



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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May 30, 2013

The Honorable Jack Markell
Governor
Tatnall Building - 2nd Floor
William Penn Street
Dover, DE 19901

Dear Governor Markell:

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 90 which revises many sections of the enabling law establishing the school choice program. It allows students to "choice" to a charter school. It requires the Department of Education (DOE) to establish and distribute a uniform application form. It addresses acceptance standards and adds "truancy" to grounds for rejection. Finally, as amended by H.A. 1, it establishes a large (27 member) "Enrollment Preferences Task Force" to report findings and recommendations to the Governor and General Assembly by January 31, 2014. SCPD has the following observations.

First, one of the motivators for the legislation was the potential for exclusion of students with disabilities based on the following acceptance/rejection provision:

Such criteria shall include the authority of the receiving district to reject an application based upon the requirements of any applicable existing individualized education plan relating to an applicant who has special needs.

The bill deletes this provision (lines 92-94). Consistent with the attached April 9, 2013 policy letter from the U.S. Department of Education to the Wisconsin Department of Education, school choice programs cannot be administered in a manner which discriminates against students with disabilities. Moreover, states must ensure that "disability status has no unlawful adverse impact on admissions decisions". At p. 2. While deletion of the above provision may promote compliance with federal law, schools could ostensibly continue to reject students with disabilities by requesting supplemental information such as IEPs (lines 50-51) and then deciding that the student does not meet criteria "related to the nature of the program or school" (line 90). It would be preferable to include an

affirmative non-discrimination standard. For example, instead of deleting the above provision (lines 93-94), it could be modified as follows:

Such criteria shall ~~include the authority of the receiving district to reject an application~~ disallow the rejection of an application based upon the content of any applicable existing individualized education plan or Section 504 plan relating to an applicant who has special needs.

Second, although the Delaware Code has historically contemplated the potential for students using the “choice” program to apply to a charter school [Title 14 Del.C. §509(a)], the bill explicitly authorizes use of “choice” to apply to charter schools (lines 38, 52-53). However, this results in conflicts between the charter school and choice laws. The following are examples.

- A. Authorized preferences are different. Compare Title 14 Del.C. §506(a)(3)(4) with lines 88-108).
- B. Choice students must generally enroll for 2 years while charter students must generally enroll for 1 year. Compare Title 14 Del.C. §407(a)(2) with Title 14 Del.C. §506(d).

Third, lines 80-81 require receiving districts to offer public information sessions on choice opportunities available in schools and programs in that district. When the GACEC assessed Vo-Tech district admissions, a downstate district noted that local “regular” districts no longer allowed the Vo-Tech district to participate in similar information sessions. It would be preferable to add the following sentence to line 81: “Each reorganized receiving district will invite the participation, on a voluntary basis, of representatives of the Vo-Tech district and charter schools from the same county as the reorganized receiving district.” This would allow families to attend 1 event and receive information about more options.

Thank you for your consideration and please contact SCPD if you have any questions regarding our observations on the proposed legislation.

Sincerely,

A handwritten signature in black ink, reading "Daniese McMullin-Powell". The signature is written in a cursive, flowing style.

Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Matthew Denn
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

hb 90 choice school enrollment 5-30-13



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

AB:RW:JF
DJ 169-85-23

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Washington, DC 20530
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April 9, 2013

By Electronic and U.S. Mail

Tony Evers
State Superintendent
Wisconsin Department of Public Instruction
P.O. Box 7841
Madison, WI 53707-7841

Dear Mr. Evers,

Thank you for facilitating our meeting on December 12, 2012 with officials from the Department of Public Instruction ("DPI"). The purpose of the meeting was to discuss DPI's obligation under Title II of the Americans with Disabilities Act of 1990 ("Title II"), 42 U.S.C. §§ 12131-12134, to ensure that students with disabilities who seek to attend voucher schools through the Milwaukee Parent Choice Program ("MPCP" or "school choice program") do not encounter discrimination on the basis of their disability status. As you are aware, advocacy groups in Wisconsin have alleged that students with disabilities in the Milwaukee Public Schools ("MPS") are (1) deterred by DPI and participating voucher schools from participating in the school choice program, (2) denied admission to voucher schools when they do apply, and (3) expelled or constructively forced to leave voucher schools as a result of policies and practices that fail to accommodate the needs of students with disabilities. Our position, consistent with interviews of parents and public school district officials, is that DPI must do more to enforce the federal statutory and regulatory requirements that govern the treatment of students with disabilities who participate in the school choice program.

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

Because the school choice program is a public program funded and administered by the State, the State's administration of the program is subject to the requirements of Title II. See 28 C.F.R. § 35.102(a) ("[T]his part applies to all services, programs, and activities provided or made available by public entities."). Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The regulations implementing Title II require, *inter alia*, that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. See 28 C.F.R. § 35.130(b)(7).¹

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

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

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

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

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

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

1. **State's ADA Title II Obligation.** Pursuant to Title II, DPI must eliminate discrimination against students with disabilities or students whose parents or guardians have disabilities in its administration of the Milwaukee Parent Choice Program ("MPCP"), the school voucher program in Racine, and school voucher programs established in any other locality. The private or religious status of individual voucher schools does not absolve DPI of its obligation to assure that Wisconsin's school choice programs do not discriminate against persons with disabilities as required under Title II.
2. **Complaints.** DPI must establish and publicize a procedure for individuals to submit complaints to DPI alleging disability-related discrimination in the school choice program. DPI will furnish copies of these complaints to the United States on December 15, 2013 and June 15, 2014. The United States will independently review these complaints, and DPI's response thereto, to ensure that complaints are being appropriately addressed.
3. **Additional Data Collection and Reporting.** DPI must, by the dates indicated below, gather and produce to the United States in written format information that will enable the United States to determine how and to what extent students with disabilities are being served by voucher schools. The information should be disaggregated by school and include the following: (1) by September 30, 2013, the number of students with disabilities enrolled in voucher schools for the 2013-2014 school year, disaggregated by grade level and type of disability; (2) by September 30, 2013, the number of students with disabilities denied admission to a voucher school for the 2013-2014 school year; (3) by June 15, 2014, the number of students with disabilities who left a voucher school at any time during the 2013-2014 school year to return to the local public school system; and (4) by June 15, 2014, the number of students with disabilities suspended or expelled

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

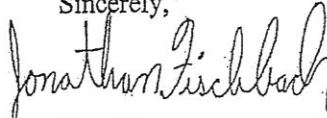
from a voucher school, disaggregated by grade level and type of disability. The United States will review these reports and take appropriate action, pursuant to the ADA and consistent with Department practice, if the information reported reveals actual or potential unlawful discrimination. See 28 C.F.R.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

4. **Public Outreach about the School Choice Program to Students with Disabilities.** DPI must conduct outreach to educate the families of students with disabilities about school choice programs, and provide specific and accurate information about the rights of students with disabilities and the services available at voucher schools. DPI shall provide a copy of any existing outreach and informational materials related to the voucher schools, and submit any new and/or revised DPI materials for review to the United States.
5. **Monitoring and Oversight.** DPI must ensure that voucher schools do not discourage a student with a disability from applying for admission, or improperly reject a student with a disability who does apply to a voucher school. DPI must further ensure that voucher schools, absent a valid ADA defense, do not expel/exit a student with a disability unless the school has first determined, on a case-by-case basis, that there are no reasonable modifications to school policies, practices or procedures that could enhance the school's capacity to serve that student. DPI shall report any review, investigation and/or findings of potential unlawful discrimination to the United States, and document the actions taken by the agency to remedy the discrimination.
6. **ADA Training for Voucher Schools.** DPI must provide mandatory ADA training to new voucher schools and to existing voucher schools on a periodic basis, and submit a copy of any training materials and attendance sheets to the United States.
7. **Guidance.** By December 31, 2013, DPI must develop program guidance in consultation with the United States to assist and educate voucher schools about ADA compliance.

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

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

Sincerely,

A handwritten signature in cursive script, reading "Jonathan Fischbach".

Anurima Bhargava
Renee Wohlenhaus
Jonathan Fischbach

Educational Opportunities Section
Civil Rights Division

Cc: Janet A. Jenkins, Esq.