (*See* MPS Br. 26-28.) MPS first suggests the reasoning in the case is inapplicable because the case involved a state's taxing authority, but leaves this Court to guess at why that matters for purposes of the Equal Protection Clause. MPS then appears to argue that Wisconsin does not really have a uniformity requirement that could be violated by MPS's policy because, unlike other school districts, MPS need not bus students at all. But the legislature specifically imposed the reasonable uniformity requirement on school districts like MPS that due to the City Option are not required to bus students but do so voluntarily. *See* Wis. Stat. § 121.54(1)(b).

[3] All of the excerpts from the Solik-Fifarek deposition referred to herein are contained in Dkt. #21, Exhibit C to the McGrath Declaration.

This leaves MPS to fall back on its attendance-area/non-attendance area distinction, which was addressed above.

MPS's transportation policies exist against the backdrop of a larger, and controlling, framework established by the Wisconsin legislature designed to protect the safety and welfare of all schoolchildren by making it a basic duty of school districts to provide transportation without regard to what school they attended. *Cartwright*, 40 Wis. 2d at 506. MPS is executing state law in enacting its policy and receives state financial aid for doing so. The policy's classification scheme cannot be in service of a legitimate governmental goal if it contravenes state policy declaring such classifications illegitimate. MPS has utterly failed to explain why this reasoning is wrong or why it does not apply here. [4]

a. "Cost" does not justify MPS's "within one mile of a bus stop" rule.

The main justification that MPS relies upon for its classification is cost. (MPS Br. 13-21.) MPS argues that even though it spends over $40,000,000 per year to transport its own students, it is justified in spending zero dollars to transport private school students because that saves the district money. But this argument is and must be a non-starter.

First, as noted above, Wisconsin law has taken the cost justification away. A school district is under a legal compulsion to treat public and private schools with reasonable uniformity, receives state aid for doing so, and cannot justify refusing to do so simply because it costs less to avoid its legal duties.

[4] MPS argues in a footnote that by pointing to Wisconsin law requiring MPS to transport SJA's students and its own students with reasonable uniformity, SJA is really asking this Court to decide a question of state law. (MPS Br. at 29 n.15.) But this Court need not interpret Wisconsin law any more than the Supreme Court was required to interpret West Virginia law in *Allegheny Pittsburgh*. It is manifest that providing transportation to one group but denying it to another is not "reasonable uniformity" with respect to the provision of transportation. In any event, SJA set forth and explained case law of the Wisconsin Court of Appeals expounding the phrase in its Opening Brief. (Dkt. #7, SJA Br. 20.)

Second, the argument proves too much. It would justify virtually every legislative classification that the government could make and would fly in the face of the Supreme Court's admonition that "[w]hen a state distributes benefits unequally, the distinctions it makes" must "rationally further[] a legitimate state purpose." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985). This admonition by the Supreme Court would be meaningless if saving money, without more, could provide a rational basis for withholding benefits from some disfavored group. Denying generally available benefits to some disfavored citizens will *always* save money.

MPS's argument, if accepted, would mean that the State of New Mexico could grant tax benefits to Vietnam veterans, but limit the benefits to those who resided in the state before May 8, 1976. After all, denying the same veterans' benefit to those who came into the state after that date would save money. That was the plan, but the Supreme Court said no. *Hooper*, 472 U.S. at 614-15. MPS's argument would mean that the State of Alaska could distribute benefits to its citizens in varying amounts based on the length of each citizen's residence in the state. Such a classification, after all, would save some money. But the Supreme Court said no. *Zobel v. Williams*, 457 U.S. 55, 56 (1982). MPS's argument would mean that Congress could deny food stamps to households that contained unrelated individuals. That would, after all, cost less than providing benefits that included that group. The Supreme Court said no. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

MPS takes issue with SJA's quotation of language from *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974) – which explains that a state could not prohibit poor children from attending its schools simply to save money on education – because *Shapiro* used the term "invidious" in describing

impermissible classifications. (MPS Br. 15.) MPS contends that its discrimination against private school students is not "invidious." But the Supreme Court has used "invidious" in different ways at different times, sometimes meaning simply "arbitrary" and sometimes meaning "motivated by animus." *See generally* Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 Hastings Const. L.Q. 323 (1994).

In the context of *Shapiro* it means arbitrary. The point made by the *Shapiro* Court is that while prohibiting poor children – or for that matter, red-haired children, or children born in July – from attending school might save money, that is not sufficient to sustain a law. *Shapiro,* 394 U.S. at 633. Finding such measures unconstitutional does not require a legislature motivated by animus, or a historically suspect category of individuals, but instead simply a classification scheme that is arbitrary and irrational.

The inadequacy of any scheme that uses saving money as an excuse to discriminate against children with respect to education was most clearly articulated by the Supreme Court in *Plyler*, 457 U.S. at 227. In attempting to establish a 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 basis for the law. *Id.* In other words, if we do it this way we can save some money. That is the exact argument MPS makes here. The Supreme Court rejected saving money as an excuse for discrimination out of hand. "Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Id.* That, however, is what MPS is doing here. It is freely spending money to transport its own students to its public city-wide schools (when by statute it is not required to do so) but then professes to save money by barring such benefits to children attending private city-wide schools. That is not permissible under the Equal

Protection Clause.

MPS attempts to distinguish *Deutsch v. Teel*, 400 F. Supp. 598 (E.D. Wis. 1975) (MPS Br. at 28), but *Deutsch* is particularly instructive because the court in that case rejected MPS's 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 concerns did not justify MPS's actions. 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.

MPS relies on *Srail v. Village of Lisle*, 588 F.3d 940 (7th Cir. 2009) (MPS Br. 13), but *Srail* does not help MPS. *Srail* involved a class-of-one equal protection claim by citizens of the Oak View subdivision against the Village of Lisle, which had expanded water services to other subdivisions but not to Oak View. *Srail*, 588 F.3d at 942. Lisle did not rely on cost alone to justify its decision. Instead, Lisle explained, and this Court agreed, that "costs associated with an extension, *coupled with [the Village's] assessment of resident disinterest and the unlikely success of an expansion*" justified its decision. *Id.* at 947-48 (emphasis added). More specifically, while Lisle "would normally recoup the costs of an expansion by passing these costs on to residents who connect to the Lisle system," "Lisle offered evidence supporting its determination that residents of Oak View were uninterested in personally financing the expansion of the Lisle system" and that this disinterest would be problematic. *Id.* Further, Oak View was already being served by a private utility company and Lisle had never before "extended its system into an area where it would have been forced to compete with another

utility company." *Id.* at 947.

In short, Oak View was in a completely different category of expense from other subdivisions for purposes of the Equal Protection analysis; Lisle had ample reason to put Oak View in a class of its own. Thus, under *Srail*, cost can be a factor but only if the cost to serve the disfavored class would be unique in kind or amount. That is the exact point that SJA made in its opening brief at pages 26-28. MPS has made no showing of such unique costs in this case.

Nor does this Court's decision in *Racine Charter One v. Racine Unified School District*, 424 F. 3d 677 (7th Cir. 2005), call for a different result. That case involved a charter school, which under Wisconsin law is not considered a private school. That is a critically important difference between that case and this one because charter schools are not covered by Wis. Stat. § 121.54. In its decision in *Racine Charter One*, this Court considered public and private school students together as a class distinct from charter school students under the statute. *See Id.* at 685. It considered the students in the first category (public school and private school students) as those whom a public school district was required to transport by statute and students in the second category (charter school students) as those whom public school districts were not required to transport by statute.

Thus, if a school district transports charter school students, it would be doing so voluntarily and not by statutory mandate, and that would be a *special* cost because it was over and above its statutory obligations. In fact, this Court specifically pointed out that the costs associated with transporting Charter One students were "unique." *See Racine Charter One*, 424 F.3d at 685 ("[T]he unique and independent nature of Charter One not only suggests that the school's students are not similarly situated to those who do receive RUSD busing, but also provides a rational basis for denying the benefit to those students."). *Id.* at 685-86 ("[W]e need

only recognize the unique and additional costs that RUSD would incur were it to provide such service to Charter One."). Saving money by failing to voluntarily offer transportation to students who have no statutory right to it is not the same as saving money by refusing to offer transportation to students who do have that right.

It cannot be the case that any cost is enough to justify discriminatory classifications. If that is the holding of *Racine Charter One*, then *Racine Charter One* conflicts with the Supreme Court case law discussed above, with the Supreme Court's decision in *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988), and with this Court's decision in *Irizarry v. Bd. of Educ. of City of Chicago*, 251 F.3d 604 (7th Cir. 2001) (the latter two of which are discussed at pages 26-27 of SJA's Opening Brief), and, as a result, *Racine Charter On*e ought to be overruled.

Finally, in three different places in its brief MPS attempts to exaggerate the effects that an adverse ruling in this case would have on MPS. First MPS argues that if it loses it will have to extend busing benefit to all public and private high school students attending their designated attendance area school. (MPS Br. 14 n.5.) This is incorrect; SJA's claim would extend to other private, city-wide schools but not to other schools unless they could prove that MPS is discriminating against them on some other basis.

Second, MPS contends that even having to provide benefits to other private, city-wide schools would make the costs "significantly higher" than just providing them to SJA (MPS Br. at 15, n. 6). But there is no evidence in the record stating how many, if any, other private city-wide high schools exist in Milwaukee. There are undoubtedly some but the number would be extremely limited due to the provisions of Wis. Stat. § 121.51(1) which tend to preclude city-wide attendance areas for religious schools except same sex schools (SJA is an all-girls school).

Third, MPS argues that if this Court holds costs can never constitute a rational basis for

limiting benefits it will mean that governments must provide benefits to everybody or nobody. (MPS Br. 17.) But SJA is not arguing for such a holding. MPS could, for example, decide to provide transportation only to students who live more than 2 miles from school and decide that the others could safely walk to school. It could decide to provide transportation only to students who live more than one mile from a bus stop and decide that the others could safely take a city bus. It could decide to provide transportation to elementary school students and not high school students.

SJA does not contend it is all or nothing. SJA simply contends that where benefits are provided, and a governmental body chooses to limit benefits, there must be a rational basis for the classes it designates. Here, MPS could easily restructure its policy to meet the reasonable uniformity requirements of Wisconsin law – and thus fulfill the rational basis test – without adopting an all-or-nothing approach.

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

In addition to its cost argument MPS argues several other purported justifications for its "one mile from a bus stop" rule, all under the heading of "fulfilling its educational mandate under the Wisconsin Constitution." (MPS Br. 22-26.) But as an over-arching problem, all of MPS's arguments miss the mark. MPS's purported "justifications" are merely the reasons why MPS buses its own students to its city-wide high schools; 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 than MPS treats its own students.

The district court noted that MPS's reasoning on these issues "supports MPS's attendance policy for its own schools, but it is a red herring here." (Dkt. #49, Order at 17; A. App at 117.)

The actual question is why MPS did not extend a uniform benefit to similarly-situated private school students. MPS never adequately answers that question.

Moreover, dissecting MPS's justifications on their merits shows that none of them works. The first is that over-crowding may be a justification for its "one mile from a bus stop rule." (Dkt. #10, MPS Br. 22-23.) However, 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. (Dkt. #20, Flanders Decl. ¶19, Ex. B.; Dkt. #32, MPS Resp. to Pl.'s Proposed Findings of Fact at ¶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.

Even examining individual schools where overcrowding "could have been a problem," as MPS urges the Court to do, demonstrates that over-crowding issues do not justify MPS's policy. South Division is a good example. The undisputed facts show that South Division could have accepted 356 of the 899 students that were bused out of that neighborhood. (Dkt. #32, 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. (Dkt. #32, MPS Resp. to PPFF ¶63.) If the bare possibility of over-crowding was an issue, MPS should have been equally willing to transport those students 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 providing access to special programming and "closing the

achievement gap" provide a rational basis for its classification. (MPS Br. 23-24.) As explained above, those goals only justify MPS's decision to transport its own students. They say nothing about MPS's decision to treat similarly-situated public and private school students unequally.

c. There is no rational basis for the July 1st deadline for private schools.

MPS says that the deadline is necessary because it needs to know which private students are eligible for transportation and to begin making provisions for such transportation. (MPS Br. at 29.) MPS admits that it needs the precise same information for its students but says that it has immediate access to the information from its own records (presumably its enrollment records). (*Id*.) But this explanation makes no sense.

Assume that two families move to Milwaukee on August 30th and that school starts on September 1st. One family enrolls their children in a private school on August 31st and the other family enrolls their children in a public school on August 31st. MPS will provide free transportation to the children of the family who attend a public school even though MPS did not even know they existed until August 31st. MPS will provide no transportation to the children of the family that attend a private school, even if the private school notifies MPS on August 31st (the same day the private school found out about them), because they were not on the private school's roster by July 1st. The logistical problems (whatever they might be) are exactly the same but the outcome is different.

MPS also says that the deadline is necessary because it has to check the information provided by private schools against its own records and check on available bus routes (MPS Br. at 29-30), but again that in no way explains the July 1st deadline. Presumably it takes MPS a few days to check on its own students as well. Do they attend a city-wide school or a Neighborhood School? Do they live more than two miles from school? What bus route will best accommodate

them? MPS's own witness has admitted that the logistical issues, to do whatever is necessary, would be the same whether the students attend a private or a public school. (Dkt. #21 at 31; Solik-Fifarek Dep. at 52-53.) SJA is not saying that MPS has to provide transportation to its students on the same day that SJA notifies MPS that they have enrolled. SJA is simply saying that there is no rational basis for the discriminatory July 1st deadline.

Moreover, the MPS rule imposing the July 1st deadline lacks a rational basis because it penalizes the wrong person. Private school students and their families have transportation rights under § 121.54. The rule does not impose a deadline on these students and their families that they have somehow missed, but on a different entity – private schools. There is no legitimate governmental interest served by penalizing the intended beneficiaries under § 121.54 for an omission by a third party, and MPS offers no such justification.

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. THE DISTRICT COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT TO SJA

Assuming that this Court agrees with SJA on the first part of this brief that none of SJA's purported justifications for its disparate treatment of private school students and public school students provide an actual rational basis for its rules, then the district court not only erred in granting summary judgment to MPS, but it also erred in failing to grant summary judgment to SJA on its § 1983 claim, and this Court should reverse that error.

The elements of a claim under 42 U.S.C. § 1983 are: (1) the plaintiff held a constitutionally protected right; (2) the plaintiff was deprived of that right in violation of the

Constitution; (3) the defendants intentionally caused the deprivation; and (4) the defendants acted under color of state law. *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989). MPS does not in any way attempt to dispute that, assuming SJA establishes a constitutional violation in this case, SJA has established each element of its § 1983 claim.

A. SJA and the 68 SJA Students Denied Transportation by MPS Held a Constitutionally Protected Right and that Right Was Violated by MPS.

If the Court agrees with SJA on the first half of this brief then there is no remaining argument to dispute that SJA and the 68 SJA students are constitutionally entitled to the equal protection of the laws, and MPS violated those rights by imposing stricter restrictions on the receipt of transportation benefits by SJA students than it does on the receipt of those benefits by similarly-situated public school students. This satisfies the first two elements of the claim.

B. MPS Intentionally Violated the Rights of SJA and the 68 SJA Students.

MPS does not dispute that it knew when it denied transportation benefits to the 68 SJA students that it was treating them differently than similarly-situated public school students and it was doing so because of a rule that MPS itself created. Nor does MPS dispute that SJA put it on specific notice of its claim prior to filing the claim. (Dkt. #21, McGrath Decl. ¶18, Ex. I.)

Despite having this specific information, MPS did nothing to address the problem of the 68 SJA students, and did nothing to change its policies or to change Rule 4.04. Knowledge of the law and the failure to follow the law is proof of intent. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (holding that a public official's violation of clearly established statutory or constitutional rights is sufficient to establish intent).

Moreover, the MPS Superintendent was the losing defendant in *Deutsch v. Teel*, 400 F. Supp. 598 (E.D. Wis. 1975) and, as a result, MPS knew specifically that it was obligated under Wisconsin statutory law and the Equal Protection Clause to treat private school students the same

as public school students when it came to transportation benefits. MPS offers nothing in its brief to counter the evidence of intent on its part.

C. MPS Acted under Color of State Law.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). Under the law, a municipality that makes a discretionary decision under the authorization of a state statute is liable under § 1983. *Snyder v. King*, 745 F.3d 242, 247 (7th Cir. 2014). Choosing a particular action that is permitted by state law is a "deliberate choice [by the municipality] to follow a course of action . . . made from among various alternatives." *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986).

Under Wis. Stat. § 121.54, MPS had the discretion to set its own transportation policies. By choosing an unconstitutional method of following § 121.54, MPS made itself liable under § 1983. *See N.N. ex rel. S.S. v. Madison Metro. Sch. Dist.*, 670 F. Supp. 2d 927, 937 (W.D. Wis. 2009).

Assuming that the Court agrees that there was no rational basis for MPS's transportation rules, the undisputed evidence establishes that all of the elements of a § 1983 violation are present. SJA and its students had a constitutional right to equal protection that was violated by MPS. The violation was intentional and it was done under color of law. As a result, SJA is entitled to summary judgment on its claim under § 1983.

CONCLUSION

SJA requests that this Court reverse the decision of the district court and grant summary judgment in its favor. Upon granting summary judgment to SJA, SJA requests that this court remand the case to the district court to enter judgment for the stipulated amount of damages ($178,640 per Dkt. #47, Stipulation Regarding Damages) and for a determination of attorneys'

fees and issuance of an injunction preventing MPS (and its successors) from enforcing the challenged transportation policies all as permitted under 42 U.S.C. § 1988.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Cir. Rule 32 because it contains 6,970 words.

2. This brief complies with the typeface requirements of Cir. Rule 32 because it has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** in **12 point Times New Roman and with 11 point Times New Roman for the footnotes**.

Dated this 9th day of July, 2018.

/S/ RICHARD M. ESENBERG

CERTIFICATE OF SERVICE

I certify that on July 9, 2018, I electronically filed the foregoing Brief with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the case, who are registered CM/ECF users:

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