UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE UNDER SECRETARY

THE UNDER SECRETARY

331

July 27, 1990

Mr. Robert S. Peterkin
Superintendent of Schools
Administration Building
5225 West Vliet Street
P.O. Drawer 10K
Milwaukee, Wisconsin 53201-8210

Dear Mr. Peterkin:

Thank you for your letter of July 13, 1990, and for the copy of the letter that you sent to State Superintendent Herbert Grover discussing issues raised by the Milwaukee Parental Choice Program. State Representative Polly Williams has also been in touch with me concerning these issues.

Because of the importance to these issues of Section 504 of the Rehabilitation Act of 1973 and the Education of the Handicapped Act, several weeks ago I asked Richard Komer, Deputy Assistant Secretary for Policy in the Office for Civil Rights, to prepare for me a memorandum addressing the effects of these statutes and our implementing regulations on the Milwaukee Parental Choice Program. I have just received his memorandum and wanted to share a copy of it with you as soon as possible. I know that there is pending litigation involving the Program, and wanted you to know our views on these statutes.

I appreciate your sharing your views with me, and look forward to further exchanges.

Sincerely,

Ted Sanders

Enclosure

cc: Governor Tommy G. Thompson
State Representative Annette Polly Williams
State Superintendent Herbert J. Grover

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

TO : Ted Sanders
Under Secretary

JUL 27 1990

FROM : Richard D. Komer
Deputy Assistant Secretary
for Policy
Office for Civil Rights

SUBJECT: The Milwaukee Choice Program

I. Introduction

On June 20, 1990, you charged me with preparing for you a memorandum specifically addressing whether, and to what extent, Section 504 of the Rehabilitation Act and the Education of the Handicapped Act apply to the Milwaukee Choice Program. These constitute exceedingly difficult issues of first impression for the Department, whose resolution is further complicated by the interaction of the Civil Rights Restoration Act of 1987, which amended Section 504 and which, in conjunction with its legislative history, presents a model of ambiguity. Nevertheless, I have reached the conclusions that follow.

Due to time constraints the various concerned POC's have not been given an opportunity to comment formally on this memorandum. I have met twice with the staff people from the various POC's that your memorandum of June 20 designated to assist me, and found their input to have been very helpful. I also gave them a very abbreviated opportunity to review this memorandum and have made some modifications in response to their comments. I take sole responsibility for its contents. The Office of General Counsel has, however, expressed agreement with the conclusions reached about both Section 504 and the EHA, and OSERS has also indicated agreement with the conclusion reached on the EHA.

II. Summary of Conclusions

1. The Education of the Handicapped Act does not apply to placements in private schools resulting from parents' decisions to participate in the Milwaukee Choice Program. Any handicapped children so placed would be "private school handicapped children" under the EHA regulations (34 C.F.R. 300.450) and as such would not be entitled to the EHA's free, appropriate public education (FAPE) requirements. The relevant SEA and LEA would be required to ensure that "equitable services" are provided to these children, as they must with respect to other parentally placed children.

2a. Section 504 does not directly apply to the private schools, assuming as appears to be the case that the State is using State and not Federal money to fund the placements. In the language of the regulations, the private schools are not "recipients" of Federal funds and their programs and activities are not federally-assisted. This means the schools are not required, among other things, to file assurances directly with the Department; nor would their employment practices be covered (34 C.F.R. Subpart B).

b. Section 504 does cover the State's activity of creating and administering the Choice Program, as part of the program or activity of a recipient of Federal financial assistance. The Civil Rights Restoration Act defines program or activity very broadly, as including "all the operations" of a state agency "any part of which is extended federal funds." The State's role in the Choice Program appears to be such an operation, even though the Federal funding is received for other parts or operations.

c. The obligations imposed by Section 504 and the implementing regulations on the State Agency are far less clear. The statute provides virtually no guidance, and while several provisions of the regulations arguably apply to this situation, they provide no real explication of what constitutes discrimination in this context. I believe the most reasonable approach to giving content to the State's duty is to view it as analogous to the requirements explicitly established in the Section 504 regulations for federally-assisted private education programs (34 C.F.R. S 104.39).

d. Under these standards, the private schools are "not required to provide an appropriate education to handicapped students with special educational needs" where the schools do not offer programs designed to meet their needs (34 C.F.R. Part 104, App. A at 28). A private school would not be allowed to exclude a handicapped student "able to participate in the program with minor adjustments in the way the program is normally offered" (id.).

3. The Notice of Intent to Participate in the Milwaukee Parental Choice Program, in stating requirements of Federal law with which participating schools must comply, has exceeded the requirements of the EHA and Section 504. Sections II.4 and III purport to establish standards that the schools have to assure that they will meet in serving handicapped children under the EHA and Section 504. Because these children are parentally placed under the

EHA, the EHA is largely inapplicable. The DPI requirements under Section 504 track both the EHA and the Section 504 provisions applicable to public rather than private education, and as a result impose far more extensive requirements than I conclude are appropriate.

III. Background

In the interest of brevity, I am not going to provide a lengthy description of the Milwaukee Choice Program; it is contained in the attachment at Tab A. For our purposes here, it is sufficient to highlight a couple of points. First, the program is structured so that the State subsidizes private school placements of former public school students to the not insubstantial tune of $2,500 per capita. Second, these funds appear to come out of a State appropriation without commingling of Federal funds. Third, the program on its face sets few limitations on the private schools that can participate. Fourth, which school a participating student attends is a function of the parent's choice, not a matter of SEA or LEA selection.

The statute defines eligible students in terms of family income and contains no exclusion of handicapped children. The private schools are to choose among their applicants on a random basis. It is unclear in the statute whether a private school could reject an applicant needing special services that it does not normally provide or could charge for these additional services. In any case, we can assume that private schools were intended to retain flexibility to control the content and execution of their own programs and to remove students failing to meet their standards.

In administering the Program, the Wisconsin Department of Public Instruction (DPI) has issued to Milwaukee non-sectarian private schools a document entitled "Notice of School's Intent to Participate in Milwaukee Choice," attached at Tab B. If a school agrees that it will comply with all the requirements contained in the form, then the DPI will find the school to be eligible under the Program. Conversely, refusal to complete the form will result in a finding of ineligibility.

There are two provisions relevant to Section 504 and the EHA. Section II, entitled Student Rights, requires in subsection 4 that the school guarantee that it will comply with Section 504's prohibition of discrimination on the basis of handicap. The subsection adds "[f]or educational obligations for handicapped students see Section III-Handicapped Students."

Section III, in turn, is stated to be applicable if "any of the students applying for admittance to your school under this program are handicapped. Because the potential exists for handicapped students to be involved in this program, the school must meet the following requirements for handicapped students." The "following

requirements" appear to address EHA requirements, as if the enrollment of the child in the private school were an LEA placement for the purpose of providing special education. Among other things, the schools would be obligated to provide all children with exceptional educational needs (i.e., special education) a free and appropriate public education, including necessary supportive and related services.

The schools also would have to commit to complying with all Section 504 provisions applicable to preschool, elementary, and secondary education programs receiving Federal assistance, except, ironically, section 104.39 "private education programs." In short, it seems fair to say that with respect to handicapped students the DPI equates the obligations of the participating private schools to those of a federally-assisted public school.

IV. The EHA*

Part B of the EHA, 20 U.S.C. 1400 et seq., requires that States, like Wisconsin, and local school districts in Wisconsin, receiving Federal funds under the Act make available a free appropriate public education (FAPE) to all children within the State. Wisconsin was clearly meeting this requirement prior to implementation of the Choice Plan and would equally clearly be meeting it after implementation, whether or not the private schools are subject to the EHA requirements. State agencies, like DPI, administering the EHA program are not, however, required to pay for the education of handicapped children who are "parentally placed" in private schools. 34 C.F.R. 300.403. Such children are not entitled to FAPE.

Parental placements can be contrasted with "public agency placements" in which a public agency places a child in a private school or facility in order to provide special education and related services. 34 C.F.R. 300.400. In this latter situation the relationship between the public agency and the private school or facility is contractual, with the handicapped child entitled to FAPE and all attendant rights and procedures. The private school becomes the mechanism through which the public agency fulfills its

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* The information in this section is largely taken from several memoranda attached at Tab C. OGC and OSERS have indicated orally that they agree with my legal conclusion that children placed by their parents in a private school participating in the Milwaukee Choice Program should be considered "parentally placed."

obligation to the child and the public agency (or agencies) pays the full cost of the placement. The children and their parents have the same rights they would have if the children were educated directly by the public agency. 34 C.F.R. 300.401(b).

If FAPE was otherwise available to the children and the parents elected to place the child in the Milwaukee Choice Program, then the placement would be considered to be a parental placement, not a public agency placement for the purpose of providing FAPE. Therefore, the State would not be required to ensure that private schools chosen by the parents would provide FAPE. Conversely, if the placements of the children under the Program are considered to be public agency placements, then DPI would have to ensure provision of FAPE either by contract with the private school, such as through obtaining the sorts of commitments required by the "Notice of School's Intent to Participate" form issued by DPI, or by DPI directly.

Despite the fact that the State is partially subsidizing the placement in private school of any handicapped child who participates in the Program, the fact that it is the parent or parents who are making the unilateral decision to place their child in private school despite the availability of FAPE in the public schools renders these placements "parental placements," in my view. Unlike public agency placements that are made through the IEP process and where the LEA has the controlling role in determining that the child needs to attend the private school or facility, as with other parental placements in the Milwaukee Program the key decisionmaker is the parent(s). Consequently, I conclude that DPI is not required by the EHA to ensure that FAPE is provided to any handicapped child placed by his or her parents in the private school through the Milwaukee Choice Program.

This does not mean, however, that DPI and the Milwaukee Public Schools, the relevant LEA, do not have residual duties vis-a-vis handicapped children who attend those private schools, whether under the auspices of the Program or otherwise. The EHA and the Departments' EDGAR regulations require that the SEA and the LEA ensure that "equitable services" are provided to private school students. 34 C.F.R. 300.403 (EHA); 34 C.F.R. 76.650 - .662 (EDGAR); see also the OSERS memorandum attached at Tab D. The "equitable services" requirement does not, however, entitle parentally placed children to the full range of EHA-B services that they would receive if they were entitled to FAPE, nor does it require the Milwaukee LEA to serve all children with handicaps enrolled in the Milwaukee Choice Program. Nonetheless, the fact that the EHA contemplates SEA and LEA provision of some services to private school handicapped students further buttresses the conclusion that state support for the parentally placed students does not convert their private school placement into a public agency placement. This fact also may tend to ameliorate any deterrent effect that the lack of a FAPE requirement might have on

Milwaukee parents considering participation for their handicapped children in the Choice Program.

V. Section 504

A. Direct Coverage

The legal issues involving Section 504's applicability to the Milwaukee Choice Plan are, not surprisingly, considerably more difficult and complex than those involving the EHA. This is in part due to the fact that Section 504 is a much more general statute than the EHA and in part due to the uncertain effect of the Civil Rights Restoration Act of 1987, an Act riddled with ambiguity but which directly addresses coverage issues. Section 504's generality is remedied to some extent by fairly detailed Departmental regulations, but despite the regulations' greater specificity they do not, and cannot be expected to, address every possible permutation of federally-assisted programs or activities. Although the Department has dealt with several issues related to Choice plans among public schools, neither the Department nor OCR has dealt with a Choice plan involving private schools. Indeed, there is very little Section 504 law or policy involving private schools in general at the elementary and secondary levels, presumably because these schools are rarely grantee/recipients of Federal funds. In short, we are navigating in largely uncharted waters.

I consider first whether the private schools that would like to participate in the Choice Program should be considered to be recipients of Federal funds and thus directly subject to Section 504 coverage. If the answer to this inquiry is affirmative, one would then have to answer whether the schools should be considered to be operating private education programs, in which case section 104.39 of the Section 504 regulations is applicable, or public elementary and secondary programs, in which case the rest of Subpart B of the regulations would apply (SS 104.31 -.38). Finding the schools to be one sort of recipient or the other would resolve the issue without having to consider the much murkier question of whether they have indirect obligations through receipt of State money from the State agency recipients.

Unfortunately for the length of this memorandum, these private schools would not be recipients of Federal funds. "Recipients" are defined in section 104.3(f) as including private agencies to which Federal financial assistance is provided directly or through another recipient, such as the SEA (DPI). The State statute creating the Program, however, appears to fund the tuition reimbursements from a State appropriation (see S 199.23(4) of the Milwaukee parental choice program statute in Tab A). Absent a commingling of Federal monies into the appropriations, it appears that the schools are not subrecipients (i.e., indirect recipients) of Federal funds.

The Civil Rights Restoration Act does not affect this analysis. No legislative language was changed regarding receipt of Federal funds, nor was any change apparently intended. For example, the Senate Report on its bill, S. Rep. 100-64, 100th Cong., 1st Sess. at 28 (1987), in addressing "matters not affected by the bill," asserts that "The bill does not change in any way who is a recipient of federal financial assistance." The Report then makes specific reference to our Section 504 regulations treatment of private schools as nonrecipients where their students participate in certain federally-funded programs. Given our assumption that the Milwaukee Choice Plan is an exclusively State-funded program, the conclusion is inescapable that the private schools are not recipients directly subject to our regulations. Nor, by virtue of the longstanding Departmental policy referenced by the Committee Report, would they become recipients if their handicapped students received some benefits from the EHA via the SEA and LEA's obligations to provide for "equitable services" for private school handicapped students. (That OCR applies this policy to Section 504 is evidenced by the Section 504 regulations themselves, 34 C.F.R. Part 104, App. A, paragraph 1. The Policy itself was announced with respect to Title VI and published in the Federal Register. See 41 Fed. Reg. 35553 (August 23, 1976) (a copy is attached at Tab E)).

Reinforcing our conclusion that the Civil Rights Restoration Act did not intend to render the private schools recipients of Federal funds, despite the fact that they receive funds from a recipient, is another statement in the Senate Report about subrecipiency:

> For State and local governments, only the department or agency which receives the aid is covered. Where an entity of State or local government receives federal aid and distributes it to another department or agency, both entities are covered.

S. Rep. 100-64, 100th Cong., 1st Sess. 4 (1987).

Obviously, departments or agencies (or private schools) to which Federal aid is not distributed or transferred were not intended to be covered.

B. Indirect Coverage

Finding that the private schools are not recipients and thus directly subject to Section 504 does not, however, constitute the end of our inquiry. There are several other ways in which the statute and regulations can affect them and arguably justify the approach taken by the DPI in its Notice. First among these is whether the private schools should be viewed as contractors with the State agency. This is the Section 504 analog to the question

under the EHA of whether the placements in the private schools would be "public agency placements." Similar to the conclusion under the EHA that these would be "parental placements" and not public agency placements, we reach a parallel conclusion under Section 504 - the private schools are not contractors.

State agency recipients, such as DPI, are prohibited from discriminating both directly against qualified handicapped persons and indirectly through contractual, licensing, or other arrangements. 34 C.F.R. 104.4(b)(1) and (4). Thus, when an LEA satisfies its obligation to provide FAPE under Section 504 and the EHA by placing a handicapped student in a private school, the LEA is responsible for the full cost of the placement and for ensuring that the private school cooperates in any way necessary. 34 C.F.R. 104.33(b)(3). These arrangements are contractual, and the LEA is required to bind the contractor in such a way that the rights of the student are preserved. The contractor's duties to the student flow from the contract with the LEA, and the contractor does not become a recipient or subrecipient, since any Federal funds it "receives" are received pursuant to a procurement of services contract, which is excluded from the definition of Federal financial assistance. 34 C.F.R. 104.3(h). (DPI seems to be following this approach in the Notice, by seeking to force the private schools to commit to doing all the things an LEA or private contractor would have to do for a public agency placement.) Where, however, a handicapped student's parents voluntarily place him or her in a private school after the LEA has made FAPE available within its public school system, the LEA has no obligation to pay for the placement under Section 504 just as under the EHA. 34 C.F.R. 104.33(c)(4). OCR has extended this rationale to parental placements in state schools as well. See the OCR memorandum dated July 22, 1988 re the Colorado School for the Deaf and Blind, attached at Tab F. In that policy guidance OCR held that transportation costs for students placed by their school districts were a public responsibility (the state school agreed to pay), while the costs for students placed by their parents were the parents' responsibility.

The Milwaukee Choice Program does not appear to involve or contemplate a contractual relationship between the SEA or LEA and the private schools. On the contrary, the statute seems to create an entitlement for the participating students to have the SEA pay their tuition in the private schools. Unlike the situation with public agency placements under the EHA and Section 504, the parents are the operative decisionmakers and no LEA participation is involved.

Another way besides a contractual relationship in which Section 504 can affect the private schools is discussed in the excerpt from the Section 504 regulations Appendix included in the Senate Report on the Civil Rights Restoration Act:

> One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of section 104.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

S. Rep. 100-64, 100th Cong. 1st Sess. 28 (1987). The Report states that this approach would not be affected by the Senate bill, which formed the basis for the Civil Rights Restoration Act. OGC (see the first memorandum in Tab C) and I agree that the Appendix reference is a typographical error and that the correct reference is to section 104.4(b)(1)(v) of the Section 504 regulations. That provision states that a recipient may not, on the basis of handicap, "Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program."

As noted previously, the Appendix A reference to the prior interpretation is to the 1976 Report on Nonpublic Schools Participating in Federal Programs, published in the Federal Register and attached at Tab E. This Report states that where a private school is not a recipient but "seeks eligibility for its students to participate in the federally-assisted program of the public institution," OCR does not require an assurance of compliance from the private school. Instead, OCR requires that the recipient entity make sure that no discrimination occurs in the federally-assisted program by ensuring that no discriminatory practices occur in the private school, because these would directly affect the federally-assisted program.

If the private school students at schools that would like to participate in the Choice Program are already or will at some future date participate in one or more federally-assisted programs operated by DPI or the LEA, such as the "equitable services" provided under the EHA, then both the approach discussed in the Report and the "significant assistance" provision of the Section 504 would clearly come into play. At this point, however, we do not know if the schools presently have such links, and whether they will in the future is speculative. Even if we knew, we would have

to answer the subsequent question of what constitutes the "discrimination" that the private schools must be prevented from engaging in. The subpart of the Section 504 regulations dealing with elementary and secondary education programs contains a specific standard for private education programs receiving Federal funds (34 C.F.R. 104.39) that differs radically from the obligations of similar public programs. Except where such private programs are special education programs themselves, the private schools have much more limited obligations than public programs. They are not subject to 104.32 "Location and Notification," 104.33 "FAPE," 104.35 "Evaluation and Placement" and 104.36 "Procedural Safeguards," which are major components of Section III of the DPI Notice it requires private schools to sign, except where compliance with 104.33, 104.35, and 104.36 would constitute only "minor adjustments" to their programs. Unless the private schools are already operating special education programs, it is extremely doubtful whether compliance with these requirements could be accomplished with only "minor" adjustments.

Under the significant assistance provision, whereby we indirectly impose Section 504 obligations on nonrecipient private schools, I see no colorable argument for finding that such indirectly affected schools should be held to a stricter nondiscrimination standard than a recipient private school directly assisted by Federal funds. The rationale behind considering the private schools not to be recipients themselves when their students participate in Federal assistance programs appears to be based on congressional intent that the assistance is for the benefit of the private school students and not the private schools they attend. This, of course, contrasts with the postsecondary student assistance program involved in Grove City v. Bell, 465 U.S. 555 (1984), which the Court said was designed to aid colleges and universities, as well as students. I fail to see why when only the students are intended to benefit from the assistance and do so by participating in the Federal program, that their school should be subjected to stricter requirements than when the aid goes directly to the school and thus can be said to benefit all of its students. In the absence of some persuasive reason I have overlooked, I believe the "significant assistance" obligation imposed on private schools indirectly by federally-assisted public agencies should not exceed those in section 104.39.

I have concluded that the private schools are not recipients themselves, and that if their students participate in federally-assisted LEA activities such as EHA "equitable services," the LEA would not be justified in imposing nondiscrimination requirements going beyond the standards contained in 34 C.F.R. 104.39 applicable to private education programs. It remains to be seen whether Section 504 requires the SEA (DPI) to impose the sorts of requirements that it has imposed in its Notice to the private schools. This question involves the most difficult issues that we must face.

The first part of this question is whether Section 504 applies to the SEA's activities in setting up and administering the Choice Program, given the fact it does not appear to be using Federal funds for this activity. Section 504's coverage is limited to programs and activities receiving Federal funds, so a serious issue arises as to whether Section 504 applies to the SEA's actions, let alone requires the SEA to indirectly impose all of Section 504's requirements on the private schools. Not without serious misgivings, I conclude that Section 504 does apply to the SEA's actions.

State and local governments have long had programs of aid to students in private and even parochial schools. At the elementary and secondary levels they have provided free textbooks and transportation and at the postsecondary level scholarships and stipends not unlike the aid involved in the Milwaukee Choice Plan. To the best of my knowledge, OCR has never asserted jurisdiction over these State and local activities. Nor has it sought to indirectly regulate the schools the students attend by telling the State and local governments to assure nondiscrimination on the part of the schools. I think it is a reasonable assumption that the reason OCR did not assert jurisdiction was that it did not consider the private programs to be federally funded programs or activities. The nearest analogous situation I can think of is the Department of Justice's opposition to letting school districts fund private school placements for public school students after the district had unconstitutionally segregated its public schools and then closed them to avoid desegregation. Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1963). This action is readily distinguishable in that, among other things, the school districts were in a remedial posture, having previously violated the constitutional rights of students. They were thus under an affirmative obligation to desegregate their schools, an obligation that conflicted with establishing a new program intentionally aimed at subverting their remedial duty.

Moreover, although the Section 504 regulations lack a definition of "program," the Title VI regulations contain one at 34 C.F.R. 100.13(g), which OCR has always looked to in dealing with program definition issues. Though hardly a model of clarity, when read as a whole it is hard to read this definition as including a State-funded choice program. Nor do related Title VI sections implicitly addressing coverage, such as section 100.4, "Assurances required," and section 100.5, "Illustrative examples," appear to imply coverage of such programs.

Consequently, I seriously doubt whether prior to both the Grove City and the Civil Rights Restoration Act OCR would have asserted jurisdiction over the State's actions in creating the Milwaukee Choice Plan. The Restoration Act, however, contains a very broad definition of the programs or activities covered by Section 504. Under this definition "program or activity" means "all the

operations of a department . . . any part of which is extended Federal financial assistance."

Read literally, this seems to cover the State's action in creating and operating the Choice Program, since it would appear to be an "operation" of a department a part of which is receiving Federal funds. Thus, we may be facing a situation where, ironically, the title, "The Civil Rights Restoration Act," may be misnomer, in that the Act does more than just restore pre-Grove City coverage; it may have expanded it substantially. Notwithstanding the fact that the legislative history of the Act, as well as the title, suggest that it was intended solely to restore coverage, I do not believe that we are at liberty to disregard the literal language of the new definition of program or activity in favor of continuing prior approaches. Discrepancies between the proposed new Act and past agency interpretations were thoroughly aired, and the new language was drafted with considerable attention, over several sessions of Congress. While Congress may have been wrong about whether the new definition comported with past practice, and some of the opponents of the bill right about the discrepancy, the proponents appear to have clearly intended the literal scope of the definition and this intention controls. See Brown v. GSA, 425 U.S. 820, 829 (1976) ("[T]he relevant inquiry is not whether Congress correctly perceived the then current State of the law, but rather what its perception of the state of the law was.")

Having concluded that the State's actions in creating and administering the Choice Program are subject to Section 504 as a part of a program or activity receiving federal funds; the question now becomes what obligation does Section 504 impose. Nothing in the Section 504 regulations directly addresses how a State must regulate entities to which it extends its own funds. Section 104.46(b)(1)(v), the "significant assistance" provision discussed on page 10, prohibits DPI from providing significant assistance to an organization that "discriminates," but doe not further elaborate on what constitutes discrimination. As noted previously, the provisions of Subpart D, which specifically addresses preschool, elementary, and secondary education, are all framed in terms of a recipient that operates such programs, and the private schools would not be recipients. If they were, we earlier concluded they would be subject to section 104.39 on private education programs. I think it makes sense, in this situation as well, one not anticipated by the drafters of the original regulations, to interpret the general prohibitions of Subpart A contained in section 104.4 to impose on the State agency recipient, DPI, the obligations of ensuring that any private schools receiving State funds comply with the standards applicable to private schools receiving Federal assistance directly from the Federal government,with respect to Choice Program students. In other words, DPI should require assurances that the private schools will comply with section 104.39, rather than the other provisions of Subpart D, as it currently does in its Notice.

I recognize that one can argue that the Milwaukee Choice Plan has the effect of discriminating against otherwise qualified handicapped students, in violation of section 104.4(b)(iii). That provision forbids a recipient from providing qualified handicapped students with a benefit that is not as effective as that provided others. Thus, while on its face the Plan does not exclude any handicapped students, if the private schools are not required to provide FAPE and meet all other standards applicable to the public schools, certain handicapped students will likely be unable to take advantage of the program because the private schools will not provide the necessary special services they need. (Other handicapped students, of course, will be able to use the Program because they will not need such services, or because the LEA will provide them under its EHA equitable services obligations, or because the parents will now be able to afford them, since tuition will be free.)

This same argument can be made against many activities of a State or local education agency like DPI, which points up the need to be cautious in applying section 104.4(b)(iii). LEAs offer gifted and talented programs that by their very nature exclude in effect classes of handicapped children. They offer interscholastic athletics programs that exclude in effect other classes of handicapped children from certain activities. States provide higher education scholarships that in effect exclude certain handicapped children. Frequently, we justify these exclusionary effects by finding the availability of other similar activities. Certainly where the public schools remain ready, willing, and able to provide a free appropriate public education to any handicapped student unable to utilize the Program because of a need for special services, we should hesitate to create impediments to a Program of potentially great benefit to large numbers of handicapped and nonhandicapped children alike.

The Supreme Court's decision in Alexander v. Choate, 469 U.S. 287 (1985), also counsels caution in applying the "equally effective" requirements of the Section 504 regulations. In that case, the Supreme Court considered allegations whether a State's limitation of medicaid reimbursement to 14 days discriminated against handicapped persons, since handicapped persons were alleged to be more likely to need more days. Although the Court assumed that Section 504 could reach "at least some conduct that has an unjustifiable impact upon the handicapped" (469 U.S. at 300), the Court specifically found that the facially neutral provision of 14 days to everyone provided handicapped persons meaningful access and did not exclude them from the medicaid services.

In reaching its conclusion, the Court acknowledged that a variety of the Section 504 prohibitions "read in isolation" could be taken to suggest the medicaid program required equal results for handicapped persons. The Court found instead that the proper focus of the regulations was on an equal opportunity to benefit and that

the State did not have to redefine the benefit it offered "simply to meet the reality that the handicapped have greater medical needs. 469 U.S. at 304.

Wisconsin's Program providing $2,500 tuition reimbursement per child provides meaningful access to private education to handicapped children and does not exclude them. Especially when viewed in conjunction with the State's ongoing responsibility to make far more extensive services available through its public school programs, offering an equal benefit should not be viewed as discrimination, provided the requirements of section 104.39 are imposed on the private schools. This would ensure that any decisions that the private schools make do not exclude a qualified handicapped student if, with minor adjustments, the student can be provided an appropriate education.

VI. CONCLUSION

Although neither issue is crystal clear, it appears: (1) that the EHA does not cover placements effected by parents participating in the Milwaukee Choice Program; and (2) that the Section 504 regulations should be interpreted as indirectly subjecting the private schools to the requirements respecting private education programs (34 C.F.R. 104.39). The obligations DPI seeks to impose on the private schools wishing to participate in the Program go well beyond section 104.39, and to the extent that they do they are not necessitated by Federal law.

Attachments
As stated