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**TESTIMONY OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY IN
SUPPORT OF 2021 ASSEMBLY BILL 160**

Chairman Thiesfeldt and Members of the Assembly Committee on Education:

Thank you for providing us with the opportunity to testify in favor of Assembly Bill 160. I am Libby Sobic and I am an attorney at the Wisconsin Institute for Law & Liberty. WILL has provided counsel and litigated cases relating to student transportation in a variety of contexts. I am testifying today to provide a legal overview of the Wisconsin student transportation law and AB 160.

This committee is no doubt aware of the importance of safe and reliable transportation to public and private school students and their families. Wisconsin has a long history of helping ensure that schoolchildren do not have to worry about how they will get to school, and it is a history of which we should all be proud. In 1967, the Wisconsin Constitution was amended to clarify that the Legislature was authorized to provide transportation to students to ensure their safety regardless of the sector of school they attended. The Legislature then immediately crafted laws distributing transportation benefits to public and private school students alike.

The basic framework present in state statute today is relatively straightforward. School districts are generally required to provide transportation to qualifying public and private school students and in return the districts receive state aid under a formula that takes into account the number of students and distance transported.

This general transportation requirement contains an exception called the “City Option,” which provides that school districts need not transport students residing in certain types of cities. While districts are permitted to “elect[]” to transport these children, if they do so, state law requires that “there shall be reasonable uniformity in the transportation furnished to the pupils, whether they attend public or private schools.”¹ The animating principle behind Wisconsin’s transportation laws is that “the same consideration of safety and welfare should apply to public and private schools alike.”²

In practice, transportation benefits to private school students take several forms, including yellow bus service, parent reimbursement contracts, or contracts with

¹ § 121.54(1)(b).

² *Cartwright v. Sharpe*, 40 Wis. 2d 494, 506, 162 N.W.2d 5 (1968).

private schools for transportation. But regardless of the form they take, these benefits are crucial to our students, families, and schools. According to the Legislative Fiscal Bureau, for example, 415 school districts transported over 448,000 public school students and around 27,000 private school students in the 2018-2019 school year alone.³ And in the City of Milwaukee, home to the state's largest school district and the highest number of private schools in the state, 38,825 public school students and 6,563 private school students received benefits. For the school year 2019-2020, Milwaukee Public Schools received over 9% of total state transportation aid, representing over \$2 million, to cover the costs of providing transportation benefits to these students.⁴

But despite Wisconsin's tradition of providing these benefits and widespread reliance on them, over the past school year we have seen students denied the transportation aid this Legislature gave them in violation of state law. In August of 2020, while private schools were already facing the substantial challenge of reworking their approaches in the face of the COVID-19 pandemic, MPS announced that it simply would not be providing transportation benefits to private school students until further notice. In its view, because MPS' own program would be virtual and thus the district would not be transporting its own students, it did not need to transport private school children to their in-person classes.

The district's position resulted in at least 6,000 private school families without access to transportation to school, many of which were open and safely providing in-person education for some of their students. Yet the district received \$2 million in transportation aid in 2019-2020 and the state has continued to fund districts meeting their legal obligations for providing transportation.

In my view, MPS has failed to meet its legal obligations under Wisconsin's transportation law.

* * *

Because students within MPS generally fall within the city option, MPS does not have to transport them. But it has long chosen to do so anyway. And that choice triggers its obligation under state law to ensure "reasonable uniformity" in the transportation it provides, regardless of whether students attend public or private school. The same considerations of safety and welfare apply no matter what kind of school a child is attending.

³ Russ Kava and Christa Pugh, Legislative Fiscal Bureau, *State aid to school districts* 25 (Jan. 2021), available at

https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2021/0027_state_aid_to_school_districts_informational_paper_27.pdf.

⁴ See Wisconsin Department of Public Instruction, *Final-4-June-2020 PTA Payment 6-9-2020* (June 2020), <https://dpi.wi.gov/sfs/aid/categorical/pupil-transportation-aid>.

There is a modest body of law regarding what this “reasonable uniformity” provision requires. Relevant here, both a 1979 Court of Appeals decision⁵ and a 1972 opinion of the Attorney General⁶ make clear that a district otherwise providing transportation to public and private school students generally must transport private school students on days that the public school district is not in session. The Court of Appeals decision just referenced additionally relied on Wis. Stat. § 121.56 for this principle, which states that “the transportation of public and private school pupils shall be effectively coordinated to insure the safety and welfare of the pupils.” In the Court’s view, this statutory provision is meant “to prevent discriminatory treatment of pupils attending private schools in the transportation provided them.”⁷

So, for example, if a city option district that has elected to transport students closes its schools for holiday break, it has to keep providing transportation to private schools if they remain in session. This makes perfect sense. If the private schools were closed for holiday break, there’s no doubt that the public school would keep transporting its own students, so the reverse should also hold true. That is reasonable uniformity.

In sum there are two basic rules at play: if a city option district chooses not to provide transportation to its own students at all, it need not transport private students. On the other hand, if the district does provide transportation, it cannot simply withhold benefits on days that its schools are closed.

MPS is using the occasion of the COVID-19 pandemic to skirt its obligations to private school students. It is acting like it is a district that does not provide transportation at all, even to its own students, in order to justify its decision to withhold benefits from private school students. But of course, it does provide transportation; it has long provided transportation; it has a published transportation policy, available online;⁸ it accepts millions in state funds to offer these services. In fact, it is our understanding that now that MPS is resuming in-person instruction of its students, it is likewise resuming transportation of those students. But if MPS is willing to transport its own students on in-person days even if a private school chooses to remain virtual due to COVID-19, reasonable uniformity demands that it should have been providing benefits on days that it was virtual but private schools were in person. MPS had every right to decide to hold classes virtually during this pandemic. But private schools also had the right to make the opposite decision, and MPS cannot use its ministerial authority over the flow of transportation dollars to penalize private schools that opened to in-person instruction earlier than it did.

⁵ *Hahner v. Board of Education*, 89 Wis. 2d 180, 278 N.W.2d 474 (1979).

⁶ 61 OAG 240, 244 (1972).

⁷ *Hahner*, 89 Wis. 2d at 191.

⁸ Milwaukee Public Schools, *Administrative Policy 4.04* (March 3, 2009), available at <https://mps.milwaukee.k12.wi.us/MPS-English/COO/Transportation/AdministrativePolicy4.04.pdf>.

MPS has violated its legal obligations at its own peril, because under Wis. Stat. § 121.58(2)(am), “[n]o state aid of any kind may be paid to a school district . . . which willfully or negligently fails to transport all pupils for whom transportation is required under s. 121.54.” They have put their own state aid in jeopardy.

The bill this committee is considering addresses this issue in a simple and effective way. It ensures transportation benefits are provided to private students on the same terms as in the previous school year and authorizes school districts to obtain state aid for payments made. This is a good compromise that places the safety and welfare of our children first.

Thank you for your time. I would be happy to answer any questions you may have regarding my testimony.

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