



DOJ quietly concludes ‘overreach’ into Wisconsin parental choice program

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January 4, 2016

Parents and advocates of Milwaukee’s storied school voucher program are feeling relief and frustration in learning that the U.S. Department of Justice has quietly closed a four-year, “legally dubious investigation” into the parental choice program without charges of wrongdoing, according to the head of a school choice advocacy group.

“It was always an unwavering dedication to serving all children with all the resources you have in these (private) schools and knowing that there was no discrimination going on,” said Jim Bender, president of Wisconsin School Choice. “But when you have a long investigation without much information, you get skeptical.

“You are left feeling helpless, especially when you are dealing with the federal Department of Justice and the (Wisconsin) Department of Public Instruction,” said Bender, whose nonprofit organization serves the state’s growing market of educational alternatives to public education.

Of course, most in the Milwaukee school choice community had little idea the furtive DOJ had ended its long-running secret probe until nearly two weeks after it was quietly concluded.

As the Milwaukee Journal Sentinel reported Monday, the Justice Department on Dec. 23 sent a letter to the Wisconsin Department of Public Instruction notifying the agency that “no further action is warranted” beyond the changes it requested the DPI make two years ago to DPI’s administration of Milwaukee’s school voucher program.

As Wisconsin Watchdog has detailed in its investigation of the DOJ probe, DPI has told the federal government it has no power to act upon the changes under Wisconsin’s parental choice law and the state Supreme Court’s interpretation of the law.

“The DOJ has now reaffirmed what the DPI stated all the way back in 2011 — there is no record of the school choice programs in Wisconsin discriminating against students with special needs,” Bender said.

Now that the “ongoing” investigation has been closed, school choice supporters want answers to why it was pursued for so long.

The DOJ launched what critics have described as the agency’s “power grab” into Wisconsin’s nation-leading school voucher program in August 2011 following a complaint filed by Disability Rights Wisconsin, among others.

Correspondence between DOJ and DPI began as early as fall 2011, according to documents obtained by the Wisconsin Institute for Law & Liberty in an open records request. WILL, a Milwaukee-based public interest law firm, has challenged the Justice Department probe and DPI's assisting role on behalf of a very frustrated parental choice community.

On April 9, 2013, the Justice Department sent DPI a letter demanding the state education agency do more to “enforce the federal statutory and regulatory requirements” under Title II of the Americans with Disabilities Act.

The DOJ believes Wisconsin's school choice program has discriminated against students with disabilities either by denying access to voucher-based private schools or by expelling or “constructively” forcing disabled students to leave the schools “as a result of policies and practices that fail to accommodate the needs of students with disabilities.”

If DPI didn't address the alleged problems, the Justice Department threatened that “the United States reserves its right to pursue enforcement through other means.”

There are a couple of problems with DOJ's suppositions and threats, however. First and foremost:

Title II of the ADA has never applied to private entities, including schools, except when a public body has “contracted out” its duties to a private entity, according to WILL. There is no such contract for service involved in the state's choice program, including the state's 25-year-old voucher system, which uses a portion of taxpayer money to subsidize the cost of tuition at private schools for eligible students who wish to transfer out of — or, some say, escape, — the public school system.

And private schools are not public entities, a point upheld on a couple of occasions by the Wisconsin Supreme Court. The court has held that the use of vouchers at private schools does not transform them into “public schools.”

“This was a typical example of federal overreach,” said WILL president Rick Esenberg in a statement. “The federal government demanded that the state of Wisconsin regulate private schools in a way that state law did not permit. While it's gratifying that — after over four years — the federal government finally recognized that there is nothing to see here, it's troubling that Washington continues to throw its weight around.”

Monica Murphy, Disability Rights Wisconsin managing attorney, told the Journal Sentinel the organization “went the DOJ route because it was a way of having a more systematic impact and having things apply across the board.”

The Obama administration frequently has been told by courts to get its nose out of the state's education business.

In a stinging rebuke, the U.S. 5th Court of Appeals last year shot down the DOJ's “disingenuous” attempt to control Louisiana's school voucher program for low-income students in failing school districts.

“The DOJ claimed the voucher program imperiled desegregation efforts but two studies showed that the vouchers actually improved racial integration,” the Cato Institute’s Jason Bedrick wrote last month.

“Indeed, since the vast majority of voucher recipients are black, a victory for the DOJ would have meant keeping black students trapped in failing schools. Fortunately, the court ruled differently,’ Bedrick wrote.

The battles between the states and federal government have only intensified since the Wall Street Journal declared 2011 “The Year of School Choice” in the wake of 13 states either enacting new school choice laws or expanding existing ones. Wisconsin, under Republican Gov. Scott Walker, has transformed Milwaukee’s longstanding voucher program into a growing statewide initiative.

But the parental choice program must live under the continued threat of more investigations, more harassment, by the Obama administration.

“Please note that this determination does not preclude investigation of future complaints, if any,” wrote DOJ trial attorney Colleen Phillips in the letter to the state Department of Public Instruction.