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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

December 2, 2015

KEITH B. ASHDOWN, STAFF DIRECTOR
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The Honorable Loretta Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Lynch:

I write to request information about the Department of Justice's (DOJ) scrutiny of the Milwaukee Parental Choice Program (MPCP) that has been ongoing since at least August 27, 2011.¹ Despite repeated inquiries for basic information about the DOJ's probe,² as well as an invitation to testify before the Committee about this matter,³ the DOJ continues to refuse to provide any transparency to the Committee.⁴

At the heart of the Committee's request for information about the DOJ's examination of the MPCP is the serious need for the Committee to understand the basis and nature of the DOJ's actions. While the Americans with Disabilities Act "requires the [DOJ] to provide technical assistance to businesses, State and local governments, and individuals with rights or responsibilities under the law,"⁵ the DOJ has yet to clearly articulate whether it is simply providing technical assistance to the Wisconsin Department of Public Instruction (DPI) or whether it is pursuing enforcement actions against MPCP participants. The Committee has clear authority under the Standing Rules of the Senate and S. Res. 73 (114th Congress) to conduct oversight of the DOJ and its actions examining the MPCP. Despite this authority, the DOJ continues to reject the opportunity to provide transparency into its monitoring of the MPCP.

¹ Joy Resmovits, "Wisconsin Education Dept. Responds to DOJ Voucher Probe," Huffington Post, November 3, 2011, http://www.huffingtonpost.com/2011/11/03/wisconsin-vouchers-doj-investigation-disabilities-discrimination_n_1074328.html.

² Email from Majority Staff, S. Comm. on Homeland Sec. and Governmental Affairs to U.S. Dep't of Just. Representative (Oct. 14, 2015, 10:39 EDT). See also June 16, 2015 Letter from U.S. Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs to Loretta Lynch, Att'y Gen., U.S. Dep't of Just. See also July 16, 2015 Letter from U.S. Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs to Loretta Lynch, Att'y Gen., U.S. Dep't of Just.

³ July 10, 2015 Letter from U.S. Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs to Loretta Lynch, Att'y Gen., U.S. Dep't of Just.

⁴ Telephone Call with U.S. Dep't of Just. Representative (Oct. 29, 2015). See also July 7, 2015 Letter from Peter J. Kadzik, Assistant Att'y Gen., U.S. Dep't of Just. to U.S. Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs. See also July 31, 2015 Letter from Peter J. Kadzik, Assistant Att'y Gen., U.S. Dep't of Just. to U.S. Senator Ron Johnson, S. Comm. on Homeland Sec. and Governmental Affairs.

⁵ U.S. Dep't of Just., Civil Rights Div., Information and Technical Assistance on the Americans with Disabilities Act, Dep't of Just. Responsibilities: ADA Technical Assistance Program, <http://www.ada.gov/taprog.htm>.

The DOJ has been examining the MPCP for over four years without pursuing any action against any private schools participating in the program.⁶ To date, the DOJ has not produced any reports, findings, or reviews about the administration of the MPCP by the Wisconsin Department of Public Instruction.⁷ In a letter to the Committee dated July 7, 2015, the DOJ asserted that it has

not pursued any action against private schools participating in the MPCP Program under Title II. Rather, **our investigation is limited to ensuring that the State complies with its obligation to ensure that the MPCP Program is open to all students and does not discriminate against students with disabilities.** The Department will continue to monitor the MPCP Program and to assist DPI, where needed, in complying with applicable federal civil rights laws.⁸

However, in a subsequent letter to the Committee dated July 31, 2015, the DOJ wrote that it is “continuing to investigate and monitor DPI’s response to our earlier findings of potential ADA violations.”⁹ These statements appear to be at odds, and the DOJ has done nothing to clarify its actions in this matter. Moreover, the DOJ has provided no information to the Committee about its “earlier findings” of potential ADA violations—the findings on which the DOJ apparently now relies to justify its continued examination of the MPCP.

The vague and varying reasons stated by the DOJ for its continued, four-year examination of the MPCP are concerning, both in terms of the DOJ’s exertion of influence over a program politically opposed by the Administration,¹⁰ and in terms of the appropriate use of taxpayer resources. By way of comparison, the DOJ spent two years investigating serious allegations of politically-motivated discrimination on a national scale by senior officials at the Internal Revenue Service before declining to pursue criminal charges and formally notifying the Committee of its decision and rationale.¹¹ It is simply not fair to the MPCP, the participating schools, or the students benefitted by the program for the DOJ to investigate indefinitely and without justification.

The United States Court of Appeals for the Fifth Circuit recently ruled against the DOJ’s efforts to intervene in the private school choice program in the state of Louisiana.¹² In this case,

⁶ July 7, 2015 Letter from Peter J. Kadzik, Assistant Att’y Gen., U.S. Dep’t of Just. to U.S. Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs.

⁷ Telephone Call with U.S. Dep’t of Just. Representative (Oct. 29, 2015).

⁸ *Id.* (emphasis added).

⁹ July 31, 2015 Letter.

¹⁰ Governor Bobby Jindal and Governor Scott Walker, What’s Obama’s Problem With School Choice?, Politico, July 9, 2014, <http://www.politico.com/magazine/story/2014/07/whats-obamas-problem-with-school-choice-108667>. See also Gizzi, John, DC Democrat: Obama is Biggest Problem for School Vouchers, Newsmax, Sept. 4, 2013, <http://www.newsmax.com/John-Gizzi/Chavous-vouchers-lawsuit-Obama/2013/09/04/id/523751/>. See also Hess, Hannah, A Federal Funding Fight over D.C. Vouchers, March 17, 2015, <http://blogs.rollcall.com/hill-blotter/school-vouchers-dc-funding-fight/>.

¹¹ Oct. 23, 2015 Letter from Peter J. Kadzik, Assistant Att’y Gen., U.S. Dep’t of Just. to U.S. Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs, and U.S. Senator Thomas Carper, Ranking Member, S. Comm. on Homeland Sec. and Governmental Affairs.

¹² *Brumfield v. La. State Bd. Of Educ.*, No. 14-31010, 2015 U.S. App. LEXIS 19624 (5th Cir. Nov. 10, 2015).

the DOJ sought, under a forty-year-old desegregation order, to create “a process for continuing federal oversight of the voucher program to operate alongside the existing private school certification process.”¹³ The DOJ pursued this action “in spite of the fact that the DOJ had already conceded that there had been no [non-discriminatory certification] violation here, and that the private schools themselves are not ‘segregated’.”¹⁴ In its opinion, the Fifth Circuit noted:

The only evidence before the trial court shows that there have been no negative effects on the desegregation of Louisiana’s public schools. Instead, the DOJ contends that the state’s voucher program *might* potentially frustrate the desegregation of public school districts in other pending cases. **The DOJ admits that this position amounts to a fishing expedition.**¹⁵

The Fifth Circuit concluded:

DOJ’s bold strategy, if upheld, would circumvent the ordinary litigation process in two ways. The reports it seeks do not fall under the auspices of discovery permitted by the Federal Rules of Civil Procedure, which authorize the compelled production of information only after a complaint alleges violations of law. Here, there was no complaint, hence no basis for DOJ to intrude into the affairs of Louisiana and its disadvantaged student population. American discovery follows the common law adversary process, not the civil law’s inquisitorial process, yet DOJ seeks to be the inquisitor.¹⁶

It appears that the DOJ is seeking to be the inquisitor of the MPCP by conducting a similar indefinite fishing expedition. DOJ has not pursued litigation to adjudicate the allegations in the complaints filed with the DOJ which initiated this probe.¹⁷ The DOJ’s indefinite scrutiny of the MPCP in lieu of enforcement action or other legal proceedings is troubling.

For the reasons above, I reiterate my earlier request that you fully respond to the basic requests for information in my letters dated June 16, 2015, and July 16, 2015. Additionally, I request that you please provide the following information:

1. Please provide the number and duration of each open examination or investigation by the DOJ relating to disability-related discrimination allegedly committed by public school systems, charter school networks, and private schools.

¹³ *Id* at *12.

¹⁴ *Id* at *11.

¹⁵ *Id* at *25 (emphasis added).

¹⁶ *Id* at *38.

¹⁷ American Civil Liberties Union Found. Racial Just. Program et al., v. State of Wisconsin et al., U.S. Dep’t of Just. Civil Rights Div., June 7, 2011, American Civil Liberties Union Racial Justice Program, et al v. State of Wisconsin, et al, U.S. Dep’t of Justice Civil Rights Division, June 7, 2011, https://www.aclu.org/files/assets/complaint_to_doj_re_milwaukee_voucher_program_final.pdf.

The Honorable Loretta J. Lynch

December 2, 2015

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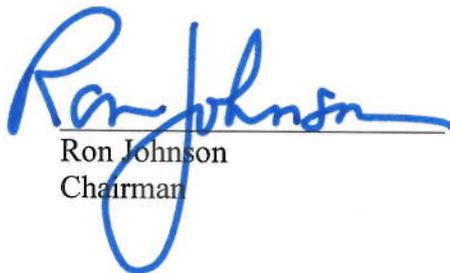
2. Please provide the number of DOJ employees who have worked on the DOJ's probe of the MPCP since its inception;
3. Please provide the titles and grade-level of all DOJ employees who have worked on the DOJ's probe of the MPCP since its inception;
4. Please provide the total amount of funds expended by the DOJ in carrying out its probe of the MPCP since its inception, including expenses for travel, such as the amount of DOJ resources spent on airline tickets, hotels, and employee per diems.

Please provide this information as soon as possible but no later than 5:00 p.m. on December 16, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency, economy, and effectiveness of all agencies and departments of the Government."¹⁸ Additionally, S. Res. 73 (114th Congress) authorizes the Committee to examine "the efficiency and economy of operations of all branches of the Government including the possible existence of fraud, misfeasance, malfeasance, collusion, mismanagement, incompetence, corruption or unethical practices...."¹⁹ For purposes of this request, please refer to the definitions and instructions in the enclosure.

If you have any questions about this request, please contact Courtney Allen of the Committee staff (Majority) at (202) 224-4751. Thank you for your prompt attention to this matter.

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Thomas Carper
Ranking Member

Enclosure

¹⁸ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

¹⁹ S. Res. 73 § 12, 114th Cong. (2015).

Instructions for Responding to a Committee Request
Committee on Homeland Security and Governmental Affairs
United States Senate
114th Congress

A. Responding to a Request for Documents

1. In complying with the Committee's request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e. CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic form should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - a. The production should consist of single page Tagged Image Files (".tif"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - b. Document numbers in the load file should match document Bates numbers and .tif file names.
 - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - d. All electronic documents produced should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

Instructions for Responding to a Committee Request

- e. Alternatively, if the production cannot be made in .tif format, all documents derived from word processing programs, email applications, instant message logs, spreadsheets, and wherever else practicable should be produced in text searchable Portable Document Format (“.pdf”) format. Spreadsheets should also be provided in their native form. Audio and video files should be produced in their native format, although picture files associated with email or word processing programs should be produced in .pdf format along with the document it is contained in or to which it is attached.
 - f. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), consult with the Committee staff to determine the appropriate format in which to produce the information.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
 7. Documents produced in response to the request should be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
 8. When producing documents, identify the paragraph in the Committee’s schedule to which the documents respond.
 9. Do not refuse to produce documents on the basis that any other person or entity also possesses non-identical or identical copies of the same documents.
 10. This request is continuing in nature and applies to any newly discovered information. Any record, document, compilation of data or information not produced because it has not been located or discovered by the return date, should be produced immediately upon subsequent location or discovery.
 11. All documents should be Bates-stamped sequentially and produced sequentially. Each page should bear a unique Bates number.
 12. Two sets of documents should be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
 13. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.

Instructions for Responding to a Committee Request

14. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
16. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents which would be responsive as if the date or other descriptive detail were correct.
17. In the event a complete response requires the production of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
18. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

B. Responding to Interrogatories or a Request for Information

1. In complying with the Committee's request, answer truthfully and completely. Persons that knowingly provide false testimony could be subject to criminal prosecution for perjury (when under oath) or for making false statements. Persons that knowingly withhold subpoenaed information could be subject to proceedings for contempt of Congress. If you are unable to answer an interrogatory or information request fully, provide as much information as possible and explain why your answer is incomplete.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. Your response to the Committee's interrogatories or information requests should be made in writing and should be signed by you, your counsel, or a duly authorized designee.

Instructions for Responding to a Committee Request

4. When responding to interrogatories or information requests, respond to each paragraph in the Committee's schedule separately. Clearly identify the paragraph in the Committee's schedule to which the information responds.
5. Where knowledge, information, or facts are requested, the request encompasses knowledge, information or facts in your possession, custody, or control, or in the possession, custody, or control of your staff, agents, employees, representatives, and any other person who has possession, custody, or control of your proprietary knowledge, information, or facts.
6. Do not refuse to provide knowledge, information, or facts on the basis that any other person or entity also possesses the same knowledge, information, or facts.
7. The request is continuing in nature and applies to any newly discovered knowledge, information, or facts. Any knowledge, information, or facts not provided because it was not known by the return date, should be provided immediately upon subsequent discovery.
8. Two sets of responses should be delivered, one set to the Majority Staff and one set to the Minority Staff. When responses are provided to the Committee, copies should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
9. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.
10. In the event that knowledge, information, or facts are withheld on the basis of privilege, provide a privilege log containing the following information: (a) the privilege asserted; (b) the general subject matter of the knowledge, information, or facts withheld; (c) the source of the knowledge, information, or facts withheld; (d) the paragraph in the Committee's request to which the knowledge, information, or facts are responsive; and (e) each individual to whom the knowledge, information, or facts have been disclosed.
11. If a date or other descriptive detail set forth in this request is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, provide the information that would be responsive as if the date or other descriptive detail was correct.
12. In the event a complete response requires the transmission of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
13. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.

Instructions for Responding to a Committee Request

C. Definitions

1. The term “document” in the request or the instructions means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra- office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” in the request or the instructions means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in meetings, by telephone, mail, telex, facsimile, email (desktop or mobile device), computer, text message, instant message, MMS or SMS message, regular mail, telexes, discussions, releases, delivery, or otherwise.
3. The terms “and” and “or” in the request or the instructions should be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” in the request or the instructions mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, businesses or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify” in the request or the instructions, when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; and (b) the individual’s business address and phone number.

Instructions for Responding to a Committee Request

6. The terms “referring” or “relating” in the request or the instructions, when used separately or collectively, with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” in the request or the instructions means agent, borrowed employee, casual employee, consultant, contractor, de fact employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee or subcontractor.
8. The terms “you” and “your” in the request or the instructions refer to yourself; your firm, corporation, partnership, association, department, or other legal or government entity, including all subsidiaries, divisions, branches, or other units thereof; and all members, officers, employees, agents, contractors, and all other individuals acting or purporting to act on your behalf, including all present and former members, officers, employees, agents, contractors, and all other individuals exercising or purporting to exercise discretion, make policy, and/or decisions.

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