NO. 372A14 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
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HART, et al., Plaintiff-Appellees, v. STATE OF NORTH CAROLINA, et al., Defendant-Appellants, and CYNTHIA PERRY and GENNELL CURRY, THOM TILLIS AND PHIL BERGER, et al., Intervenor-Defendant-Appellants.	)	From Wake County 13-CVS-16771

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BRIEF OF AMICUS CURIAE

NORTH CAROLINA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

IN SUPPORT OF PLAINTIFF-APPELLEES

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Alan B. Krueger & Pei Zhu, *Another Look at the New York City School Voucher Experiment*, 47 Am. Behav. Scientist 658, 683-85 (2004) 13

Alan B. Krueger & Pei Zhu, *Inefficiency, Subsample Selection Bias, and Nonrobustness: A Response to Paul E. Peterson and William G. Howell*, 47 Am. Behav. Scientist 718, 726-27 (2004) 13

Helen F. Ladd, *School Vouchers: A Critical View*, J. Econ. Persp., Fall 2002 .....4, 5

Kim Metcalf et al., *Evaluation of the Cleveland Scholarship and Tutoring Program 1998-2003, Executive Summary*, October, 2004; Summary Report, 1998-2003; Technical Report 1998-2003, Bloomington, Ind., October 2004 .....5, 14

Paul E. Peterson & William G. Howell, *Efficiency, Bias, and Classification Schemes: A Response to Alan B. Krueger and Pei Zhu*, 47 Am. Behav. Scientist 699, 702 (2004).....13

Public Policy Forum, *Research Brief: Choice Schools Have Much in Common with MPS, Including Student Performance, 2013* (available at: http://publicpolicy forum.org/sites/default/files/2013VoucherBrief-Clarified_1.pdf).....14

Cecilia Elena Rouse and Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions,* Annual Review of Economics, Volume 1, 2009 .....5, 14

Jim Ryan, *Five Miles Away, A World Apart* (Oxford University Press, New York, 2010).....20

Online Resources

Halifax Academy
http://www.halifaxacademy.org/ about-us/our-history-philosophy.html.....10

Hobgood Academy
http://www.hobgoodacademy.com/history.php 11

Kerr-Vance Academy
http://www.kerrvance.com/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=185&MMN_position=211:207 10

Lawrence Academy
http://www.lawrenceacademy.org/About_LA/School_History.asp.....10

National Center for Educational Statistics, Private School Universe Survey
http://nces.ed.gov/surveys/pss/privateschoolsearch/. 11

N.C. Cepartment of Public Instruction, Data & Reports, Student Accounting
http://www.ncpublicschools.org/fbs/accounting/data/ 11

Northeast Academy
http://www.northeasteaglesnc.com/athletics.htm.....10

Private School Review
http://www.privateschoolreview.com/school_ov /school_id/32738.....11

Ridgecroft School
http://ridgecroftschool.org/ about-us-2/.....10

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STATEMENT OF THE CASE

Amicus Curiae adopt by reference Appellee's Statement of the Case. N.C. R. App. P. 28(f).

STATEMENT OF FACTS

Amicus Curiae adopt by reference Appellee's Statement of Facts. N.C. R. App. P. 28(f).

ARGUMENT

I. THE VOUCHER PLAN VIOLATES THE NORTH CAROLINA CONSITUTION BECAUSE IT INCREASES SEGREGATION IN PUBLIC SCHOOLS, UNDERMINES EFFORTS TO ACHIEVE RACIAL DIVERSITY, AND SUBSIDIZES HYPERSEGREGATED AND DISCRIMINATORY PRIVATE SCHOOLS

The so-called “Opportunity Scholarship Program” (“OSP” or “voucher plan”) at issue in the present appeal directly threatens the mission and members of the NC NAACP because of its impact on the poorest children in North Carolina. The voucher plan harms the great majority of children of color who will remain in the traditional public schools, and undermines North Carolina’s public education system, not just by drawing resources away from the public schools, but also by turning those schools into “discard zones” where only the poorest children remain, and by subsidizing hypersegregated private schools that are at liberty to discriminate against at-risk students.

A. The Experiences of Other Communities Demonstrate the Adverse Segregative Impacts of Private School Voucher Programs

Whatever their intent, private school voucher programs have been shown to support a pattern of school resegregation, both by enabling individuals to engage in "private" segregative choices (choosing racially homogenous private schools populated by children of the voucher recipient's race), and by bolstering the receiving schools' discriminatory efforts to choose their students. See Helen F. Ladd, *School Vouchers: A Critical View*, J. Econ. Persp., 3, 13 (2002). Private schools are able to segregate students by race and ability in two significant ways: "creaming" (choosing the best and least costly students); and "cropping" (denying services and enrollment to diverse learners on the basis of their disability, socioeconomic status, and language learner status). *See*, Julian V. Heilig, et al., *Remarkable or Poppycock? Lessons from School Voucher Research and Data*, Texas Center for Education Policy, July 28, 2014, (citing Etscheidt, S., *Vouchers and students with disabilities: A multidimensional analysis*, Journal of Disability and Policy Studies, 16(3), 156-168 (2005)). Often these students are "steered away" or "counseled out" of the school after admission, when difficulties arise. Heilig, at 5 (citing Jessen, S.B., *Special education and school choice: The complex effects of small schools, school choice, and public high school policy in New York City*, Educational Policy, 27(3), 427-466 (2012)).

For more than a decade, education researchers have examined the segregative effect "creaming" and "cropping" have on student demographics both within the receiving private schools as well as in the public schools from which vouchers are taken. *See* Ladd, *School Vouchers: A Critical View,* at 13. Extensive study of the longest-running voucher program in the world, operated in Chile since the 1980s, shows increased school segregation and inequities as the result. *See* Jaime Potales et al., *Do Vouchers Create More Inequality? Lessons from Universal Implementation in Chile*, Institute for Urban Policy Research and Analysis (2012).[1]

The social impact of such increased divisions should alarm any good government. While public schools offer a common experience and opportunities to learn alongside individuals from many different backgrounds, privatization efforts like the voucher plan at issue result in greater segregation by race, class, gender, religion, disability, and national origin. Martha Minow, *Symposium: Public Values In An Era of Privatization: Public and Private Partnerships: Accounting For The New Religion*, 116 Harv. L. Rev. 1229, 1252 (2003). "As a result, schools could exacerbate misunderstandings among groups and impede the goal of

[1] Amicus acknowledges that there are many differences between Chile and North Carolina. However, because of its longevity, Chile's voucher system has been the most thoroughly studied by researchers, as noted by Ladd, Minow, and Potales in the articles cited herein.

building sufficient shared points of reference and aspirations for a diverse society to forge common bonds." *Id.*

Amicus urge the Court to consider these long-term impacts. Although voucher programs may begin by targeting low-income and non-white students in low-performing public schools, they inevitably broaden their eligibility criteria. The recent Congressionally-mandated review of the District of Columbia's Opportunity Scholarship Program, which has operated since 2004, shows that a majority of the participating schools serve a higher percentage of white students, have less diverse student bodies, and charge higher tuitions than in earlier years of the program. Institute of Education Sciences, *Evaluation of the DC Opportunity Scholarship Program*, October 2014, at http://ies.ed.gov/ ncee/pubs/ 20154000/ pdf/ 20154000.pdf. Similarly, evaluations of the longest-running voucher schemes in the United States, those in Cleveland and Milwaukee, show that these programs have not been effectively limited to low-income students, and now primarily serve a population of students that is less impoverished than the population of students remaining in the traditional public schools. *See* Cecilia Elena Rouse and Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions*, Annual Review of Economics, Volume 1, 2009; Kim Metcalf *et al*., *Evaluation of the Cleveland Scholarship and Tutoring Program 1998-2003*,

Executive Summary, October, 2004; *Summary Report*, 1998-2003; *Technical Report 1998-2003*, Bloomington, Ind., October 2004.

In addition, Cleveland's program provides ample evidence that the wealthier and whitest schools simply will not accept vouchers. "This issue is highlighted in [*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)] . . . . despite the fact that suburban districts could participate in the program, none chose to do so." James Forman, Jr., *The Rise and Fall of Vouchers: A Story of Religion, Race and Politics*, 54 UCLA Law Rev. 547, 584 (2007). A year after winning the *Zelman* case, the lawyer who led the defense of school voucher programs explained why those well-resourced doors were closed to voucher recipients:

> [The] reason was obvious: many of the families in the suburban public schools had escaped the inner city, and they didn't want the 'problems'—that is, poor minority schoolchildren—following them.

Id. (quoting Clint Bolick, *Voucher Wars* 92 (2003)).

Private schools risk little, if any, legal ramifications for their "creaming" and "cropping" practices, as they are exempt from scrutiny under most anti-discrimination statutes. In fact, following earlier hearings in this case, where the issue of racial segregation in schools potentially receiving state voucher funds was raised by Plaintiffs, the statute was amended to prohibit any school accepting vouchers from discriminating on the basis of race or ethnicity. N.C.G.S. 115C-562.5(c1). No similar prohibition on discrimination on the basis of religion,

gender, or disability was included however, meaning schools that expressly, overtly or implicitly segregate students on those bases remain eligible to receive state funds. The lower court correctly held that such discrimination, subsidized by taxpayer dollars in the form of vouchers, violates Article I § 19 of the North Carolina Constitution.

Any other conclusion would run counter to controlling law. In *Norwood v. Harrison*, 413 U.S. 455, 93 S. Ct. 2804 (1973) black students attending public schools in Mississippi challenged the state's program of providing free textbooks to children attending private segregated schools within the state.[2] Because (as in the present case) the vast majority of the private schools at issue were parochial, the trial court relied on the Establishment Clause of the First Amendment to rule the program constitutional. *Norwood v. Harrison*, 340 F. Supp. 1003, 1013 (D. Miss. 1972). On appeal, a unanimous Supreme Court rejected that reliance:

> Like a sectarian school, a private school -- even one that discriminates -- fulfills an important educational function; however… the legitimate educational function cannot be isolated from discriminatory practices -- if such in fact exists. Under *Brown v. Board of Education*, 347 U.S. 483 (1954), *discriminatory treatment exerts a pervasive influence on the entire educational process.* The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly

[2] It is noteworthy for the present appeal that the stated purpose of the free textbook program was to improve the overall quality of education in the state. *Norwood v. Harrison*, 340 F. Supp. 1003, 1013 (D. Miss. 1972).

> unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but *neither can it call on the Constitution for material aid from the State*.

413 U.S. at 469, 93 S. Ct. at 2812 (emphasis added). Importantly, the Court further found no distinction between granting free textbooks to discriminatory private academies and free tuition grants to individual families since both "are a form of financial assistance inuring to the benefit of the private schools themselves." *Id.* at 466, 93 S. Ct. at 2810.

Although the order on appeal in this case refers explicitly only to religious discrimination, Amicus urges that an examination of the private schools accepting vouchers in this case reveals not only exclusion based on religious beliefs, but overt discrimination based on disability, as well as broad racial and ethnic disparities. And there are few legal safeguards against such private discrimination. In 2012, the ACLU Foundation Racial Justice Program, Disability Rights of Wisconsin and individual parents filed a complaint with the U.S. Department of Justice under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act alleging that Wisconsin's voucher program (the "Choice" program) discriminates against students with disabilities and segregates those students "in one portion of the publicly funded educational system" (the

traditional public schools). The response from Wisconsin's Department of Instruction (DPI) underscores private schools' unchecked latitude to discriminate:

> While the DPI is not aware of any discriminatory policy or practice that it employs in respect to the Choice program, the DPI acknowledges this does not mean that individual Choice schools do not engage in discriminatory practices. As such, the DPI will work with the United States to eliminate discrimination to the extent the DPI has the statutory authority to do so….[T]he DPI has significant concerns about the DPI's authority to ensure that Choice schools do not discriminate against students with disabilities.
>
> See attached Exhibit 1 at 6.

The identical latitude to discriminate was knowingly and intentionally built into North Carolina's voucher program when its proponents did not include any prohibition against discrimination based on disability, religion, or gender. The State's sanctioning—by policy and finance— of such obvious and foreseeable segregation compelled the trial court to conclude that the voucher program violates Article I, Section 19 and Article IX Section 2(1) of North Carolina Constitution. (R. 995.) That conclusion should be affirmed.

B. Vouchers subsidize hypersegregated schools that are at liberty to discriminate against at-risk students, and will increase segregation among North Carolina students.

The voucher plan will increase racial isolation of white, black, and Latino students by moving children from more diverse traditional public schools to more racially homogenous private schools. Too many private schools in North Carolina

remain hypersegregated vestiges of the "segregation academies" that sprung up in the late 1960s and early 1970s in areas with high concentrations of African-American students as part of the resistance to integration by white parents who could afford to leave the public schools. To wit:

- Bertie County is 62% African American. Lawrence Academy was founded in Bertie County in 1968. Its student body is 98% white.
- Halifax County is 53% African-American. Halifax Academy and Hobgood Academy were both founded in 1969. Halifax Academy is 98% white; Hobgood Academy is 95% white.
- Hertford County is over 60% African-American. Ridgecroft School, founded in 1968, is 97% white.
- Northampton County is 58% African-American, but Northeast Academy, established in 1966, is 99% white.
- Vance County is 49% African-American; Kerr-Vance Academy, established in 1968, is 95% white.

Private school demographics in other Black Belt counties in the Eastern part of the state are similar to the above. The only other private school in Bertie County is 99% white. The only private school in Greene County is 99% white. Majority African-American Warren County has one private school. It is nearly 90% white. Wilson County (39% African-American) has two private schools, 91% and 81% white, respectively.[3] Notably, of the ten North Carolina counties with

[3] The county data listed here is from the 2010 U.S. Census. The school data is from the Institute of Education Sciences, National Center for Education Statistics, *Private School Universe Survey (PSS): Public-Use Data File User's Manual for School Year 2009-2010.* The founding dates are

the highest concentration of African American students, only one—Halifax County-- received any vouchers: one went to Miracle Tabernacle Christian School, which has a total enrollment of 10 total students, 100% of whom are African American, and one went to Hobgood Academy, which is 91% white.

Based on data about enrollment of voucher students (made available by the State on September 29, 2014), the schools receiving the highest number of vouchers are substantially more segregated by race than the public school districts in which they are located: [4]

- Greensboro Islamic Academy received 43 vouchers (more students than it enrolled in 2013) and reports having 89% students of color, while Guilford County Schools was 38% white, 41% black, 11% Latino.

- Word of God Christian Academy (Raleigh) received 26 vouchers and is 100% African American, while Wake County Schools was 49% white, 25% Black, 15% Latino.

- Trinity Christian Academy (Fayetteville) received 18 vouchers and reports having 80% students of color, while Cumberland County Schools was 34% white, 45% black and 11% Latino.

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from the individual school websites, http://www.lawrenceacademy.org/About_LA/School_History.asp; http://ridgecroftschool.org/ about-us-2/; http://www.northeasteaglesnc.com/athletics.htm; http://www.halifaxacademy.org/ about-us/our-history-philosophy.html; http://www.hobgoodacademy.com/history.php; http://www.kerrvance.com/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=185&MMN_position=211:207. Hobgood Academy accepted one voucher student as of September 29, 2014.

[4] Demographic data for Greensboro Islamic Academy is from http://www.privateschoolreview.com/schoolov /school_id/32738. For all other private schools, data available at http://nces.ed.gov/surveys/pss/privateschoolsearch/. Since the most recent data available for these private schools was for 2011-12 school year, the same year was used for the public schools for comparison, available at 2011-2012 Grade, Race, Reports, at http://www.ncpublicschools.org/fbs/accounting/data/.

- Tabernacle Christian School (Monroe) received 17 vouchers and is 90% white, while Union County Public Schools was 68% white, 13% black, and 14% Latino.

- First Assembly Christian Academy (Concord) received 17 vouchers, and was the most racially diverse of the top five voucher recipients, reporting a student body that is 78% white. Nevertheless, it is still much more racially imbalanced than either Cabarras County Schools: 63% white, 18% Black, 13% Latino; or Kannapolis City Schools: 44% white, 27% black, 23% Latino.

Although information about the individual race of any particular voucher recipient has not been made available, whatever their race, every one of the 121 students attending these five private schools will be moving from a more racially and culturally diverse educational environment to a more segregated one.

C. <u>There is No Evidence That Voucher Programs Provide Educational Benefits for Students of Color or Low Wealth Students</u>

In addition to increased racial isolation of students—both those attending state-subsidized private schools and those remaining in the traditional public schools—there is no evidence that private schools are better at educating students. Forman notes that the racial-justice claim for vouchers

> would need to be tied to educational quality, not values or religious freedom, and would therefore require some evidence that private schools were more effective than public ones at teaching academic skills.

Forman, 54 UCLA Law Rev. at 570. Such evidence has not materialized.

The studies on which privatization proponents rely—from James S. Coleman's 1982 study of Catholic high schools to the 2012 publication by voucher proponents Matthew M. Chingos and Paul Peterson—all suffer from bias and other measurement error that, at least in the case of Chingos and Peterson, are unmentioned by the studies' authors. *See, e.g.*, Sara Goldrick-Rab, Sept. 13, 2012 *Review of The Effects of School Vouchers on College Enrollment: Experimental Evidence from New York City*, Brookings Institution (August 23, 2012) (available at http://nepc.colorado.edu/files/ttr-voucherscollege.pdf). Accounting for measurement errors reveals that in fact there is no statistically significant educational advantage incurred by African American and poor voucher recipients. *Id. See also* Forman, 54 UCLA Law Rev. at 572, n. 129 (citing Alan B. Krueger & Pei Zhu, *Another Look at the New York City School Voucher Experiment*, 47 Am. Behav. Scientist 658, 683-85 (2004); Alan B. Krueger & Pei Zhu, *Inefficiency, Subsample Selection Bias, and Nonrobustness: A Response to Paul E. Peterson and William G. Howell*, 47 Am. Behav. Scientist 718, 726-27 (2004); Paul E. Peterson & William G. Howell, *Efficiency, Bias, and Classification Schemes: A Response to Alan B. Krueger and Pei Zhu*, 47 Am. Behav. Scientist 699, 702 (2004)).

Nor is there evidence that voucher programs and other schemes that shift public money to private schools have been successful in improving the education

of low-income students in the places that those schemes have been tried. *See* Public Policy Forum, *Research Brief: Choice Schools Have Much in Common with MPS, Including Student Performance, 2013* (available at http://publicpolicy forum.org/sites/default/files/2013VoucherBrief-Clarified_1.pdf); Rouse *et al*. (2009); Metcalf *et al*., (2004).

Most of the studies done on the longest-running voucher scheme in the United States, the Milwaukee Parental Choice (MPC) Program, find that the peer public school students perform either the same or better than voucher recipients. The most recent study of MPC concluded that participating Milwaukee students performed significantly worse in both reading and math than students in Milwaukee Public Schools. The Cleveland Scholarship and Tutoring Program, has generated similar results. "Public school students made greater learning gains in comparison to voucher recipients, even though voucher recipients were less likely to be low-income." Rouse *et al*. (2009).

II. THE VOUCHER PLAN VIOLATES THE NORTH CAROLINA CONSITUTION BECAUSE IT ABDICATES THE STATE'S OBLIGATION TO PROVIDE A SOUND BASIC EDUCATION

A. The Voucher Plan Undermines the State's Ongoing Obligations Under *Leandro*

In the ongoing *Leandro* litigation, this Court recognized that the North Carolina Constitution guarantees the right to a sound basic education, and

specifically highlighted the state's obligation to protect that right for "at-risk" students, "who, due to circumstances such as an unstable home life, poor socio-economic background, and other factors," face particular challenges to securing the opportunity for a sound basic education. The Court went on to define an "at-risk" student as having any of these characteristics: member of a low-income family, participant in free or reduced price lunch program, parents with limited education, limited English proficiency, member of racial or ethnic minority, or a single parent household. *Hoke County Bd. of Educ. v. State (Leandro II),* 358 N.C. 605, 636-637 (2004). The court found the state violated its constitutional duty to provide a sound basic education to this demographic of students in particular, and had an affirmative obligation to develop remedial measures. *Id.*, at 638.

The challenge of ensuring that every child in North Carolina receives a sound basic education is an enormous one. Identifying and addressing the particular needs of at-risk children, as required by *Leandro II,* compounds both the scope and the stake of that challenge. One critical component of assessing the State's progress in honoring its constitutional duty requires the collection, review, analysis, and assessment of comprehensive testing data (e.g. End-of Course and End-of-Grade tests, ACT, EVASS growth assessments). This data must be examined both longitudinally and comparatively for every school district in the state, to determine each school district's level of success in meeting its obligation,

and to ensure consistent and ongoing compliance with the constitutional mandate. The voucher program, which is expressly designed to target the same population of students that this Court expressly identified as 'at-risk" in *Leandro II,* will place these students in schools that utilize none of the tools necessary to measure the educational outputs this Court's ruling demands. By adopting this voucher program, the state is attempting to contract out its constitutional liability to provide a sound basic education, and is paying a contractor (the private schools receiving vouchers) that has neither the means, the intent or the responsibility to provide the information necessary to ensure that constitutional right is protected.

But it is not just voucher schools' lack of measurement and accountability that violates the state's *Leandro* obligations. The practical consequences of the marketization of education and the resulting transformation of the traditional schools into a discard zone, means not only the educational abandonment of public school students, but guarantees that those schools will have neither the financial nor political support to provide an adequate education. And *that* is the real assault on the constitutional right of every child to a sound basic education.

Again, the longest-running voucher program in the world demonstrates this to be true. Chile's universal implementation of vouchers resulted in private schools, perceived as superior to public schools, dominating those schools in competition for student enrollment. Heilig, at 4. Only a few public schools and

districts have managed to overcome this perception, and only by implementing the same "creaming" and "cropping" techniques that private schools use, reducing the number of students enrolled with behavioral problems, learning disabilities or other challenging characteristics. *Id*. Thus the vast majority of at-risk students have become concentrated in the only schools that will take them: the traditional public schools. It is no wonder that those schools, no matter how committed their teachers and staff may be to providing a quality education, are perceived as a discard zone to be avoided by parents who can afford to do so. That perception leads to further political and economic abandonment of those schools and the related adverse educational impacts on those students.

The evidence simply does not support voucher proponents' claim that vouchers will expand choice to low-income families and reduce stratification by making parental income less determinative of who attends private schools. Studies over decades show low-income students have fewer opportunities, and greater barriers, to choice in a voucher system – barriers that, in addition to the "creaming" and "cropping" already discussed, include private schools' selection criteria (including test scores); private schools located in wealthier areas charging parents additional fees; exclusion of students with behavioral and academic issues; and self-segregation based on specific social class values and cultural desires. *Id*. (citing Portales, *Understanding how vouchers impact municipalities in Chile, and*

how municipalities respond to market pressures, University of Texas at Austin, 2012). While vouchers may be considered "efficient" in the eyes of some lawmakers because they shift the cost of educating students to private schools and reduce state funding to public schools, they are not a solution—and in fact, exacerbate—inequities in educational opportunities.

In light of North Carolina's public education system and this Court's *Leandro* mandate, vouchers subvert the state constitution's guarantee of a sound basic education. By encouraging students who have sufficient resources and abilities to do so to leave the public schools for private schools, where there is no obligation to comply with equal protection and no accountability to even begin to determine whether the student is receiving a constitutionally-compliant education, the voucher program expressly undermines the State's duty under *Leandro*.

B. The Manipulation of Race to Promote Private Schools Vouchers

It is ironic that the voucher movement, which seeks to privatize education at the public's expense, would claim to be advancing racial and social justice. It is also noteworthy that the direct ancestry of school vouchers in North Carolina is our state legislature's response to the 1954 *Brown v. Board of Education* decision, the 1956 Pearsall Plan, which would permit a school district ordered to desegregate to close its public schools and then provide vouchers to students to attend private schools (which only existed for white students). The plan legitimized the use of

taxpayer dollars to fund white families' abandonment of desegregated public schools and to subsidize racially segregated private schools. See David Morgan, *History of Private School Regulation in North Carolina*, Division of Non-Public Education, N.C. Dept. of Administration, http://www.ncdnpe.org/documents/hhh138c.pdf (1980).

Investigation into the voucher movement's more recent history explains why the racial/social justice claim became its centerpiece. Proponents of privatization began reaching out to African Americans only after voucher and tuition-tax-credit proposals foundered throughout the 1980s and 90s. See Forman, 54 UCLA Law Rev. at 569. Two of the intellectual architects of the school privatization movement have been quite transparent about their strategy. In their 1999 article, John Coons and Stephen Sugarman declared that school-choice coalitions

> must include and feature actors who are identified publically with groups that advertise their concern for the disadvantaged. The leadership must visibly include racial minorities of both sexes and prominent Democrats….The conservative commitment to the project is necessary but should remain mute until the coalition has secured leadership whose party affiliation, social class or race—preferably all three—displays what the media will interpret as concern for the disadvantaged.

Id., at 568 (quoting John E. Coons & Stephen D. Sugarman, *Making School Choice Work For All Families* 85 (1999)).

In addressing what he described as the "trench warfare" pitting conservatives against liberals, leading voucher advocate Paul Peterson said:

> There's only one force out there that's probably going to change the story, and that's black families….The reason is that if black families say this is something that's really important to them, it's going to change the calculations of all the politicians who have lined up on one side or another.

Id., at 569 (quoting from John E. Coons et al., *The Pro-Voucher Left and the Pro-Equity Right*, 572 Annals Am. Acad. Pol. & Soc. Sci. 98, 114 (2000)).

Jim Ryan, Dean of the Harvard Graduate School of Education, summarized this strategy succinctly:

> Those who advocate for . . . vouchers might claim, as Bolick does, to be thinking only of the hapless students stuck in failing schools. But their ultimate aim—to inject more market-based competition into the public school arena— is not hard to detect. . . expanding choices for students is a means to an end, not an end itself. The end is greater privatization of public schools.

Jim Ryan, *Five Miles Away, A World Apart* (Oxford University Press, New York, 2010), pp. 246-47.

CONCLUSION

The state's private school voucher program unconstitutionally uses public funds to exacerbate and entrench the legacy of private schools in maintaining segregation in education, undermines the state's decades-long efforts to eliminate the vestiges of *de jure* discrimination, and violates the state's constitutional duty to provide a sound basic education to all children, and especially to at-risk children. The voucher program is being hypocritically marketed to low wealth and minority

communities when there is no evidence that the program can or will provide substantive educational benefits to these children.

The NAACP resoundingly rejects the claim by North Carolina's voucher program proponents that it is for the benefit of poor students of color, and condemns this perverted attempt to divide the African American community against its own best interests— interests which are evidenced by the fact that the overwhelmingly majority of African American and poor students will remain in our public schools, which will be further deprived of resources because of the voucher plan. Poor students, including those of color, benefit from strong public schools. The voucher program undermines public education by robbing its resources and privatizing a public good cherished in this state and enshrined in our constitution.

The Court should affirm the trial court's order and declare the voucher act unconstitutional.

Respectfully submitted, this the 2nd day of February, 2015.

UNC CENTER FOR CIVIL RIGHTS

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This the 2nd day of February, 2015.

UNC CENTER FOR CIVIL RIGHTS

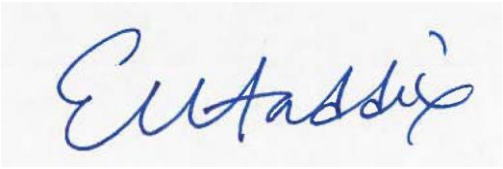

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EXHIBIT 1

U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section

AB:RW:JF
DJ 169-85-23

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Washington, DC 20530
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Suite 4300
Washington, DC 20004
Telephone: (202) 514-4092
Facsimile: (202) 514-8337

April 9, 2013

By Electronic and U.S. Mail
Tony Evers
State Superintendent
Wisconsin Department of Public Instruction
P.O. Box 7841
Madison, WI 53707-7841

Dear Mr. Evers,

Thank you for facilitating our meeting on December 12, 2012 with officials from the Department of Public Instruction ("DPI"). The purpose of the meeting was to discuss DPI's obligation under Title II of the Americans with Disabilities Act of 1990 ("Title II"), 42 U.S.C. §§ 12131-12134, to ensure that students with disabilities who seek to attend voucher schools through the Milwaukee Parent Choice Program ("MPCP" or "school choice program") do not encounter discrimination on the basis of their disability status. As you are aware, advocacy groups in Wisconsin have alleged that students with disabilities in the Milwaukee Public Schools ("MPS") 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 constructively forced to leave voucher schools as a result of policies and practices that fail to accommodate the needs of students with disabilities. Our position, consistent with interviews of parents and public school district officials, is that DPI must do more to enforce the federal statutory and regulatory requirements that govern the treatment of students with disabilities who participate in the school choice program.

At the December 12 meeting, DPI provided assurances that it is committed to administering the school choice program in accordance with all applicable state and federal requirements, and requested that the United States enumerate in writing the specific measures that must be implemented to comply with federal law. This letter is intended to provide DPI notice of its legal responsibilities as the agency charged with administering and overseeing the school choice program, and to set forth a process to ensure DPI's compliance with federal law.

Because the school choice program is a public program funded and administered by the State, the State's administration of the program is subject to the requirements of Title II. See 28 C.F.R. § 35.102(a) ("[T]his part applies to all services, programs, and activities provided or made available by public entities."). Title II 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. § 12132. The regulations implementing Title II require, inter alia, that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. See 28 C.F.R. § 35.130(b)(7).[1]

DPI's obligation to eliminate discrimination against students with disabilities in its administration of the school choice program is not obviated by the fact that the schools participating in the program are private secular and religious schools. Indeed, courts recognize that the agency administering a public program has the authority and obligation under Title II to take appropriate steps in its enforcement of program requirements to prohibit discrimination against individuals with disabilities, regardless of whether services are delivered directly by a public entity or provided through a third party. See, e.g., Armstrong v. Schwarzenegger, 622 F.3d 1058, 1066 (9th Cir. 2010); Kerr v. Heather Gardens Ass'n., No. 09-409, 2010 WL 3791484, at *11 (D. Colo. Sept. 22, 2010); Disability Advocates, Inc. v. Paterson, 598 F.Supp.2d 289, 317-18 (E.D.N.Y. 2009), rev'd on other grounds, Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, 675 F.3d 149 (2d Cir. 2012); James v. Peter Pan Transit Mgmt. Inc, No. 97-747, 1999 WL 735173, at *8-9 (E.D.N.C. Jan. 20, 1999); cf. 28 C.F.R. §§ 35.130(b)(1)(v); 35.130(b)(3). In short, the State cannot, by delegating the education function to private voucher schools, place MPCP students beyond the reach of the federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs.

DPI must therefore implement and administer the school choice program in a manner that does not discriminate against children with disabilities or parents or guardians with disabilities.[2] To effectuate these rights in the specific context of the school choice program, DPI is required under Title II to ensure that its policies, practices and procedures governing the program (1) empower students with disabilities and their parents to make informed decisions during the school selection process; (2) ensure that disability status has no unlawful adverse impact on admissions decisions, and (3) ensure that voucher schools do not discriminate against students with disabilities enrolled in the school, either by denying those students opportunities and

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[1] Under Title II, an entity must modify a policy, practice, or procedure unless it can show that the modification "would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

[2] Title II's nondiscrimination requirements do not compel DPI to require that voucher schools affirmatively provide students with disabilities special education and related services pursuant to the Individuals with Disabilities Education Act ("IDEA"). See 20 U.S.C. § 1400, et seq. However, a student with a disability who meets the income requirements for the school choice program, and voluntarily foregoes IDEA services in order to attend a voucher school, is entitled to the same opportunity as her non-disabled peers to attend the voucher school of her choice and to meaningfully access the general education curriculum offered by that school.

benefits available to non-disabled students, or by failing to make reasonable modifications to school policies where ADA regulations apply to DPI or participating schools. DPI is further obligated to collect accurate information about all participating schools, fully inform the public about the educational services and accommodations for persons with disabilities available at participating schools, verify that advertisements to potential enrollees are accurate, and ensure that services offered through the school choice program are provided in a manner that does not discriminate on the basis of disability. Finally, because DPI is charged with operating the school choice program, it is responsible for monitoring and supervising the manner in which participating schools serve students with disabilities.[3]

To this end, DPI must comply with the following requirements:

1. **State's ADA Title II Obligation.** Pursuant to Title II, DPI must eliminate discrimination against students with disabilities or students whose parents or guardians have disabilities in its administration of the Milwaukee Parent Choice Program ("MPCP"), the school voucher program in Racine, and school voucher programs established in any other locality. The private or religious status of individual voucher schools does not absolve DPI of its obligation to assure that Wisconsin's school choice programs do not discriminate against persons with disabilities as required under Title II.

2. **Complaints.** DPI must establish and publicize a procedure for individuals to submit complaints to DPI alleging disability-related discrimination in the school choice program. DPI will furnish copies of these complaints to the United States on December 15, 2013 and June 15, 2014. The United States will independently review these complaints, and DPI's response thereto, to ensure that complaints are being appropriately addressed.

3. **Additional Data Collection and Reporting.** DPI must, by the dates indicated below, gather and produce to the United States in written format information that will enable the United States to determine how and to what extent students with disabilities are being served by voucher schools. The information should be disaggregated by school and include the following: (1) by September 30, 2013, the number of students with disabilities enrolled in voucher schools for the 2013-2014 school year, disaggregated by grade level and type of disability; (2) by September 30, 2013, the number of students with disabilities denied admission to a voucher school for the 2013-2014 school year; (3) by June 15, 2014, the number of students with disabilities who left a voucher school at any time during the 2013-2014 school year to return to the local public school system; and (4) by June 15, 2014, the number of students with disabilities suspended or expelled

[3] All private entities that operate as places of public accommodation must also comply with the provisions of Title III of the ADA, unless an exemption or defense applies under the ADA. See 42 U.S.C. §§ 12181, et seq. In some cases, private entities that contract or enter into other arrangements to provide services under the auspices of a public program are also subject to the nondiscrimination requirements that govern the program itself, including but not limited to the specific requirements imposed by the administering agency in accordance with Title II. See 28 C.F.R. §§ 35.130(b)(1)(v); 35.130(b)(3).

from a voucher school, disaggregated by grade level and type of disability. The United States will review these reports and take appropriate action, pursuant to the ADA and consistent with Department practice, if the information reported reveals actual or potential unlawful discrimination. See 28 C.F.R. § 35.176.

4. **Public Outreach about the School Choice Program to Students with Disabilities.** DPI must conduct outreach to educate the families of students with disabilities about school choice programs, and provide specific and accurate information about the rights of students with disabilities and the services available at voucher schools. DPI shall provide a copy of any existing outreach and informational materials related to the voucher schools, and submit any new and/or revised DPI materials for review to the United States.

5. **Monitoring and Oversight.** DPI must ensure that voucher schools do not discourage a student with a disability from applying for admission, or improperly reject a student with a disability who does apply to a voucher school. DPI must further ensure that voucher schools, absent a valid ADA defense, do not expel/exit a student with a disability unless the school has first determined, on a case-by-case basis, that there are no reasonable modifications to school policies, practices or procedures that could enhance the school's capacity to serve that student. DPI shall report any review, investigation and/or findings of potential unlawful discrimination to the United States, and document the actions taken by the agency to remedy the discrimination.

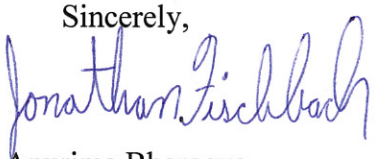
6. **ADA Training for Voucher Schools.** DPI must provide mandatory ADA training to new voucher schools and to existing voucher schools on a periodic basis, and submit a copy of any training materials and attendance sheets to the United States.

7. **Guidance.** By December 31, 2013, DPI must develop program guidance in consultation with the United States to assist and educate voucher schools about ADA compliance.

These provisions require DPI to amend the policies and practices that govern its oversight of Wisconsin's school choice program for the 2013-2014 school year. At the conclusion of the 2013-2014 school year, the United States will evaluate DPI's compliance with these provisions and identify any additional remedial measures necessary to bring DPI into compliance with federal law. In the event DPI fails to comply with these provisions and/or implement any additional measures necessary to ensure that students with disabilities are not discriminated against in state-administered school choice programs, the United States reserves its right to pursue enforcement through other means.

If you have any questions or concerns, or would like to further discuss this letter, please contact Jonathan Fischbach by phone, (202) 305-3753, or by email at jonathan.fischbach @usdoj.gov. Thank you in advance for your cooperation.

Sincerely,



Anurima Bhargava
Renee Wohlenhaus
Jonathan Fischbach

Educational Opportunities Section
Civil Rights Division

Cc: Janet A. Jenkins, Esq.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION

Tony Evers, PhD, State Superintendent

November 25, 2013

By Electronic and U.S. Mail

Renee Wohlenhaus
Educational Opportunities Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Patrick Henry Building, Suite 4300
Washington, DC 20530

Dear Ms. Wohlenhaus:

On behalf of the Wisconsin Department of Public Instruction (DPI), I am responding to your April 9, 2013 letter to State Superintendent Tony Evers. In this letter, I will first address general concerns the DPI has. I will then address the DPI's response to the specific requirements outlined in your April 9, 2013 letter.

The DPI is fully committed to ensuring that its administration of the Choice program does not discriminate against persons with disabilities. The DPI is not aware of any discriminatory policy or practice that it employs in respect to its administration of the Choice programs. For example, in your April 9, 2013 letter, you state that advocacy groups in Wisconsin have alleged that students with disabilities in the Milwaukee Public Schools are "deterred by DPI and participating voucher schools from participation in the school choice program." The DPI has no policy or practice of deterring students with disabilities from participating in the Choice programs.

While the DPI is not aware of any discriminatory policy or practice that it employs in respect to the Choice program, the DPI acknowledges this does not mean that individual Choice schools do not engage in discriminatory practices. As such, the DPI will work with the United States to eliminate discrimination to the extent the DPI has the statutory authority to do so. As previously indicated to the United States in correspondence and in our December 12, 2012 meeting, the DPI has significant concerns about the DPI's authority to ensure that Choice schools do not discriminate against students with disabilities. Further, as will be discussed below, the DPI has concerns regarding its authority to comply with the specific requirements outlined in the April 9, 2013 letter.

As discussed in previous correspondence, the Choice program is a state program, funded

solely with state dollars, that provides financial assistance (i.e., vouchers) to low-income families in order to allow eligible children to attend a participating private school of their choice at no cost. In order to be eligible for the Choice program, a pupil must be a member of a family whose income is at or below 300% of the federal poverty limit. Wis. Stat. § 119.23(2)(a)1.a.[1] Schools are required to select pupils on a random basis and may only reject an eligible pupil if it has reached its capacity. Wis. Stat. § 119.23(3)(a). A school may only give preference to a pupil if the pupil previously attended the same school or if one of the pupil's siblings attends the same school. *Id.*

In order to participate in the Choice program, private schools must comply with various statutory and administrative rule requirements. These requirements are primarily concerned with financial reporting and accountability requirements. *See e.g.,* Wis. Stat. § 119.23(7)(am) (Participating schools are required to submit to the DPI specific financial reports). While state law and regulations place various requirements on participating schools, the Wisconsin Supreme Court has consistently held that participating schools remain private, not public schools. *See Davis v. Grover*, 166 Wis. 2d 501, 280 N.W.2d 460 (1991); *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998).

The DPI has only limited statutory authority in administering the Choice program. It is well-settled law in Wisconsin that state agencies only have those powers which are expressly conferred or necessarily implied from the statutory provisions under which it operates. *See e.g. Brown Cnty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247, 250 (1981); *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 62, 342 Wis. 2d 444, 478. As such, the DPI only has those powers expressly conferred or necessarily implied from the statutes enacted by the Wisconsin Legislature.[2] The DPI's authority in regards to the Choice program is set forth in Section 119.23 of the Wisconsin Statutes. *See* Wis. Stat. §119.23. The DPI implements these statutory requirements through its administrative rules. *See* Wis. Admin. Code PI§ 35.

The state superintendent is authorized to take specific action against a Choice school only in specified, limited circumstances. With few exceptions, none of which are relevant herein, the specific actions the DPI can take and the circumstances in which the DPI can take them are set forth in Wis. Stat. § 119.23(10) and in Wis. Admin. Code §§ PI 35.05(10) and (12). As mentioned above, this oversight is primarily related to ensuring accountability with voucher

[1] Section 119.23 of the Wisconsin Statutes governs the Milwaukee Parental Choice Program. Section 118.60 of the Wisconsin Statutes governs the Parental Private School Choice Program in Racine, Wisconsin. Because the statutory language between Wis. Stat. §§ 118.60 and 119.23 is almost identical, this letter will only cite Wis. Stat. § 119.23. You should also be aware that the Wisconsin Legislature and Governor revised the Choice school law under Wis. Stat. § 118.60 to enable choice schools to operate anywhere in the state, thus establishing the Wisconsin Parental Choice Program. There is a 500 student cap on this new program for the for the 2013-2014 school year and a 1000 student cap for the 2014-2015 school year. There are also provisions regarding which schools can participate in the new program and how students are selected to attend those schools. The department can provide additional information if requested.

[2] The state superintendent also has powers conferred by the Wisconsin Constitution. *See* Wis. Const. art. X, § 1. However, these powers are in regards to the supervision of public schools. *See* Thompson v. Craney, 199 Wis. 2d 674, 683, 546 N.W.2d 123, 128 (1996).

payments. As a result, the DPI is concerned that it does not have the authority under state law to take many of the actions outlined in the US DOJ's April 9, 2013 letter.

The DPI is also concerned that federal law does not provide the DPI with necessary authority to take the required actions. The DPI's concerns are amplified by the guidance provided in the US DOJ's ADA Title II Technical Assistance Manual. Specifically, the manual provides, "A public entity may not discriminate on the basis of disability in its licensing, certification, and regulatory activities." ADA Title II Technical Assistance Manual, II-3.7200 Licensing. The manual further clarifies that a state "is not accountable for discrimination in employment or *other practices* of XYZ company, if those practices *are not the result of requirements or policies established by the State.*" *Id.* (Emphasis added). The DPI is not aware of any discriminatory practices engaged in by individual Choice schools which are the "result of requirements or policies established by" the DPI. As such, the DPI is concerned that, under Title II, it does not have the authority to take action against, nor is it responsible for, discriminatory practices by private Choice schools which are not the result of requirements or policies established by the DPI or state law.

Similarly, the DPI is concerned that the cases cited by the United States do not provide the DPI with the authority to take the requested actions. For example, the United States cited *Armstrong v. Schwarzenegger,* 622 F.3d 1058, 1066 (9th Cir. 2010), among other cases, as support for the assertion that "the State cannot, by delegating the education function to private voucher schools, place MPCP student beyond the reach of federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs." Again, the DPI is not aware of any discriminatory practice or policy it employs in the administration of the Choice program. Further, *Armstrong* involved the contracting of a government service (i.e., housing state prison inmates) with another entity (i.e., county jails). *Armstrong*, 622. F.3d at 1062. The Ninth Circuit reasoned that California could not avoid its Title II obligations towards state prisoners by contracting with counties to house the inmates. *Id.* at 1069. The Choice program is fundamentally different. With the Choice program, the DPI does not contract out educational services it would normally provide. Rather, the DPI provides financial assistance (i.e., vouchers) to eligible parents, each of whom is free to choose an eligible private school of their choice. Absent the Choice program, neither the State nor the DPI would provide such assistance.

Based on the DPI's commitment to ensuring that its administration of the Choice program is free of discrimination, desire to provide disabled, but otherwise eligible, students the opportunity to participate in the Choice program, and its concerns regarding its limited authority, the DPI provides the following responses to the specific requirements of the April 9, 2013 letter:

(1) <u>DOJ Requirement: State's ADA Title II Obligation</u>

> Pursuant to Title II, DPI must eliminate discrimination against students with disabilities or students with disabilities or students whose parents or guardians have disabilities in its administration of the Milwaukee Parental Choice Program ("MPCP"), the school voucher program in Racine, and school voucher programs established in any other locality. The private or religious status of individual voucher schools does not absolve DPI of its

obligation to assure that Wisconsin's school choice programs do not discriminate against persons with disabilities as required under Title II.

DPI Response:

The DPI is fully committed to ensuring that its administration of the Choice program does not discriminate against persons with disabilities. The DPI is not aware of any discriminatory policy or practice it employs in respect to its administration of the Choice program. For example, in your April 9, 2013 letter, you state that advocacy groups in Wisconsin have alleged that students with disabilities in the Milwaukee Public Schools are "deterred by DPI and participating voucher schools from participation in the school choice program." The DPI has no policy or practice of deterring students with disabilities from participating in the Choice program. Moreover, the DPI has no knowledge of any facts supporting an allegation that it deters any students with disabilities from participating in the choice school programs.

The DPI respectfully requests that the United States tell the DPI what aspects of the DPI's legislatively circumscribed administration of the Choice program results in any violation of Title II.

(2) <u>DOJ Requirement: Complaints</u>

DPI must establish and publicize a procedure for individuals to submit complaints to DPI alleging disability-related discrimination in the school choice program. DPI will furnish copies of these complaints to the United States on December 15, 2013 and June 15, 2014. The United States will independently review these complaints and DPI's response thereto, to ensure that complaints are being appropriately addressed.

DPI Response:

The DPI will establish and publicize a complaint procedure for individuals to submit complaints to the DPI regarding disability-related discrimination in the Choice programs. The DPI will provide copies of the complaints and the DPI's response to the complaints to the United States.

The DPI is concerned about (1) the nature of any DPI response to the complaints and (2) the United States' review of such responses. As mentioned above, the DPI has limited statutory authority to sanction Choice schools. Specifically, Wis. Stat. § 119.23(10) authorizes the DPI to bar Choice schools or withhold state payments to Choice schools in very specific situations. Further, the DPI only has authority to address allegations of discrimination in two specific situations. First, the DPI has the authority to ensure that Choice schools accept pupils on a random basis and only reject pupils if the Choice school has reached capacity or if pupils do not meet residency or income requirements. Wis. Stat. § 119.23(3)(a). As such, the DPI has the authority to withhold payments to a Choice school if the school denied a student admission based on the student having a disability. Wis. Stat. § 119.23(10)(d). Second, the

DPI has the authority to ensure that Choice schools comply with 42 U.S.C. 2000d. Wis. Stat. § 119.23(2)(a)4. As such, the DPI can withhold funds under Wis. Stat. § 119.23(10)(d) if a Choice school discriminates against a student based on the student's race, color, or national origin.

Because the DPI only has limited statutory authority to address discrimination against Choice students, the DPI is concerned it only can address complaints of disability discrimination in relation to the admission of pupils. The DPI does not have the statutory authority to address disability discrimination in other contexts.

(3) DOJ Requirement: Additional Data Collection and Reporting.

> DPI must, by the dates indicated below, gather and produce to the United States in written format information that will enable the United States to determine how and to what extent students with disabilities are being served by voucher schools. The information should be disaggregated by school and include the following: (1) by September 30,2013, the number of students with disabilities enrolled in voucher schools for the 2013-2014 school year, disaggregated by grade level and type of disability; (2) by September 30, 2013, the number of students with disabilities denied admission to a voucher school for the 2013-2014 school year; (3) by June 15, 2014, the number of students with disabilities who left a voucher school at any time during the 2013-2014 school year to return to the local public school system; and (4) by June 15, 2014, the number of students with disabilities suspended or expelled from a voucher school, disaggregated by grade level and type of disability. The United States will review these reports and take appropriate action, pursuant to the ADA and consistent with Department practice, if the information reported reveals actual or potential unlawful discrimination. See 28 C.F.R. § 35.176.

DPI Response:

The DPI welcomes the opportunity to work with the United States in determining the types and extent of discrimination by Choice schools against persons with disabilities. However, the DPI is concerned that it currently lacks the statutory authority to force Choice schools to submit the information required for items requested. For example, the DPI lacks the statutory authority to require Choice schools to submit to the DPI "the number of students with disabilities suspended or expelled from a voucher school, disaggregated by grade level and type of disability." While the DPI will ask Choice schools for this information, the DPI does not believe it can require Choice schools to submit this data or face some sanction if they do not. In the most recent Wisconsin biennial budget (2013 Act 20, ss. 1732M to 1734), the Wisconsin Legislature mandated that the DPI collect graduation rates and achievement gap data from Choice schools, as well as all other schools, categorized by various populations, including students with

disabilities.[3]

However, this provision does not become effective until a statewide student information system is established. After the system's establishment, schools have five years to participate in that system or develop another system that is interoperable with the DPI system. Once this occurs, the department likely can provide the information requested in numbers (1) and (4) above.

Additionally, the DPI is concerned that this requirement might violate the principle established by *Printz v. United States,* 521 U.S. 898, 925 (1997), and *New York v. United States,* 505 U.S. 144, 174-77 (1992). Specifically, the U.S. Supreme Court has made it clear that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz,* 551 U.S. at 925. The DPI is concerned that the United States is asking the DPI to help the United States implement or enforce the ADA against third parties (i.e., Choice schools).

(4) DOJ Requirement: Public Outreach about the School Choice Program to Students with Disabilities.

> DPI must conduct outreach to educate the families of students with disabilities about school choice programs, and provide specific and accurate information about the rights of students with disabilities and the services available at voucher schools. DPI shall provide a copy of any existing outreach and informational materials related to the voucher schools, and submit any new and/or revised DPI materials for review to the United States.

DPI Response:

The DPI will conduct outreach to families of students with disabilities about the Choice programs, the rights of students with disabilities, and the services available to students with disabilities at Choice schools. Specifically, the DPI will develop materials addressing these topics and to make the materials available via publication on the DPI website, sending the materials at no cost to families who request them, and sending the materials to Choice schools on an annual basis. While the DPI will ask Choice schools to make these materials available to all families who participate in the Choice program, the DPI believes it lacks the statutory authority to require Choice schools to provide these materials to all families.

The DPI also will provide the United States with copies of any materials developed or revised of the purpose of outreach to the families of students with disabilities. All other "existing outreach and informational materials related to voucher schools" is already available on the DPI website. *See* http://sms.dpi.wi.gov/sms_choice. If the United States needs hard copies of these materials, the DPI will provide the United States with hard copies.

[3] The following is the link to the cited sections of 2013 Wisconsin Act 20: https://docs.legis.wisconsin.gov/2013/related/acts/20/1732M.

(5) DOJ Requirement: Monitoring and Oversight.

DPI must ensure that voucher schools do not discourage a student with a disability from applying for admission, or improperly reject a student with a disability who does apply to a voucher school. DPI must further ensure that voucher schools, absent a valid ADA defense, do not expel/exit a student with a disability unless the school has first determined, on a case-by-case basis, that there are no reasonable modifications to school policies, practices or procedures that could enhance the school's capacity to serve that student. DPI shall report any review, investigation and/or findings of potential unlawful discrimination to the United States, and document the actions taken by the agency to remedy the discrimination.

DPI Response:

As stated previously, the DPI is fully committed to ensuring that its administration of the Choice programs does not discriminate against persons with disabilities. The DPI will work with the United States to monitor the operations of Choice schools to determine whether discrimination is occurring. As mentioned above, the DPI has only limited statutory authority regarding Choice school admission practices. Wis. Stat. § 119.23(3)(a). The DPI does not have the statutory authority to review Choice school expulsions. Because of the DPI's limited authority regarding regulation of Choice schools and its even more limited authority to impose any kind of sanctions against Choice Schools for what the United States or the DPI might consider discrimination, the DPI is concerned that it lacks the statutory authority to review, investigate, and correct discriminatory expulsions.

(6) DOJ Requirement: ADA Training for Voucher Schools.

DPI must provide mandatory ADA training to new voucher schools and to existing voucher schools on a periodic basis, and submit a copy of any training materials and attendance sheets to the United States.

DPI Response:

DPI does not provide ADA training for any public schools in Wisconsin. The Chicago office of the USDOJ Office of Civil Rights has advised the DPI that the OCR provides that training, not the DPI. Moreover, OCR in Chicago has told the DPI that the DPI should refer ADA questions and complaints to OCR. The DPI believes it would be better and more efficient to use the same model for Choice schools since OCR, not the DPI, is the expert in ADA compliance and has the explicit statutory authority to address ADA violations.

The DPI regularly conducts training sessions for Choice schools, including mandatory training sessions for new Choice school administrators. The DPI is willing to have OCR staff come to these trainings to provide information and instruction to Choice schools. The DPI is also

willing to provide to Choice schools any materials OCR has developed regarding ADA and its requirements.

(7) **DOJ Requirement: Guidance.**

By December 31, 2013, DPI must develop program guidance in consultation with the United States to assist and educate voucher schools about ADA compliance.

DPI Response:

The DPI will develop program guidance in consultation with the United States to assist and educate Choice schools about ADA compliance. The DPI also will make this guidance available on the DPI website and send the guidance to Choice schools. The DPI respectfully requests that the United States assist the DPI in developing this guidance in a timely manner

In conclusion, the DPI is fully committed to ensuring that it administers the Choice program in a nondiscriminatory manner. The DPI, like the United States, firmly believes that all eligible students should have the opportunity to participate in the Choice program. Insofar as the United States believer that some Choice schools may not be in compliance with the ADA, the DPI is concerned that it lacks the statutory authority to take action against such schools on that basis. The DPI looks forward to working with US DOJ, within the scope of the DPI's authority, to educate and assist Choice schools on ADA compliance.

Sincerely,

Janet Jenkins
Chief Legal Counsel
Wisconsin Department of Public Instruction

Cc: State Superintendent Tony Evers
Wisconsin Department of Justice