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Written Testimony

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Chairman Johnson, Ranking Member Carper, and distinguished members of the Senate Committee on Homeland Security & Governmental Affairs:

Thank you for the opportunity to submit written testimony about the United States Department of Justice’s investigation into the Milwaukee Parental School Choice Program. For two years, we have been tracking – and pushing back against – the U.S. Department of Justice’s unprecedented and baseless investigation into the Milwaukee Parental Choice Program. We have provided legal advice to clients and stakeholders in the school choice community and released two comprehensive memos on the subject, attached to the testimony as Exhibits A and B. Our work on this issue has been cited by columnist George Will, “[Justice Department becomes a schoolyard bully in Wisconsin](#)” and appeared in the National Review, Politico, and the Milwaukee Journal Sentinel, among other outlets.

We are attorneys at the Wisconsin Institute for Law & Liberty (WILL), a nonprofit, nonpartisan law and policy center with offices in Milwaukee. Through education, litigation, and public advocacy, we seek to advance the public interest, the rule of law, individual liberty, constitutional government, and a robust civil society.

For today’s [hearing](#) on the Milwaukee school choice program, we are releasing a primer about the DOJ’s investigation into school choice in Wisconsin. It is important to note that the investigation has little to do with children and everything to do with the prerogatives of the educational establishment. There is not one documented instance of what any reasonable person might call discrimination against a child with special needs by a school participating in one of Wisconsin’s private school choice programs. While DOJ ordered the state Department of Public Instruction (DPI) – the state education agency – to gather such complaints, it appears that not one complaint has been filed with DPI.

Indeed, what the DOJ and anti-choice advocates say is “discrimination” is actually a product of their own political maneuvering against parental choice. If a school participating in the choice program is unable to provide a given level of services to a student with special needs, it is often because Milwaukee Public Schools (MPS), as the gatekeeper for federal aid, have failed to adequately allow funds appropriated for those services to “Follow the Child.” When the state legislature has proposed special needs vouchers to remedy the situation, they have been opposed by the very “disability rights advocates” who instigated the DOJ’s investigation.

The DOJ investigation is not about kids. It's about a policy – school choice – that the adults who benefit from the traditional public educational structure and vehicles for providing services to children with special needs see as eroding their prerogatives and market share. It is an assault on the sovereignty of the state of Wisconsin, and yet another attempt by the Obama Administration to recast federal law into something that Congress has not passed.

I. The Investigation

Wisconsin has one of the nation's largest and oldest school choice programs. In 2014-15, nearly 28,000 low-income families, mostly in Milwaukee, took advantage of a state-funded voucher to attend a private school of their choosing. Two weeks ago, Governor Scott Walker and the Republican legislature passed a budget that greatly expands the program statewide.

Following a complaint filed by the ACLU, Disability Rights Wisconsin and two unnamed families¹, the U.S. Department of Justice, in August 2011, opened a formal investigation into the state of Wisconsin and the Milwaukee Parental Choice Program as to whether the program violated federal law by discriminating against children with disabilities. In April 2013, the Civil Rights Division of the DOJ sent a letter and legal memo to the state Department of Public Instruction (DPI), accusing the school choice program of violating Title II of the Americans with Disabilities Act (ADA). The letter concluded that Wisconsin had to impose new requirements on schools participating in the choice program by June 2014. Failure to comply, it said, could lead to litigation. No evidence of discrimination was presented at that time. We responded with a legal memorandum, concluding that the DOJ's legal theory was an unprecedented use of federal disability law (see Exhibit A).

A year later, the DOJ forced the DPI to obtain student disability records from private schools in the choice program. We wrote a legal memo (see Exhibit B), advising schools against doing so because, among other reasons, the DPI lacked the statutory authority to request disability records. Few schools complied. In October 2014, the DOJ required the DPI to establish a new disability complaint process, so any complaints against the choice program can be forwarded to attorneys at the DOJ.

The US DOJ refuses to comply with our open records requests about the investigation, media inquiries, and document requests from the Senate Committee on Homeland Security & Governmental Affairs. Yet, the DPI has responded to our records request, and, as of our last request, not one complaint has been filed against a private school in the choice program.

II. The DOJ's Legal Theory is Wrong

The DOJ essentially believes that private schools in the choice program should be regulated like public schools under Title II of the Americans with Disabilities Act (ADA). That statute prohibits discrimination by public entities. Title II's injunction against discrimination has come to mean that a public entity subject to it must accommodate the special needs of persons with disabilities unless doing so would "fundamentally alter" the affected program. DOJ argues that DPI, which is itself subject to Title II, has certain limited administrative responsibilities with respect to the provision of state-funded vouchers to parents. The parents then use these vouchers at private schools. DPI must, therefore,

¹ The allegations of discrimination in the complaint were highly stylized. In neither case had a school rejected a voucher student. In one instance, the school was unable to provide the same level of service as the student's former public school because it did not receive the same level of funding. In the other, a school was accused of "discrimination" for imposing reasonable behavioral requirements, which, in its view, would better serve the child in the long run.

assure that these schools comply with Title II standards even if they have no access to the public funds that would enable them to do so. By this “six degrees of separation” method of interpretation, DOJ seeks to transform private schools into public ones.

This is an unprecedented and astonishing legal theory. First, it conflicts with the ADA itself. Private schools, as “public accommodations,” are governed by Title III, which *completely exempts religious schools from the ADA*. Over 85% of choice schools are religious. It is odd to think that Congress intended regulators to use a Rube Goldberg interpretive contraption to use a part of the law that does not, by its plain terms, apply to schools that are elsewhere excluded from the law. Second, it is contrary to long-held U.S. Department of Education (ED) policy. A 2001 ED memo states: “Title II of the ADA does not directly apply [to private schools], as the private schools are not public entities.” Memorandum from Susan Bowers, U.S. ED, 2 (Mar. 30, 2001). In 1990, the ED determined that federal disability laws do not apply to “placements in private schools resulting from parents decisions to participating in the Choice Program.” Memorandum to Gov. Tommy Thompson, U.S. ED Education (1990).

Third, the DOJ’s legal theory also violates U.S. Supreme Court precedent. The Supreme Court has held that a “private entity [that] performs a function which serves the public does not make its acts state action.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). In *Rendell-Baker*, the Court concluded that employees in private schools, whose income is from public funds, are not state employees. *Id*; see also *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (holdings that state funding alone is not enough to treat nursing homes as public entities); see also *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (“[E]ducation is not and never has been a function reserved to the state . . . and [courts] have declined to describe private schools as performing an exclusive public function.”)

Finally, DOJ’s theory defies logic and erodes the distinction between public and private entities. It is not unlike saying that, because recipients of SNAP benefits may use them at Wal-Mart, the store itself has been transformed into a public entity – and must now comply with legal requirements that apply only to the government.

A more detailed legal analysis can be found in WILL’s August 28, 2013 letter to DOJ and Executive Summary (Exhibit A). It can also be found in the testimony of Richard Komer of the Institute for Justice submitted today.

III. Why the Investigation Matters

- *DOJ’s legal theory would end the school choice program.* Title II of the Americans with Disabilities Act (ADA) requires public entities to accommodate students with disabilities unless doing so would “fundamentally alter” their program. Public schools are subject to this requirement and additional obligations under federal statutes governing education for children with special needs. But they also receive additional funding to meet these obligations and, as public entities with their own taxing authority and that of the state, have access to more. Private schools participating in the choice program, for the most part, do not receive these additional funds. To impose comparable obligations would result in a substantial – and potentially fatal – financial burden on the choice program and its participating schools.

In addition, school choice is valuable because it permits different approaches. It embodies the simple truth that “one size does not fit all.” Imposing federal – or even state – supervision and direction of precisely how schools serve children with special needs would undercut the benefits of educational diversity. This is undoubtedly one of the reasons that Congress exempted religious schools from the ADA in the first instance.

- *The State of Wisconsin has been “commandeered” by the U.S. government.* In June 2014, the DOJ forced the DPI to ask private schools to complete a Disability Data Report, which includes specific questions about students’ disabilities and whether they were suspended or expelled. There is no state statute that authorizes DPI to request such data. Fourteen choice schools did turn their student data over to the DPI, who then promptly sent it to the DOJ.

In October 2014, the DPI – on behalf of the DOJ’s orders – established a new disability complaint process. Although they are not advised what discrimination means, parents can fill out a form and submit to DPI claiming that their children have been subject to discrimination. Once submitted to the DPI, the form is forwarded to the US DOJ. Moreover, the DPI will initiate a complaint procedure by contacting the school about the complaint, proposing a resolution, and, if no solution can be agreed upon, issuing a written decision and plan to correct the violation. The DPI has not said if there is a way to appeal their decision.

To its credit, DPI has recognized that Wisconsin law does not give it authority to oversee the activities of schools participating in the choice program. Its administrative role with respect to the program is carefully delineated and limited by state law. The DPI admitted that it has no statutory authority to create such a procedure. Even if the federal standards that DOJ wants it to enforce applied to private schools, DPI has admitted that it lacks authority to issue or enforce decisions that would be binding on private schools.

Yet, DOJ has ignored these legal niceties and regarded the law of a sovereign state as something to be brushed away. It has told DPI that it will do what Washington bids without regard to what Wisconsin permits. And, to its discredit, when the U.S. DOJ has said “jump,” the DPI has simply asked “how high?” DOJ has forced DPI to aid in its investigation and the Tenth Amendment of the U.S. Constitution does not permit states to be “commandeered” in this way. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot force local law enforcement officers to perform background checks on handgun owners); *New York v. U.S.*, 505 U.S. 144 (1992) (holding that the federal government cannot require States to provide for the disposal of radioactive waste generated within their borders).

- *A “chilling” effect.* No school in Milwaukee wants to find themselves on the opposite side in a courtroom from their country. Yet, the U.S. DOJ says that schools must do one thing – but the text of federal law, U.S. Department of Education, and U.S. Supreme Court all say do to something else. The DOJ seems to demand that the schools do what public schools are funded to do even though they are not. For many, they may be required to do things inconsistent with their distinctive and alternative faith-based approaches (not everyone believes, for example, that students with “oppositional-defiance order” should not be taught to conform themselves to generally applicable requirements), even though federal law exempts religious schools from such requirements.

School leaders, who wish not to be named and who are understandably reluctant to go public, ask us what exactly they are supposed to do. The investigation has left parents and school leaders confused

and concerned about when and if another shoe will drop. By launching a never-ending and baseless investigation, DOJ is attempting to regulate by in terrorem effect without accountability.

IV. Timeline of Events

June 7, 2011, The complaint is filed: The American Civil Liberties Union (“ACLU”) and Disability Rights Wisconsin file a [complaint](#) with the U.S. Department of Justice, asking them to investigate the “systematic discrimination against and exclusion of students with disability in Wisconsin’s school voucher program.” They file the complaint against: State of Wisconsin, Department of Public Instruction, Messmer Preparatory Catholic School, and Concordia University School.

The complaint alleges that students with disabilities in the choice program are 1) deterred by DPI and participating voucher schools from participating in the school choice program; 2) denied admission to voucher schools when they do apply; and 3) expelled or forced to leave because of choice schools’ policies and practices that fail to accommodate the needs of students with disabilities.

August 17, 2011, The investigation begins: The Civil Rights Division of the United States Department of Justice (“DOJ”) opens an investigation into Wisconsin’s school choice program to determine whether the choice program “discriminates against students with disabilities.”

September 27, 2011, DOJ questions DPI: The DOJ begins to investigate the Wisconsin Department of Public Instruction (“DPI”), the state’s education agency. The DPI initially resists the DOJ by [saying](#) that federal disability laws do not apply to the choice program: “DPI has no policies or procedures that reference the obligation of participating MPCP schools to comply [b]ecause there is no such obligation.”

April 2013, DOJ determines that the school choice program must be changed: The Civil Rights Division of the U.S. DOJ [sends a letter and legal memo](#) to the Wisconsin Superintendent of Public Instruction Tony Evers. The DOJ declares – without citing to any evidence of discrimination – that the State of Wisconsin and the Milwaukee school choice program are in violation of federal disability law, the Americans with Disabilities Act. Therefore, the State must “do more to enforce the federal statutory and regulatory requirements that govern the treatment of students with disabilities.” The DOJ mandates that:

1. DPI must establish and publicize a procedure for individuals to submit complaints about private schools.
2. DPI must report to the U.S. DOJ the number of disabled students that are served by voucher schools. The DOJ will review the data.
3. DPI must report all discrimination claims to the Justice Department.
4. DPI must conduct outreach to educate the families of students with disabilities about school choice.
5. DPI must provide mandatory ADA training to voucher schools.
6. DPI must develop program guidance in consultation with the U.S. to enforce compliance.

The letter 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.”

August 2013, WILL Responds to DOJ: On behalf of clients in the school choice community, Attorneys Rick Esenberg and CJ Szafir at the Wisconsin Institute for Law & Liberty (WILL) [release a legal response](#). We argue that the DOJ’s letter is legally inaccurate and supported by no evidence of actual discrimination.

September 2013 – May 2014, WILL files open records request with DPI: The few records that are not withheld under attorney-client privilege show that the DOJ made threats to the DPI and references to an “on-going” investigation.

May 2014, State GOP calls out Evers: Republicans in the Wisconsin State Senate [notify](#) Superintendent Tony Evers that they want to be updated on the DOJ’s investigation.

June 2014, US DOJ demands data from private schools: The US DOJ orders the state DPI to obtain private school student disability data by the end of June. [The Disability Data Report](#) that DPI sends to schools in the choice program, asks about what actions private schools have taken regarding students with disabilities (i.e. suspended, expelled, denied admission).

June 2014, WILL calls out DPI, DOJ: On behalf of clients in the school choice community, Attorneys Rick Esenberg and CJ Szafir [release a legal memo](#), advising private schools in the choice program not to comply with the DPI’s request for data because the DPI has no legal authority to enforce this request. As a result, only a handful of schools comply with DPI’s request.

July 2014, DOJ invokes “law enforcement” exception to FOIA request: WILL files a Freedom of Information Act (FOIA) request with US DOJ for all communications with DPI and documents pertaining to the Wisconsin school choice program. The request is denied. DOJ states that the records and communications “pertain to an ongoing law enforcement proceeding” and releasing them would “risk of jeopardizing the ongoing enforcement proceeding.”

August 2014, DPI sends data to DOJ: The DPI compiles all of the disability data from its June 2014 request. Only 14 schools turned in data dealing with 30 students. A full version of the Disability Data Report was sent to the US DOJ. A redacted version was given to legislators, WILL, and SCW. DPI would not explain why a redacted version was sent to the public and a full version was sent to the US DOJ.

October 2014, DOJ orders DPI to create complaint process: The DPI – pursuant to DOJ’s “orders” – establishes a new disability complaint process and form for parents who believe that their children have been discriminated against in the choice program. The form does not define discrimination. It is not clear what type of complaints will be pursued by DPI. The DPI does not have the legal authority to create a broad disability discrimination complaint procedure. It is clear that, after a parent submits the form to the DPI, the form will be forwarded to the US DOJ.

If it does act, the DPI says it will contact the school about the complaint, propose a resolution, and, if no solution can be agreed upon, issue a written decision and plan to correct the violation. The DPI has not said if there is a way to appeal their decision.

March 2015, U.S. Rep. notifies DOJ: U.S. Congressman Jim Sensenbrenner [notifies](#) Attorney General Holder that the DOJ investigation is of “great concern” to him and that he is “worried about the

incorrect application of Title II ADA standards the effect this will have on the viability of the private school voucher programs.”

May 2015, No complaints filed yet: DPI responds to open records request from WILL and claims that no one has filed a disability complaint against a private school in the choice program.

June 2015, U.S. Senator asks for DOJ records: U.S. Senator Ron Johnson, Chairman of the Committee on Homeland Security and Governmental Affairs, [calls on the DOJ](#) to explain their investigation. Senator Johnson requests documents and communications by June 30. According to Johnson’s office, the DOJ did not comply.

V. Conclusion

We are confident that at the end of this hearing you will come to the conclusion that the DOJ’s investigation into the Milwaukee School Choice Program is dangerous, unprecedented, and without any real evidence of discrimination. On behalf of the proponents of the education status quo, the DOJ is trying to change the school choice program in ways that would cause it to collapse. In addition to poor public policy, this raises significant Tenth Amendment issues that will have to be addressed in the future.

We welcome any questions you may have and our contact information is below. Thank you for allowing us to submit this testimony.

Sincerely,

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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.

INTRODUCTION

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.

To the contrary, 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.

But Title II has never been applied to private entities (including schools), save for the situation (not present here) when a public body has "contracted out" its responsibilities to a private entity. Nor has the exacting standard urged by DOJ ever 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. 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 if they don't.

Furthermore, the 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.

The DOJ's demands are potentially harmful. 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

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").

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.

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 but failed to do so. But that, too, is not the case.

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. We conclude that: 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.

ANALYSIS

I. Title II Does Not Apply to Choice Schools

A. Choice Schools are not public entities

Title II of the Americans with Disabilities Act provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the

benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 1232. Under the ADA, “public entity” includes any department or agency of a local government. 42 USC § 12132(1)(B).

Private schools participating in the choice program are not “public entities.” *See* Wis. Stat. § 118.165(1)(b) (stating that an institution is a private school if it, among other things, is privately controlled.). After establishment of the program in 1989, it was challenged as, among other things, a violation of the requirement that public “district schools” (as they are called in the Wisconsin Constitution) be uniform. The Wisconsin Supreme Court rejected the challenge, holding that the use of vouchers at private schools does not transform them into “public schools.” *Davis v. Grover*, 166 Wis. 2d 501, 540, 480 N.W. 2d 460, 474 (1992). Noting that public schools remained open and the choice students were free to attend them, the court observed that “[i]n no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school” and “decline[d] the opportunity to adopt such a conclusion.” *Id.*

When the program was expanded in 1995 to include sectarian schools, it was challenged again on the same basis and also as a violation of federal and state constitutional prohibitions against the establishment of religion or the use of public funds for sectarian instruction. Again, the Wisconsin Supreme Court upheld the program, in part because private schools are not made “public” by accepting state funded vouchers from students and their families:

In *Davis* this court squarely rejected the argument that private schools receiving state funds under the original [choice program] were “district schools” to which the uniformity requirement applies. The court noted that the original [choice program] explicitly referred to participating schools as “private schools” and observed that “[i]n no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school.”

We apply the same reasoning in this case.

Jackson v. Benson, 218 Wis. 2d 835, 893, 578 N.W.2d 602, 627 (1998) (citations omitted).

This should surprise no one. DPI’s only powers with respect to the choice program are enumerated in Wis. Stat. § 119.23 and include enrolling schools into the program, collecting fees, ensuring financial viability of participating schools, teacher accreditation, and informing parents which schools participate in the program. It has no authority to “ensure” that schools are

structured in any particular way or to provide additional funding for the provision of “nondiscriminatory services.” Its ability to remove schools from the program is carefully delineated in § 119.23(10) and does not include oversight, approval, or disapproval, of a school’s curriculum, programming, or operations. Its authority over educational programming in Choice Schools is limited to enforcement of the general and limited requirements imposed on all private schools. *Id.*

Although the vouchers may be used only at schools that meet certain minimal eligibility requirements, the DPI does not control where they may be used. It is students and their families who decide whether they will leave the public schools and enroll in a private Choice School. It is they who decide where the voucher will be used. Nor does the DPI “administer” or exercise any control over how voucher funds are used by Choice Schools. *See, e.g., Davis v. Grover, supra*, 166 Wis. 2d at 542 (“[N]o express limitations exist on the use of the funds paid to private schools through the MPCP.”).

To be sure, DPI must award vouchers to students without regard to their disability and, to be eligible for the program, Choice Schools must admit them. *See* Wis. Stats. § § 119.23(2), 118.60(2). But there is no assertion that these requirements – all a matter of state law – have not been met and, even if they had not, DOJ has no power to enforce them. What DOJ wants is to turn the choice program into something that Wisconsin did not adopt. It wants the state to treat these schools not as an alternative to public schools that remain open to all, but at their extension. It wants Wisconsin to go beyond providing a financial benefit to families to use as they see fit, to one that either controls the activities of the schools that these families choose or exclude those schools that do not comply with a standard that, as we shall see, Congress has chosen not to impose on (at least) the overwhelming majority of Choice Schools.

B. The Receipt of Public Money Does Not Make Choice Schools Public Schools for Purposes of Title II

In order to get around the law, DOJ argues that in order to be Title II compliant, DPI must “ensure that voucher schools do not discriminate against students with disabilities” in some way that goes beyond the state mandate of equal treatment. It appears to be saying that the limited authority DPI plays with respect to the choice program requires not only that DPI *administer* the voucher program in a non-discriminatory fashion, but that *all of the operations* at Choice Schools would have to be structured so as to meet Title II’s requirement that a policy,

practice, or procedure must be modified unless it can be shown that the reasonable modification would “fundamentally alter the nature of the service, program or activity.” *See DOJ Letter, p. 2* (citing to 28 C.F.R. § 35.130(b)(7)). In other words, the limited role that DPI, as a public entity, plays in administering the choice program supposedly turns all of the private schools into public entities subject to Title II.

If this sounds contrived, it is because it is. It is also unprecedented. The receipt of public money does not make the recipient a public entity. 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.

The U.S. Supreme Court has repeatedly held that a “private entity [that] performs a function which serves the public does not make its acts state action.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). For example, private schools can receive public money but not be held to the same laws as traditional public schools. *See Id.* (holding that employees in private schools whose income is primarily from public funds are not state employees); *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (holding that state funding alone is not enough to treat nursing homes as public entities); *See Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (“[E]ducation is not and never has been a function reserved to the state . . . and [courts] have declined to describe private schools as performing an exclusive public function.”); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002) (holding that schools participating in a choice program can be religious without implicating Establishment Clause or religious discrimination concerns).

Wisconsin’s treatment of Choice Schools reflects this holding. *Jackson v. Benson, supra*, 218 Wis. 2d at 893-894 (“In *Davis* this court squarely rejected the argument that private schools receiving state funds under the original [choice program] were “district schools” to which the uniformity requirement applies.”); *Davis v. Grover, supra*, 166 Wis. 2d at 539-540 (holding that “private schools participating in the [choice program] do not constitute “district schools” for purposes of the uniformity clause”).

Title II does not transfer the obligations it imposes on a public entity to whomever it pays public funds or make those public entities responsible for the actions of the recipients of tax

dollars. In *Liberty Resources v. Philadelphia Housing Authority*, 528 F. Supp. 2d 553 (E.D. Pa. 2007), the plaintiff argued that Title II compelled a public entity administering the Section 8 rental voucher program to ensure that the private rental properties at which these vouchers were used were “handicap accessible.” *Id.* at 566. The public entity, the court concluded, was “not responsible and cannot control the actions of private landlords” and could not be held to have violated ADA for the “failure of the private rental market to provide voucher holders with a sufficient number of accessible units.” *Id.* at 570.

This case is remarkably like *Liberty Resources*. DPI administers financial assistance to families who choose a private school. That does not obligate DPI to enforce – or the private schools to adhere to – the same legal standards applicable to public schools (who, of course, receive additional funding that the Choice Schools do not).

The DOJ’s theory of Title II “osmotic transfer” was also rejected in *Bacon v. City of Richmond*, 475 F.3d 633 (4th Cir. 2007). The U.S. 4th Circuit Court of Appeals held that the City of Richmond was not liable for, or obligated to remedy, the lack of accessibility in school buildings operated by the Richmond City Public Schools. This was so even though the City owned and provided funding to the public schools to maintain the allegedly offending buildings and that the plaintiff had argued, as the DOJ does here, that this “power of the purse” obligated the city to ensure that the operations it funded were ADA compliant. *Id.* at 640. In rejecting this theory of “pass through” liability, the court observed that the City did not control the school buildings, school system, or day-to-day school activity. *Id.* According to the court, “[t]he plain text of Title II limits responsibility to public entities that discriminate against or exclude persons with disabilities for services To hold that a city or State by virtue of its funding authority is liable for injury caused solely by a separate and independent corporate body is a novel and unprecedented theory.” *Id.* at 642 (emphasis added).

The relationship between DPI and Choice Schools is much weaker than that between the city and public schools in *Bacon*. Here, there is no direct payment to private schools. DPI does not own the Choice Schools or maintain them. Rather, DPI simply sends a voucher check to qualifying parents who then give it to the private school of their choice.

Significantly, the 4th Circuit noted that federal circumspection was particularly appropriate in public education and courts should “tread with especial caution” when asked to “recalibrate the State’s basic system of educational governance” *Id.* at 641. Wisconsin’s

commitment to school choice represents a considered – and long standing – determination of the state of Wisconsin that low income families will benefit from having an alternative in addition to private schools. Observing that “Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children,” the Wisconsin Supreme Court has recognized that public schools provide a “not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin.” *Jackson v. Benson, supra*, 218 Wis.2d at 895. In enacting school choice, “the State has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities in addition to those provided by [public schools.]” *Id.* The federal government should not frustrate Wisconsin’s choice to provide something extra for low income families by distorting Title II to make private schools act like public schools.

C. In relation to the Choice Program, Title II applies only to DPI’s “Authorized Activities”

Because the receipt of vouchers does not turn private schools into public, providing *state* money to a private party does not create a *federal* obligation on part of the provider to control the private entity’s actions in a way not contemplated by state law. Title II only applies “with regard to the services [that public entities] in fact provide”. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 (1999). A state need not expand or alter a program because doing so might make it more effective for or valuable to persons with disabilities. The State of Wisconsin, by providing state money through vouchers, is not responsible for or required to assume control over the activities of those schools at which they are used to ensure that they meet whatever standard would be applied to DPI’s own activities. Wisconsin is not obligated to assert control over private schools or deny parents the right to use vouchers at schools that do not meet whatever standards might apply to public schools.

Courts have repeatedly decided that the obligation of nondiscrimination under Title II extends only to the program a state has chosen to enact. *See Tennessee v. Lane*, 541 U.S. 509, 537 (2004); *Olmstead*, 527 U.S. at 603 (states do not have to make “fundamental alterations” to their services and programs); *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999); *Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d 884, 888-89 (D. Idaho 2006) (“State is not required to assure the disabled greater benefits than provided to non-handicapped but only that all citizens are equally able to access the benefits of the services provided.”); *see Liberty*

Resources, supra, 528 F. Supp. 2d at 567 (analyzing several Supreme Court cases to conclude that “ADA only requires a program to provide equal access to its core service.”)

For example, in *Rodriguez*, the plaintiff sued New York under Title II arguing the state’s Medicaid plan coverage of “personal care services” designed to help beneficiaries remain in their homes did not include safety monitoring devices claimed to be necessary for disabled persons. 197 F.3d at 618. The plaintiffs argued that the unavailability of these devices rendered the entire Medicaid package “ineffective” for certain disabled persons who wished to use it to remain in their homes. They demanded that the state restructure its Medicaid program in a way that accommodated this need and argued that failure to do so constituted impermissible discrimination.

The Second Circuit rejected this argument. Citing and clarifying *Olmstead*, the court stated that the “ADA does not mandate the provision of new benefits,” such as a safety monitoring device, and it is not the court’s role to determine what benefits should be provided by the state. *Id.* at 619. The ADA only allows the court to determine whether the state discriminates against disabled persons “with regards to benefits *it does provide.*” *Id.* (emphasis added). Consequently, because New York’s Medicaid program did not provide safety monitoring devices “as a separate benefit for anyone, it does not violate the ADA by failing to provide this benefit to [plaintiff].” *Id.*

In other words, if a state decides to provide a limited benefit, say vouchers, it need not expand the program. The fact that a more capacious program, say public administration of Choice Schools, might be said to provide greater benefits to disabled persons does not make it a violation of Title II. This is consistent with the Supreme Court’s interpretation of Section 504 of the closely related Rehabilitation Act of 1973 (“section 504”).² In *Alexander v. Choate*, 469 U.S. 287, 301 (1985), the Supreme Court considered the argument that Tennessee’s limitation of

² The language of the ADA and section 504 of the Rehabilitation Act are virtually identical - with the exception of the program with rules and regulations. He required all participating schools to test nor requires MPCP schools to provide t that sec. 504 applies only to federally funded programs. Given their similarities, Congress has intended to have Title II and section 504 be “construed and applied consistently.” *Liberty*, 528 F. Supp. 2d at 564. According to 42 U.S.C § 12133, the “remedies, procedures, and rights” under 504 are also available under Title II. As a result, the courts have interpreted statutes as being “interchangeable” with one another. *Gorman v. Barch*, 152 F.3d 907, 912 (8th Cir. 1998); *see also DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist.*, 126 F.3d 1102, 1105 (8th Cir. 1997) (“Congress intended Title II and its implementing regulations to be consistent with the Rehabilitation Act and its regulations.”). *But see Baird ex rel. Baird v. Rose*, C.A.4 (Va.) 1999, 192 F.3d 462. (“[W]hile the [ADA and RA] should be construed to impose the same requirements when possible, there are situations in which differences between the statutory provisions dictate different interpretations.”).

Medicaid reimbursement for hospital stays to fourteen days discriminated against persons with disabilities because such individuals are more likely to require a longer stay. The Court rejected it, concluding that the obligation of nondiscrimination “[d]oes not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical need.”).

D. DPI Administration of the Choice Program Consists of the Provision of Vouchers - and not Public Education

Because, in order to comply with Title II, the Supreme Court has required public entities to *only* “provide equal access to its core services,” it is necessary to define just what those services are. The DOJ Letter argues that the choice program delegates “the education function to private voucher schools,” which implies that the service provided by the DPI in the choice program is a public education for eligible students. This is flat-out wrong.

In describing the choice program as “delegating” public education, DOJ describes a program that does not exist and declares that Wisconsin has done something which state law and the facts make clear it has not. As we have seen, the State has simply provided financial assistance to certain low income families who seek an alternative to public schools. *Jackson v. Benson, supra*, 218 Wis. 2d at 895 (“By enacting the amended MPCP, the State has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities *in addition* to those provided by the State under art. X, § 3.”) (emphasis added). Indeed, the Wisconsin Supreme Court has made clear that the choice program does not “delegate” the “education function.” *Davis, supra*, 166 Wis. 2d at 538-539 (“[T]he MPCP in no way deprives any student the opportunity to attend a public school with a uniform character of education. Even these students participating in the program may withdraw at any time and return to a public school.”); *Jackson v. Benson, supra*, 218 Wis. 2d at 894 (“We apply the same reasoning in this case.”).

DOJ’s consideration of the actual nature of the choice program and the limitations on DPI’s role consists of ignoring them. The way it does this is to pump up the level of abstraction. Rather than acknowledging that the choice program is limited to the provision of a voucher that families choose to use at a school that they select (while public schools remain available), it falsely claims that the choice program involves the provision of public education or, as it puts it in atmospheric terms, “the education function.” By recasting a limited voucher program at this

level of abstraction, it elides the limited nature of the DPI’s authority and the private nature of Choice Schools.

But, as we have seen, the courts have rejected the aggressive application of Title II by way of broad and unspecific descriptions of the benefits provided by a public program. Providing a service does not require that it be expanded to provide greater benefits to disabled benefits. The provision of rental housing vouchers is not the provision of affordable public housing. *Liberty Resources, supra*. Providing assistance for particular medical services is not the provision of “adequate health care.” *Alexander, supra; Rodrigues, supra*. Providing capital funds for school buildings is not the provision of public education. *Bacon, supra*.

And the choice program is not the provision of public education. Public schools remain open and free to all – including those who enter the choice program but wish to re-enter public schools. No one disputes that a full panoply of educational services are available, including those necessary to ensure access to the “free appropriate public education” for disabled students required by the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et. seq.* Implementing school choice in Wisconsin does not displace or “contract out” public education. It merely offers low income families who wish to forgo public education assistance in doing so.³ *See Jackson v. Benson, supra*, 218 Wis. 2d at 857 (“The purpose of the [choice] program is to provide low-income parents with an opportunity to have their children educated outside of the embattled [public school system].”).

As noted earlier, the provision of a limited financial benefit, such as vouchers, does not make the vendors from whom recipients purchase services “public entities” or compel a state or local government to expand that benefit by, for example, assuming control over these private entities, funding additional services or removing otherwise eligible vendors from the program. In *Liberty Resources, supra*, the plaintiffs argued that an agency administering Section 8 rental assistance vouchers was obligated to ensure that the private properties at which vouchers were spent conformed to Title II’s requirements of non-discrimination and accommodation. 528 F.Supp. 2d at 558. The plaintiffs defined the benefit as having access to “affordable housing.” They claimed that, because the city was providing public money to be used with private

³ There is, in fact, no “contracting” in the choice program between DPI and private schools at all. Eligible private schools accept vouchers from parents; there is no contract, direct or indirect, between DPI and private schools in the choice program. In fact, the Wisconsin State Statutes distinguish between “Contracts with Private Schools and Agencies,” § 119.235, and the Choice Program, § 119.23.

landlords, those landlords were subject to the requirements of Title II and had to alter their buildings to accommodate persons with disabilities.

But the court held that, much like the choice program, the rental voucher program was a “package of services that provide assistance . . . in locating affordable housing.” *Id.* at 568. Recipients would “select units that already meet individual needs and quality standards based on their existing state.” *Id.* at 569. There was no ADA violation because both disabled and non-disabled voucher holders had access to this benefit. Significantly for this case, the *Liberty* court held that the housing voucher program is “not responsible and cannot control the actions of private landlords” and, thus, the program is not liable under ADA if for the failure of private landlords to not provide enough accessible housing units. *Id.* at 570.

Likewise, parents enrolling their children in the choice program “select schools that already meet individual needs and quality standards.” *Davis v. Grover, supra*, 166 Wis. at 544. If all private schools do not provide the services that the family of a disabled child desires, there is no Title II violation, like in *Liberty Resources*. In fact, Wisconsin provides more robust opportunities for disabled students than Philadelphia provided for disabled tenants. If private schools, individually or in the aggregate, do not provide the desired services, a child can continue to attend a public school. Wisconsin is not required to provide additional funding for choice students with disabilities or to provide DPI with authority over private schools that it does not possess. Because it does not become responsible for the actions of schools where parents choose to use vouchers, it need not ban Choice Schools who do not comply with the more intrusive standard of Title II from the program.

E. The State of Wisconsin Has Not “Contracted out” the “Educational Function”

That Wisconsin has not “contracted out” the “education function” is confirmed by comparing the choice program to circumstances where such “contracting out” has been found. There are times when an agency might contract with a private vendor to perform a function for the agency. For example, it might engage private schools to provide education for children with disabilities. Under IDEA, this is known as a “public agency placement.” *See* 34 CFR § 300.325. Because it truly does involve a “delegation” of public education to a private entity, obligations imposed on public schools, such as the right to a “free appropriate public education” under IDEA, are not – and could not – be forfeited. *See* Memorandum from Robert R. Davila,

Assistant Secretary Office of Special Education to Wisconsin Governor Tommy G. Thompson, U.S. Department of Education, 4-5, (Sept. 2, 1990); 34 C.F.R. §§ 300.400, 300.401(b).

But “public agency placement” is not what’s happening here. Students whose parents take them out of an available and appropriate public school and enroll them in a private school are “parentally placed” and, therefore, waive their IDEA and FAPE rights. *Id.*; see *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 173 (2d Cir. 2001) (“Public agencies are the only entities directly responsible under IDEA.”); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 153 (1st Cir. 1998) (“[T]he ADA imposes no requirement on [a private college prep school] to devise an individualized education plan such as the IDEA requires of public school.”).

Thus, private schools, even in the choice program, are not required to provide a “free appropriate public education” (FAPE) to every disabled student in the school district. This is true even if the family receives state financial assistance to enroll in the private alternative. The U.S. Department of Education (“ED”) has, at least twice, written that students with disabilities who voluntarily enter into the choice program waive their IDEA rights, including a free, appropriate public education, during their time at the private school. See Memorandum from Robert Davila, ED, 1 (1990); Memorandum from Susan Bowers, ED, 1-2 (2001).

Indeed, *DOJ itself recognizes this* in conceding – contrary to the allegations in the Complaint – that the independent choice of parents to forego public schools and obtain a private education for their child forfeits their rights under IDEA. *DOJ Letter*, p. 2. And DOJ’s own 2009 Guide to ADA Compliance requires only public schools make available a free, appropriate education to children with disabilities.

This concession undercuts its own argument. DOJ does not explain why private placement exempts Choice Schools from FAPE requirements but requires them to become Title II compliant or turn away students who wish to use vouchers to attend. If parental choice into a private school is not “contracting out the public education function” for purposes of IDEA, there is no rational reason that it is “contracting out” for Title II purposes.

The cases relied on by DOJ do not suggest otherwise. Each involved a contract between government and a private (or other public) entity to provide a service that the government chose not to provide directly.⁴ In *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010), for

⁴ It also is worth mentioning that two of the cases the DOJ cites are unpublished opinions, and another was later vacated by the court of appeals – which the DOJ fails to mention.

example, the State of California housed many of its prisoners in jails operated by the counties. The court held that the State violated Title II because its prisoners, in county jail, were being discriminated against on account of their various disabilities. *Id.* at 1063. Prisoners were not given a voucher to attend an institution of their choice. In *Kerr v. Heather Gardens Association*, 2010 WL 3791484 (D. Colo. Sept. 22, 2010), a disabled plaintiff resided at a senior living facility (Heather Gardens) that had a contract with a public entity (the Metropolitan District) to provide senior living care in which it assumed all of the public entities' duties at a facility owned by the public entity. Seniors were not given a voucher to reside at the living center of their choice. Similarly, in *James v. Peter Pan Transit*, 1999 WL 735173 (E.D.N.C. Jan. 20, 1999), the City of Raleigh contracted with Peter Pan transit to operate its bus system. The Plaintiff, a wheelchair passenger on city buses, filed a complaint that the wheelchair lifts were not operable in many buses and the judge denied the City's motion for summary judgment because public entities are prohibited from contracting out their Title II obligations. Bus passengers were not being given vouchers to ride the transit system of their choosing.

Likewise, in *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 318 (E.D.N.Y. 2009), it appears that a state agency was using private vendors to provide public services, although there is a larger problem with DOJ's citation of the case. The decision DOJ relies on ultimately resulted in a judgment and remedial order that was *vacated* because the Court of Appeals determined that the plaintiffs did not have standing to bring the suit. *Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 154 (2d Cir. 2012) ("The District Court's March 1, 2010 judgment and remedial order is therefore VACATED and the action is DISMISSED for lack of jurisdiction.). We assume that this was an oversight, but it is significant. A vacated decision "has no precedential authority." *Newdow v. Congress*, 383 F.Supp.2d 1229, 1240 (E.D. Cal. 2005), rev'd on other grounds, *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (2010); *Durning v. Citibank, NA*, 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991) ("A decision may be reversed on other grounds and still have precedential value, whereas a vacated decision has no precedential authority."); *U.S. v. Michael*, 645 F.2d 252, 254 n. 2 (vacated opinion is as if it never existed); *see also O'Connor v. Donaldson*, 422 U.S. 563, 577 n. 12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect").

Indeed, these cases and the DOJ's own Technical Compliance Manual demonstrate that Title II standards are not applicable to choice schools. The manual makes clear that "[p]ublic entities are not subject to title III of the ADA, which covers only private entities" and "[c]onversely, private entities are not subject to title II." See *The Americans with Disabilities Act – Title II Technical Assistance Manual* ("TAM"), II-1.3000 (available at <http://www.ada.gov/taman2.html#II-1.3000>). While it notes that there are situations in which a contract with a private entity may have Title II implications, the illustrations that it provides (contracting for operation of a restaurant in a public park, leasing part of a public building, building a publicly owned stadium through use of a private contractor, contracting with a private vendor to operate group homes) make clear that Title II applies when government uses a private vendor to provide government services. *Id.* No illustration suggests that providing financial assistance to persons to purchase a private service implicates Title II.

That the service provided is one that is also provided publicly makes no difference just as Title II was not applicable to Section 8 housing because government also provides public housing directly. The state does not have a monopoly on public education and, as we have seen, Title II does not follow vouchers and financial assistance.

Although not mentioned by DOJ, the Complaint alleged that Wisconsin has set up a "dual school system" because there are fewer students with disabilities in Choice Schools in Milwaukee than there are in the Milwaukee Public Schools. The complainants rely on the Supreme Court's decision in *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1963).

It is not surprising that DOJ would ignore this argument. In *Prince Edward County*, the local school authorities closed the public schools and provided vouchers to be used at private schools that would not admit black students. This was done to avoid a remedial integration order based upon a finding of intentional *de jure* segregation. Here, the public schools remain open (in fact, the overwhelming majority of students in Milwaukee still attend them) and Choice Schools may not turn away disabled students. There has been no finding of discrimination and there is no remedial order.

Beyond that, the disparity is not as great as the Complaint alleges. Because MPS, as the Local Education Agency ("LEA"), does not make federal funding available to Choice Schools at

the same rate as it does for itself, parents in Choice Schools are less likely to seek evaluation and their children are less likely to be identified as disabled. Moreover, because funding for disability services is not as readily available to private schools, some parents may gravitate towards the school that can provide greater resources for their children.

II. Under the Law, Private Schools Are Treated Differently than Public Schools and, thus, Are Subject to a Less Exacting Standard

This is not to say that the DPI could never be liable under Title II for its own discrimination regarding the choice program. A Title II violation might be shown if the vouchers were not made equally available to students with disabilities – if, say, DPI refused to permit parents of children with disabilities to enroll their children in a Choice School.

But the Choice Schools themselves – either directly or by DOJ’s theory of “osmotic transfer” – are not subject to Title II. That conclusion is buttressed by the structure of federal disability law. For example, under section 504 of the Rehabilitation Act, even where private schools are direct recipients of public funding, they are subject to a different standard.⁵ In other words, even if the vouchers were funded by the federal government, they would not be subject to the more intrusive “fundamental alteration” standard of Title II. To the contrary, private schools who are direct recipients of federal funds are subject only to the less exacting standard of 34 C.F.R. 104.39, providing that a private school “may not, on the basis of handicap, exclude a qualified handicapped person if the person can, *with minor adjustments*, be provided an appropriate education, as defined in § 104.33(b)(1), within that recipient's program or activity.” (Emphasis added.) A private school that has no program for the mentally handicapped is not required to admit a mentally handicapped student if establishing such a program would be more than a *minor adjustment*. 34 C.F.R. 104 App. A, 404.

It would be bizarre if schools that accept payments from parents who receive state funded vouchers are subject to more exacting federal standards than they would be if the vouchers were federally funded. Even when it has considered the obligations that Title II might place upon the limited role played by public entities like DPI in administering programs like Wisconsin’s, the

⁵ Notwithstanding allegations in the Complaint, DOJ does not argue that the Choice Schools are recipients of federal funding subject to Section 504 of the Rehabilitation Act of 1973. For reasons that are beyond the scope of this memorandum, it is correct to reject such an approach. See Bowers Memorandum, ED, 1-2; Memorandum from Richard D. Komer, Deputy Assistant Secretary for Policy, to Ted Sanders, Under Secretary, U.S. Department of Education, 6 (Jul. 27, 1990).

U.S. Department of Education has not applied such a high standard to participating private schools themselves. At most, ED has stated that a public entity must only assure itself that schools in the choice program do not exclude a student with a disability “if the person can, with minor adjustments, be provided an appropriate education within the school’s program.” Memorandum from Susan Bowers, Acting Deputy Assistant Secretary for Civil Rights to John W. Bowen, School Board Attorney, U.S. Department of Education, 2, (Mar. 30, 2001) (emphasis added).⁶

The argument against application of the more aggressive standard urged by DOJ is even stronger today. But there is certainly no warrant for the aggressive “pass through” theory advanced here. In other contexts, DOJ recognizes that. Subsequent to the ED’s adoption of this position in 1990, Congress adopted the ADA, including Title III prohibiting discrimination in “public accommodations,” 42 U.S.C.A. § 12182. If they meet the definition of a “public accommodation,” private schools might be subject to Title III. But this suggests they would not be subject to Title II. DOJ’s own technical assistance manual for ADA makes clear that “public entities are not subject to title III of the ADA, which covers only private entities . . . [and] private entities are not subject to title II.” *See* The Americans with Disabilities Act – Title II Technical Assistance Manual, II-1.3000, available at <http://www.ada.gov/taman2.html#II-1.3000>.

More fundamentally, the ADA exempts most Choice Schools. Title III expressly exempts “religious organizations or entities controlled by religious organizations.” 42 U.S.C. § 12187. According to the U.S. DOJ regulations, the religious exemption “is very broad ... [e]ven when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage.” *Id.* at 605-606 (citing 28 C.F.R. Part 36, Appendix B (interpreting the statutory exemption)). Over 85% of Choice Schools are religious⁷ – so the DOJ’s Title II/Title III mix-up is no small matter.

DOJ’s attempt to “pass through” the requirements of Title II is an end-run around that exemption – and it cannot work. It is a cardinal principle of statutory construction that the

⁶ It is not clear that even the “minor adjustment” obligation recognized by the ED survives enactment of the Americans with Disabilities Act. If Congress has determined what is and is not to be considered unlawful discrimination in private schools in the enactment of Title III, there is little warrant even for the less onerous duty identified by ED. See pp. __, *infra*.

⁷ Wolf, Patrick J. “Milwaukee Parental Choice Program: Descriptive Report on Participating Schools 2010-11,” School Choice Demonstration Project, Milwaukee Evaluation Report #33, 1, February 2012.

specific controls the general. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment). The express exemption of Title III cannot be trumped by a protean reading of the general language of Title II. This is particularly so given that Title II purports to cover only public entities and contains no language extending its scope to religious or secular private schools or, as DOJ seems to suggest, to anyone that provides a service in exchange for a benefit provided by a public entity.

As to the remaining secular Choice Schools, neither the Complaint nor the DOJ Letter alleges that the choice program – or any of participating private schools – has violated Title III of the ADA prohibiting discrimination in public accommodations. In any event, DPI lacks the authority to enforce Title III to which it is not subject.

III. The DPI Lacks the Authority to Implement the DOJ’s “Requirements”

A long-time principle in Wisconsin law has been that state agencies have only those powers that are expressly granted to it, or necessarily implied, by the state legislature. *See Brown v. State*, 230 Wis. 2d 355, 377, 602 N.W.2d 79, 90 (Ct. App. 1999); *see State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335, 339 (1974) (“[I]f the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.”). Administrative agencies, such as DPI, only have those powers that are “expressly conferred or necessarily implied from the statutory provisions.”⁸ *Brown Cnty. v. Dep’t of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247, 250 (1981).

The Wisconsin state legislature recently confirmed and re-enforced this understanding by enacting Wis. Stat. § 227.10(2m), which provides that “[n]o agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is *explicitly* required or *explicitly* permitted by statute or by a rule that has been promulgated in accordance with this subchapter.” (Emphasis added). State agencies may not implement regulations based on a power “necessarily implied” by the state legislature. If the state

⁸ The Superintendent of Public Instruction does have constitutional power as well. According to Article X, “the supervision of *public instruction* shall be vested in a state superintendent.” (emphasis added) Wis. Const. Art X, sec I.

legislature does not specifically bestow a regulatory power to the DPI, the DPI does not have that power.

As noted above, DPI's authority with respect to schools receiving voucher students is carefully circumscribed. Private schools are not within the state Superintendent of Public Instruction's general supervisory authority over public education which is, in any event, limited to whatever powers have been "prescribed by law." *See* Wis. Const. Art. X, Sec 1. It has no authority to field and adjudicate complaints against private schools. It is required to accept due process complaints and state complaints related to equitable services under IDEA, but, according to the DPI, none have been filed in relation to children with disabilities. In addition, the DPI has no authority to collect data on disabilities.⁹ According to Wis. Stat. § 119.23(6m)(b), the DPI has the power to collect certain information from private schools about their students, yet this power is enumerated and states nothing relating to disabled students.¹⁰

The DPI cannot control the curriculum or programming of private schools. It cannot "require" ADA training. It has no general authority to conduct "monitoring" or "oversight" of Choice Schools. In short, it has no authority to do anything (save perhaps public outreach or offering voluntary training) that DOJ wants it to do. Even Superintendent Evers, certainly no strong ally of school choice,¹¹ has admitted that the DPI cannot legally implement the DOJ's requirements. *See* DPI Letter to DOJ, 3-6.

We have been down this road before. DPI once tried to do precisely the type of things that DOJ asks it to do now, only to be stopped by the courts. When the original Milwaukee

⁹ *DPI Letter to DOJ*, 6, September 2011 ("DPI is not involved in the operation of individual schools" besides ensuring financial viability and other statutes").

¹⁰ "Annually, by August 1st, provide to the department the material specified in par. (a) and all of the following information: 1. The number of pupils attending the private school under this section in the previous school year. 2. The number of pupils attending the private school other than under this section in the previous school year. 3. For each of the previous 5 school years in which the private school has participated in the program under this section, all of the following information: a. The number of pupils who attended the private school under this section and other than under this section in the 12th grade and the number of those pupils who graduated from the private school. b. The number of pupils who attended the private school under this section and other than under this section in the 8th grade and the number of those pupils who advanced from grade 8 to grade 9. c. The number of pupils who attended the private school under this section and other than under this section in the 4th grade and the number of those pupils who advanced from grade 4 to grade 5. d. To the extent permitted under 20 USC 1232g and 43 CFR part 99, pupil scores on all standardized tests administered under sub. (7) (e). 4. A copy of the academic standards adopted under sub. (7) (b) 2."

¹¹ In January 2013, Superintendent Evers called school choice expansion "morally wrong." Morrell, Alex, *Wisconsin superintendent Tony Evers calls school choice expansion morally wrong*, Appleton Post-Crescent, May 24, 2011, available at <http://www.postcrescent.com/article/20110524/APC0101/105240434/Wisconsin-superintendent-Tony-Evers-calls-school-choice-program-morally-wrong->.

Parental Choice Program¹² was enacted into law in 1990, Superintendent Herbert Grover – a vocal opponent of the law – tried to prevent implementation of the program with rules and regulations. He required all participating schools to comply with disability laws exactly as the public schools, *i.e.*, each private school had to allow access to and provide free education to all disabled students. *Davis v. Grover*, Trial Court Opinion, Dane County (8-6-90). A Dane County Circuit Court judge held that the Superintendent’s burdensome regulations against school choice were invalid because the regulations “deviat[ed] from, exceed[ed] or change[ed] the language of the statute.” *Id.* DPI chose not to appeal from that aspect of the judgment and may well be judicially estopped from asserting a broader authority today.

IV. The DOJ Lacks the Legal Authority to Order the DPI to Take the Actions Mandated in the DOJ Letter

The aggressive approach taken by DOJ raises significant federalism concerns. While Congress might prohibit discrimination by public entities, forcing states to apply federal anti-discrimination norms to private parties simply because they provide services in exchange for state-funded vouchers, raises questions of “commandeering.” The federal government is constitutionally prohibited from enlisting state officials to enforce federal statutes. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot force local law enforcement officers to perform background checks on handgun owners). It may “neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Id.* at 935; *New York v. U.S.*, 505 U.S. 144 (1992) (holding that the federal government cannot require States to provide for the disposal of radioactive waste generated within their borders).

While DOJ will undoubtedly argue that the obligation it seeks to impose is a direct – and permissible – regulation of the state itself, the limitations of the commandeering cases cannot be evaded by asserting that the existence of some connection between a public and private entity – say the administration of a voucher program or some limited form of regulation – empowers federal agencies to direct states to adopt an extensive regulatory and monitoring scheme directed at those private agencies. It does not empower federal agencies to require state agencies to do

¹² The original program provided 1,000 low-income students in the Milwaukee public school district with a \$2,500 voucher to enroll in private nonsectarian schools.

what state legislatures have not empowered them to do. DOJ's actions are particularly problematic in the absence of any finding – or even charge of – discrimination by private schools. It is not seeking to remedy a violation, but to force a sovereign state to enact its preferred prophylactic regulatory scheme. DOJ does not say that it has conducted the investigation required under 28 CFR § 35.172, issued findings of fact and conclusions of law, or taken any of the other steps necessary to resolve such a complaint as required by the applicable federal regulations. The mere existence of a complaint, the allegations of which have never been proven, does not justify the DOJ skipping right to the remedy phase and ordering DPI to take the steps mandated in the DOJ Letter.

Perhaps that is because it is not even clear that the DOJ is the appropriate agency to be conducting an investigation relating to that complaint. Pursuant to 28 CFR 35.190(b)(2) the “Designated Agency” for all complaints of discrimination on the basis of disability by a public entity relating to programs and services involving the operation of elementary and secondary education systems is the Department of Education – not the Department of Justice. And even though the complaint was filed with DOJ, pursuant to 28 CFR 35.171(a)(2)(ii) when the DOJ receives a complaint for which it is not the designated agency, it shall refer the complaint to the appropriate agency designated in 28 CFR 35.190(b)(2).

CONCLUSION

DOJ seeks to use authority it does not have 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 require these schools to provide services for which they, unlike their public school counterparts, receive no funding and which may be inappropriate for a private school. The foreseeable result would be to force schools out of the program and restrict the choices available to low income families and their children. 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.



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To: Interested Parties

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

School Choice Wisconsin has asked the Wisconsin Institute for Law & Liberty for a public comment on DPI's new and unprecedented request for detailed information from private schools participating in the choice program regarding their students with disabilities. Below is our public comment for those interested:

On June 10, 2014, the Wisconsin Department of Public Instruction ("DPI") sent a notice to all administrators in the private school choice program reminding them of the deadlines for submitting various existing reports. However, DPI's notice also asks each of the schools to submit a *new* report by June 30, 2014, one that is not required by state law or any previous DPI rule. This new report would provide certain information regarding students with disabilities:

New Report – Disability Data Report: As required by the United States Department of Justice (USDOJ), starting with the 2013-14 school year the department is collecting information on how choice students with disabilities are served in voucher schools. Whereas the Department of Public Instruction cannot require you to submit this data, we request private schools that participated in the choice program during the 2013-14 school year, complete the "Disability Data" report in OAS by June 30, 2014. Additional information on the disability areas can be found in the report in OAS. To access the disability data report, please click "Disability Data" under the "Other Reports" section of the left navigation bar in OAS.

DPI says that this "new report" – which it concedes is voluntary – has been "required" by the United States Department of Justice ("DOJ"). It does not tell the private schools that DOJ has no authority to "require" such a report and that DOJ is trying to impose unprecedented and improper legal requirements on these schools regarding students with disabilities – requirements which are not imposed by law and for which schools in the choice program receive little to no funding.

DPI's unacknowledged decision to assist DOJ in this effort raises several serious legal issues that schools must take into account in considering their response to DPI. Each school should consult its own legal counsel before deciding to turn over the requested information.

1) Private schools in the choice program cannot be compelled to provide the requested data.

Administrative agencies, such as DPI, have only those powers that are “expressly conferred or necessarily implied from statutory provisions.” *See Brown Cnty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247, 250 (1981). The Superintendent of Public Instruction has constitutional power under the Wisconsin Constitution, Article X, section 1, but this power is limited to the administration of public education. DPI has no power over schools in the choice program, except to the extent the legislature has said so.

Nothing in the Wisconsin statutes empowers DPI to collect data on children with disabilities or requires private schools to provide it. DPI agrees with us on this point. In a November 25, 2013 letter to DOJ, DPI stated that: “it currently lacks the statutory authority to force choice schools to submit the information required” in responding to DOJ’s request for information on disabled students in the choice program. Indeed, DPI’s June 10 notice itself confirms that DPI **“cannot require you to submit this data.”**

It is, therefore, indisputable that DPI cannot require private schools to provide DPI with any of the information that it seeks in this new disability report unless authorized by a future action from the Wisconsin legislature. In other words, **schools do not have to comply.**

In fact, it is doubtful that DPI has the authority even to “request” disability related information from private schools in the choice program. In 2011, DOJ wrote to DPI, asking for the “total number of students in the school, the total number and the percentage of students with disabilities in the school, the number of students in each disability category represented at the school.” DPI Letter to DOJ, November 25, 2011, 5. DPI responded in August 2011 by saying that “Wisconsin Statute § 119.23, the statute governing the MPCP, *neither authorizes DPI to request nor requires MPCP schools to provide [disability] data.*” (emphasis added) *Id.* at 4. In other words, as recently as 2011, DPI did not believe that it has the statutory authority to request the information that it is now requesting. Nothing about the pertinent statutes has changed.

2) DOJ cannot require private schools in the choice program to provide this information or DPI to request it.

This extraordinary request has its origins in a complaint filed with DOJ by the American Civil Liberties Union and Disability Rights Wisconsin in 2011. That complaint alleges that private schools in the choice program discriminate against students with disabilities. In response, DOJ sent a letter to DPI stating that it must ensure these private schools comply with certain onerous legal standards regarding students with disabilities that are applied to public schools.

Last year, we wrote a public memo demonstrating that DOJ’s legal theory – which is the functional equivalent of stating that private schools in the choice program are public entities because they receive state dollars – is directly contradicted by U.S. Supreme Court and Wisconsin Supreme Court precedent, U.S. Department of Education policy, and even DOJ’s own guidance for complying with federal disability law. As we noted in our memo, holding these private schools to this improper standard does

not help children. It may require private schools in the choice program to provide services for which they, unlike public schools, do not receive funding. It may force them to abandon distinctive and valuable alternative methods for addressing behavioral problems. The full memorandum can be found by clicking [here](#). In its November 25, 2013 letter to DOJ, DPI actually agreed with us on this.

This is important because it establishes that DPI has no authority to require private schools in the choice program to comply with the improper and unlawful standard insisted upon by DOJ. For that reason, DOJ has no authority to compel – or, as the US Supreme Court has said, “commandeer” a sovereign state to collect data on its behalf. In other words, DPI’s suggestion that DOJ can “require” the collection of this data is wrong.

3) *By turning the data over, schools are actually exposing themselves to potential violations of state and federal law.*

The new Disability Data Report section of the OAS asks for the name or other identifier for each disabled student. It also asks if that student was denied admission, enrolled during the school year, left for a public school, and/or was suspended or expelled. Finally, the form asks for the school to identify each disability that the student has. **This student information could be confidential.** Because a school’s decision to complete this part of the form is voluntary and DPI has no power to compel a school to report the requested information, filling out this report and returning it to DPI would present a variety of privacy-related legal concerns for the schools. Consider:

A. Family Education Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g)

Federal student privacy law – FERPA – prohibits a school from disclosing personally identifiable information about a student’s education records without the consent of the parent unless one of the specific FERPA exceptions applies. FERPA applies to private schools that receive funds under any program administered by the Department of Education. Therefore, it may not apply to all private schools in the choice program but, were it to apply, it prohibits the school from supplying the requested information to DPI. None of the FERPA exceptions are applicable. There is no court order, subpoena, or federal or state statute which authorizes the nonconsensual disclosure of this information to DPI.

B. Wisconsin Medical Records Privacy Act (Wis. Stats. § § 146.81- 146.84)

The information being requested would likely require schools to disclose information contained in a student’s healthcare records. Wis. Stat. § 146.82 provides that “[a]ll patient health care records shall remain confidential.” Depending on how a school has obtained information regarding a student’s disability, disclosing the personal health information of such student on the new report may violate this requirement.

Moreover, Wisconsin law defines records kept even by private schools as pupil records. While state law governing the confidentiality of pupil records does not apply to private schools, it does say that all pupil records that relate to the pupil’s health and that are not a pupil’s physical health record shall be treated as a patient health record under Wis. Stats. § 148.81 to 146.84. *See* Wis. Stat. § 118.125(2m). For that reason, as well, information on students’ health status would appear to be subject to the confidentiality provided by § 146.82.

C. Student and Parent Handbooks

Many private schools in the choice program issue a handbook to parents and students relating to a variety of topics. These handbooks can contain “privacy” statements in which the school promises to keep the student’s records confidential and promises that such records will not be disclosed without the parent’s consent. These promises may be enforceable under Wisconsin law and would be breached by a voluntary disclosure to DPI.

D. This information might become a public record once it is sent to DPI

If the information is provided to DPI, then it may become a public record subject to general disclosure under Wisconsin’s Open Records Act. Remember that the confidentiality of student records guaranteed under Wis. Stat. 118.125 only applies to records maintained by public schools.

4) Compliance with DPI’s Request May Create Additional Forms of Exposure for Schools.

The “Instructions for Entering Disability Data” for DPI’s request for information on children with disabilities specifically requires the school to “accept responsibility for the data being correct.” At first blush, this may seem odd. How can DPI compel that the information provided to it be accurate, when it concedes that it does not have the power to compel production of the information in the first instance and, in fact, may even lack authority to ask for it? Our concern, however, is that if schools voluntarily provide the requested information they will be deemed to have warranted its accuracy. This leads to two potential problems.

First, the form and questions asked are so vague that, by answering them, private schools could be at risk of inadvertently providing wrong data. The Disability Data Report lists 11 types of disabilities and instructs the school to “check all that apply.” It is unclear that a school would have accurate and up-to-date data regarding disabilities for each of its students – even if it were permitted to divulge it. This is particularly so for students who were not admitted or enrolled at the school, yet the new report calls for information about them as well.

Furthermore, DPI provides no guidance as to how private schools in the choice program are supposed to identify children with disabilities. Where are these schools supposed to get the expertise to determine whether the specific diagnoses that match these disabilities actually apply to a particular student? What if a school defines a disability in a manner that does not conform to DPI’s definition? Because DPI has not provided sufficient definitions or guidance, it is unclear how schools are supposed to know what is requested.

Second, the new Disability Data Report has four boxes to check either “yes” or “no” about the child’s status with the school and choice program. It allows no option to qualify or explain an answer. For example, it asks if a student was denied admission. Does this include students who were not admitted because the school did not have enough spots and the student did not win the lottery? How would the school know if such a student had a disability or what the disability was? If it did know, would a positive response inaccurately imply that the student was rejected because he or she was disabled? The new report also asks whether the child was “suspended or expelled.” Yet, without allowing

schools to provide a reason for the suspension or expulsion, DPI's form may create the appearance that schools are discriminating based on a disability.

This might not be as concerning if we did not know that this information is being gathered at the behest of an agency that has announced its intent to force DPI to hold private schools to an improper standard.

4) Conclusion

DPI cannot force – and should not be asking for – private schools in the choice program to turn over data on children with disabilities. It is attempting to facilitate U.S. DOJ's investigation into Wisconsin's school choice program, an investigation that is not supported by existing law. In other words, DOJ is seeking to enforce inapplicable laws against private schools by commandeering DPI to ask for enrollment data that DOJ is unable or unwilling to ask for on its own.

Each school must decide for itself, after consulting with its own counsel, whether to provide the data requested by DPI. We at WILL want to make sure that the school choice community is aware of the above issues as it goes through the decision-making process.

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