Contact: Rick Esenberg
Tel. 414-727-6367
FAX: 414-727-6385
Email: rick@will-law.org

FOR IMMEDIATE RELEASE

WILL RESPONDS TO U.S. DOJ

WI School Choice Program is compliant with ADA and does not discriminate; DOJ is playing politics with the law, has no legal basis for letter to DPI

August 28, 2013, Milwaukee, WI – Last May, the public learned that the United States Department of Justice (DOJ) had sent a letter to the Wisconsin Department of Public Instruction (DPI) demanding that DPI "must do more" to enforce the Americans with Disabilities Act (ADA) in connection with school choice. It requires that DPI undertake specified activities. Today, the Wisconsin Institute for Law and Liberty released a memo responding to DOJ's claims.

The memo concludes that the DOJ is wrong. The ADA is inapplicable to the vast majority of private schools participating in the school choice program and DPI lacks the authority to do what DOJ demands. WILL President Rick Esenberg observes that DOJ's letter is not based on a finding – or even an allegation – of any actual discrimination. "DOJ misunderstands school choice in Wisconsin and ignores state and federal law, decades of court precedent, and even long standing federal policy," he said. It is, he added, "just another federal power grab."

U.S. DOJ requires DPI to act in time for the '13-'14 school year. So far, the DPI has been silent on the issue. The media should inquire about what DPI intends to do. Will it ignore the letter? Does it intend to comply with the U.S. DOJ demands and, if so, how will it do so and by what authority?

DOJ's argument relies on the faulty premise that private schools in the choice program are public entities – or can be regulated in the same way – because they accept state dollars. But this is inconsistent with controlling precedent and the pertinent statutes. The fact that parents use vouchers at private schools does not turn them into public entities any more than the use of SNAP benefits at a Wal-Mart or TANF benefits to pay a child care provider makes either the store or the daycare public bodies. Nor does it subject them, by a form of "osmotic transfer" to the same legal obligations that do apply to public entities.

DOJ's effort to enforce ADA against private schools in the choice program is particularly misplaced given that Congress has determined that religious schools – which comprise the overwhelming majority of schools participating in the program – are exempt from Title III of the ADA (which the DOJ mistakenly refers to as Title II).

It might be a different matter if Wisconsin had, as DOJ alleges, "delegated" the "education function" to private schools in the program, but that is not the case. As the courts have long recognized, school choice merely provides an additional alternative for low income families.

And it is the very existence of that alternative that DOJ is targeting. "U.S. DOJ is attempting to hijack Wisconsin education policy by pushing burdensome regulations on private schools and subjecting them to programming requirements that they, unlike public schools, receive no funding to meet. This is federal overreach at its worst," said CJ Szafir, WILL's Education Policy Director.

So what's really going on here? Wisconsin is a leader in giving parents the freedom to choose their child's school - and the DOJ, like the unions, don't like it. Just last week, DOJ sued Louisiana advancing the theory that allowing low income, predominantly minority families to choose a school for their child would somehow constitute impermissible racial segregation. For whatever reason, the Justice Department doesn't want low income families to enjoy the choices that have been available to everyone else. It seems intent on frustrating the ability of those families to escape failing public schools or to decide that a different kind of school might best serve their children. DOJ is, of course, entitled to its own views of what constitutes good public policy.

But it is not entitled to remake the law.

The full legal memo is on the WILL website and is available upon request. The Executive Summary is on the following pages.

The Wisconsin Institute for Law & Liberty is a non-profit, public interest law firm promoting the public interest in constitutional and open government, individual liberty, and a robust civil society. Further inquiries may be directed to Mr. Esenberg at rick@will-law.org.

WISCONSIN INSTITUTE
FOR LAW & LIBERTY

August 28, 2013

To: Interested Parties

From: Rick Esenberg, President and General Counsel
CJ Szafir, Associate Counsel and Education Policy Director
Wisconsin Institute for Law and Liberty (WILL)

Subject: A legal analysis of the United States Department of Justice's Letter to the Wisconsin Department of Public Instruction regarding compliance with Title II of the Americans with Disability Acts.

EXECUTIVE SUMMARY

Background: On April 9, 2013, the United States Department of Justice – Civil Rights Division ("DOJ") wrote a letter to the Wisconsin Department of Public Instruction ("DPI") claiming that the DPI "must do more to enforce federal statutory and regulatory requirements that govern the treatment of students with disabilities who participate in the school choice program." *See U.S. Department of Justice Letter to State Superintendent Tony Evers*, 1, April 9, 2013 ("DOJ Letter"). The Letter lays out the actions that, in DOJ's view, DPI must take in order to be compliant with Title II of the Americans with Disabilities Act ("Title II"). It ends with a threat: the DPI is required to implement new policies for the upcoming 2013-2014 school year, and if not, "the United States reserves its right to pursue enforcement through other means." *Id.* at 4.

Although referring to it only in passing, the DOJ Letter was presumably prompted by a complaint filed on June 8, 2011, by Disabilities Rights Wisconsin and the American Civil Liberties Union ("the Complaint"). The Complaint contains highly stylized allegations of "discrimination," but the DOJ Letter does not address them and makes no allegations of its own. The Letter contains no claim or "finding" that any school (collectively "Choice Schools")

participating in the Wisconsin's various forms of school choice ("the choice program")[1] has engaged in any form of discrimination against students with disabilities.

Choice Schools are not "public entities": The Letter is nothing more than an assertion of the power to regulate. It claims that DPI is somehow empowered to enforce a federal statute (Title II) that is applicable only to "public entities" (like DPI) against private schools. While the Letter is vague on just what this might mean, it suggests that, in applying Title II, DPI must impose on Choice Schools the exact same legal standard applicable to government schools, *i.e.*, a requirement that Choice Schools change their programs to accommodate students with a disability as long as the change would not "fundamentally alter" the school. *DOJ Letter*, p. 2 (citing to 28 C.F.R. § 35.130(b)(7)). In other words, DOJ apparently believes that the legal standards applicable to DPI as a public entity are "transferred" to private Choice Schools because DPI administers payment of the vouchers to choice families. If that sounds contrived, it is because it is:

- Choice Schools are not "public" schools or entities under state or federal law.
- It is not the case that if a private organization receives public money, it inherits all the responsibilities of a public entity. The fact that parents use vouchers at private schools does not turn them into public entities any more than the use of SNAP benefits at a Wal-Mart or TANF benefits to pay a child care provider makes either the store or the daycare subject to Title II. Title II does not become "applicable" to a private school simply because the state funds a voucher to families who choose to use it at that school.
- Thus, Title II has never been applied to private entities (including schools), save for the situation when a public body has "contracted out" its responsibilities to a private entity. But, contrary to DOJ's allegation, Wisconsin has not "delegated" the public education "function" to Choice Schools. Public schools remain fully available and, as the Wisconsin Supreme Court has recognized, school choice only provides an alternative to public education for low income families who remain free to use public schools if they so desire.

[1] There are three different programs. The Milwaukee Parental Choice Program ("MPCP") limited to the city of Milwaukee began in 1990. The Parental Private School Choice Program ("PPSCP") in Racine went into effect in 2012. As of the 2013-2014 school year, there is also a statewide Parental Choice Program ("PCP").

- The legal ADA standard urged by DOJ has never been applied to Choice Schools. To the contrary, federal law expressly calls for a different – and less intrusive – standard for most, if not all, private schools. As DPI itself - along with the federal Department of Education - recognizes, private schools, given their different position in the educational landscape, need only make "minor adjustments" to accommodate students with disabilities. In fact, Congress has determined that religious schools – currently comprising approximately 85% of Milwaukee Choice Schools – are completely exempt from the Americans with Disabilities Act.
- In the absence of some violation of federal law, DOJ has no authority to tell Wisconsin how to regulate Choice Schools, and Wisconsin has not chosen to regulate them in the way that DOJ now demands. DPI has no authority under state law to force Choice Schools to do what DOJ demands or to deny eligible families the opportunity to send their children to an otherwise eligible school.

DOJ Letter is unnecessary: State law already requires that Choice Schools may not deny admission to any student on the basis of disability and that DPI provide vouchers to families of disabled and non-disabled students alike. As noted above, DOJ does not allege that DPI and the Choice Schools have not complied with these requirements.

DOJ's demands will hurt families and private schools: The application of Title II to Choice Schools would require them to adjust their programs or provide additional services as long as it does not "fundamentally alter" their programs. That might require these schools to significantly alter their distinctive approaches with no benefit to disabled students. If, for example, Choice Schools do not provide the same type and quantity of services as public schools, it is because they, unlike their public counterparts, do not receive funding to provide them. Calling this "discrimination" will not cause the services to be provided unless and until the state provides funding for them. If no funding is provided, the effect of the DOJ's approach would be to force schools out of the program, reducing the alternatives available to low income families.

In addition, some Choice Schools may offer distinct approaches to discipline and may be unwilling to tolerate certain forms of misbehavior alleged to stem from mental disabilities. While such an alternate approach may be impermissible in public schools, Congress has never said that it must be forbidden in private schools – even when poor families have chosen to place

their children in those schools with publicly funded vouchers. Imposing a "one size fits all" requirement on Choice Schools will deny parents of disabled and non-disabled students an alternative without expanding opportunities for those families that prefer a traditional approach.

Public schools still exist: All of this might be justified if Choice Schools were being utilized by the state of Wisconsin to replace public schools, but that is not the case. Voucher students attend them only if their parents so choose, while public schools remain open and fully funded. Choice students have the right to leave and enroll in a public school. The DOJ's position might be more appealing – although perhaps still not legally sound – if Choice Schools were provided the resources to provide additional programming for students with disabilities and failed to do so. But that, too, is not the case.

DOJ is hijacking state education policy: In sum, DOJ seeks to commandeer a state agency to enforce a law against private schools that does not apply to them through means that the state agency has no authority to employ.

- Its objective is to impose extra-legal obligations on these schools for which they, unlike their public school counterparts, receive no funding and which may be inappropriate for a private school.
- The foreseeable result is to force DPI to depart from state law and push schools out of the program because they cannot provide services for which they receive no funding.
- As such, the DOJ Letter is not about "opening access" to the Choice Schools or preventing discrimination against certain disabled students in a manner prohibited by the law. It – like the Complaint – is not about students with disabilities or discrimination. It is about educational choice. The DOJ does not like it and wants to make its continued success as difficult as possible.

WILL's conclusions: 1) Title II does not apply to Choice Schools, 2) to the extent that Title II imposes obligations on DPI with respect to the choice program, they are limited to the role it plays in the program's administration and the limited benefits that it provides, 3) the DPI lacks the authority to implement the DOJ's "requirements," and 4) the DOJ lacks the authority to order the DPI to take the actions mandated in their Letter.

The full legal memo is on the WILL website and is available upon request.