The complex legacy of *Jamie S.*

Special education in Milwaukee schools has improved, even as plaintiffs lost a landmark class action case launched in 2001.

by Alan J. Borsuk

On the face of the matter, no one can doubt that the plaintiffs lost the Jamie S. case. More than a decade after a class action suit was filed challenging many aspects of how the Milwaukee Public Schools (MPS) system handled its obligations related to special education, Jamie S. et al. v. Milwaukee Public Schools et al. effectively ended in January 2012. That was when a decision by the U.S. Court of Appeals for the Seventh Circuit wiped out a string of victories for the plaintiffs before Magistrate Judge Aaron Goodstein in the federal district court in Milwaukee.

Even more generally, the Seventh Circuit opinion, combined with a June 2011 Supreme Court decision (Wal-Mart Stores, Inc. v. Dukes), means it is likely that Jamie S. already has played a significant role in ending a period in which class action challenges to special education systems in school districts around the United States were relatively frequent.

At the same time, the legacy of the Jamie S. case appears more complex. The litigation brought what can be called practical victories for the plaintiffs. In particular, improvements they sought in the systems and practices of the Milwaukee Public Schools came to pass. Indeed, every party involved in the issue agrees that MPS is doing better now than in 2001, when the case was launched, in complying with special education requirements. For more than a decade, the suit was a factor in shaping MPS policy. It continues to touch daily life for thousands of Milwaukee children. This may be one of those situations in which the impact of a lawsuit even on the parties cannot fully be measured by the final decision in court.

These various effects of Jamie S. are worth exploring. This requires, first, a look back. ▸▸

Illustrations by Robert Neubecker

Defining the Class

Perhaps the filing of the case—then known as *Lamont A. et al. v. Milwaukee Public Schools et al.*—was a sign of how much effort it would take to move the case forward. Lawyers for a nonprofit organization called the Wisconsin Coalition for Advocacy (which later became Disability Rights Wisconsin) decided to file the suit in federal court in Milwaukee on September 11, 2001. They found the courthouse closed—that was, of course, the day of terrorist attacks on the east coast. The suit was filed September 13.

The suit was a broad challenge to how MPS dealt with students who had or might have special education needs. The complaint portrayed a system that, in a nutshell, was failing to provide what a large number of children were entitled to under the federal Individuals with Disabilities Education Act (IDEA). It sought to include thousands of children in a class represented by the plaintiffs. It named as defendants not only MPS but also the Wisconsin Department of Public Instruction, which, the suit said, had not adequately used its authority to assure that Milwaukee was implementing IDEA. The parties consented to allow Goodstein, a magistrate judge (not a district judge), to handle the case.

In November 2003, after several rounds of proceedings and more than two years after the case was filed, Goodstein issued a decision granting the plaintiffs' request to make the case a class action and defining the class. His ruling narrowed the class to focus on an aspect of the IDEA called Child Find—basically, the process for identifying children who are entitled to special education help and getting them on course to receive such help. Goodstein defined the class as "[t]hose students eligible for special education services from the Milwaukee Public School System who are, have been or will be either denied or delayed entry or participation in the processes which result in a properly constituted meeting between the IEP team and the parents or guardians of the student." An IEP is an "individualized educational plan." Developing an IEP is a crucial process in special education.

Goodstein's decision was crucial to the course of the case. It also made a young girl, identified only as Jamie S., the lead plaintiff, since other children who were initially among the named plaintiffs didn't fit within the class. Goodstein described Jamie S. in a later opinion as a girl with cognitive problems that were spotted in kindergarten. Her teacher at that point told Jamie's mother to see what happened as time passed. By age nine, Jamie was unable to multitask and needed help with hygiene and dressing. Her mother's further requests for testing Jamie weren't acted on. Finally, Jamie was given an IEP evaluation, but her mother was not present, a violation of the law. It was determined Jamie had a low IQ and was eligible for special education.

Goodstein set a schedule in which the case would be tried in phases. The first, in fall 2005, involved testimony by several expert witnesses for each side and focused on MPS's overall record in handling special education determinations. The second phase, in April 2006, focused on the specifics such as the histories of the named plaintiffs.

Even as the case was unfolding, it began to have an impact. MPS officials were determined to fight the plaintiffs all out. For one thing, both administrators and Milwaukee school board members argued that MPS did not have the money to do all that the plaintiffs wanted and was already financially pressed by the high cost of special education. That was especially so, officials said, because the federal government had never lived up to suggestions made when the first version of the IDEA passed in the 1970s that it would pay 40 percent of the cost of special education nationwide.

But, at the same time, MPS began changing in directions that the plaintiffs sought. MPS leaders felt under pressure to show that they were complying with requirements, and several say that, from top to bottom, orders were to meet all the rules. The *Jamie S.* case "was the biggest thing on my mind, all day, every day," Patricia Yahle, MPS special education chief from 2002 until her retirement in 2011, said in a recent interview. Jeff Moulter, a special education administrator throughout the period (he now holds the title of "equitable educational opportunities coordinator"), said that meeting deadlines and paperwork requirements became very important. "I think we got pretty good at that," Moulter said.

Goodstein issued a decision on September 11, 2007, that came down strongly on the side of the plaintiffs. He found liability on the part of MPS and DPI for not meeting the requirements of Child Find. For MPS, that included too-often missing deadlines for conducting IEPs; for DPI, that included not putting enough teeth into orders to MPS to improve its record. "It is the opinion of the court that the plaintiffs have satisfied their burden to establish a systemic problem with the MPS program," Goodstein wrote.

A partial settlement, a lot of change

Goodstein decided the case would move to the third stage of trial, focusing on remedies—unless, as he urged in his decision, the parties settled out of court. He got half of that. In a dramatic turn, DPI and Disability Rights announced in July 2008 that they had agreed on a settlement that included imposing on MPS expectations of close to 100 percent compliance with IDEA requirements in each school in the system. Jodi Searl, a lawyer employed by MPS who worked extensively on the case, said MPS officials were waiting for a fax from DPI when they got word of the settlement. "It was a difficult blow," she said.

Coulter stepped into the action as other circumstances surrounding MPS were changing. The federal No Child Left Behind education law was bringing escalating sanctions against schools and school districts that hadn't met expectations. For MPS, that meant the state was gaining more power to order sometimes-sweeping "corrective actions" in Milwaukee. Much of what the DPI–Disability Rights settlement called for became part of these corrective actions, which gave the specific ideas force even against the non-settling defendant, MPS—and a source of authority independent of the partial settlement.

In addition, the Council of the Great City Schools, a peer organization of leaders of urban school districts, conducted analyses of several aspects of MPS's work,

The partial settlement changed the dynamics and course of the case. DPI was now on the other side from MPS. As part of the settlement, DPI agreed to pay for an outside "special expert" to be appointed by the court to oversee MPS's work on carrying out the settlement.

Goodstein approved the settlement and the naming of W. Alan Coulter, a professor at Louisiana State University Health Sciences Center in New Orleans, as an independent expert, with broad powers to shape what the partial settlement meant. Coulter had a long record of involvement in monitoring special education programs for the U.S. Department of Education and others. He quickly emerged as a key figure in determining the long-term impact of *Jamie S.* His vision for what needed to be done in Milwaukee went well beyond special education, and he would view his role under Goodstein's order as putting him nearly on a par with both MPS Superintendent William Andrekopoulos and Wisconsin Superintendent of Public Instruction Tony Evers.

delivering strong criticisms. One report pointed to decentralization of academic decision making in MPS, which allowed 18 or more reading programs to be in use in the schools, as a big reason that reading education was ineffective. In short order, control of what was going on in the schools began to shift from individual buildings to the MPS central administration. The centralization process accelerated after Gregory Thornton became MPS superintendent in 2010.

Another Great City Schools report criticized the heavy use of student suspensions. MPS may have had the highest suspension rates in the country, the report suggested, while steps short of suspension were rarely used and could be more constructive. Subsequently, central administrators directed principals to reduce use of suspensions—a step also accelerated under Thornton. Excessive suspensions were one of the original concerns of the plaintiffs in *Jamie S.*, and Coulter was also a critic of them.

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MPS also was making an internal change that advocates on all sides agree was important: a big push to improve data collection and use. This change occurred partly because it was important in the *Jamie S.* proceedings to demonstrate progress in meeting IDEA requirements. To be sure, there were other reasons as well that good data became a priority in MPS, including that there was so much need for good data to meet other accountability demands and (most generally) that such data collection had come to be regarded nationwide as such a valuable element of efforts to improve education.

There was, in addition, growing nationwide support for education practices such as Response to Intervention (RTI), a strategy that includes screening children at early ages and when there are early signs of a child's getting off a good academic track. Coulter was a big advocate of RTI, DPI leaders also liked the approach, and soon it was high on the agenda for use in Milwaukee and, subsequently, throughout Wisconsin.

The change in MPS leadership from Andrekopoulos, superintendent from 2002 to 2010, to Thornton, who was new to Milwaukee, was also important. Whereas MPS leaders until then largely had fought the plaintiffs and then DPI, Thornton wanted to cooperate, at least on many fronts. Whereas Andrekopoulos and Coulter butted heads, Thornton and Coulter hit it off. Coulter said, "It just completely changed the chemistry." Thornton, Coulter, and DPI chief Tony Evers met in person every month for about two years; while they didn't agree on everything, the atmosphere improved and the pace of change increased.

The total effect: MPS has launched a wide array of changes since 2008, with accelerating change since 2010. The changes have not yet borne notable fruit in terms of improved student achievement, including for special education students, but there are signs of progress. They also continue to address key concerns that prompted the *Jamie S.* suit in the first place.

Going beyond special education

By this point (2008 or so), *Jamie S.* had become part of changes that went well beyond special education issues to address the way MPS served all its students—and one of the biggest boosters of this was the court-appointed expert, Coulter. He viewed the way reading and math were taught and the way behavior and discipline were handled for all students as areas where he should express himself—and he did, with effect.

But everything was not clear sailing. MPS was still fighting Goodstein's decisions, and the opposition escalated in 2009 when Goodstein ordered the development of a plan for MPS to search out people who as students between 2000 and 2005 might not have received special education services they were entitled to. Many of them were now adults. They were to receive "compensatory education" to make up for what they hadn't gotten back then. What that meant was not specified, but angry MPS leaders argued that this could cost them large amounts of money that they did not have.

With Goodstein's approval of the DPI–Disability Rights settlement and the order to create a compensatory education plan, the case seemed, for the first time, appealable to the Seventh Circuit. The case was argued before Judges Joel Flaum, Ilana Rovner, and Diane Sykes on September 7, 2010. It was 16 months until the panel issued its decision—a period during which the Supreme Court issued a decision that strongly influenced the final ruling.

Wal-Mart v. Dukes was a case alleging violations by Wal-Mart of Title VII of the Civil Rights Act of 1964 through the discretion exercised by the company's local supervisors over pay and promotion matters. In a 5 to 4 decision, the high court ruled in 2011 that as many as 1.5 million women who worked for Wal-Mart did not constitute an appropriate group for a class action because their claims did not meet the requirement of depending on "a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

The appeals court's decision on *Jamie S.* was premised firmly on the *Wal-Mart* ruling. The opinion, written by Sykes, rejected Goodstein's definition of the class involved in the suit, as well as his acceptance of conclusions reached by expert witnesses for the plaintiffs.

"Like the Title VII claims in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the IDEA claims in this case are highly individualized and vastly diverse, making this case unsuitable for class-action treatment under Rule 23 of the Federal Rules of Civil Procedure," the decision said.

"In short, a class of unidentified but potentially IDEA-eligible students is inherently too indefinite to be certified," it continued. "To bring individual IDEA claims together to litigate as a class, the plaintiffs must show that they share some question of law or fact that can be answered *all at once* and that the *single answer* to that question will resolve a central issue in all class members' claims." That was not the case for *Jamie S.*

Flaum joined Sykes in the opinion. Rovner wrote separately that she agreed that Goodstein had not defined the class in an acceptable fashion, but that she was not sure there was no valid way to define a class in cases such as this.

With the class determination thrown out, all the rest of the action fell with it. MPS, which had pretty much lost every round of the case for a decade in the district court, was suddenly the full winner. The DPI–Disability Rights settlement was erased. Coulter's role ended almost immediately. The "compensatory education" dispute was dead. Years of what looked to some like futile resistance by the school board and MPS administration in court were suddenly vindicated.

The big-picture influence of *Jamie S.*

Searl, the long-time MPS lawyer and administrator, now works for Harley-Davidson. In 2012, she completed a dissertation about the *Jamie S.* case and other special education class action cases from around the country, as part of completing a Ph.D. from the University of Wisconsin–Madison in educational leadership and policy analysis. She downplayed any sense that the suit helped accomplish the plaintiffs' goals.

"The plaintiffs' use of class action litigation was not successful to advance resolution on the issues that originally caused them to turn to the court system for relief. Based upon the Seventh Circuit's ruling, the plaintiffs were returned back to their pre-class certification status," Searl concluded. "After almost 11 years of litigating through the federal court system, the plaintiffs ultimately lost the case in its entirety."

On the other hand, she wrote, "there was a certified class of plaintiff students for almost nine years, a liability decision that stood for over four years before being overturned, and a settlement agreement between the plaintiffs and the state department of education that was in effect for almost four years of the litigation. All of this required the ongoing attention and resources of the DPI and the school district."

In an interview, Searl maintained that the practical effects of the case did not play much of a role in making things better for MPS students. In fact, she thought the case may have slowed down MPS's own efforts to improve.

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But others differ. Yahle, MPS's special education chief throughout almost all of the period, said, "The lawsuit gave us an enormous opportunity" to do more for kids both with and without IEPs. The lawsuit emphasized that everybody was responsible for every kid, she said, and it led to the first time she felt all systems in MPS were aligning to help all kids.

Yahle listed three aspects of the *Jamie S.* legacy: "the spit shine that we put on the compliance process"; the positive impact of cooperation between MPS and DPI in improving special education work, which offered DPI lessons it applied statewide; and what she called the biggest impact, improving the overall education picture through more-effective attention to the needs of all students.

Yahle said of the fight's unfolding, "You never want to say to the other side, 'Thanks for the lawsuit because we've grown.'" But she believes that to be the case. "It definitely made us look at early intervention in a different way, in a practical way."

Coulter agreed that the impact of *Jamie S.* on education in Milwaukee was positive. He said that when he first got involved, it was "somewhat disappointing" to see that Wisconsin, especially Milwaukee, was behind other places in implementing ideas such as early screening and intervention. "*Jamie S.* became an opportunity to introduce a number of the reforms that had been happening in other places for a much longer time," he said. At least when his Milwaukee duties ended in 2012, he said two things required by the IDEA were clearly being achieved: Kids were being evaluated in a timely manner, and parents were being invited to participate in those evaluations and the planning for those children.

Nothing suggests that there has been backsliding since then. DPI data for the 2011–2012 school year show that Milwaukee completed 99.93 percent of special education evaluations in a timely manner, compared to 98.91 percent for the state. Jennifer Mims Howell, director of specialized services for MPS, said, "*Jamie S.* has made us hyper-vigilant on timelines and compliance." Troy Couillard, a DPI official who worked with MPS officials, said, "There are a lot of systems in place now that Milwaukee is using more effectively."

Sue Endress, an advocacy specialist for Disability Rights, agrees that the overall special education picture is better now than a decade ago. "Are there still struggles? Yes," she said. "It takes a lot of years to turn a train around." There are, for example, too many inexperienced teachers, she said. But the trends have been toward the better.

Jeff Spitzer-Resnick was a staff attorney for Disability Rights throughout the course of the case; he is now in private practice. Asked whether things have gotten better, he said, "I would say that both the nature and the number of violations of the law—there's no scientific way to count that—but I think they're reduced."

Monica Murphy, managing attorney of the Milwaukee office of Disability Rights, said, "I don't think *Jamie S.* did anything for the plaintiffs." Their lives "continued down the dismal paths" they were on. But the case made some difference to kids who came after them, she said.

Lessons from the legal proceedings

From the standpoint of the legal process, the legacy of *Jamie S.* reflects some significant truths:

• **The judge matters.** One can never know to which of six active or senior district judges the case would have been assigned if the parties had not consented to Goodstein's presiding over the case as a magistrate judge. But there can be no doubt that, rightly or wrongly, at least some of them would have been less receptive to a class action of this sort even before *Wal-Mart v. Dukes*. It is also likely that the case would come before the Seventh Circuit much more quickly now, as federal law [Rule 23(f) of the Federal Rules of Civil Procedure] changed only a month after Goodstein's 2003 decision, making it considerably easier to appeal class certifications from the outset. And Rovner's partial dissent—she was open to the possibility that a more narrowly defined class could be appropriate in the case—suggests that a different panel of the Seventh Circuit

might have gone in that direction. It takes only one vote for a 2–1 decision to come out the other way.

• **Court rulings are implemented in the context of broader realities.** To turn from the courts to the larger world, *Jamie S.* played a part in improving MPS's work with special education students. But that came in the context of a machine with a lot of moving parts. In the real life of a system as big and complex as MPS, change is not simple, a court order doesn't necessarily work out the way it was intended (consider the impact of desegregation of Milwaukee schools in the late 1970s and the accelerated white flight in that period), and identifying winners and losers requires more than reading or knowing direct decisions. Anyone considering undertaking a major legal challenge needs to consider context that goes well beyond the courtroom and is likely to be unpredictable in its development.

• **Cooperation is a lot better than confrontation (at least sometimes)—and it's often all about people.** The changes that seem to be working out well were propelled in large part by two events: First, the DPI, which was a defendant in the lawsuit, settled with the plaintiffs, and, in effect, joined forces with them against MPS. Second, the change in MPS superintendents from Andrekopoulos to Thornton in 2010 improved the way key players interacted, in a way that bore fruit. The most positive results have arisen from positive environments.

• **The forecast for class actions of this kind is not rosy.** The Supreme Court's *Wal-Mart* decision, and its application to special education class actions by the Seventh Circuit, have slowed, if not halted, such cases nationwide, according to several people who follow the national scene. Coulter said, "*Jamie S.* has had a national chilling effect on litigation as it relates to kids with disabilities in public schools because of the circuit's decision around definition of a class." The case is often mentioned, he said, in discussions of the advisability of litigation concerning special education.

Class actions were a major strategy of special education advocates in the last 15 to 20 years. Searl describes the mixed success of several of those large cases in her dissertation. But, overall, school systems that were defendants improved their records on the ground, even if, in some cases, they won in court. With the class action route stymied and with few people having the resources to go to court over individual situations, the likelihood that courts will influence special education policy is diminished.

Spitzer-Resnick said he is troubled by the poor forecast for class action suits after they had been used well to deal with systemic problems. "You can't do it one at a time," he said. "You need at least the threat of a class action to get action."

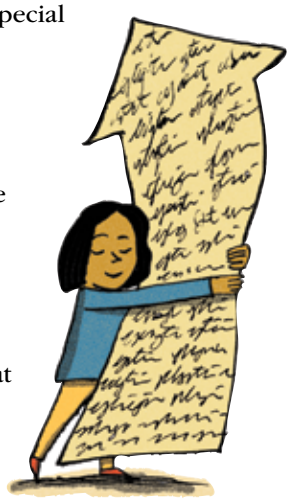
Looking forward in Milwaukee

The difference between winning some gains in the schools and losing in court is not a small one for Disability Rights Wisconsin itself. As part of the 2008 settlement between the organization and DPI, DPI agreed to pay $475,000 for the organization's attorneys' fees and costs. As part of his remedies order, Goodstein required MPS to pay the organization $459,123.96. But when the appeals court's decision came, Disability Rights was no longer the "prevailing party." In August 2012, Judge Rudolph Randa of the Eastern District of Wisconsin ordered the organization to repay MPS. He ruled that the DPI payment was a matter for state courts. DPI filed suit in Dane County in March 2013, seeking repayment. Disability Rights has appealed Randa's order to repay MPS to the Seventh Circuit. The organization has reduced its staff and spending.

But what about the special education students? In Milwaukee and beyond, *Jamie S.* was part of a period in which compliance with the Individuals with Disabilities Education Act was the priority. There seems to be general agreement that compliance has improved, and no one is in favor of going backward on that.

Even so, overall achievement for special education children has not improved and remains generally poor. MPS special education leaders say now that the emphasis needs to be put on improving actual achievement for students. They believe all the changes that have been made in recent years will pay off on that front.

Stephanie Petska, director of the special education team at the state DPI, said federal education officials also have acknowledged that emphasis solely on compliance has not produced adequate academic gains and that the focus needs to be put on success in learning. She said she is excited for the potential for steps that are being taken nowto bring benefits.



But she added a crucial thought that goes beyond court orders or formal policies. "There has to be sustained will," she said. ■