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Private in Name Only: A Statutory and Constitutional Analysis of Milwaukee's Private School Voucher Program

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I. Introduction

In 1990 the Wisconsin Legislature enacted the Milwaukee Parental Choice Program ("MPCP").[1] The first publicly funded voucher program of its type in the United States,[2] the MPCP permitted up to one percent (1%) or approximately 1000 of the enrolled children in Milwaukee Public

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1. 1989 WISCONSIN ACT 336, § 228 (MAY 11, 1990). The current version of the law is codified at: WIS. STAT. §119.23 (2014).

2. *School Vouchers, History*, National Conference of State Legislatures, http://www.ncsl.org/research/education/school-choice-vouchers.aspx (last visited Feb. 10, 2015).

Schools ("MPS") to attend private non-sectarian schools within the city's limits if their family's income was no more than 175% of the federal poverty level.[3] Participating schools were limited to enrolling no more than 49% of their overall student population by means of the voucher, [4] which provided approximately $2500 per student.[5]

Not surprisingly, the program was extremely controversial and was soon challenged in state court. When the Wisconsin Supreme Court heard *Davis v. Grover* [6] in 1992, seven schools and 341 children participated in the MPCP.[7] The court entertained three allegations: (1) the law was invalid because the procedures used to enact it violated the state's constitutional prohibition against "private" or "local" bills; (2) the law violated the state constitution's education clause; and (3) the law violated the state's public purpose doctrine.[8] The court, splitting 4–3, upheld the program on all three counts.[9] The majority's reasoning repeatedly referenced the "experimental" nature of the program and the limits placed by the legislature on participation in support of the conclusion reached.[10]

However, the "experimental" program analyzed in 1992 differs dramatically from that in operation now. The MPCP has been revised several times, each time expanding the scope of the program, both in terms of the schools and students eligible to participate.[11] Both religious and non-

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3. Davis v. Grover, 480 N.W.2d 460, 463 (Wis. 1992).

4. *Id.* at 464.

5. *Id.* at 476 n.23.

6. 480 N.W.2d 460 (Wis. 1992). As will be discussed further below, the program was later challenged and upheld on Establishment of Religion Clause grounds after the program was expanded to permit private religious schools to participate. *See infra* Part III.

7. WISCONSIN LEGISLATIVE AUDIT BUREAU, MILWAUKEE PARENTAL CHOICE PROGRAM: AN EVALUATION 11 (Feb., 2000), *available at* http://legis.wisconsin.gov/lab/reports/00-2full.pdf.

8. *Davis*, 480 N.W.2d at 462–63.

9. *Id.* at 477.

10. *Id.* at 474.

11. *See infra* Part II. The Wisconsin legislature has also created 2 additional voucher programs. First, the Racine Parental Choice Program (RPCP) for Racine, Wisconsin (Act 32 (Wis. 2011)), began in the 2011-2012 school year. Data for 2014-2015 indicate that 15 private schools and 1740 students participated in the program (WIS. DEP'T OF PUB. INSTRUCTION, RPCP FACTS AND FIGURES FOR 2014-2015 (2014), *available* at http://sms.dpi.wi.gov/choice_facts_statistics). Next was a statewide voucher program (Act 20 (Wis. 2013)). The statewide program (in locations other than Milwaukee and Racine) is limited to 1000 students in the 2014-2015 school year, and no more than 1% of any single school district's membership thereafter (WIS. STAT. § 118.60(2)(be)). Data released by the Wisconsin Department of Public Instruction indicate that 1013 students (997.5 full time equivalent students) and 31 private schools participated in the program this year (WIS. DEP'T

religious schools may now register as MPCP participating schools.[12] There are no longer limits on the percentage of students a private school may enroll through the program[13] and in fact the average MPCP school enrolls more than 80% of its students through vouchers.[14] There are no longer limits on the total number of students from Milwaukee who may participate.[15] The schools eligible to participate no longer must be physically located within the city of Milwaukee, but may be located anywhere in the state.[16] Eligibility for low-income families has been expanded from 175% to 300% of the federal poverty level,[17] an amount greater than the median household income for the state.[18] As would be anticipated and as will be described more fully in sections to follow, participation in the program has grown steadily and as of November 2014 includes 113 participating private schools that enroll a total of 26,930 students and costs the state approximately $191,000,000.[19]

The "experiment" has also yielded a variety of research reports throughout its history.[20] A recent report suggests that children enrolled in

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OF PUB. INSTRUCTION, STATEWIDE VOUCHER ENROLLMENT COUNTS (OCTOBER 23, 2014), *available* at http://news.dpi.wi.gov/sites/default/files/imce/eis/pdf/dpinr2014_110.pdf). Both programs are now codified at WIS. STAT. § 118.60.

12. WIS. STAT. § 119.23(2)(a)(1)(b).

13. Limitations originally found in WIS. STAT. § 119.23(2)(b)(2) (1990) and repealed by 1995 Wis. Act 27, §4003 (July 28, 1995).

14. Letter from Tony Evers, Wis. State Superintendent of Pub. Instruction to the Members of the Joint Comm. on Fin., at 2 (May 23, 2011), *available at* http://issuu.com/sparty1216/docs/dpi_letter_to_jcf5.23.11.

15. 2011 Wis. Act. 32, § 2539 (June 30, 2011).

16. WIS. STAT. § 119.23(2)(a).

17. WIS. STAT. § 119.23(2)(a)(1). Therefore, to be eligible for participation in the MPCP for 2014-15, the family income must be no greater than $34,953 for a family of 1, $47,181 for a family of 2, $59,409 for a family of 3, and $71,637 for family of 4 (For each additional member add $12,228). WIS. DEP'T OF PUB. INSTRUCTION, 2014-15 SCHOOL YEAR, THE MILWAUKEE PARENTAL CHOICE PROGRAM, INFORMATION FOR PARENTS (2014), *available at* http://sms.dpi.wi.gov/files/sms/pdf/2014-15_mpcp_brochure.pdf.

18. United States Census Bureau, State & County Quickfacts: Wisconsin (2014), *available at* http://quickfacts.census.gov/qfd/states/55000.html (reporting that the median household income for Wisconsin is $52,627).

19. WISCONSIN DEP'T OF PUBLIC INSTRUCTION, *MPCP Facts and Figures for 2014-15* (November, 2014) *available at* http://sms.dpi.wi.gov/choice_facts_statistics [hereinafter MPCP Facts and Figures for 2014-15].

20. *See e.g.,* John F. Witte, *The Milwaukee Voucher Experiment*, 20 EDUC. EVALUATION & POL'Y ANALYSIS 229 (December 21, 1998); JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM (2001); Research Brief, 100 PUBL. POLICY FORUM 1, (Feb. 2012). For official reports completed by the Wisconsin Legislative Audit Bureau, see: An Evaluation of the Milwaukee Parental

MPCP schools do no better, and in some cases worse, than similarly situated MPS students.[21] These results are particularly interesting since MPCP schools are not required to serve children with special needs (e.g. children with disabilities or children learning English) in the same manner as MPS schools.[22] In fact, less than 2% of the children enrolled in MPCP schools have identifiable disabilities, in contrast to nearly 20% of MPS students identified with disabilities.[23]

That difference in the proportion of children with disabilities served in the MPCP spawned the program's most recent legal challenge. In June of 2011, the American Civil Liberties Union (ACLU) and Disability Rights Wisconsin (DRW) filed a complaint with the U.S. Department of Justice (DOJ) alleging that the MPCP discriminates against children with disabilities.[24] The complaint claimed that the state violates the Americans with Disabilities Act (ADA)[25] and Section 504 of the Rehabilitation Act (Section 504)[26] by implementing a program that is not accessible to all children, resulting in the effective segregation of children with disabilities

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Choice Program, Report 00-2 (Feb. 2000); Test Score Data for Pupils in the Milwaukee Parental Choice Program (Sept. 2008); Test Score Data for Pupils in the Milwaukee Parental Choice Program, Report 2 of 5 (Aug. 2009); Test Score Data for Pupils in the Milwaukee Parental Choice Program, Report 3 of 5 (Aug. 2010); Test Score Data for Pupils in the Milwaukee Parental Choice Program, Report 4 of 5 (Aug. 2011); Test Score Data for Pupils in the Milwaukee Parental Choice Program, Report 5 of 5 (Aug. 2012). For seven research reports conducted by the University of Arkansas, School Choice Demonstration Project, see http://www.uaedreform.org/category/department-of-education-reform/scdp/milwaukee-evaluation/mpcp-final-reports/.

21. WIS. DEP'T OF PUB. INSTRUCTION, OVERALL MPS RESULTS HIGHER THAN CHOICE SCHOOLS ON STATEWIDE EXAMS 2 (2011), *available at* https://millermps.files.wordpress.com/2011/03/dpi-comparison-mps-voucher-wkce-testing.pdf.

22. *See* WIS. DEP'T OF PUB. INSTRUCTION, MILWAUKEE PARENTAL CHOICE PROGRAM & RACINE PARENTAL CHOICE PROGRAM FREQUENTLY ASKED QUESTIONS – 2015-16 SCHOOL YEAR, 4 (2015), *available at* http://sms.dpi.wi.gov/sites/default/files/imce/sms/Choice/MPCP and RPCP FAQ 2015-16.pdf.

23. WIS. DEP'T OF PUB. INSTRUCTION, *supra* note 21, at 2.

24. Complaint at 3, ACLU v. Wisconsin, U.S. Dep't of Justice (June 7, 2011). *available at* https://www.aclu.org/files/assets/complaint_to_doj_re_milwaukee_voucher_program_final.pdf.

25. 42 U.S.C. § 12101 *et seq*. The Americans with Disabilities Act prohibits discrimination on the basis of disability. It includes 5 titles. Title I: Employment Discrimination; Title II: Discrimination in Public Services; Title III: Discrimination in Public Accommodations; Title IV: Discrimination in Telecommunications; Title V: Miscellaneous Provisions. Title II applies to programs created and operated by public entities: 42 U.S.C. §§12131-12134; 28 C.F.R. 35 *et seq*.

26. 29 U.S.C. §794; 34 C.F.R. 104 *et seq*. Section 504 prohibits discrimination on the basis of disability by any recipient of federal financial assistance.

in MPS.[27] Moreover, they argued that in violation of the ADA and Section 504, MPCP schools actively discourage from enrolling and routinely turn away children with disabilities who could be accommodated in their programs.[28] Characterizing MPCP schools as "private in name only," the organizations called on the Department of Justice to investigate the matter and ensure MPCP satisfies all non-discrimination requirements.[29]

The expansion of the MPCP and the charges made regarding children with disabilities focus attention on the public/private distinction typically used to describe schools.[30] The issues raised in the complaint to the Department of Justice in combination with the expansion of the program since its "experimental" start also suggest the need to re-examine the constitutional analysis from *Davis v. Grover* with regard to the Education Clause and Public Purpose Doctrine.[31] Do the changes enacted by the state legislature that result in a large and growing voucher program continue to satisfy state constitutional mandates? If the program results in concentrations of children with disabilities in public schools, does it satisfy the non-discriminatory requirements of both state and federal law? These questions have particular import not only for the MPCP but also for the two other voucher programs created by the Wisconsin legislature, the Racine Parental Choice Program and the Wisconsin Parental Choice Program.[32] Although this analysis concentrates on the MPCP, the issues examined have equal application to Wisconsin's other voucher programs.[33]

Accordingly, the purpose of this study is to review the history of the Milwaukee Parental Choice Program and to re-examine the program with respect to three legal issues: (1) does the MPCP operate free from discrimination on the basis of disability?; (2) does the MPCP comport with the state constitution's education clause that requires the legislature to provide for district schools that are as nearly uniform as practicable?; and (3) does the MPCP comport with the public purpose doctrine? This analysis is divided into five parts. Part II reviews the statutory history of the MPCP. Part III describes current participation in the MPCP. In Part IV previous

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27. Complaint, ACLU v. Wisconsin, U.S. Dep't of Justice, *supra* note 24, at 3.

28. *Id.* at 4.

29. *Id.* at 27.

30. *See id.*

31. *Davis*, 480 N.W.2d at 477.

32. *Supra*, note 11.

33. The analysis may also have some application in other states with voucher programs, including Indiana (IC 20-51-1 and IC 20-51-4), and Louisiana (La. Rev. Stat. §§ 17:4011-4025), and Ohio (Ohio Rev. Code §§ 3313.974-979).

judicial rulings and the pending ACLU/DRW allegations about the program are reviewed. Part V analyzes the three legal issues of concern and Part VI provides a concluding discussion.

II. A Brief Statutory History of the MPCP

As noted above, the MPCP began in 1990 and was signed into law by then Governor Tommy Thompson.[34] The law has been amended twenty times, with the most recent changes made in 2013.[35] The law has also grown both in participation and scope. The original law comprised only 9 sections covering a little more than 1 page. The statute now numbers 15 provisions[36] and fills seven pages of Chapter 119. While the changes have expanded the program substantially, the Wisconsin legislature has also enacted increasing requirements for private schools' participation. This section reviews the evolution of the current statute with respect to 5 issues: (1) student eligibility; (2) private school participation; (3) authority of the State Superintendent and Department of Public Instruction (DPI); (4) program evaluation; and (5) funding.

Table 1 summarizes the changes made to provisions related to student eligibility. As illustrated, the MPCP initially defined low-income students as those whose families made no more than 1.75 times the federal poverty level.[37] In 2005, that provision was amended to permit voucher students whose family income increased after admittance to remain in the private school, provided the family's income did not exceed 2.2 times the poverty level.[38] That limit on eligibility increased again in 2011,[39] now defining any student as eligible if family income totals no more than 3.0 times the poverty level and permits an admitted student to remain in the program if

34. 1989 WISCONSIN ACT 336, § 228 (MAY 11, 1990).

35. The law was originally enacted by the legislature in 1989 Wisconsin Act 336. Amendments were adopted through: (1) 1993 Wisconsin Act 16, (2) 1995 Wisconsin Act 27; (3) 1995 Wisconsin Act 216; (4) 1997 Wisconsin Act 27; (5) 1997 Wisconsin Act 113; (6) 1999 Wisconsin Act 9; (7) 2001 Wisconsin Act 16; (8) 2001 Wisconsin Act 105; (9) 2003 Wisconsin Act 33; (10) 2003 Wisconsin Act 155; (11) 2005 Wisconsin Act 25; (12) 2005 Wisconsin Act 125; (13) 2009 Wisconsin Act 28; (14) 2009 Wisconsin Act 96; (15) 2011 Wisconsin Act 32; (16) 2011 Wisconsin Act 47; (17) 2013 Wisconsin Act 8; (18) 2013 Wisconsin Act 20; (19) 2013 Wisconsin Act 237; (20) 2013 Wisconsin Act 256.

36. WIS. STAT. §§ 119.23(1), (2), (3), (3m), (4), (4m), (4r), (5), (6), (6m), (7), (8), (9), (10), (11).

37. WIS. STAT. § 119.23(2)(a)(1) (1990).

38. 2005 Wis. Act 25, § 1895h (July 26, 2005).

39. 2011 Wis. Act 32, § 2536c (June 30, 2011).

family income increases thereafter.[40] Similarly, the cap on the total number of vouchers available grew from 1% to 1.5% in 1993,[41] to 15% in 1996,[42] to 22,500 students in 2006.[43] Act 32 removed the cap entirely for the program beginning with the 2011-2012 school year.[44] The law also initially set limits on students' previous school experiences.[45] Over time, those constraints, too, have all been removed. As such, any child residing in Milwaukee is eligible for a voucher, whether or not they have ever attended an MPS school.[46] The practical effect of the provisions for enrollment eligibility is that the vouchers have always funded three types of students –those exiting MPS schools, those who are attending any school for the first time, and those already enrolled in private schools who merely shifted from private to public funding.[47]

40. Wis. Stat. § 119.23(2)(a)(1)(a).

41. 1993 Wis. Act 16, § 2300 (Aug. 11, 1993).

42. 1995 Wis. Act 216, § 54 (April 29, 1996).

43. 2005 Wis. Act 125, § 7 (March 25, 2006).

44. 2011 Wis. Act 32 § 2539, repealing 119.23(2)(b) which read: "No more than 22,500 pupils . . . may attend private schools under this section."

45. WIS. STAT. § 119.23(2)(a)(2) (1990) ("In the previous school year the pupil was enrolled in the school district operating under this chapter, was attending a private school under this section or was not enrolled in school.").

46. WIS. STAT. § 119.23(2)(a) (2013).

47. This trend was replicated with Wisconsin's newest voucher program. Of the 500 seats available in the statewide program the first year of its operation in 2013-14, 72.9 % students previously attended a private school, 21.2% previously attended a public school; 3.3% were entering school for the first time, 2.4% had been previously homeschooled, and 1 student had attended school in another state in the previous school year. WIS. DEP'T OF PUB. INSTRUCTION, WPCP FACTS AND FIGURES FOR 2013-2014 (November 2013) *available at* http://sms.dpi.wi.gov/files/sms/pdf/wpcp_fact-and-figures_13-14_2013_10.pdf.

Table 1: Changes to MPCP Provisions Concerning Student Eligibility

Original Requirement	**Changes and Year of Change**			
Family income does not exceed 1.75 times the federal poverty level	If family income increases after admittance, child & siblings remain eligible if income is below 2.2 times the federal poverty level (2005)	Raised to 3.0 times the federal poverty level and permits remaining in the program even if income increases (2011).		
Resides in the city and previous year and attended MPS, the participating private school, or was not enrolled	Added children enrolled in grades K-3 in any private school in the city regardless of MPCP participation (1995)	Repealed (result is that any child residing in Milwaukee may participate) (2005)		
Total cap set at 1% of MPS enrollment	Increased to 1.5% (1993).	Increased to 7% for 1995-96 and 15% for 1996-97 (1995).	Set cap at 22,500 pupils (2006).	Eliminated cap (2011).

An examination of MPCP provisions governing private school participation reveals two important trends. First, the number of schools permitted to participate and the scope of that participation has increased. Schools initially had to be both non-sectarian and located within Milwaukee city limits.[48] The legislature removed the first limitation in 1995 when it expanded to include religious schools[49] and the second in 2011 when it permitted any private school to participate, opening the program to suburban private schools.[50] Another major expansion involves limitations on the total number of voucher students any school could enroll. The program initially required that each participating school be more privately, than publicly funded by limiting total enrollment to 49% of the student population.[51] That percentage increased to 65% in 1993[52] and was removed entirely with the MPCP's expansion to include religious schools in 1995.[53] Finally, beginning with the 2011-2012 school year, participating schools were granted the authority to charge reasonable fees (e.g., book fees, lab

48. WIS. STAT. § 119.23(2)(a) (1990).
49. 1995 Wis. Act 27, § 4002 (July 28, 1995).
50. 2011 Wis. Act 32, § 2536 (June 30, 2011).
51. WIS. STAT. § 119.23(2)(b)(2) (1990).
52. 1993 Wis. Act 16, § 2300 (Aug. 11, 1993).
53. 1995 Wis. Act 27, § 4003 (July 28, 1995).

fees) and tuition over and above the voucher amount.[54] The latter authority only applies to high schools and only if the family makes more than 2.2 times the federal poverty limit.[55]

A second trend involves the growth in the number of conditions schools must agree to in order to participate in the program. Initially, the schools had to commit to very little.[56] They could not discriminate on the basis of race,[57] had to meet health and safety codes that apply to public schools,[58] and they had to meet their choice of one of 4 standards, which included:

> 1) At 70% of the pupils in the program advance one grade level each year.
> 2) The private school's average attendance rate for the pupils in the program at least 90%.
> 3) At least 80% of the pupils in the program demonstrate significant academic progress.
> 4) At least 70% of the families of the pupils in the program meet parent involvement criteria established by the private school.[59]

These requirements remain in the current law, but the legislature has increased conditions of participation several times in the twenty years of program operation. The first new regulation was added in 1995 and required schools to submit to financial audits.[60] Then, following some highly publicized problems with some participating schools,[61] the legislature created several more conditions of participation in 2004 and granted DPI some direct regulatory authority it had previously lacked. New provisions added in 2004:

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54. WIS. STAT. § 119.23(3m)(2014).

55. *Id*.

56. As discussed *infra* at note 121 and accompanying text, the Wisconsin DPI attempted to regulate the program more fully, but those regulations were struck down in Davis v. Grover, 480 N.W.2d 460 (Wis. 1992).

57. WIS. STAT. § 119.23(2)(a)(4).

58. WIS. STAT. § 119.23(2)(a)(5).

59. WIS. STAT. § 119.23(7)(a).

60. 1995 Wis. Act 27, § 4007r (July 29, 1995).

61. *See* e.g., *Voucher School Owes State $330K; Teachers Gripe Over Pay*, CAPITAL TIMES (Dec. 12, 2003), at 12C; *State Has Few Options with School*, CAPITAL TIMES (Sept. 15, 2003), at 5A; Sarah Carr, *2 Schools of Thought Clash on Voucher Plan Controls*, MILWAUKEE J. SENTINEL (Oct. 12, 2003), at A1; Sarah Carr and Nahal Toosi, *Voucher School May Be in Financial Trouble*, MILWAUKEE J. SENTINEL (Dec. 12, 2003), at B1.

- Required participating private schools to provide a certificate of occupancy in advance or participation.[62]
- Gave the State Superintendent the authority to immediately terminate participation of school if there was imminent harm to health and safety of children.[63]
- Required financial audits to meet standards.[64]
- Required participating private schools to provide proof of financial viability,[65] sound fiscal practices,[66] and that the school's administrator has had fiscal management training.[67]

The legislature increased regulatory control again in 2005 and 2006, adding provisions more directly related to instructional quality, requiring that:

- Teachers be high school graduates or hold high school equivalence diplomas.[68]
- Schools be accredited by 1 of 5 private school organizations.[69]
- Schools administer nationally normed tests in reading, math, & science in 4th, 8th and 10th grades and submit results to the School Choice Demonstration Project at the University of Arkansas.[70] The Legislative Audit

62. 2003 Wis. Act 155 § 4 (March 31, 2004).

63. 2003 Wis. Act 155 § 5 (March 31, 2004).

64. 2003 Wis. Act 155 § 1 (March 31, 2004).

65. 2003 Wis. Act 155 § 4 (March 31, 2004).

66. 2003 Wis. Act 155 § 2 (March 31, 2004).

67. 2003 Wis. Act 155 § 4 (March 31, 2004).

68. 2005 Wis. Act 25 § 1895t (July 26, 2005).

69. 2005 Wis. Act 125 § 6 (March 25, 2006). Those organizations were: Institute for the Transformation of Learning at Marquette University, the Wisconsin North Central Association, the Wisconsin Religious and Independent Schools Accreditation, the Independent Schools Association of the Central States, and the Archdiocese of Milwaukee. In 2013, the law was amended to omit the Institute for the Transformation of Learning at Marquette University, substitute "the diocese or archdiocese within which the private school is located" for the Archdiocese of Milwaukee, and add the Wisconsin Evangelical Lutheran Synod School Accreditation, the National Lutheran School Accreditation, and the Wisconsin Association of Christian Schools to the list of acceptable accrediting entities. 2013 Wis. Act 20, § 1872m, *codified* at WIS. STAT. § 119.23(7)(ad).

70. 2005 Wis. Act 125 § 8 (March 25, 2006). The reports by the School Choice Demonstration project may be found at: http://www.uaedreform.org/category/department-of-education-reform/scdp/milwaukee-evaluation/mpcp-final-reports/

> Bureau was directed to review that analysis and report to the legislature.[71]

The trend to hold schools further accountable for instructional quality continued with new provisions in 2009. The most significant of these provisions required MPCP schools to adopt the academic standards in mathematics, science, reading, writing, geography and history[72] and participate in the state achievement testing for the first time in program history.[73] Provisions also now require teachers and administrators to hold at least a bachelor's degree[74] and teacher's aides to be high school graduates.[75] The most recent changes require participating schools to participate in the state's student information system.[76] Table A1 in Appendix A summarizes these changes to private school participation and their relationship to the original provisions.

Not surprisingly, as the legislature set more conditions for school participation, it likewise increased the authority of the State Superintendent and the Department of Public Instruction[77] to take action if the school failed

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71. 2005 Wis. Act 125 § 8 (March 25, 2006). For the official reports completed by the Wisconsin Legislative Audit Bureau, see: An Evaluation of the Milwaukee Parental Choice Program, Report 00-2 (Feb. 2000); Test Score Data for Pupils in the Milwaukee Parental Choice Program (Sept. 2008); Test Score Data for Pupils in the Milwaukee Parental Choice Program, Report 2 of 5 (Aug. 2009); Test Score Data for Pupils in the Milwaukee Parental Choice Program, Report 3 of 5 (August 2010); Test Score Data for Pupils in the Milwaukee Parental Choice Program, Report 4 of 5 (Aug. 2011); Test Score Data for Pupils in the Milwaukee Parental Choice Program, Report 5 of 5 (Aug. 2012).

72. 2009 Wis. Act 28 § 2289 (July 1, 2009). The provision incorporates WIS. STAT. § 118.30(1g)(a)(3) which reads: "The governing body of each private school participating in the program under s. 119.23 shall adopt pupil academic standards in mathematics, science, reading and writing, geography, and history. The governing body of the private school may adopt the pupil academic standards issued by the governor as executive order no. 326, dated January 13, 1998."

73. 2009 Wis. Act 28 § 2290 (July 1, 2009); amended slightly by 2013 Wis. Act 20 § 1874 (June 30, 2013). The provision, now codified at WIS. STAT. § 119.23(7)(e), incorporates WIS. STAT. § 118.30 (1s) which requires MPCP schools to administer tests adopted or approved by the state superintendent in 4th, 8th, 9th, and 10th grades.

74. 2009 Wis. Act 28 § 2278d (July 1, 2009).

75. 2009 Wis. Act 28 § 2289.

76. 2013 Wis. Act 256 §7 (April 9, 2014).

77. Wisconsin's State Superintendent of Public Instruction is a constitutional officer and elected in a statewide election for a 4-year term (Wis. Const. Article X, Section 1). This structure led to a situation in both *Davis v. Grover* (*supra* note 6) and *Jackson v. Benson* (*infra* note 143 and accompanying text) where the state superintendent and governor stood on different sides of the disputes about the program. For a discussion of this political division, *see e.g.* Julie Underwood, *Choice in Education: The Wisconsin Experience*, 68 EDUC. L. REP. 229, 235 (1991).

to meet program requirements. While the statute does not grant the authority to bar a school for poor academic performance generally[78] or to assert oversight in a manner consistent with the authority over public schools, the revisions have strengthened state oversight as shown in Table 2. The agency can withhold funds from schools under some conditions[79] and can require a number of assurances regarding the facility and curriculum in order to approve participation.[80] While the school has to provide the information to the agency, the DPI does not have the authority to approve that curriculum or direct a participating school to add to or omit anything from its course of study.[81] The DPI may only take immediate action terminating a school's authorization to participate in the program if it is determined "that conditions at the private school present an imminent threat to the health and safety of pupils."[82]

78. See, for example, a recent report of an MPCP school that closed precipitously in December 2013, leaving 66 students without an academic home. Newspaper accounts report "John Johnson, DPI spokesman, said Wednesday that the department's authority over voucher schools, which are all private and predominantly religious, is limited. There's nothing in state law that allows the DPI to take action against a private school because of low academic performance or because of a school leader's personal finances, Johnson said." Erin Richards, *Leaders of Closed Milwaukee Voucher School are now in Florida*, MILWAUKEE J. SENTINEL (Jan. 15, 2014). The statute does allow the superintendent to deny participation to a school that fails to achieve or has lost its accreditation for the school year following the loss (WIS. STAT. §119.23(10)(ar)).

79. WIS. STAT. § 119.23(10)(d). Those conditions are: (1) Misrepresented required information; (2) Failed to provide the notice or pay the fee required; (3) Failed to refund to the state any overpayment; (4) Failed to meet at least one of the required academic standards; (5) Failed to provide the information to parents; (6) Failed to adopt appropriate academic standards or excuse a student from religious activities at parental request; (7) Failed to keep student records, provide the same to parents, or issue a diploma or certificate for graduating students; (8) hired a person disqualified by the state superintendent for improper previous conduct.

80. WIS. STAT. § 119.23(6m)(b).

81. *Id*.

82. 2003 Wis. Act 155 § 5 (Mar. 31, 2004) (codified at WIS. STAT. § 119.23(10)(b)).

Table 2: Changes to MPCP Provisions Concerning DPI Responsibilities and Authority

Original requirement	**Changes and year of change**	
Provide information to parents about program	Establish a public information campaign (1993)	Information campaign requirement repealed, but original provision retained (1995)
State Superintendent monitor performance in relation to 4 standards	Repealed and replaced by authority to bar participation or withhold funds if application to participate misrepresented information, failed to provide requisite assurances by statutory date, or failed to meet 1 of 4 standards. (2004)	May withhold funds for non-compliance with student data requirements. (2014)
	Revoke participation immediately if imminent threat to students' health or safety. (2004)	
	Revoke authorization to participate at end of school year if school fails to maintain accreditation. (2013).	

Provisions requiring program evaluation tell an interesting story. The original law included provisions for programmatic evaluation, including a comparison between the performance of students in MPCP schools and those similarly situated in MPS schools.[83] Those original evaluative components were removed when the program expanded to include religious schools.[84] Given the likelihood of a constitutional challenge under the Establishment of Religion Clause of the First Amendment, it appears that

83. 1989 Act 336 § 228, (May 11, 1990) (codified at WIS. STAT. § 119.23(5)(d)(1990)). The provision directed the state superintendent to "Annually submit to the chief clerk of each house of the legislature for distribution to the appropriate standing committees under s. 13.172(3), and to each private school participating in the program under this section, a report comparing the academic achievement, daily attendance record, percentage of dropouts, percentage of pupils suspended and expelled and parental involvement activities of pupils attending a private school under this section and pupils enrolled in the school district operating under this chapter."

84. 1995 Wis. Act 27, § 4007m (July 28, 1995).

the legislature removed provisions that could make the program vulnerable to claims of "excessive entanglement" between government and religion under an application of the analysis from *Lemon v. Kurtzman*.[85] After the program survived that scrutiny by the Wisconsin Supreme Court in 1998[86] and the U.S. Supreme Court likewise upheld a similar Cleveland program in 2002,[87] the legislature again instituted an evaluation component in 2006.[88] The provision called for testing and data collection to be analyzed by the School Choice Demonstration Project at the University of Arkansas and audited by the Legislative Audit Bureau, with comparative reports due annually from 2007-2011.[89] Now that those evaluations are complete, the law has no active evaluation provision.[90]

Table 3: Changes to MPCP Provisions Concerning Evaluation of the Program

Original requirement	**Changes and year of change**	
State superintendent: Submit an annual report comparing MPCP schools to MPS schools on academic achievement, daily attendance, dropout rate, suspension and expulsion data, & parental involvement	Repealed (1995)	
State superintendent may conduct financial or performance evaluations	Repealed (1995)	
Legislative audit bureau perform an audit by 1/15/95.	Perform audit by 1/15/2000 (1995)	Repealed since audits completed (2001)
	Legislative audit bureau must review results of School Choice Demonstration	Repealed evaluation and legislative audit provision (2013)

85. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). The "Lemon Test" requires that any state action (1) serve a legitimate secular purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) avoids excessive entanglement between government and religion.

86. Jackson v. Benson, N.W.2d 602 (Wis. 1998).

87. Zelman v. Simmons Harris, 536 U.S. 739 (2002).

88. 2005 Wis. Act 125, § 8 (March 25, 2006).

89. *Id.*

90. *See* 2013 Wis. Act 8, § 38 (March 28, 2013) (repealing the requirement that data be provided for evaluation).

	Project annually from 2007-2011 (2006)	

Finally, the funding of the vouchers has changed over time. Initially the MPCP vouchers were funded with the tax dollars that would have gone to MPS instead going to the private participating school.[91] Since then a complex formula has evolved that shares costs for the program between MPS and general state revenues. A thorough discussion of the funding mechanism is beyond the scope of this paper, but suffice it to say here that a maximum voucher amount ($7,210 for elementary students and $7,856 for 2014-2015) is set by statute,[92] and the voucher must not exceed actual educational costs spent by a school.[93] Program costs are currently shared statewide and "[b]eginning in the 2013-14 school year, the previous 38.4% aid reduction to MPS will be reduced by 3.2 percentage points per year until the program is fully funded by state general purpose revenue. In the 2014-15 school year the MPCP is funded 32% from a reduction in state general aid to MPS ($61,120,000 in 2014-15) and 68% from state general purpose revenue ($129,880,000 in 2014-15)."[94] Table 4 chronicles those changes over time.

Two other funding changes should also be noted. First, in 1999, the program expanded to permit vouchers for summer programming.[95] Secondly, the manner in which DPI pays participating schools has come full circle. Originally, each calendar quarter DPI cut a check for each participating school in an amount equal to the number of participating students multiplied by 25% of the voucher amount.[96] When the program expanded to permit religious schools, the statute changed this practice to direct the funds to the parents by means of a restrictively endorsed check.[97] So rather than one check per participating school, the state provided one check per child, per quarter. The checks were mailed to the schools, but

91. WIS. STAT. § 119.23 (5)(a)(1990).

92. WIS. STAT. § 119.23(4)(bg). Beginning in 2015-16, the voucher amount will be determined by a formula.

93. WIS. STAT. § 119.23(4)(bg)(3). Participating schools are also permitted to recoup debt service costs associated with educational programming.

94. MPCP Facts and Figures for 2014-15, *supra* note 19.

95. 1999 Wis. Act 9, § 2109q (Oct. 29, 1999).

96. 1989 Act 336, § 228, (May 11, 1990) (codified at Wis. Stat. § 119.23(4)(1990)).

97. 1995 Wis. Act 27, § 4006m (July 29, 1995).

made out to the parents and parents had to endorse them over to the schools.[98] This change was made in order to avoid invalidation under the Establishment Clause as a direct payment to religious schools.[99] The 2011 revisions to the law returned the procedure to the original process.[100]

Table 4: Changes to MPCP Provisions Concerning Program Funding

Original Requirement	**Changes and Year of Change**			
Voucher equals equivalent per pupil state aid	Voucher equals equivalent per pupil state aid or private school operating budget and debt service per pupil whichever is less (1995)	Set maximum voucher amount to $6,442 (2009).	Adds section to specify what may be considered to calculate school's operating budget and debt service (2011).	Set maximum voucher to $7210 (elementary) & $7856 (high school) for the 2014-15 academic year) and establishes a formula for voucher increases thereafter (2013).
MPS state aid reduced by the number of participating students.	Requirement that MPS pay for 45% of voucher with the state providing the remainder from general revenue funds (2001)	Changed formula for determining proportion paid by MPS and proportion paid by general revenue funds (2009).	Changed formula to eventually shift to being fully funded under state's general purpose revenues (2013).	
Make quarterly payments to schools based on enrollment	Payments made directly to parents with restrictively endorsed checks (1 per child)(1995)	Make quarterly payments directly to the school on behalf of the parent; single payment for each school (2011).		
	Added summer school voucher (1999)			

98. *Id.*

99. Jackson v. Benson, 578 N.W.2d 602, 618 (Wis. 1998).

100. 2011 Wis. Act 32, §§ 2541m, 2542, 2542c (July 1, 2011) (codified at WIS. STAT. § 119.23 (4)(c)).

III. Current MPCP Participation

As would be anticipated given the statutory expansions reviewed in the previous section, participation has increased steadily since the program's inception. The first year of the MPCP saw 7 participating schools enrolling 300 students.[101] After *Davis* was decided in 1992, participation increased to 11 schools and a total of 594 students.[102] The school year (1998-99) after the Supreme Court's ruling upholding the program on Establishment Clause grounds[103] saw the most dramatic increase, from 23 to 83 schools and from 1487 to 5761 students.[104] During the 2010-2011 school year,[105] 20,996 students attended 102 participating private schools.[106] Not surprisingly, with the cap removed, the 2011-2012 school year saw the largest increase in participation since 2006.[107] As mentioned earlier, the MPCP now funds nearly 27,000 students who attend 113 private schools.[108] As the Public Policy Forum pointed out, "[i]f MPCP were a Wisconsin public school district, it would be the third largest in the state behind Milwaukee and Madison districts."[109]

MPCP schools vary with regard to the number of voucher students each accepts, but the program has evolved such that the majority of schools rely heavily on the vouchers for operational funding. Analysis of the enrollment data for 2012-2013 reported by the Public Policy Forum,[110] an organization that tracks MPCP participation, documents that on the average participating MPCP schools enroll 82% of their student body by means of a voucher. That percentage increases to 87% if you examine those schools

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101. WISCONSIN LEGISLATIVE FISCAL BUREAU. MILWAUKEE PARENTAL CHOICE PROGRAM, INFORMATIONAL PAPER 28, at 9, (January, 2011).

102. *Id.*

103. Jackson, 578 N.W.2d at 618.

104. WISCONSIN LEGISLATIVE FISCAL BUREAU, *supra* note 101.

105. For 2010-11, the MPCP still had a limitation on the number of students who could participate (22,500), defined eligibility as 175% of the poverty level, and restricted participating schools to those within the city's limits. WIS. STAT. 119.23(2)(b)(2009).

106. Wis. Dep't of Pub. Instruction, *MPCP Facts and Figures for 2010-2011* (November, 2013), *available at* http://sms.dpi.wi.gov/sms_geninfo.

107. Anneliese Dickman & Jeffrey Schmidt, *Research Brief: Significant Growth in School Choice* 100:1 PUBLIC POLICY FORUM 1–12 (February 2012), *available at* http://publicpolicyforum.org/sites/default/files/2012voucherbrief.pdf.

108. MPCP Facts and Figures for 2014-2015, *supra* note 19.

109. Dickman & Schmidt, *supra* note 107, at 3.

110. *See Milwaukee Voucher Schools 2012-2013*, PUBLIC POLICY FORUM (Feb. 2013), *available at* http://publicpolicyforum.org/sites/default/files/2013VoucherPoster.pdf. For a report on the previous year's enrollment, *see* Dickman & Schmidt, *supra* note 107, at 9.

within Milwaukee's city limits[111] and if you omit the only two Milwaukee schools with less than 10% voucher enrollment,[112] the average MPCP enrollment increases to 88.6%.[113] Table 5 presents an analysis of schools' enrollment with respect to the proportion admitted through the MPCP.

Table 5: Analysis of the % of MPCP Students in Participating Schools' Total Student Population[114]

% of MPCP students in total school population	# of MPCP participating private schools	% of total participating schools	# of MPCP participating private schools in city of Milwaukee	% of total participating schools in city of Milwaukee
Schools w/o data to compute	3	2.7%	1	1.0%
0 – 9.9%	8	7.1%	2	2.0%
10 – 19.9%	1	.9%	1	1.0%
20 – 29.9%	2	1.8%	0	0.0%
30 – 39.9%	1	.9%	1	1.0%
40 – 49.9%	4	3.5%	4	3.9%
50 – 59.9%	4	3.5%	4	3.9%
60 – 69.9%	3	2.7%	3	2.9%
70 – 79.9%	6	5.3%	5	4.9%
80 – 89.9%	13	11.5%	13	12.7%
90 – 99.9%	50	44.2%	50	49.0%
100%	18	15.9%	18	17.6%
Total	113	100.0%	102	100.0%

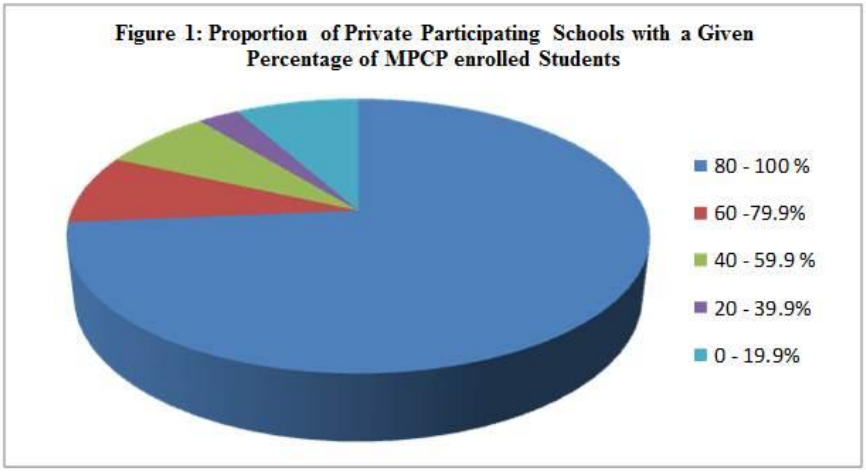
As shown, 50 schools (44.2%) had 90–99.9% MPCP enrollment and 18 schools (15.9%) had 100% MPCP enrollment. Only 16 schools (14.2%) had less than 50% MPCP enrollment. Figure 1 presents the same data, but divides the schools into quintiles depending on enrollment. As this graphic shows, nearly three-fourths of MPCP participating schools (71.7%) had 80% or greater voucher enrollment.

111. *Id.*

112. *Id.* Marquette University High School (4.6%) and Divine Savior Holy Angels High School (8.4%).

113. *See Id.*

114. This table was compiled by analyzing the data reported by Public Policy Forum (*supra* note 110).



This pattern of publicly funded enrollment prompted State Superintendent Tony Evers to remark, "This government subsidy has protected Milwaukee private schools from the market forces that have led to declining private enrollment statewide."[115] After reviewing the data in the letter to the state legislature's Joint Committee on Finance, Evers also posed the following question: "If only one in five students enrolled in a choice school pays tuition, then when do choice schools stop being private schools and become something else?"[116]

Superintendent Evers also reported on another enrollment trend he called "concerning," the relative number of children with disabilities enrolled in the MPCP schools when compared to those of MPS.[117] He reported data that children with disabilities comprised only .7% of MPCP schools enrollments, while children with disabilities were about 19.9% of MPS enrollment.[118] Another more recent DPI document places the proportion of children with disabilities in MPCP schools at a slightly higher level (2%).[119] In addition, the DPI reports that percentage of MPS students with disabilities has steadily increased over the years, even though the number of students with disabilities in the public system has remained

115. Letter from Tony Evers, Wis. State Superintendent of Pub. Instruction to the Members of the Joint Comm. on Fin., *supra* note 14, at 2.

116. *Id*. at 5.

117. *Id*. at 2.

118. *Id*.

119. WIS. DEP'T OF PUB. INSTRUCTION, *supra* note 21.

stable.[120] In other words, MPS has lost "regular" education students to the MPCP, but not "special" education students.

IV. Legal Challenges to the MPCP

The Wisconsin Supreme Court has heard challenges to the MPCP twice. The first challenge, *Davis v. Grover*, began when then State Superintendent Bert Grover promulgated a series of regulations plaintiffs believed exceeded his authority under the original MPCP.[121] School administrator and civil rights groups then intervened to challenge the constitutionality of the program.[122] Interestingly, one area of contention at the trial court level was the MPCP's treatment of children with disabilities. Superintendent Grover had created a rule that would have required MPCP schools to serve children with disabilities in a manner similar to public schools, effectively making what was then the Education for All Handicapped Children's Act[123] applicable to the MPCP schools.[124] Judge Steingass rejected that argument[125] largely deferring to a memo written by

120. Letter from Tony Evers, Wis. State Superintendent of Pub. Instruction to the Members of the Joint Comm. on Fin., *supra* note 14.

121. Davis v. Grover, 480 N.W.2d 460, 464-65 (Wis. 1992).

122. *Id.*

123. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*.; 34 C.F.R. 300 *et seq*. The IDEA provides federal funds for the purpose of funding special education and related services (20 U.S.C. §1400(d)). It is a highly prescriptive law that mandates that states ensure that each eligible child with a disability have available a free appropriate public education (20 U.S.C. §1412(a)). Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability" (20 U.S.C. §1401(29)). Related services "means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children" (20 U.S.C. §1401(26)). For a full explanation of the legal requirements for IDEA, *see e.g.*, DIXIE SNOW HUEFNER AND CYNTHIA M. HERR, NAVIGATING SPECIAL EDUCATION LAW AND POLICY (2012).

124. *See* Julie Underwood, *Choice in Education: The Wisconsin Experience*, 68 EDUC. L. REP. 229, 237 (1991).

125. Davis *v. Grover*, No. 90-CV-25765 (Dane Cty. Cir. Ct. 1990).

Richard D. Komer, Deputy Assistant Secretary for Policy in the Office for Civil Rights of the U.S. Department of Education.[126] Komer concluded that since the participating schools were private, they could only be required to make reasonable accommodations to enroll children with disabilities.[127] Although the case advanced to the appellate court on the other issues, the ruling with respect to children with disabilities was never appealed.[128]

The heart of the complaint in *Davis v. Grover* was its consideration of three constitutional issues: (1) whether the bill had been enacted according to constitutionally required procedures that prohibit the legislature from passing "private" or "local" bills;[129] (2) whether the program violated the uniformity clause of the state constitution's education provision;[130] and (3) whether the law comported with the public purpose doctrine.[131] Judge Steingass found the law constitutional on all three counts.[132] The Court of Appeals reversed, finding that the MPCP was a local bill in contravention of the state constitution.[133]

The Wisconsin Supreme Court disagreed. Justice Callow wrote for a four-person majority.[134] First the court determined that the MPCP, as an educational experiment, had sufficient statewide application that it should not be considered a local or private bill and therefore reversed the appellate court on that issue.[135]

Next the court analyzed the program under the state constitution's education clause. That clause reads as follows:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such

126. Memorandum from Richard D. Komer, Deputy Assistant Sec'y for Policy in the Office for Civil Rights of the U.S. Dep't of Educ. to Ted Sanders, Under Sec'y to the Dep't of Education, (July 27, 1990).

127. *Id.* For a discussion, *see* Julie F. Mead, *Including Students with Disabilities in Parental Choice Programs: The Challenge of Meaningful Choice*, 100 EDUC. L. REP. 463, 476 (1995).

128. *See* Davis *v.* Grover, 464 N.W. 2d 220, 222 (Wis. Ct. App. 1990).

129. WIS. CONST. art. IV, § 18.

130. WIS. CONST. art. X, § 3.

131. *See* State ex rel. Warren v. Rueter, 170 N.W. 2d 790 (1969).

132. Davis, *supra* note 128.

133. *Id*. at 220.

134. Justices Callow, Ceci, Day, and Steinmetz formed the majority. Chief Justice Heffernan, and Justices Abrahamson and Bablitch dissented.

135. Davis v. Grover, 480 N.W.2d 460, 471 (Wis. 1992).

> schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.[136]

The court read this mandate to compel the legislature to create "district schools," but ruled that the private schools participating in the MPCP did not become "district schools" merely because they received public funding. The court reasoned that "[t]he uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin."[137] The MPCP, the court reasoned "merely reflects a legislative desire to do more than that which is constitutionally mandated" and that the legislature's "experimental attempts to improve that foundation in no way denies any student the opportunity to receive the basic education in the public school system."[138]

Similarly, the court held that the MPCP satisfied the public purpose doctrine. That doctrine is not enshrined in Wisconsin's constitution, but the "court has long held that public expenditures may be only for public purposes."[139] Challengers had argued that the state did not have sufficient control over MPCP schools to ensure that the funds adequately served a public purpose. In this instance, the court determined that education was a valid public purpose and that private schools could further that purpose. The court noted that the state already set minimum standards that statutorily defined "private school" in Wisconsin, including requirements that the school:

> (1) be organized to primarily provide private or religious-based education;
> (2) be privately controlled;
> (3) provide at least 875 hours of instruction each school year;
> (4) provide a sequentially progressive curriculum of fundamental instructions in reading, language arts, mathematics, social studies, science, and health;
> (5) not be operated or instituted for the purpose of avoiding or circumventing compulsory school attendance; and

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136. WIS. CONST. art. X § 3.

137. Davis, 480 N.W.2d at 474.

138. *Id.* For a discussion of voucher programs and state constitutional provisions, *see* Preston Green and Peter Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, BYU EDUC. & L.J. 275 (2010).

139. Davis, 480 N.W.2d at 474.

> (6) have pupils return home not less than two months of each year unless the institution is also licensed as a child welfare agency.[140]

The court concluded that those requirements "coupled with parental involvement suffice to ensure the public purpose is met."[141] The court also noted that the statutory requirement for "detailed reports and evaluations" worked to guarantee the program served a public purpose.[142]

Six years later, the Wisconsin Supreme Court would re-examine the MPCP and its relationship to both the Uniformity Clause and public purpose doctrine in *Jackson v. Benson*.[143] *Jackson* is best known for the court's analysis of the Establishment of Religion Clause issues raised by the legislature's removal of the requirement that MPCP schools be non-sectarian.[144] In addition to upholding the law on state[145] and federal religious claims,[146] *Jackson* also considered whether changes enacted to the law placed it out of compliance with the other state constitutional mandates.[147] Opponents had argued that the removal of the cap on the number of students a given school could enroll under the voucher would allow a school to be supported entirely by public funds, thus making it a public, not a private school. The court rejected this argument, finding the proportion of voucher students enrolled in a school irrelevant to determining whether it was a private school. The majority held that "mere appropriation of public monies to a private school does not transform that school into a district school under art. X, § 3" and that "[t]his conclusion is not affected by the amount of public funds a private school receives."[148]

Likewise, the court re-affirmed the program's compliance with the public purpose doctrine.[149] Challengers argued that the removal of the evaluative components of the law so weakened the accountability provisions that the MPCP no longer sufficiently satisfied a public purpose.

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140. *Id*. at 475, citing WIS. STAT. § 118.165 (1992).

141. *Id*.

142. *Id.* at 476.

143. Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998). The court split 4-2 in reaching its decision. Justices Steinmetz, Wilcox, Crooks, and Prosser formed the majority. Chief Justice Abrahamson and Justice Bablitch dissented. Justice Bradley did not participate.

144. *Id.* at 607.

145. *Id.* at 623.

146. *Id.* at 620.

147. *Id*. at 607.

148. *Id.* at 627.

149. *Id.* at 630.

The court rejected this reasoning and listed three ways the program remained accountable to the public: (1) MPCP schools "continue to be subject to the instruction, curriculum, and attendance regulations that govern all private schools"; (2) the statute still required financial audits and a further review by the Legislative Audit Bureau; and (3) "the schools participating in the amended MPCP are also subject to the additional checks inherent in the notion of school choice."[150]

As noted in the introduction, the most recent legal challenge to the MPCP was filed on June 7, 2011, even before the legislature enacted expansions to the program that same year.[151] That challenge renewed concerns that the MPCP does not adequately serve students with disabilities.[152] Complainants alleged that participating private schools actively turn away students with disabilities they could serve with minor accommodations to existing programs[153] in violation of the non-discrimination mandates of both Section 504 of the Rehabilitation Act,[154] and the Americans with Disabilities Act.[155] They asserted that MPCP schools are "recipients" of federal funds and therefore are directly responsible under Section 504 for compliance, rather than as indirect recipients of monies that flow to the state.[156] Moreover, they maintained that "the growth of the voucher program combined with the exclusion of students with disabilities from that program has led to an increasing concentration of students with disabilities in MPS," effectively segregating children with disabilities in MPS schools.[157] Referencing the concerns raised by State Superintendent Evers, they pointed to the difference between the percentage of students with disabilities served in MPCP schools (1.6%) and the MPS schools (19.5%).[158] While the complaint takes aim at private schools for not doing enough to accommodate enrolled children with disabilities,[159] the complaint predominantly focused on the

150. *Id.* at 629–630.

151. 2011 Wis. Act 32 (June 26, 2011).

152. Complaint, ACLU v. Wisconsin, U.S. Dep't of Justice, *supra* note 24.

153. *Id.* at 5.

154. 29 U.S.C. §794; 34 C.F.R. 104 *et seq*.

155. 42 U.S.C. §§12131–12134; 28 C.F.R. 35 *et seq*.

156. Complaint, ACLU v. Wisconsin, U.S. Dep't of Justice, *supra* note 24, at 3.

157. *Id.* at 10.

158. *Id.*

159. Two MPCP schools are named respondents in the complaint: Messmer Preparatory Catholic School and Concordia University School. *Id.* at 1.

state legislature and its development of the program, accusing the state of violating the federal non-discrimination acts by not taking affirmative action to ensure the voucher program operates in a non-discriminatory manner with respect to children with disabilities.[160] They also alleged that the Department of Public Instruction has not provided sufficient oversight to ensure that the MPCP schools comply with their non-discrimination obligations.[161] Once again, the complaint raised the issues of whether MPCP schools are private or public, declaring "[t]he voucher schools ought to be treated like public schools given the nature of their funding from the state [and] [a]s such they ought to accept IDEA-eligible students and provide them with appropriate services, at the same rate as public schools."[162] The complaint requested that the DOJ:

- fully investigate [the] claims [made in the complaint];
- ensure that the voucher program ceases operating in a way the leads to segregation of Milwaukee students with disabilities in MPS;
- ensure that DPI monitors the schools participating in the voucher program to ensure that students with disabilities are given equal access;
- halt the expansion of the voucher program unless and until the segregation and discrimination issues are remedied; and
- grant any other relief it deems just and proper.[163]

The Department of Justice began its investigation by requesting information from the DPI and other respondents.[164] While the private school responses to DOJ requests are not publicly available, the DPI made its responses to the DOJ's inquiries public.[165] Those responses sketched out DPI's position that the MPCP is funded with state funds only and that no federal education dollars flow to the participating schools.[166] DPI acknowledged that some MPCP schools participate in the National School

160. *Id.* at 22–27.

161. *Id.* at 4.

162. *Id.* at 28.

163. *Id.* at 5.

164. Letter from U.S. Dep't of Justice Civil Rights Div. to the Wis. Dep't of Pub. Instruction, Aug. 17, 2011.

165. Responses of State Superintendent Tony Evers and the Wis. Dep't of Pub. Instruction to U.S. Dep't of Justice Civil Rights Div. Letter of August 17, 2011 (Sept. 27, 2011).

166. *Id.*

Lunch Program.[167] The agency then explained that it does not have statutory authority to directly oversee participating schools' admission and treatment of children with disabilities beyond obtaining assurances of non-discrimination.[168] As such, much of the information requested by the DOJ was met with the same response—DPI has no authority and therefore does not have nor collect the requested information.[169]

The DOJ issued its response to the investigation in a letter dated April 9, 2013.[170] While the letter made no findings of fact, it detailed the federal agency's position 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."[171] The letter did not address the complaint's assertion that schools should be bound to additional requirements under Section 504 as direct recipients of federal funds, nor did the letter weigh in on the private/public nature of schools that participate. Rather it focused on the obligations of the state with regard to administering a public program in accordance with Title II of the Americans with Disabilities Act.[172] The DOJ concentrated it analysis on the public nature of the voucher program and the state's obligation under Title II of the ADA[173] to ensure that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be

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167. *Id.*

168. *Id.*

169. The DPI informed the DOJ that it has: (a) No staff person specifically responsible for the participation of children with disabilities in the MPCP; (b) No policies or procedures, letters, emails, or other correspondence that reference MPCP compliance with Section 504 or the ADA; (c) No letters, emails, or other documents or materials sent to MPCP schools regarding access or programming for children with disabilities; (d) No data collected to track application, enrollment, retention, outreach, disenrollment, transfer, and suspension or expulsion of children with disabilities in MPCP schools; (e) No data to indicate the total number of students with disabilities enrolled in each participating school or the disability categories represented; (f) No data tracking students who enroll in the MPCP and subsequently return to MPS or the basis for any withdrawal, either in the aggregate or disaggregated by disability status; (g) No DPI personnel with authority to approve publicity, outreach, or enrollment information produced by schools. (h) No monitoring activities for MPCP schools' compliance with Section 504 and the ADA. Responses of State Superintendent Tony Evers, *supra* note 165.

170. *See* Letter from Anurima Bhargava et al., U.S. Dep't. of Justice, Civil Rights Div., Educ. Opportunities Sec., to Tony Evers, State Superintendent, Wis. Dep't. of Pub. Instruction (Apr. 9, 2013), *available at* https://www.aclu.org/files/assets/04_09_13_letter_to_wisconsin_dpi_0.pdf.

171. *Id.* at 1.

172. *Id.*

173. *Id.* at 2.

denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[174] Specifically, the DOJ concluded that the DPI must:

> (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 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.[175]

The DOJ also directed the state agency to collect accurate data on the participation of children with disabilities, review the accuracy of marketing materials, and ensure that no discrimination occurs.[176] The DOJ letter then listed seven (7) specific requirements for DPI compliance (See Table 6), reminding the state that "[t]he 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."[177]

The Department of Public Instruction responded to the DOJ's directives in a letter dated November 25, 2013.[178] DPI's letter reiterated its response to earlier questions that it has limited statutory authority to oversee the private schools participating in the program.[179] The letter then

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174. 42 U.S.C. §12132.

175. Letter from Anurima Bhargava et al. to Tony Evers, *supra* note 170.

176. *Id.* at 3.

177. *Id.* Citing Armstrong v. Schwarzenegger, 622 F. 3d 1058, 1066 (9th Cir. 2010) (upholding ADA regulations requiring public entities to ensure non-discrimination when third parties are involved in delivery of programs or benefits); Kerr v. Heather Gardens Ass'n, No. 09-409, 2010 WL 3791484, at *11 (E.D.N.Y. 2009) (holding that a public entity must ensure non-discrimination of third parties delivering public benefits), 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) (holding that when a public entity contracts with a third party, it must ensure non-discrimination under the ADA); cf, 28 C.F.R. §§35.130(b)(1)(v); 35. 130 (b)(3).

178. *See* Letter from Janet Jenkins, Chief Legal Counsel, Wis. Dep't. of Pub. Instruction, to Renee Wohlenhaus, Civil Rights Div., U.S. Dep't of Justice (Nov. 25, 2013) *available at* http://watchdog.wpengine.netdna-cdn.com/wp-content/blogs.dir/1/files/2014/04/DPI-Response-dated-November-25-2013.pdf.

179. *Id.*

outlined DPI's concerns regarding DOJ's requirements, including a request that the DOJ provide more detail about the ways Title II has been violated.[180] The DPI also questioned whether DOJ had the authority to order the DPI to impose additional requirements on the private voucher schools and its own authority to comply with the directives giving the statutory limits placed on the state agency by the state legislature.[181] Table 6 provides a comparison between each DOJ directive and DPI's response to it. While declaring the agency's commitment to non-discrimination, the DPI only promised full compliance with two of the seven directives—preparation and dissemination of outreach materials to families and the development of program guidance regarding the ADA for all participating private schools.[182] It is not known whether the agency abided by any of the deadlines imposed by the letter.

Table 6: Side by Side Comparison of DPI Responses to DOJ Directives

DOJ Directive[183]	**DPI response to Directive**[184]
Eliminate discrimination against students with disabilities in the MPCP and all state voucher programs.	Requests the DOJ "tell the DPI what aspects of DPI's legislatively circumscribed administration of the Choice program results in any violation of Title II."
Establish and publicize a complaint procedure for those alleging disability discrimination in the voucher program. Provide the DOJ copies of all complaints and their resolution by 12/15/2013 and 6/15/2014.	The DPI will comply, but is concerned that it has only has statutory authority to address discriminatory behavior in the admissions process and "limited statutory authority to sanction Choice schools" for any other discriminatory behavior.

180. *Id.*

181. *Id.* at 2–3.

182. *Id.* It should be noted that to date no guidance for participating MPCP schools or parents of enrolled children regarding the ADA has been made available on the MPCP website.

183. *See* Letter from Anurima Bhargava et al., U.S. Dep't. of Justice, Civil Rights Div., Educ. Opportunities Sec., to Tony Evers, State Superintendent, Wis. Dep't. of Pub. Instruction (Apr. 9, 2013), *available at* https://www.aclu.org/files/assets/04_09_13_letter_to_wisconsin_dpi_0.pdf.

184. *See* Letter from Janet Jenkins, Chief Legal Counsel, Wis. Dep't. of Pub. Instruction, to Renee Wohlenhaus, Civil Rights Div., U.S. Dep't of Justice (Nov. 25, 2013) *available at* http://watchdog.wpengine.netdna-cdn.com/wp-content/blogs.dir/1/files/2014/04/DPI-Response-dated-November-25-2013.pdf.

DOJ Directive[183]	**DPI response to Directive**[184]
Collect data regarding the number of children with disabilities who apply, are accepted, are denied (by 9/30/2013), are suspended or expelled, and who leave each participating voucher school (by 6/15/2014), disaggregated by grade level and type of disability.	The DPI will request the data, but believes it has no statutory authority to demand it or to sanction schools that fail to provide it. "[T]he DPI is concerned that this requirement may violate the principle…that the Federal Government may not compel the States to implement…federal regulatory programs."
Conduct outreach to families of children with disabilities to inform them of their rights under program and the services available at participating voucher schools.	The DPI will comply and make materials available on the program's website, but believes it lacks the statutory authority to require participating schools to disseminate the materials.
Provide monitoring and oversight to ensure that voucher schools do not engage in any discrimination on the basis of disability during admissions, programming, suspension or expulsion.	The DPI will work with the DOJ to monitor whether discrimination is occurring in the Choice schools. "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 . . ., the DPI is concerned it lacks the statutory authority to review, investigate, and correct discriminatory expulsions."
Provide mandatory ADA training to new voucher schools and periodic training to continuing voucher schools and provide a copy of the all materials to the DOJ.	The DPI will request the Chicago office of the US DOJ Office for Civil Rights provide the training.
By 12/31/2013, develop program guidance concerning the ADA and private school participation in the voucher program.	The DPI will work with the DOJ to develop the guidance.

V. Revisiting the Legal Issues

The complaint brought by the ACLU/DRW and others marks the third significant challenge to the MPCP. Not surprisingly, like each of the previous disputes, it coincides with a major expansion of the program.[185]

185. Davis v. Grover, 480 N.W.2d 460, 463 (Wis. 1992) followed the establishment of Milwaukee's voucher program. Jackson v. Benson, 218 Wis. 835, 578 N.W.2d 602 (Wis. 1998) followed the expansion of the program to include religious schools and increase the number of students who could participate, and the latest challenge filed by the ACLU coincided with the removal of the participation cap, among other changes.

All three challenges call into question what it means to be a "private" school and how that differs from a "public" school. Furthermore, even though the ACLU/DRW complaint did not explicitly attempt to renew the previous constitutional claims considered in both *Davis* and *Jackson*, by arguing that the schools are "private in name only" and should be considered "public" schools for the purposes of their service to children with disabilities, they effectively invited re-analysis of those claims.

A. Disability Discrimination

Given the focus of the ACLU/DRW complaint, it is necessary to address the allegation of disability discrimination in the MPCP first. Both Section 504 and the ADA are federal laws that prohibit discrimination on the basis of disability, though Section 504's reach is limited to recipients of federal financial assistance.[186] The state, as a recipient of federal funds, must ensure compliance with Section 504. Any school that receives federal funds would likewise fall directly under the ambit of Section 504. In addition, MPCP private schools are indirectly bound by Section 504 because of their relationship to a recipient (the state) through a state operated program.[187] ADA's Title II,[188] which applies to "public entities,"[189] also mandates the state ensure non-discrimination on the basis of disability in all its programs and activities.[190] Private schools must directly comply

186. Section 504 reads: "No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." (29 U.S.C. § 794(a)). The purpose of the ADA is: "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities" (42 U.S.C. §12101).

187. *Supra* notes 170–177 and accompanying text.

188. 42 U.S.C. §§12131–12134; 28 C.F.R. 35 *et seq.*

189. *See* 42 U.S.C. § 12131 (2012) (defining "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).").

190. *See* 42 U.S.C. § 12132 (2012) (noting that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied

with Title III of the ADA,[191] which addresses the need for public accommodations to be offered on an equitable basis.[192] In addition, similar to Section 504's indirect reach, private schools that participate in the MPCP (a state program) fall indirectly under the state's Title II obligations. Both laws require that qualified individuals with disabilities be reasonably accommodated in order to avoid discrimination.[193] Reasonable accommodations or modifications are measures taken to mitigate the effects of a disability such that the person can reasonably participate in and benefit from the activity.[194]

The ACLU/DRW complaint makes allegations against both some participating schools and the state.[195] The easier of the two claims to analyze is the allegation that the private participating schools have not admitted students with disabilities, discouraged their applications, or have failed to provide reasonable accommodations to them once enrolled. If proven, these claims appear to be clear violations of the private schools' obligations under Section 504 and the ADA to enroll and serve those

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the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

191. 42 U.S.C. §§12181-12189 (2012); 34 C.F.R. 36 *et seq*.; *See specifically* 42 U.S.C. §§ 12181 (2012) ("The following private entities are considered public accommodations for purposes of [Title III], . . . (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.").

192. *See* 42 U.S.C. § 12182(a) (2012) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.").

193. *See* 28 C.F.R. § 35.130(b)(7) (2014) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."); 28 C.F.R. § 36.302(a) (2014) ("A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations."); 34 C.F.R. § 104.39(a) (2014) ("A recipient that provides private elementary or secondary education 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.").

194. *Id. See generally* CTL ex rel. Trebatoski v. Ashland School Dist., 743 F.3d 524 (7th Cir. 2014); Doe v. Woodford County Bd. of Educ., 213 F.3d 921 (6th Cir. 2000); Mark H. v. Hamamoto, 620 F.3d 1090 (9th Cir. 2010).

195. *See* Complaint, ACLU v. Wisconsin, U.S. Dep't of Justice, *supra* note 24.

students who can be reasonably accommodated in existing programs.[196] Interestingly, the DOJ letter did not directly address these claims.[197] These allegations, however, are not unlike claims in other choice contexts where incidents of "counseling out" have been documented in charter schools, statewide open enrollment, and magnet school settings.[198] Similar conclusions have put operators of those choice programs on notice that discrimination against children with disabilities in choice contexts must be corrected. In fact, administrative guidance and rulings around those choice environments have yielded four reasonably clear directives:[199]

1. All publicly funded choice programs must be accessible to children with disabilities.[200]
2. Parents and children can not be required to waive needed services in order to participate in the choice program.[201]
3. A student's right to "free appropriate public education" must be preserved in any choice program delivered in public schools.[202]
4. States need to determine which entity (the sending district, receiving school or district, a combination, or some other entity) will serve as the responsible "local education agency" for purposes of IDEA.[203]

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196. *Supra* notes 186–194 and accompanying text.

197. *Supra* note 170.

198. *See* Julie F. Mead, *How Legislation and Litigation Shape School Choice*, *in* EXPLORING THE SCHOOL CHOICE UNIVERSE: EVIDENCE AND RECOMMENDATIONS, 39–64, at 52 (Gary Miron, et al. eds., 2012).

199. *Id.*

200. *See* Letter to Lunar, 17 IDELR 834 (OSEP 1991); Letter to Evans, 17 IDELR 836 (OSEP 1991); Letter to Bina, 18 IDELR 582 (OSEP 1991); Letter to Bocketti, 32 IDELR 225 (OCR 1999); Letter to Gloecker, 33 IDELR 222 (OSEP 2000).

201. *Fallbrook Union Elementary School District*, 16 IDELR 754 (OCR 1990); *San Francisco Unified School District*, 16 IDELR 824 (OCR 1990); *Chattanooga Public School District*, 20 IDELR 999 (OCR 1993).

202. Letter to Lunar, 17 IDELR 834 (OSEP 1991); Letter to Evans, 17 IDELR 836 (OSEP 1991); Letter to Bina, 18 IDELR 582 (OSEP 1991); Letter to Bocketti, 32 IDELR 225 (OCR 1999); Letter to Gloecker, 33 IDELR 222 (OSEP 2000).

203. *San Francisco Unified School District*, 16 IDELR 824 (OCR 1990); Letter to Bocketti, 32 IDELR 225 (OCR 1999); Letter to Gloecker, 33 IDELR 222 (OSEP 2000).

Of course, these directives involve public school choice options, whereas the MPCP program is a publicly funded private school program. This distinction requires a bifurcated examination when considering whether the program operates in nondiscriminatory manner. The direct actions of participating private schools are important, but equally if not more important is the state's obligation to ensure that each program or benefit it establishes is nondiscriminatory both on its face and as implemented. In this instance, the state legislature must ensure that the public voucher program it enacts is accessible to children with disabilities and the DPI, as the agency responsible for overseeing the program, must ensure that that public voucher programs are implemented in a nondiscriminatory manner. These are the allegations the DOJ addressed in its post-investigation letter.[204]

DPI's November 2013 response to DOJ directives seems to neglect these important distinctions. Even if the schools that participate in the MPCP are private, the voucher program is not. The MPCP is a public program, which requires the state to assure non-discrimination in its operation.[205] As the DOJ explained, "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."[206] The DPI objected to the DOJ's analysis, contending that the federal agency was likening the MPCP to contracted services.[207] According to the DPI, that characterization is in error because the state does not contract with the schools per se, but rather merely makes the vouchers available to parents who decide where to use them.[208] As the agency, concluded, "[a]bsent the Choice program, neither the State nor the DPI would provide such assistance."[209]

Still, while the form of contract may differ from those defining the relationships in the cases cited by the DOJ,[210] it seems disingenuous to argue that DPI has not entered into a contractual relationship with the private schools that participate in the program. "The requisite elements of a

204. Letter from Anurima Bhargava et al. to Tony Evers, *supra* note 170.

205. 28 C.F.R. § 35.102(a) (2014) ("[T]his part applies to *all services, programs, and activities* provided or made available by public entities.") (emphasis added).

206. Letter from Anurima Bhargava et al. to Tony Evers, *supra* note 170, at 2.

207. Letter from Janet Jenkins to Renee Wohlenhaus, *supra* note 178, at 2.

208. *Id.*

209. *Id.*

210. *Supra* note 177.

contract include an offer and an acceptance, consideration, and mutual assent to terms . . . ."[211] The state established a program inviting the participation of private schools (offer) and providing voucher funds (consideration). The funds are sent to the schools, not to parents. In exchange for the voucher funds, the schools agree to provide educational services to eligible students (acceptance and mutual assent). Moreover, the form completed by a private school to participate in the program includes the following language under the heading "Agreement/Signatures":

> The Private School agrees that compliance with all the requirements in Wis. Stat. §§ 118.60 and/or 119.23 and Administrative Code PI 35 constitutes a *condition of receipt of funds* under the above-referenced program, and that *this notice of intent to participate is binding upon the school*, its successors, transferees and assignees for the period during which the school is a participant in the program. The school assures that all contractors, subcontractors, subgrantees, and others with whom it arranges to provide services or benefits to its students in connection with this program are not in violation of the stated statutes, regulations, guidelines, and standards. In the event of failure to comply with PSCP [Private School Choice Program] requirements, the school understands that its participation in the program can be terminated.[212]

Even if one accepts DPI's contention that the relationship it has with private schools participating in the public voucher program is not technically a contract, it is apparent that DPI enters into a binding agreement with each private school that chooses to participate in the program.

ADA regulations make clear that public entities, including states,[213] must ensure that "all services, programs, and activities provided or made available by public entities"[214] avoid discrimination on the basis of disability even when the benefit is made available "through contractual, licensing, or *other arrangements.*"[215] The MPCP and other voucher

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211. 17 C.J.S. *Contracts* § 1 (West 2014).

212. Form, Wis. Dep't of Pub. Instruction, Private Schools Choice Programs (PSCP) Notice of School's Intent to Participate, 2015–16 School Year (emphasis added), *available at* http://dpi.wi.gov/sites/default/files/

imce/forms/doc/fpcp-109.doc.

213. *Supra* note 189.

214. 28 C.F.R. § 35.102(a) (2014).

215. 28 C.F.R. § 35.130(b)(1) (2014) (emphasis added); Section 504 regulations similarly mandate that: "A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii)

programs operated by the state are clearly public benefits made available to individuals through "contractual . . . or other arrangements" with the private schools that elect to take advantage of public funding that follows when the schools determine to participate in the program.

Moreover, the state has an obligation to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[216] The data collection and information dissemination required by the DOJ seems a modest set of directives unlikely to "fundamentally alter the nature of the" publicly funded private school voucher programs it operates[217] and which are "necessary to avoid discrimination" in the voucher program. Whether or not the state legislature has vested the DPI with the authority to oversee the MPCP's inclusion of children with disabilities, the state must satisfy the obligations set for every public entity under the ADA.

The state's current construction of the program has predictably[218] resulted in the concentration of children with disabilities in the public system and has relieved the private schools against which public schools compete from serving a similar population. Even if one accepts for the sake of argument that the DPI has vastly under-estimated the number of children with disabilities and that the actual percentage is between 7.5% and 14.6%,[219] it is beyond argument that the students with disabilities that

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that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State." 34 C.F.R. §104.4(b)(vii)(4)(2014).

216. 28 C.F.R. § 35.130(b)(7) (2014).

217. In fact, the original version of the MPCP included a requirement that the state superintendent annually submit to the legislature "a report comparing the academic achievement, daily attendance record, percentage of dropouts, percentage of pupils suspended and expelled and parental involvement activities of pupils attending a private school under this section and pupils enrolled in the school district operating under this chapter." WIS. STAT. §119.23 (5)(d) (1990). This requirement, since repealed by the legislature, involves data quite similar to that requested by the DOJ. 1995 Wis. Act 27, §4007m (July 28, 1995).

218. *See, e.g.*, Julie K. Underwood, *Choice Is Not a Panacea*, 71 EDUC. L. REP. 599, 607 (1992) ("If a voucher program does not take this into consideration, two things will happen. First, the schools will become segregated in that few handicapped or at-risk students will be served in the private Choice schools. Secondly, the costs for the resident public school district will increase as the children in need of expensive programs remain in the public schools.").

219. Patrick J. Wolf, John F. Witte, & David Fleming, REPORT 35: SPECIAL EDUCATION AND THE MILWAUKEE PARENTAL CHOICE PROGRAM, SCHOOL CHOICE DEMONSTRATION

require additional programming in order to succeed, including children with the most severe needs requiring the costliest special education services, are foreclosed from participation in a public program, the MPCP.[220] As such, a reasonable conclusion is that the state of Wisconsin has conditioned a public benefit on disability status for more than 20 years without ever taking active steps to ensure its non-discrimination obligations under the law.

In fact, the only form of non-discrimination explicitly incorporated in the statute is compliance with "42 U.S.C. 2000d"[221] or Title VI of the Civil Rights Act of 1964 which mandates that no one on the basis of "race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[222] The MPCP regulations likewise make no mention of disabilities or avoiding disability discrimination.[223] A "frequently asked questions" document does address the question of whether a private school is "required to enroll a child with special needs in

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PROJECT, at i (2012). Of note, there are two problems with these estimates. First, they are just that—estimates—while the DPI figures are based on actual numbers of students with Individualized Education Programs (IEPs) found eligible under the IDEA. 20 U.S.C. § 1414 (2012). Secondly, the increased estimates are based on estimates of children with disabilities made by private school administrators and parents. As such, they include all children who have a disability, not just those whose disabilities are such that special education is needed in order for an appropriate education to result. *See* 20 U.S.C. § 1401(3)(A) (2012) (noting the standard for eligibility under IDEA); 34 C.F.R. § 300.9 (2014). In essence, every public school has three types of children with disabilities: (category 1) those children with some mental or physical impairment that may limit, but does not substantially limit any major life activity; (category 2) those children with some mental or physical impairment that substantially limits a major life activity and makes them eligible for protection from discrimination under Section 504 (29 U.S.C. § 794 (2012); 34 C.F.R. § 104.3(j) (2014)) and the ADA (42 U.S.C. §§ 12131–12134 (2012); 28 C.F.R. § 35.104 (2014)); and (category 3) those children with some mental or physical impairment that adversely affects educational performance such that special education is needed, making them eligible under the IDEA (20 U.S.C. § 1401(3)(A) (2012); 34 C.F.R. § 300.9 (2014)). The estimates of 7.5–14.6% children with disabilities in MPCP schools uses an estimation that combines all three categories, while the MPS figure of 19.5% children with disabilities is comprised only of those children eligible under IDEA (category 3).

220. Recall that private schools need not provide any special education and related services and only need to make reasonable accommodations to existing programs. *See supra* notes 191–194 and accompanying text.

221. WIS. STAT. § 119.23(2)(a)(4) (2014).

222. 42 U.S.C. § 2000d (2012).

223. WIS. ADMIN. CODE PI ch. 35 (2014).

the Choice program, and to provide the child with whatever services are required to allow the child to learn,"[224] providing the response that:

> A private school may not discriminate against a child with special educational needs during the admissions process for the Choice program. However, as a private school, a Choice school is required to offer only those services to assist students with special needs that it can provide with minor adjustments. Parents should contact the Choice school during the admission process about the services the school is able to provide for their child. Parents should also contact the school district in which the private school is located for more information on the services the school district provides to children with special needs who are enrolled in the public schools and the lesser services that the school district provides children with special needs who are enrolled in private schools.[225]

Participating schools are also asked to sign a form acknowledging receipt of a list of student rights.[226] As explained in the cover letter accompanying the form, the document

> contains an acknowledgement at the bottom by the [private school's] choice administrator that the Department of Public Instruction (DPI) has advised you of Judge Steingass' ruling in 1990[227] of certain individual rights applicable within MPCP schools. It was agreed to at the Legislature's Joint Committee on Administrative Rules meeting held

224. WIS. DEP'T OF PUB. INSTRUCTION, *supra* note 22.

225. *Id.* The last part of the answer provided refers to the "equitable participation" provision of the IDEA. *See* 20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. §§ 300.130–144. Those provisions require the "local educational agency" in which the private school is located to provide services to children with disabilities enrolled by their parents in those schools. The IDEA requires a proportional amount of federal funds to be spent on students in private schools, though children and their parents do not have an entitlement to the same level or types of services they would if they remained enrolled in a public school. *See* U.S. Dep't.of Educ., Office of Special Educ. Programs, *IDEA Regulations: Children Enrolled by Their Parents in Private Schools*, IDEA.ed.gov, http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C5%2C (last visited Feb. 3, 2014) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

226. Letter from Tony Evers, State Superintendent, Wis. Dep't of Pub. Instruction, to Individuals and Organizations Interested in Participating in the Private School Choice Programs (PSCP) (Nov. 18, 2013), *available at* http://sms.dpi.wi.gov/sites/default/files/imce/sms/pdf/pscp_ltr_stdnt_rights.pdf.

227. Recall that Judge Susan R. Steingass presided over the Dane County Circuit Court when it heard the first challenge to the MPCP in *Davis v. Grover*, No. 90-CV-25765 (Dane Cty. Cir. Ct. 1990). Judge Steingass' opinion is the only one to address the issue of special education in voucher schools, rejecting a regulation that would have required voucher schools to fully implement federal special education law. *Supra* notes 121-28 and accompanying text.

> July 30, 1998, that in exchange for the DPI's removal of the student rights list from the administrative rule, the [private school's] choice administrator would sign the enclosed letter of acknowledgement.[228]

That list includes a notice about Section 504 of the Rehabilitation Act,[229] but nothing regarding the Americans with Disabilities Act and expressly states that the letter "is not to be construed as an agreement between DPI and the school or as an admission that the student rights provisions attached hereto apply to private schools participating in the choice program."[230] Accordingly, the state legislature has elected not to address disability discrimination in the statute neither at its inception nor through twenty subsequent revisions and in addition has purposefully acted to prohibit the DPI from doing so by regulation.[231] In essence, the state has failed as a design principle to address the treatment of children with disabilities in the MPCP, resulting in the voucher benefit being made available on an unequal basis.[232]

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228. Letter from Tony Evers to Individuals and Organizations Interested in Participating in the Private School Choice Programs (PSCP), *supra* note 226.

229. *Id.* ("Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 et. seq., which prohibits discrimination on the basis of handicap in programs and activities. To comply with Section 504, the Department of Public Instruction must assure that no qualified handicapped persons are excluded from its programs; and must assure that all handicapped students in funded placements have opportunity for a free appropriate education.").

230. *Id.*

231. It is beyond the scope of this study to examine whether or not the legislature's omission of provisions addressing students with disabilities in the MPCP and its active role taken in ensuring that the regulations likewise omit any rule outlining participating private schools' obligations demonstrates intent to discriminate on the basis of disability.

232. ADA regulations make clear that: "A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability -- (i) Deny a qualified individual with a disability *the opportunity to participate in or benefit from the aid, benefit*, or service; (ii) *Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others*; (iii) Provide a qualified individual with a disability with *an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit*, or to reach the same level of achievement as that provided to others" (28 C.F.R. 35.130(b)(1)) (emphasis added). Similarly, Section 504 dictates that: "In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap: (1) *Deny a qualified handicapped person these benefits* or services; (2) Afford a qualified handicapped person *an opportunity to receive benefits or services that is not equal* to that offered nonhandicapped persons; (3) Provide a qualified handicapped person with *benefits or services that are not as effective* (as defined in 104.4(b)) as the benefits or services provided to others; (4) *Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons*" (34 C.F.R. 104.52)(emphasis added).

In fact, it could be argued that DOJ's directives do not go far enough to ensure that children with disabilities may participate in the public program the state has created. The requirements sketched out in the DOJ letter would only require the addition of a complaint procedure, distribution of information to parents, and data collection by the state agency.[233] DOJ's letter does not address the underlying structure of the program or the barriers to voucher program participation facing children with disabilities.[234] In this case, the state designed the MPCP[235] with the full knowledge that children with disabilities encounter substantive differences should they and their parents wish to avail themselves of the public voucher benefit, even if no private school actively engages in discriminatory behavior.[236] Private schools simply do not offer the services many children with disabilities require in order to learn and only need to offer accommodations accomplished through "minor adjustments" to existing programs.[237] While it is true that the initial enactment of the MPCP predated the ADA,[238] the state has always been fully bound by similar obligations under Section 504 of the Rehabilitation Act.[239] Even so, the state has never addressed how the MPCP would be accessible to all children regardless of disability, relying always on the private school/public school distinction and the differential obligations each has under federal disability law[240] as the justification for why students with

233. Letter from Anurima Bhargava et al. to Tony Evers,, *supra* note 170, at 2.

234. *Id.*

235. The state also designed the two subsequent voucher programs operating in Racine and statewide. See *supra* note 11.

236. Davis v. Grover, No. 90-CV-25765 (Dane Cty. Cir. Ct. 1990).

237. WIS. DEP'T OF PUB. INSTRUCTION, *supra* note 22.

238. The MPCP became effective on May 11, 1990 (1989 WISCONSIN ACT 336, § 228 (MAY 11, 1990). The Dane County Circuit Court issued the first ruling in *Davis v. Grover* on August 10, 1990 (Davis v. Grover, 464 N.W.2d 220, at n.1 (Wis. Ct. App. 1990)), only 15 days after the ADA was signed into law on July 26, 1990 (Pub. L. No. 101-336). However, at the time of both the enactment and the initial legal challenge against the MPCP, Section 504 of the Rehabilitation Act of 1973 applied and likewise bound the state to ensure that all its benefits were available to individuals with disabilities on a nondiscriminatory basis. *See also* Julie F. Mead, *Including Students With Disabilities In Parental Choice Programs: The Challenge Of Meaningful Choice*, 100 EDUC. L. REP. 463, 482 (1995) ("Section 504 has been determined not to apply directly to the private schools, but indirectly through the SEA. Still, the state and all its agencies are fully bound by Section 504 and its prohibition against discrimination. . . . The state may not, in light of Section 504, enact a program which it knows will result in discrimination).

239. Davis v. Grover, No. 90-CV-25765 (Dane Cty. Cir. Ct. 1990).

240. *Contrast* the Individuals with Disabilities Education Act (IDEA), (20 U.S.C. § 1400 *et seq.*; 34 C.F.R. 300 *et seq.)*, with Title II of the Americans with Disabilities Act,

disabilities who required special education and related services could not access the program.[241]

That rationale, however, neglects the power of the state to create a program and assumes there is nothing the state legislature could do to make the program more equitably accessible to children with disabilities. In truth, the state legislature could enact provisions to ensure that children with disabilities do not have to effectively waive needed special services in order to exercise a voucher and thereby participate in a state offered public benefit. For example, the legislature could make delivery of special education and related services a condition of private school participation or require an existing educational agency (e.g., the Cooperative Educational Service Agency[242] that services that jurisdiction) to provide special education services for affected students. There may be other solutions. It is disingenuous, however, to suggest that the state is powerless to address special education needs in a discretionary voucher program of its own design. "Just as the state legislatures in the 1960s could not establish programs to provide public subsidies to private schools that discriminated on the basis of race and then claim that they had taken no part in the discrimination,[243] so, too, the Wisconsin legislature cannot enact a program that by design provides no or very limited access to children with disabilities and claim it carries no responsibility for their exclusion."[244] For the MPCP to be operated in an equitable fashion, Wisconsin, whether

(42 U.S.C. §§ 12131–12134; 28 C.F.R. 35 *et seq*. In general, under the IDEA public schools must provide whatever special education and related services an eligible child with a disability needs to receive a free appropriate public education (regardless of cost), while private schools need only make reasonable accommodations to existing programming for any child with a disability. For a full explanation of the IDEA's legal requirements, *see* DIXIE SNOW HUEFNER AND CYNTHIA M. HERR, NAVIGATING SPECIAL EDUCATION LAW AND POLICY (2012).

241. Davis v. Grover, No. 90-CV-25765 (Dane Cty. Cir. Ct. 1990).

242. *See* WIS. STAT. § 116.01 (2010) ("The cooperative educational service agencies are designed to serve educational needs in all areas of Wisconsin by serving as a link both between school districts and between school districts and the state. Cooperative educational service agencies may provide leadership, coordination, and education services to school districts, University of Wisconsin System institutions, and technical colleges. Cooperative educational service agencies may facilitate communication and cooperation among all public, private, and tribal schools, and all public and private agencies and organizations, that provide services to pupils."); *see also* Wis. Cooperative Educ. Service Agencies (CESAs), http://www.cesawi.org/ (noting that there are twelve (12) cooperative educational service agencies (CESAs) in the state of Wisconsin).

243. *See* e.g., Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218, 232 (1964).

244. Mead, *supra* note 127, at 482–83.

through the legislature or the DPI, must do more to ensure that children with disabilities have substantive access to the voucher program.

B. Education Clause of the Wisconsin Constitution

Interestingly, the limitations on the participation of children with disabilities in the MPCP may also have implications for renewed charges under the Wisconsin Constitution. As discussed earlier, the Education Clause of the Wisconsin Constitution requires that the legislature provide a system of "district schools . . . as nearly uniform as practicable."[245] However, the argument that voucher funding has transformed private schools into a new form of "district" school that was rejected in both *Davis* and *Jackson* is not likely to fare any better in 2015. The contemporary legal question would not be whether the MPCP schools are sufficiently like public schools, but rather whether the state's commitment to and substantial expansion of the MPCP have compromised the state's ability to fulfill its primary constitutional obligation to establish and fund district schools such that they are as "nearly uniform as practicable." To paraphrase the *Davis* court: Does the state's expansion and funding of the MPCP result in deprivations to MPS and other public school districts such that the legislature effectively denies students "the opportunity to receive the basic education in the public school system"?[246] Or put it another way, at what point does the state's funding of private education subvert its constitutional obligation to provide adequately for public education?

In *Vincent v. Voight*, the Wisconsin Supreme Court determined that the state's children enjoy a fundamental right to an education.[247] As the Court explained:

> We further hold that Wisconsin students have a fundamental right to an equal opportunity for a sound basic education. An equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally. The legislature has articulated a standard for equal opportunity for a sound basic education in Wis. Stat. §§ 118.30(lg)(a) and 121.02(L) (1997-98) as the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and for them to receive instruction in the arts and music, vocational training, social sciences,

245. WISC. CONST., art. X, § 3.

246. Davis v. Grover, 480 N.W.2d 460, 474 (Wis. 1992).

247. Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2000).

> health, physical education and foreign language, in accordance with their age and aptitude. An equal opportunity for a sound basic education acknowledges that students and districts are not fungible and takes into account districts with disproportionate numbers of disabled students, economically disadvantaged students, and students with limited English language skills. [248]

Accordingly, in addition to establishing the fundamentality of the right to an education, the *Vincent* Court set a standard to determine whether the legislature has met its obligation under the Education Clause. To meet the standard, the state must provide: (1) opportunity for proficiency in the core subjects of mathematics, science, reading and writing, geography, and history; (2) opportunity for instruction in the non-core subjects of art and music, vocational training, social sciences, health, physical education and foreign language; and (3) sufficient resources to address the educational needs of special student populations.[249]

The expansion of the MPCP and the addition of voucher programs in Racine and statewide[250] coincide with deep budget cuts to state funding for public school districts. The legislature cut a total of $792 million of state aid to school districts and also reduced local districts' taxing authority by $1.6 billion over a two-year period.[251] In fact, a recent analysis demonstrates that the state legislature now spends 15.3% less on support to local school districts when comparing fiscal year 2014 to fiscal year 2008. [252] This decrease amounts to $1038 less state support per pupil.[253] As a result of reduced resources, school districts cut 2,312 teaching positions in public schools across the state for 2011-2012 alone.[254]

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248. *Id.* at 396.

249. *Id.; see also* WILLIAM MATHIS, RESEARCH-BASED OPTIONS FOR EDUCATION POLICYMAKING: EFFECTIVE SCHOOL EXPENDITURES, 3 NAT'L EDUC. POLICY CTR. (Feb. 2013), http://nepc.colorado.edu/files/pb-options-6-moneymatters.pdf (last visited Feb. 2, 2013) (estimating that "[e]conomically disadvantaged children need approximately 40%-100% more funding per child. English language learners need 76% to 118% more.").

250. *Supra* note 11.

251. 2011 Wis. Act 32, § 2539 (June 30, 2011); *see also* James Shaw & Carolyn Kelley, *Making Matters Worse: the Impact of Reducing State Funding and Expanding School Choice on Student Poverty and Achievement Gaps in Wisconsin*, Paper presented to the Am. Educ. Research Ass'n. (2013).

252. Michael Leachman & Chris Mai, *Most States Funding Schools Less Than Before the Recession*, CTR. ON BUDGET & POLICY PRIORITIES (Sept. 12, 2013), http://www.cbpp.org/cms/?fa=view&id=4011.

253. *Id.*

254. Dep't. of Pub. Instruction, *Official Report Shows Cuts to School Staff for 2011-2012 school year*, (Apr. 18, 2012), *available at* http://news.dpi.wi.gov/sites/

An analysis of the effects of the 2011 budget cuts details the differential effects of the enacted changes to the school finance system.[255] The report compares the effects of the cuts between high poverty districts and low poverty districts, finding that those districts with concentrations of poverty received deeper cuts than did districts with low poverty.[256] Not surprisingly, those districts saw the greatest staff reductions.[257] As the authors concluded:

> Analysis of the fiscal impact of state budget cuts on high and low-poverty districts suggests that a simple reduction in the state budget has a significant adverse impact on vertical equity, as the highest need students, teachers, districts and taxpayers bear the largest share of the cuts. The fiscal burdens of a weak economy tend to adversely impact high poverty districts to begin with, but these effects are compounded by increases in tax burden in the highest poverty districts. Policies that promote choice often target the same high-poverty districts and further exacerbate resource reductions to support the education of the state's neediest children.[258]

Even before the 2011 budget cuts, a study of the state's school finance system concluded "there is sufficient evidence such that a judge could find that the finance system is unconstitutional with respect to its non-core obligations[259] . . . that revenue controls (along with insufficient categorical aid) cause this problem in the non-core areas."[260] Moreover, the study concluded that school districts, like Milwaukee, with concentrations of the student subgroups of "disabled students, economically disadvantaged students, and students with limited English language skills" identified by the Wisconsin Supreme Court in *Vincent*, had not been provided with

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default/files/imce/ eis/pdf/dpinr2012_58%20Annual%20Staff%20Report%20release.pdf.

255. Shaw & Kelley, *supra* note 251.

256. *Id.*

257. *Id.*

258. *Id.*; *see also* SCOTT WITTKOPF, FORWARD INSTITUTE, WISCONSIN BUDGET POLICY AND POVERTY IN EDUCATION: A STUDY OF THE IMPACT OF SCHOOL FUNDING ON EDUCATIONAL OPPORTUNITY (May 2013), http://forwardinstitute.files.wordpress.com/ 2013/05/wisconsin-budget-policy-and-poverty-in-education-2013.pdf.

259. *See* Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2000) (listing non-core subjects as "arts and music, vocational training, social sciences, health, physical education and foreign language").

260. Mark A. Paige, The Funding of Public Schools in Wisconsin: Applying the *Vincent* Standard to Assess the Finance System's Constitutionality, at x-xi (2011) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with Memorial Library, University of Wisconsin-Madison).

sufficient resources to meet the instructional needs of these special populations.[261]

These analyses suggest that expansions to the voucher program[262] in tandem with severe budget cuts may provide the evidence needed to argue that the voucher program violates the state constitution's Education Clause because financial support for the program has undercut adequate funding for the constitutionally mandated support of a system of district schools as nearly uniform as practicable.

The concentration of children with disabilities in the public system may likewise weigh in any uniformity calculus. If the MPCP does not serve comparable numbers and types of children with disabilities thus resulting in the effective segregation of children with disabilities in the public system, has the state constructively structured a district (MPS) that is no longer uniform in comparison to other districts? Recall that more than 19% of the MPS student population has been identified as requiring special education and related services.[263] One would expect the incidence of children with disabilities to be approximately 12% of the student population.[264] As recognized by the *Vincent* Court, high concentrations of children with disabilities will likely compromise the ability of local taxpayers to fund the education of children in the districts that serve them.[265] First, districts have to fund the costs of special education and related services regardless of the expense.[266] Although federal dollars flow through to school districts under the IDEA, federal funds only support about 16% of the excess costs associated with special programming.[267] The state also provides some

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261. *Id.*

262. *Supra* Parts II & III.

263. Letter from Tony Evers, Wis. State Superintendent of Pub. Instruction to the Members of the Joint Comm. on Fin., *supra* note 14.

264. *See e.g.*, Latest U.S. Disability Statistics and Facts (July 26, 2011), *available at* http://www.disabled-world.com/disability/statistics/census-figures.php.

265. Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2000).

266. 20 U.S.C. § 1401(9)(A); *see also* Cedar Rapids Sch. Dist. v. Garret F., 526 U.S. 66, 77–78 (1999) (discussing the IDEA and cost); *see also* Letter from Nat'l. School Boards Ass'n. to U.S. H.R. Subcomm. on Labor, Health & Human Services (July 24, 2013), *available at* http://www.nsba.org/sites/default/files/reports/07.24.2013%20-%20FY14%20Labor%20HHS%20Ed%20Approps%20bill_0.pdf.

267. Nat'l School Boards Ass'n, Issue Brief: Federal Funding for Education, at 2 (Feb. 2014) *available at* http://www.nsba.org/Advocacy/Key-Issues/FederalFunding/NSBA-Issue-Brief-Federal-Funding-for-Education.pdf) (noting that Congress has never appropriated funds commensurate with the level authorized by the IDEA. Recent estimates put the proportion at less than 16% of the costs of funding the special education and related services required by the IDEA.); *see also* 20 U.S.C. § 1411(a)(2)(B)(ii)(2004)(authorizing Congress

categorical funds for the same purpose,[268] but reimburses school districts for less than 30% of the costs.[269] Local school districts, then, must make up any of the costs not borne by state and federal funding and bear the predominant responsibility for funding special education. As such, the struggle to adequately fund special programming may compromise the efficacy of those programs and make it more difficult for MPS to meet its obligations to provide each child with a disability a free appropriate public education as required by the IDEA.[270] Likewise, the education of children without disabilities may be compromised by the necessity to divert general funds to meet the costly needs of the special education programming.[271] Consequently, a school district with a high concentration of children with disabilities—made so because a voucher program has produced a student population that does not reflect expected proportions of children with disabilities—is hobbled by the legislature's design and support of the MPCP. Undoubtedly, that struggle will negatively affect the "the character of instruction . . . [and] the training that these schools should give to the future citizens of Wisconsin"[272] rendering it no longer uniform as required by Wisconsin's Education Clause.

C. Public Purpose Doctrine

Similarly, re-analysis of the MPCP under the public purpose doctrine raises some interesting questions. Recall that the *Jackson* Court determined that MPCP satisfied the public purpose doctrine because participating private schools are subject to standards set by statute, the MPCP requires

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to appropriate 40% of "the average per-pupil expenditure in public elementary and schools in the United States.").

268. WIS. STAT. Ch. 121; *see also* Wisconsin Legislative Fiscal Bureau, *Informational Paper 24: State Aid to School Districts* (Jan. 2013) *available at* http://legis.wisconsin.gov/lfb/publications/Informational-Papers/Documents/2013/24State%20Aid%20to%20School%20Districts.pdf (discussing Wisconsin's school finance system).

269. *See* Wisc. Dep't of Pub. Instruction, *Special Education and School-Age Parents Aid*, *available at* http://sfs.dpi.wi.gov/sfs_speced (reporting that the Wisconsin Department of Public Instruction will reimburse school districts 27.47% of special education costs for 2012–2013 and 26.5% of special education costs for 2013–2014).

270. 20 U.S.C. § 1400(d)(1) (2012).

271. *See* Letter from Letter from Nat'l. School Boards Ass'n. to U.S. H.R. Subcomm. on Labor, Health & Human Services, *supra* note 266.

272. *See* Vincent v. Voight, 614 N.W.2d 388, 409 (Wis. 2000) (quoting an earlier Wisconsin Supreme Court decision that determined that uniformity must be judged by the "character of instruction", State ex rel. Zilisch v. Auer, 197 Wis. 284, 289 (1928)).

financial audits and a further review by the Legislative Audit Bureau and program is "subject to the additional checks inherent in the notion of school choice."[273] The current MPCP has a much broader scope and participation than the program analyzed by the Wisconsin Supreme Court in 1992[274] or 1998,[275] but the state has also enacted provisions strengthening the oversight of the program, largely through increasing the requirements private schools have to satisfy as a condition for participation in the program.[276] State law definitions of private school remain unchanged,[277] but participating schools must satisfy additional requirements regarding curriculum, assessment and discipline.[278] These facts suggest that a court may find that the program continues to satisfy the public purpose doctrine if the public purpose served is broadly described as "education."

However, there have been changes that a court may find persuasive in support of the opposite conclusion. We now have research to suggest that parental choices do not necessarily coincide with better educational environments,[279] and that the "rational market" is more myth than reality,[280] undercutting the presumption that choice serves accountability. Moreover, elements of the statute directing requirements for program evaluation the *Davis* and *Jackson* Courts referenced as evidence that the program served a public purpose[281] have since been repealed.[282] In addition, accountability demands on public education have increased substantially since the last time the Wisconsin Supreme Court considered the issue. The demands of the federal No Child Left Behind Act[283] have resulted in all Wisconsin

273. Jackson v. Benson, 578 N.W.2d 602, 629–30 (Wis. 1998).

274. Davis v. Grover, 480 N.W.2d 460 (Wis. 1992).

275. Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

276. *See supra* notes 35–100 and accompanying text.

277. WIS. STAT. § 118.165, *supra* note 140 and accompanying text.

278. WIS. STAT. § 119.23(6m).

279. WIS. DEP'T OF PUB. INSTRUCTION, *supra* note 21. *See also* CHRISTOPHER A.LUBIENSKI & SARAH THEULE LUBIENSKI, THE PUBLIC SCHOOL ADVANTAGE: WHY PUBLIC SCHOOLS OUTPERFORM PRIVATE SCHOOLS (Univ. of Chicago Press 2013); GARY MIRON ET AL., EXPLORING THE SCHOOL CHOICE UNIVERSE: EVIDENCE AND RECOMMENDATIONS (Kevin G. Welner & Alex Molnar, eds., 2013); DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS (2014).

280. *See e.g.*, Kern Alexander, *Asymmetric Information, Parental Choice, Vouchers, Charter Schools and Stiglitz*, 38 J. EDUC. FIN. 170 (2012); JUSTIN FOX, THE MYTH OF THE RATIONAL MARKEY A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET (2009).

281. Davis v. Grover, 480 N.W.2d 460, 476 (Wis. 1992); Jackson v. Benson, 578 N.W.2d 602, 629–30 (Wis. 1998).

282. 2013 Wis. Act 8, §38 (March 28, 2013).

283. 20 U.S.C. § 6301, *et seq*. (2012).

public schools being assessed yearly for performance both in the aggregate and disaggregated by gender, race, and disability.[284] What counts as accountability for public investments in education is quite different from the expectations of the 1990s and may weigh into any consideration of "public purpose." Finally, one telling omission from the invigorated authority of the state superintendent and DPI is the power to demand improvement or bar participation of low performing MPCP schools. As long as the MPCP private school meets 1 of the 4 standards of its choice, is fiscally solvent, and maintains a safe and healthy facility, DPI has no authority to address instructional quality issues.[285] This lack of legislated authority exists by design as the legislature has purposefully limited the agency's authority over the program. DPI's statutorily limited authority stands in stark contrast to the obligations the agency has if a public school (traditional, magnet, or charter) demonstrates performance problems.[286] Is the public purpose of "education" met, if data shows the programming offered does not result in students' proficiency in basic skills?[287] At what point does this lack of similar oversight of the private voucher schools suggest that the public purpose is no longer met?

While a reviewing court may still find sufficient evidence of a "public purpose" of the voucher program when viewed in isolation, a different result may occur when viewed in light of contemporaneous cuts to public school districts. During the same period the state legislature enacted legislation to grow the voucher program, it took action to cut support for public school districts.[288] Accordingly, a court may conclude that the public purpose of a private school voucher program is lost at the point that the program can be shown to interfere with the state's obligations under the Education Clause of the Wisconsin Constitution.[289] Likewise, returning to

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284. 20 U.S.C. § 6311(b)(3)(2004); *see also* Wis. Dep't of Pub. Instruction, Office of Educational Accountability and the Office of Student Assessment, http://oea.dpi.wi.gov/.

285. *See, e.g.*, Responses of State Superintendent Tony Evers, *supra* note 165; *see also* Letter from Janet Jenkins to Renee Wohlenhaus , *supra* note 178.

286. WIS. STAT. Chapters 115–121; Wis. Admin. Code PI.

287. *See* WIS. DEP'T OF PUB. INSTRUCTION, OVERALL MPS RESULTS HIGHER THAN CHOICE SCHOOLS ON STATEWIDE EXAMS 2 (2011), *available at* http://dpi.wi.gov/eis/pdf/dpinr2011_30.pdf.; *see also* Devon Carlson et al. *Life After Vouchers: What Happens to Students Who Leave Private Schools for the Traditional Public Sector?* 35 EDUC. EVALUATION AND POLICY ANALYSIS 179 (2013) (finding that voucher students who left private schools and enrolled in public schools saw substantial achievement gains).

288. *See supra* notes 250–254 and accompanying text.

289. *See supra* notes 245–262 and accompanying text.

the apparent segregative effect of the voucher program as regards children with disabilities, if legislative support for the program substantially disrupts the uniform character of the public school system, then it may be found to subvert rather than serve a public purpose.[290]

VI. Conclusion

As this analysis shows, the MPCP has evolved in size, scope, and expense. A majority of the private participating schools are dependent on the state funds that accompany the vouchers used by more than 80% of their student population. While the program has changed in many substantive ways, no changes have affected how children with disabilities may participate or the authority of the Department of Public Instruction to oversee instructional quality.

Current enrollment demographics show that children with disabilities have little access to the MPCP, resulting in a higher than expected concentration of children with disabilities in Milwaukee's public schools and the commensurate responsibility to provide the special education services they need. That pattern led to a complaint and subsequent investigation by the United States Department of Justice. The DOJ directed the state to engage in more rigorous oversight in order to ensure that the program satisfies the dictates of the Americans with Disabilities Act. Those directives have been met with resistance by the DPI, continuing the controversy of whether the program operates free from discrimination on the basis of disability.

The facts of legislative program design, delivery, and oversight suggest that should the complainants desire to push forward, a reasonable case can be made that the program violates the non-discrimination requirements of federal law. The same pattern, when viewed in light of the severe budget cuts visited on public school districts, also indicates that the program may be vulnerable to challenge under the Education Clause and public purpose doctrine of the state Constitution as the Wisconsin Supreme Court has previously held that the voucher program is permissible only so long as the legislature first satisfies its obligations to adequately fund public schools.

However, should claimants successfully litigate such allegations, any infirmities would likely be cured by subsequent legislative action. Issues

290. *See supra* notes 263–272 and accompanying text.

regarding the accessibility of the program for children with disabilities could be corrected by establishing a means to provide them with special education and related services comparable to their peers in the public system and providing DPI the statutory authority to ensure the program operates in a non-discriminatory manner. A finding that the program violates the state constitution because the state has unconstitutionally eroded its support for a "system of district schools as nearly uniform as practicable"[291] or because it fails to sufficiently serve a public purpose would likely be addressed by restoring public funding to public schools rather than dismantling the private school voucher program. Such a result would be ironic, indeed, as the private school program would only be constitutionally permissible once sufficient reinvestment in the public system occurred. In essence, the state would then be supporting two systems of education—one public and one private, though arguably private in name only.

Distinctions that once were clear—public school versus private school—thus become blurred under the country's oldest voucher program. Whether or not MPCP survives this latest legal challenge with or without revision, it is clear that the MPCP continues to generate controversy. The public–private distinction will also likely continue to attract public policy arguments as this first major experiment in market principles enters its next chapter.

291. WIS. CONST. art. X, § 3.

Appendix A

Table A1: Changes to MPCP Provisions Concerning Private School Participation

Original requirement	**Changes and year of change**		
Located in the city of Milwaukee	Eliminated location requirement (2011)		
Non-sectarian	Eliminated nonsectarian requirement (1995)		
Accepts voucher as full tuition	Schools permitted to charge reasonable fees and may charge tuition above voucher amount if child is in high school and family income exceeds 2.2 times the federal poverty level (2011).		
Cap for vouchers of 49% of school's population	Increased to 65% (1993)	Removed cap on schools (1995)	
Meets 1 of 4 standards: (70% of pupils advance 1 grade level OR 90% attendance rate OR 80% demonstrate significant academic progress OR 70% parental involvement as defined by private school)			
Comply with 20 U.S.C. 2000d (prohibits racial discrimination)			
Meets health and safety standards	Provide certificate of occupancy in advance of participation (2004)	Superintendent may immediately terminate participation of school if imminent harm to health and safety of children (2004)	Applied new indoor environmental quality standards to MPCP schools (2009).

Original requirement	**Changes and year of change**		
Appoint representative to a council			
Uses random process if applications exceed space available	Siblings may be given preference (1995)	Schools must provide reason for rejection of application; rejection on permitted if capacity reached (2009)	Preference for those previously attending private school permissible (2013).
	Submit an annual financial audit (1995)	Set standards for audits (2004).	Must use CPA & follow AICPA standards (2011).
	Religious schools may not require participation in religious activities (1995).		
	Provide proof of financial viability, fiscal practices, and administrator has had fiscal management training (2004).		
	Teachers must be high school graduates or hold equivalence (2005).	Teachers and administrators must hold bachelor's degrees; teacher's aides must be high school graduates (2009).	
	School must be accredited by 1 of 5 private school organizations (2005).	Marquette University's Institute for the Transformation of Learning no longer may accredit schools, However, unless already accredited, pre-accreditation required from Marquette University's Institute for the Transformation of Learning before participation (2009).	Preaccreditation may be done by 5 private school organizations (2011).

Original requirement	**Changes and year of change**		
	Must administer nationally normed tests in reading, math, & science in 4th, 8th and 10th grades & submit to School Choice Demonstration Project (2005)	Beginning 2010-2011, must administer state achievement tests, including 3rd grade reading test, in a manner similar to public schools and provide results to School Choice Demonstration Project through 2011 (2009)	Administer all state assessments (2013).
	Must transfer pupil records within 5 days when requested (2009)	Maintain a student information system with unique student identifiers (2014).	
	Must pay a non-refundable fee to participation each year; fees used to fund a full-time auditor to evaluate financial information (2009)		
	Requires 1050 hours in direct pupil instruction in grades 1-6 and 1137 hours in grades 7-12 (2009)		
	Provide parents information about school including governance, profit status, non-harassment process, suspension/expulsion policy, transfer credits policy, visitor policy (2009)		
	Adopt academic standards that apply to public schools (2009)		