

Wisconsin Institute for Law and Liberty: New documents show ACLU, Disability Rights-Wisconsin working closely with Obama DOJ throughout probe into Milwaukee voucher program

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Milwaukee, Wisconsin – New documents obtained by WILL through a settlement with the U.S. Justice Department (DOJ) indicate the American Civil Liberties Union (ACLU) and taxpayer-funded Disability Rights Wisconsin (DRW) were running parts of the Obama DOJ's investigation into the Milwaukee Parental Choice Program. This behavior was strongly criticized by [Hans von Spakovsky](#), former counsel to the assistant attorney general for civil rights at the DOJ and current Senior Legal Fellow at the Heritage Foundation:

“The documents are evidence that the Obama Administration engaged in unethical, improper, and disturbing conduct with the ACLU throughout its investigation into the Milwaukee school choice program.”

It is yet another example of how the hyper-partisan Obama DOJ veered sharply from its mission of “fair and impartial administration of justice.”

Despite the collusion, the four-year investigation was closed in December 2015 with no findings of wrong-doing (a summary of dates is at end of the release).

Background

In August 2011, following a complaint from the American Civil Liberties Union (ACLU) and Disability Rights Wisconsin (DRW), the Civil Rights Division of the Department of Justice launched an investigation into the Milwaukee Parental Choice Program and two private schools for alleged violations of federal disability law, i.e. the Americans with Disabilities Act. They did so on a novel legal theory that centered on treating private schools like public schools for disability law purposes because private schools receive public dollars via a state-funded voucher. This is akin to regulating Wal-Mart like a public entity because they accept food stamps. And it contradicted prior U.S. Department of Education policy, U.S. Supreme Court, and even the U.S. DOJ's own Technical Compliance Manual which says that "private entities are not subject to title II [of ADA]."

During the investigation, the [U.S. DOJ: 1\) threatened to sue the state of Wisconsin](#) unless the state made changes to the voucher program in a way detrimental to choice, 2) demanded Wisconsin turn over student records at private schools, and 3) commandeered a Wisconsin state agency (DPI) to create an illegal complaint process. All of this was done without any findings of fact or conclusions based on the investigation. It was an outrageous abuse of power by the nation's top law enforcement agency, drawing criticism from [U.S. Senator Ron Johnson](#), [WILL attorneys](#), and conservative [columnist George Will](#).

In December 2015, the DOJ closed its investigation with no findings of wrongdoing by the school voucher program. Because of the chilling nature of the investigation, in January 2016 WILL filed a freedom of information act request (FOIA) with the Obama Justice Department, seeking records relating to the investigation.

Lawsuit: WILL vs. DOJ

Unfortunately the U.S. DOJ stonewalled WILL's FOIA request and it was ignored for more than 14 months. So on February 21, 2017, [WILL sued the U.S. DOJ](#) in federal court for failure to provide public records in a timely manner.

Last summer, attorneys at WILL settled the lawsuit, obtaining more than 1,500 pages of documents about the investigation. WILL Attorney Tom Kamenick explained, "We appreciate the Justice Department's cooperation in helping to resolve the lawsuit. The end result was a victory for open government and helped shed light on the school choice investigation."

Documents from the Investigation

The three takeaways from the never-before-seen documents are:

1. Attorneys at Disability Rights Wisconsin and American Civil Liberties Union were involved in large portions of the federal investigation.

In 2011 alone, after the complaint was filed, the DRW and ACLU contacted attorneys at the US DOJ over 30 separate times. They discussed coordinating media strategy,

legal strategy, and finding new accusations of alleged discrimination. Throughout the four-year investigation, the ACLU and DRW:

- Drafted questions for the DOJ to send to the DPI and the Milwaukee Public School District. In fact, most of the materials sent by the ACLU to the DOJ were nearly identical to what the DOJ sent to DPI.
- Produced documents for the DOJ, including data on the Wisconsin school choice programs, information on the Department of Public Instruction's administration of the choice programs, and student data.
- Attempted to expand the investigation by finding new clients and connecting them with the DOJ.
- Kept DOJ in the loop on recent state legislative actions, including the expansion of the state voucher program (which ACLU said made them "concerned") and the creation of the Special Needs Scholarship Program.

2. Early on, the Wisconsin DPI told the U.S. DOJ that ACLU/DRW's legal theory had no merit; yet the investigation remained open for another three years. Early on, the state education agency, the Wisconsin Department of Public Instruction - no ally of school choice - signaled to the DOJ that their investigation was based on an erroneous legal theory:

- DPI explained - accurately - that most federal civil rights laws do not apply to private schools participating in the Milwaukee school choice program.
- DPI produced copies of Wisconsin Supreme Court cases, *Davis v. Grover* and *Jackson v. Benson*, concluding that private schools in the MPCP are not "public" schools.
- DPI explained that they did not have the legal authority to enact the changes to the voucher program demanded by the DOJ, such as requiring private schools in the Milwaukee school choice program to report private student information.

The ACLU and DRW, according to records, were "outraged" by DPI's response. The DOJ disregarded DPI's statements and, instead, in April 2013 sent the DPI a letter

stating that they must make changes to the choice program to be compliant with federal disability law.

As explained by WILL attorneys Rick Esenberg and CJ Szafir [in August 2013](#), the ACLU and DRW complaint essentially wanted private schools in the choice program to be regulated like public schools - even though they received significantly less funding. This is contradictory to the language in DOJ's own manual, which states that private entities are not subject to the same disability laws as public schools (Title II) and rather they are subject to a different, less burdensome part of the ADA which exempts religious institutions (Title III). It also contradicted prior U.S. Department of Education policy and U.S. Supreme Court precedent stating that publically funded employees in private schools do not make them state employees (Rendell-Baker v. Kohn).

And, to say nothing for their own internal "research," the Civil Rights Division should have been aware of some of this based upon the documents produced by the DPI.

3. ACLU and DRW sent a part of the complaint to the U.S. Department of Education for review. That, too, went nowhere.

DRW and ACLU had to send a part of the complaint relating to section 504 of the Rehabilitation Act claim to the U.S. Department of Education (they erroneously sent it to the US DOJ). Once the Department of Education received the complaint, they dismissed it because, in their words, private schools do not receive federal funds and are therefore not covered by that part of the law.

WILL Vice President for Policy CJ Szafir on the findings:

"These new documents help the public finally understand what was driving the Obama Justice Department's unprecedented, baseless investigation into the Milwaukee school choice program. It is deeply troubling that the supposedly "impartial" Justice Department would permit anti-voucher groups like the ALCU and DRW to be so active in the investigation. This is yet another example of government abuse by the Obama Administration's DOJ."

More information on the case, WILL vs. DOJ, can be [found here](#) and documents from the settlement referenced above can be found [here](#).

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