

# To Bus or Not to Bus, That Is the Question

Article

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Public school districts and private schools within the district often have a contentious relationship when it comes to the transportation of students to and from school. A recent decision by a federal court of appeals confirmed that the Milwaukee Public School District (“MPS”) did not violate the Equal Protection Clause of the Constitution by providing free transportation to public-school students who attend certain schools but not making this transportation available to similarly-situated private school students. The Court declined to address whether the policy complies with Wis. Stat. § 121.54, potentially inviting additional litigation over the policy in state court. The Court also found MPS’ policy of requiring private schools to provide by July 1<sup>st</sup> the names of students who need busing constitutional on its face. However, the Court found no rational basis to treat those who moved or transferred to the district after the deadline differently, based solely upon whether they go to private or public school. The latter issue was remanded to the trial court for further fact-finding. Of note, the dissent found “no rational basis” for either policy and opined the MPS rule violates the Equal Protection Clause. We anticipate the strong language of the dissenting opinion adds to the likelihood of additional litigation over the nature of the transportation public school districts are required to provide to private school students.

## **A Brief History of Public School Transportation of Private School Students**

The tension between public and private schools over the transportation of students is embedded in Wisconsin’s legal history. In 1962, the Wisconsin Supreme Court held the state constitution prohibited the expenditure of public funds to transport children to parochial and private schools.[2] This finding led directly to an amendment to the Wisconsin constitution in 1967 to provide that “[n]othing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.”[3]

The Wisconsin legislature responded by amending the school transportation statutes to require every school board to provide transportation to and from public and private schools for all students who reside in the district and live two miles or more from their school.[4] School districts may provide more generous transportation services, but there must be reasonable uniformity in the minimum distance that pupils attending public and private schools will be

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transported.[5] The transportation mandate excludes children who live in cities served by public transit systems. Under this “city option,” school districts in cities with public transit systems are not required to provide free student transportation.[6]

The 1967 legislation spawned additional litigation. In an early case interpreting the new statutory scheme, the Wisconsin Supreme Court explained that the purpose of the new legislation “was to provide that where transportation is furnished, either mandatory or permissive, it must be on a reasonably uniform basis to children attending either public or private schools.”[7] This does not mean the public school district is required to physically transport the private school student, even if physical transportation is provided to the public school student. The school district is entitled to contract transportation duties to private school students’ parents and guardians.[8]

#### **MPS Policy No. 4.04**

MPS exercised the “city option” and offers transportation to Milwaukee-area schools. There are two primary types of public schools in the MPS system: (1) citywide schools, which offer special courses, like language-immersion classes or International Baccalaureate programs, and draw from the entire Milwaukee area; and (2) attendance-area schools, which generally do not have such programs and draw only from a particular neighborhood. MPS, at times, designates certain students to attendance-area schools outside of their neighborhoods, making the school a “nonattendance-area school.”[9] The other party to this lawsuit, St. Joan Antida High School, Inc. (“St. Joan”), is a private school in Milwaukee. St. Joan technically has an attendance area; but unlike public attendance-area schools, St. Joan’s allotted area is the entire City of Milwaukee.[10]

MPS Policy 4.04 addresses transportation to these schools. Two parts of that policy were challenged by St. Joan. The first challenge concerns how MPS decides which students are eligible for busing. High school students generally receive free transportation only if they live two or more miles from their school and “more than one mile walking distance from public transportation.” However, an *MPS* high school student who attends either a citywide or nonattendance-area school more than two miles from his or her home is eligible for free transportation, regardless of proximity to public transportation; private school students are not similarly eligible. The second challenge is to MPS’ requirement that private schools submit their roster of attendees by July 1, but does not impose a roster-notification deadline for public schools.

#### **St. Joan’s Challenge**

In 2016, St. Joan applied to MPS for student transportation during the 2016-17 school year. St. Joan submitted an initial roster of 62 students on May 14, 2016 and updated the list with six more names on September 29, 2016. MPS refused to bus any of the 68 students, arguing that each of them lived within one mile of

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public transportation and the six later-added students were disclosed after the July 1 deadline. St. Joan protested, but eventually covered transportation for its students. St. Joan then asserted two claims against MPS. The first claim alleges the one-mile rule and the July 1 deadline violate the Equal Protection Clause of the Fourteenth Amendment. The second claim asserts these restrictions violate Wisconsin's reasonable uniformity requirement.

### Equal Protection

The Seventh Circuit Court of Appeals first analyzed whether to apply a "strict scrutiny" review of the MPS policy. The Court dismissed St. Joan's contention that MPS Policy 4.04 interfered with the right of parents to direct the education of their children by withholding of free busing, a state-subsidized benefit. The Court found no such interference, holding that the case law "does not protect against a state favoring public schools with public dollars, which is – at worst – all MPS has done." [11] The Court accordingly rejected a "strict scrutiny" approach to evaluating Policy 4.04 and determined the appropriate standard of review was whether the policy satisfied a "rational basis test." Under the rational basis standard, a court may invalidate a legislative classification only if there is no rational relationship between the classification and some legitimate government purpose.

The Court found MPS had legitimate interests in reducing overcrowding and expanding educational access in MPS schools. "With those goals in mind, MPS eased transportation to and from the schools that can help it do both. Easing transportation for private-school (and attendance-area) students, on the other hand, would do little to further MPS's goals. And that distinction gives MPS reason enough to treat the schools differently under rational-basis review." [12] The Court also found cost savings, in the context of MPS' other goals, provided an additional rational basis. "MPS could believe that overcrowding and access concerns were worth taking on the added cost of busing most citywide and nonattendance -area students. It has no similar reason to take on those costs for private and attendance-area students. So MPS made the rational choice: pay more to expand busing to schools that could reduce overcrowding and promote program access, but not to schools that are less likely [to] provide the same returns." [13]

### Wisconsin's Uniformity Requirement

St. Joan argued that Wis. Stat. § 121.54 precludes MPS from relying on the rational bases asserted, essentially urging the Court to find that MPS' Policy 4.04 *clearly* and *dramatically* violated a *clear* state law requirement [of uniformity in transportation of public and private school students. The majority of the Court disagreed, stating "[f]or one, § 121.54's uniformity requirement is not 'clear' [14] and absent that clarity, 'we do not see what MPS 'clearly and dramatically' violated." [15] The dissent, on the other hand, found no rational basis for the policy. "[MPS] provides transportation for students in *public* citywide high schools

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who satisfy the two-mile rule but not their counterparts in *private* citywide high schools. It has invoked the city option on discriminatory terms expressly forbidden by the statute. That's an irrational policy choice as a matter of law.”[16]

### Open Questions Inviting Further Litigation

The Court explicitly refused to address several issues, inviting litigants to seek further definition from the Wisconsin state courts. First, the Court recognized that the one-mile rule “effectively denies busing to most of the St. Joan students.” However, the Court declined “to speak for the Wisconsin courts as to whether that result is ‘reasonable’ as a matter of local busing policy.” The Court also declined to consider whether the one-mile rule complies with Wis. Stat. §121.54, holding “[t]hat question is not before us, and the answer, unsettled as it is, should come from the Wisconsin courts.”[17]

Finally, the Court found a roster-deadline constitutional on its face, but found “no rational basis” for treating students who move to the district near or after the roster deadline differently, based only on whether they go to private or public school. The Court concluded that further fact-finding to determine how MPS was enforcing the July 1 deadline was required and remanded this limited issue to the trial court for further proceedings.[18]

### Conclusion

Public school districts frequently are challenged over their transportation policies or the application of those policies. *St. Joan Antida v. MPS* affirms the public school district’s authority to draft its policy to effectuate legitimate goals. However, *St. Joan Antida v. MPS* reminds the public school district that Wis. Stat. § 121.54 requires reasonable uniformity in the treatment of public and private school students. *St. Joan Antida v. MPS* also is a harbinger of additional litigation over Wisconsin school transportation requirements.

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[1] *St. Joan Antida High School, Inc. v. Milwaukee Public School District*, No. 18-1673, 2019 WL 1324498, — F.3d —, (7<sup>th</sup> Cir. Mar. 25, 2019).

[2] *St. Joan Antida*, 2019, WL 1324498 \*\*1, & 10 (Sykes dissent), citing *Reynolds v. Nusbaum*, 17 Wis. 2d 148, 164, 115 N.W.2d 761, 769-70 (Wis. 1962).

[3] *St. Joan Antida*, 2019 WL 1324498, \*\*1 & 10 (Sykes dissent), citing Wis. Const. art. I, §23.

[4] *St. Joan Antida*, 2019 WL 1324498, \*10 (Sykes dissent), citing Wis. Stat. § 121.54 (2)(a), (b).

[5] *St. Joan Antida*, 2019 WL 1324498, \*10 (Sykes dissent), citing Wis. Stat. § 121.54 (2)(c).

[6] *St. Joan Antida*, 2019 WL 1324498, \*\*1 & 11 (Sykes dissent), citing Wis. Stat. § 121.54(1)(c).

[7] *St. Joan Antida*, 2019 WL 1324498, \*11 (Sykes dissent), citing *Cartwright v. Sharpe*, 40 Wis.2d 494, 162 N.W.2d 5 (1968).

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[8] *Providence Catholic School v. Bristol School District No. 1*, 231 Wis. 2d 159, 605 N.W.2d 238 (Ct. App. 1999).

[9] *St. Joan Antida*, 2019 WL 1324498, \*1.

[10] *St. Joan Antida*, 2019 WL 1324498, \*1.

[11] *St. Joan Antida*, 2019 WL 1324498, \*4.

[12] *St. Joan Antida*, 2019 WL 1324498, \*6, citing *Idaho Dep't. of Employment v. Smith*, 434 U.S. 100, 101 (1977)

[13] *St. Joan Antida*, 2019 WL 1324498, \*7 (citations omitted).

[14] *St. Joan Antida*, 2019 WL 1324498, \*8.

[15] *St. Joan Antida*, 2019 WL 1324498, \*8.

[16] *St. Joan Antida*, 2019 WL 1324498, \*14 (emphasis in original).

[17] *St. Joan Antida*, 2019 WL 1324498, \*8.

[18] *St. Joan Antida*, 2019 WL 1324498, \*\*9-10.

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