IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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S.W., a minor, et al.,

Plaintiffs,

-vs-

Case No: 14-CV-792

Tony Evers, in his official capacity, et al,

Defendants.

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**PLAINTIFFS' REPLY BRIEF**
**IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

There is no question that each of the Defendants is subject to Title II of the Americans with Disabilities Act as well as Section 504 of the Rehabilitation Act. It is undisputed that these federal laws prohibit the Defendants from operating any public program or providing any benefits or services in a way that discriminates against children with disabilities. It is illegal to deny disabled children full participation in such programs, services and benefits even if doing so requires some kind of accommodation. Only if the Defendants can show that permitting equal access to children with disabilities would constitute a fundamental alteration of the program, services or benefits could equal access be denied.

It is equally clear that Wisconsin's Open Enrollment Program is a public program and benefit to which both the ADA and Rehabilitation Act apply. Wisconsin need not have such a program – it could have retained a residency-based system of public education – but it chose otherwise. Having done so, it may structure the program in any number of ways, but it cannot structure it in a way that discriminates against children with disabilities. Disabled children, such as the minor Plaintiffs, must be free to participate in the program in the same way that children

without disabilities participate unless providing such access would fundamentally alter the program.

But Wisconsin has not provided children with disabilities the necessary protection. The Wisconsin Open Enrollment Program permits school districts to set a priori caps on the number of students with disabilities who can participate in the program (including a cap of zero). It permits them to do so before the school district knows whether any disabled students will apply for open enrollment, what accommodations their disabilities might require, and how those accommodations may or may not alter programming. This arbitrary cap – the State Defendants euphemistically call it "predetermination" (State Defendants' Br. p. 4) – creates a two track or "dual" system of open enrollment. One is for "regular" children and the other is for children with disabilities without any particularized consideration of whether accepting that student will fundamentally alter the District's educational programming.

As explained more fully below, this is exactly the type of categorical and generalized judgment regarding disabled students that the ADA and Rehabilitation Act were intended to prevent. *See infra* pp. 17-20. The Defendants' attempt to justify such a two-track program is astonishing.

The Plaintiffs are not saying as, for example, the defendant Greendale suggests, that if every child with a disability currently enrolled in the Milwaukee Public Schools applied to enroll in the Greendale schools through the Open Enrollment Program, each must be accepted. That may be Greendale's fear, but it is not the Plaintiffs' position and it completely mischaracterizes the Plaintiffs' criticisms of the Open Enrollment Program. We argue only that if Greendale chooses to participate in the Open Enrollment Program, once it determines how many spaces it

has in its schools, it must fill those spaces without discriminating against children with disabilities.

It is no answer to say that children with disabilities may be excluded because they may require services or accommodations that children without disabilities do not. The ADA and Rehabilitation Act preclude public entities from discriminating against children with disabilities in this way. Only if these additional services and accommodations would actually fundamentally alter the educational services offered by a District, can access to something like the Open Enrollment Program be denied.

But the Open Enrollment Program does not require such a showing (which is why it violates the ADA and Section 504 in its treatment of children with disabilities), nor could a school district make such a showing with respect to the minor Plaintiffs. Given that the cost of providing any additional needed services will be borne by the resident (sending) district, it would seem that if educating these children required a fundamental alteration in a school's educational program, it would mean the same thing in the resident district. If that is so, then even the minor Plaintiffs' resident school districts would be free to exclude them and be exempt from liability under the ADA and Section 504. That is "a bridge too far" for even the Defendants to argue, and none of them do so.

## I. THE DEFENDANTS HAVE VIOLATED TITLE II OF THE ADA AND SECTION 504.

The elements of a claim under Title II of the ADA and Section 504 of the Rehabilitation Act are not disputed. They were set forth by the Seventh Circuit in *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) as follows: (1) the plaintiff is a qualified individual with a disability; (2) she was excluded from the benefits or services of a public entity or otherwise was

discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was because of her disability.

Section 118.51(5)(a)4, on its face, discriminates against students with disabilities because it applies only to them. It is unlawful under Title II of the ADA and Section 504 because it denies children with disabilities the opportunity to participate in and benefit from a service, program or activity (namely the Open Enrollment Program), provided by public entities who are recipients of federal funding. By denying the minor Plaintiffs the opportunity to participate in the Open Enrollment Program, the Defendants have unlawfully discriminated against them based upon their disabilities. The Plaintiffs have established each of the elements of their claim.

*A.* *The Plaintiffs are qualified persons with a disability.*

The definition of a *qualified person with a disability* as set forth in the ADA is:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. §12131.

Thus, for purposes of this case, the minor Plaintiffs are *qualified persons with a disability* if (1) they have a disability, and (2) meet the essential eligibility requirements under the Open Enrollment Program. The Defendants admit that all of the minor Plaintiffs have disabilities except for S.B. With respect to S.B. there is no dispute as to the underlying facts, only a dispute as to whether those facts satisfy the definition of "disability" under the ADA. The Plaintiffs respond to this issue regarding S.B.'s disability in full at pages 22-24 of their Brief in Opposition to the Defendants' Motions for Summary Judgment and to Dismiss. Because there is no dispute

that five of the six minor Plaintiffs have a disability, only the second element is actually in question on the Plaintiffs' motion for summary judgment.

The Defendants argue that the minor Plaintiffs are not qualified individuals with a disability because, of all things, they have a disability. They say the Open Enrollment Program they administer (Superintendent Evers and DPI) and in which they participate (the School District Defendants) can be divided in two. One is only for children without a disability. Another – if Districts decide to participate – is only for students with disabilities, whatever they may be.

The Plaintiffs are not "qualified" for the former program because they are disabled. They are not "qualified" for the latter because the Districts have set "predetermination" caps which exclude them not based on an individualized evaluation of whether they can be accommodated as required by federal law – but because the District has decided, before the fact, that it does not wish to have any more children like them.

But the statutory eligibility requirements for participation in the Open Enrollment Program, as set forth in Section 118.51(2), do not exclude children with disabilities. The only eligibility requirements to apply for the Open Enrollment Program are that the person is a student and that the student's resident school district offers the same type of program the student seeks to attend in the non-resident school district. *See,* Wis. Stat. §118.51(2). Here, each of the minor plaintiffs is a student. (PPFOF ¶¶ 1, 6, 10, 14 and 18.) Further, each of them applied to attend a program in a non-resident school that was offered in their resident school district. (PPFOF ¶¶ 89, 101, 111, 131, and 150.)

Moreover, under federal law a student is "qualified" for primary and secondary educational services merely if he is "of an age during which non-handicapped persons are

provided such services." 34 C.F.R. §104.3(*l*)(2)(i). See also, *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 174 (2d Cir. 2001). Thus, even if the "program" at issue was educational services (as opposed to open enrollment), the minor Plaintiffs were "qualified" to receive them and to receive them in the grades associated with their chronological ages.

The Defendants argue that a "dual system" is in order – that the presence or absence of a disability can be an "essential qualification" – and because of their disabilities the minor Plaintiffs are not qualified to be in a regular education classroom and, therefore, they are not "qualified" within the meaning of the ADA. But that is simply a restatement of their argument that even when a school district has spaces for students for open enrollment purposes, those spaces are reserved solely for children without disabilities. As we shall see, that argument is not only wrong as a matter of law, it is precisely what these federal laws were designed to stop. *See infra* pp. 17-20.

The Defendants' argument that children with disabilities are not "qualified" to participate in the Open Enrollment Program is actually an admission that the Defendants are discriminating and believe they have a right to do so. The State Defendants do cite to a group of cases at pages 18-19 (*Oconomowoc Residential, Halpern, Coleman, Anderson and Knapp)* that relate generally to the definition of "qualified individual with a disability," but those cases stand for no more than the proposition that to be "qualified" a person must show they meet the essential eligibility requirements to participate in the program in question. In this case, Plaintiffs have done so. They meet the requirements of Section 118.51(2) and applicable federal law. None of these cases suggest that not having a disability can in and of itself be an essential requirement to participate in a primary or secondary school education program. To be sure, perhaps a deaf person cannot be a nurse or a blind person cannot drive a bus, but that is because the ADA and

Rehabilitation Act impose a limited requirement of accommodation that does not mandate their inclusion in nursing or driver training. But one cannot say that only the non-disabled can be educated.

*Mallett v. Wisconsin Division of Vocational Rehabilitation*, 130 F. 3d 1245 (7th Cir. 1997) (DPI Br. at 20-21), does not support the Defendants' argument. In *Mallett*, the Seventh Circuit dealt with a claim relating to rehabilitative services that were available only to someone who had a disability. The Seventh Circuit held that the plaintiff could not establish a violation of Section 504 without "a showing that the non-handicapped received the treatment denied to the "otherwise qualified" handicapped." *Id*. at 1257. That was impossible to show in *Mallett* because the claim involved services that were only available to individuals with disabilities. However, it is easy to show here because the Open Enrollment Program is wide open to children without disabilities – in the words of *Mallett* they receive the treatment denied to children with disabilities. *Mallet* actually shows the minor Plaintiffs are qualified individuals with disabilities because children without disabilities received the treatment (being allowed to participate in the Open Enrollment Program) denied to the minor Plaintiffs because of their disability status.

The State Defendants cite *Zukle v. Regents of Univ. of Cal.*, 166 F. 3d 1041, 1047 (9th Cir. 1999) (State Defendants' Br. at 21) but *Zukle* has nothing to do with this case. In *Zukle* it was undisputed that the plaintiff had a disability, but unlike this case she was admitted into the program at issue (medical school). However, she had failing grades and the Board dismissed her for "failure to meet the academic standards of the School of Medicine." *Id.* at 1044. She asked for accommodations that went well above and beyond those already provided by the school and the Court found that the accommodations she requested were not reasonable. Those facts -

dealing with a student failing out of medical school - have nothing to do with this case involving primary school students who were not allowed to participate in the Open Enrollment Program.

The State Defendants end their argument by discussing cases that stand for the proposition that to be "qualified" to graduate from a post-secondary program a person must show that they meet the essential eligibility requirements to matriculate from the program in question; a collegiate nursing program (*Alexander*) and medical school (*Zukle* and *Halpern*). But these cases involving requirements to matriculate from nursing and medical school (in each case the disabled plaintiffs involved were allowed to participate in the program) have nothing to do with this case. It is one thing to say that a person with a disability cannot continue in medical school because she was unable to meet the academic standards of the school, and another thing entirely to say that a child with a disability cannot participate in a primary school education program because they have a disability.

*B.* *The Plaintiffs were excluded from the benefits or services of a public entity or otherwise were discriminated against by a public entity.*

The Plaintiffs satisfy the second element of their ADA and Section 504 claims because each of the minor Plaintiffs was excluded from participation in the Open Enrollment Program by the Defendants who are public entities. Each of the School District Defendants and the DPI have admitted in response to discovery that they are "public entities" under Title II of the ADA and Section 504 (PPFOF ¶ 167). Defendant Evers initially denied he is a public entity (PPFOF ¶ 167), but he has not maintained that argument in his summary judgment brief, nor could he based on well-established law. *Bacon v. City of Richmond*, 386 F. Supp. 2d 700, 707 (E.D. Va. 2005) *citing Henrietta v. Bloomberg*, 331 F.3d 261, 288 (2d Cir. 2003) (individuals acting in their official capacities are public entities under Section 504 and Title II of the ADA). *See also*

*Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 912 (7th Cir. 2003) (ADA suits against individuals in their official capacity are permitted).

The State Defendants (DPI and Superintendent Evers) do argue, however, that they are not proper defendants herein because they did not deviate from the statute as written (State Defendants' Br. at 27-34). But this case involves a facial challenge to the statute itself. Superintendent Evers is the officer (and DPI is the agency) charged with administering the Wisconsin Open Enrollment Law and, in particular, for administering that part of the Open Enrollment Program dealing with applications for participation in the Open Enrollment Program (Plaintiffs' Opening Br. at 16-17). Thus, Superintendent Evers is an appropriate official, along with DPI, to be a defendant in a facial challenge to the Open Enrollment Law. *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 240 N.W.2d 610, 623 (1976) (actions challenging a Wisconsin state statute are appropriately brought against "the officer or agency charged with administering the statute").

As noted by the Eastern District of Wisconsin in *Goodvine v. Gorske*, when the "entity" that violates the ADA and Section 504 is the state, then the state agencies and officials who run those agencies stand in as "proxies for the state." 2008 WL 269126 *5 (E.D. Wis. Jan 30, 2008); *see also Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office"). Thus, in this case the DPI and Superintendent are proxies for the State of Wisconsin and must defend the State's conduct, including the decision to adopt Section 118.51(5)(a)4 in the first instance.

Nor is there an Eleventh Amendment problem with an action against the State under the ADA or Section 504. In the context of claims under Section 504, the Eleventh Amendment

issues were resolved in *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 912 (7th Cir. 2003)..In *Bruggeman*, the Seventh Circuit noted that the Civil Rights Act of 1964 states that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act." And that under that provision there was no Eleventh Amendment defense to a Section 504 claim. *Id*. Similarly, Section 12202 of the ADA provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." Courts have held that this section abrogates state sovereign immunity for the purpose of suits based on Title II of the ADA. *See Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004); *Toledo v. Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006).

Because he is a "public entity" as a matter of law, and because he is the officer charged with administering Wisconsin's Open Enrollment Law, Superintendent Evers is an appropriate defendant herein in his official capacity, along with DPI, in a case challenging a Wisconsin statute that they administer as a violation of federal law.

In addition, the State Defendants ignore that they have done a number of things that cause discrimination against children with disabilities:

1. The State Defendants have promulgated the rules to implement and administer the Nonresident School District Acceptance criteria which are the direct subject of this action (Section 118.51(5)(d)3).

2. The State Defendants, by rule, allow school districts to decide in January of the relevant year to set separate quotas for children with disabilities (including a quota of zero) without the school districts having any idea as to what disabilities future applicants might have. (Wis. Admin. Code PI 36.06(5)(a).) (Section 118.51(5)(a)1.) (DPI PFOF ¶ 15.)

3. The State Defendants require the parents of children with disabilities to disclose that fact in the applications for the Open Enrollment Program that they submit for their children. (PPFOF ¶ 47.)

4. If an application discloses the existence of a disability, the State Defendants then allow a nonresident school district to exclude the disabled student based upon the existence of the disability if the nonresident school district asserts that it does not have room for that student. (PPFOF ¶¶ 48-49.)

5. If a child with a disability appeals her rejection by a non-resident school district, the State Defendants deny the appeal because they permit students with disabilities to be rejected by school districts solely because they have disabilities. (DPI PFOF ¶ 37; 48-50.) (PPFOF ¶ 116.)

The State Defendants are appropriate defendants both because they have the obligation (as proxies for the State) to defend this facial challenge to Section 118.51(5)(a)4 and because they have taken specific actions that cause discrimination against children with disabilities under the Open Enrollment Program.

### *C. The exclusion, denial of benefits, and discrimination were because of the Plaintiffs' disabilities.*

The third element of the Plaintiffs' claim is that the Plaintiffs were excluded from or denied benefits or discriminated against *because of* their disabilities. The Defendants contend that the Plaintiffs cannot meet this element because the exclusion of children with disabilities from participation in the Open Enrollment Program is not because of their disabilities; it is about "space." The Defendants are wrong as a matter of law and as a matter of undisputed fact.

#### *1. The Issue is not about "Space," it is about Discrimination.*

Wisconsin has chosen to extend the benefit of open enrollment to its citizens. It has qualified that right by stating that open enrollment is permitted only into a district that has space. In filling whatever spaces are available, however, the state may not permit and the district may not engage in unlawful discrimination. It could not, to use an extreme example,

create separate programs for children of different races. And it cannot create separate programs for children with disabilities.

The best way to illustrate the point that this case is not about space is to use the undisputed facts related to several of the minor Plaintiffs.[1] For example, for the 2014-2015 school year, Muskego-Norway determined it had open seats in every class except kindergarten, including 8 spaces in sixth grade. (MNPFF ¶¶ 8-9.) P.F.'s chronological age would have put him in the sixth grade and P.F. applied to Muskego-Norway for one of those sixth grade spaces. (PPFOF ¶ 113.)

The Defendants contend that because of his autism disability P.F. needed educational services that were not typically provided in sixth grade and, as a result, he was not capable of filling one of the available sixth grade spaces. Under federal law, however, any school district that P.F. attended is legally required to treat P.F. as a sixth grader to the maximum extent possible. 20 U.S.C. 1412(5)(A) provides as follows:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. §300.116 further provides that a child with a disability "is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." (emphasis added)

These provisions of law impose the legal requirement that children with disabilities should not be shunted into separate programs and classes but instead should be in the regular classroom the student would attend if not disabled. *Beth B. v. Van Clay*, 282 F.3d 493, 497 (7th

[1] The Plaintiffs use these examples for illustrative purposes only. The arguments set forth herein apply equally to all of the Defendants.

Cir. 2002) (Congress has expressed a strong preference in favor of mainstreaming the education of children with disabilities); *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999) ("This requirement is known as "main streaming," and, as we have held, this provision creates a strong preference in favor of it.") Thus, the "space" that each child with a disability would fill is a space in the regular classroom and the student is assisted with respect to her disability through supplementary aids and services in the regular classroom.

Once P.F. (or any other student) is enrolled as a sixth-grader the school district in which he is enrolled must provide him with a free appropriate public education. 20 U.S.C. §§1400-1487. This is true whether P.F. has disabilities or not. If he needs supplementary aids and services then those are provided to him, but under the Open Enrollment Program the non-resident school district does not bear any of this cost. Under Section 118.51(12) the cost of that education is borne by the resident school district, not the nonresident district. Under the Open Enrollment Program, if a child with a disability attends a different school district the money follows her. (PPFOF ¶ 36.) The nonresident school district calculates the cost of providing the services and the resident school district pays those costs. (PPFOF ¶ 38.)

With respect to P.F., Muskego-Norway suggests that the nature of his disability somehow trumps federal law and that he cannot and would not participate in any way in a general education sixth grade classroom. (Muskego-Norway Br. at 11-13, 21-23.) But this is both not true and not material to summary judgment. It is not true because P.F.'s IEP specifically says the opposite. The IEP asks the question: "Are there modifications that can be made to the regular education program to allow the student access to general education curriculum and to meet the educational standards that apply to all students?" (Plaintiffs' Additional PFOF ¶ 29) The IEP

answers that question in the affirmative (*Id.*), meaning that P.F. can fill a spot in a sixth grade classroom. That is what P.F.'s parents expected would happen if his application had been accepted at Muskego-Norway. (Plaintiffs' Additional PFOF ¶¶ 31-31)

It is immaterial because it is undisputed that other of the minor Plaintiffs faced different situations. For example, S.B. was actually accepted by Shorewood into a third grade classroom and filled a spot in such a classroom from the start of the 2014-2015 school year until Shorewood expelled him in October 2014 because he had a disability. (PPFOF ¶¶ 154,157) It was not a question of "space." Shorewood had a third grade space; S.B. filled the third grade space; and then a month into the school year S.B.'s acceptance into that space was retroactively revoked based upon Section 118.51(5)(a)4 because he had a disability.

R.W.'s situation is similar. He was accepted at Paris to fill an available space in their kindergarten class and then his acceptance was revoked under Section 118.51(5)(a)4 because of his disability, (PPFOF ¶¶ 142-143), not because of a lack of space. There was space for him in the kindergarten class and he could have filled that space (with Paris providing supplemental services paid for by R.W.'s resident school district), but Paris refused to allow him to fill that space because of his disability.

P.F. has applied under the Open Enrollment Law to transfer into a number of different school districts. (PPFOF ¶109.) He was rejected eleven times. (*Id.*) When he was denied by Muskego-Norway there were 50 open spaces and 8 spaces in sixth grade. (MNPFOF ¶¶ 8-9.) R.W. was accepted into the kindergarten class at Paris (meaning there was a space) and then rejected because of his disability. (PPFOF ¶¶ 133,142-143.) S.B. was accepted into a third grade class at Shorewood (again establishing that there was a space) and then rejected because he has a disability. (PPFOF ¶¶ 152-154.) The minor Plaintiffs were not rejected because of

"space." The school districts involved had spaces. They were rejected because a decision was made that those available spaces could not be filled by children with a disability.

In the State Defendants' brief at p. 12, the State Defendants crystallize this issue when they point out that under *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999) the Supreme Court held that "States must adhere to the ADA's nondiscrimination requirement *with regard to the services they in fact provide*," but that the nondiscrimination provisions do not require "a certain level of benefits to individuals with disabilities." (emphasis in State Defendants' Brief) The Plaintiffs' claim is consistent with *Olmstead*. All that the Plaintiffs ask is that the Defendants adhere to the ADA's nondiscrimination requirements with respect to *a service that they in fact provide* - the Open Enrollment Program.

*2. The Discrimination is further illustrated by the Timing of the Decisions by School Districts that Participate in the Open Enrollment Program.*

School Boards make decisions about whether to participate in the Open Enrollment Program and decisions as to how many students to accept through open enrollment in January of the relevant year. Wis. Stat. §118.51(5)(a)1. For example, in its January, 2014 Board Meeting Muskego-Norway decided to participate in the Open Enrollment Program and decided at that time that it would take *zero* children with disabilities.[2] (PPFOF ¶113; MNPFOF ¶¶10-11.)

When Muskego-Norway made this decision it had no way of knowing the nature of the disabilities that applicants might have. They might have visual impairments, speech impairments, hearing impairments, etc. They might need minor adjustments or significant accommodations. There was no way of knowing who would apply at the time Muskego-Norway (and the other districts) made their decisions. The point is that the nature of the future

[2] In an odd phrasing, Muskego-Norway argues that it does not discriminate against students with disabilities, only against those with IEPs (Muskego-Norway-Paris Brief in Support of Summary Judgment, 11-12) which, of course, are necessary because the student has a disability.

applicants' disabilities does not matter to the school districts. In their January meetings they do not take into account the disabilities of specific children and determine if they can meet their needs. They make blanket decisions about "general education spaces" and "special education spaces" without regard to specific children with specific disabilities and the statute permits them to do so. Wis. Stats. §118.51(5)(a)1 says that at its January meeting a school district "shall determine the number of regular education and special education spaces available within the school district." It does not require a case by case consideration. Based on the statute, Muskego-Norway determined it had 8 spaces in sixth grade, but decided that none of them could be filled by a child with a disability, no matter what the disability was.

A student might have a vision problem and her IEP might require that she sit in the front row and receive written materials in a modified form. If so, Muskego-Norway would not give her one of the 8 spots in sixth grade because it had made a decision in January not to accept any children with disabilities. A student might have ADHD and Shorewood would deny him a spot in third grade because it had made a decision the previous January to take no children with disabilities (that is what happened to S.B.). A school district might have two or more spaces in its kindergarten class and give one of the spaces to a child without disabilities but based on its decision in January deny one of the spaces to his identical twin who has a disability (this is what happened to R.W.).

The Defendants argue that a child like P.F. that has substantial disabilities cannot fill an available space in a sixth grade classroom but that is a completely after-the-fact rationalization by the Defendants. When school districts set separate quotas for disabled children under the Open Enrollment Program in January of the relevant year, they do so with no knowledge as to the nature of the disabilities that applicants will have. They decide to reject any and all children

with disabilities and then when they receive applications from children with disabilities they automatically deny them under Wis. Stat. §118.51(5)(a)4. In fact, under Wis. Administrative Code §PI 36.06(5)(b) a school district could not review a specific open enrollment application from a child with a disability and determine that given the particular disability involved it could accommodate that child despite its earlier decision in January. School districts are specifically prohibited from doing so by the rule promulgated by the DPI.

*3. There is not (and cannot be) one Open Enrollment Program for Disabled Children and a Separate Open Enrollment Program for Non-disabled Children.*

In their first brief the Plaintiffs established that the Open Enrollment Program is a "service, program or activity" within the meaning of Title II of the ADA and Section 504. (Plaintiffs' Br. at 17-20.) None of the Defendants challenged this conclusion in any of their briefs. Thus, the program in issue in this case is the Open Enrollment Program. As noted earlier, the Open Enrollment Program is a single program. *See* §118.51. The only eligibility requirements are set forth in §118.51(2) and the minor Plaintiffs meet those eligibility requirements. (Plaintiffs' Opening Br. at 15.) There is nothing in the statutory eligibility requirements in §118.51(2) that exclude children with disabilities.

Moreover, Federal law prohibits one open enrollment program for general education and a separate program for special education. Indeed, that type of discrimination is precisely what these laws sought to end. Just as the State of Wisconsin cannot run two different open enrollment programs with one for white children and a separate one for African-American children, *N.N. ex rel S.S. v. Madison Metropolitan School District*, 670 F. Supp. 297 (W.D. Wis. 2009), it cannot do so with respect to disabled and non-disabled children.

In *N.N.* the plaintiffs sued to declare Wis. Stats. §118.51(7) unlawful. That section of the statutes allows school districts to take race into consideration in rejecting applications under the Open Enrollment Program. The Wisconsin Attorney General agreed that the statute was unconstitutional and the case proceeded on a damages question. The court's decision in *N.N.* is clear that because discrimination based on race is unlawful the State cannot permit school districts to reject Open Enrollment Programs based on that criteria. While discrimination based on race is prohibited by the Constitution and discrimination based on disability is prohibited by federal statute that distinction is irrelevant; both are illegal under federal law. Just as the State cannot run two different Open Enrollment Programs based on race, it cannot do so based on disability.

Under federal law the presumption is that children with disabilities will be taught in the same classrooms as children without disabilities. 20 U.S.C. 1412(5)(A); 34 C.F.R. §300.116. *Beth B. v. Van Clay*, 282 F.3d 493, 497 (7th Cir. 2002) (Congress has expressed a strong preference in favor of mainstreaming the education of children with disabilities); *See also Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999).

The problems created by removing children with disabilities from regular classrooms was described in *Toledo v. Sanchez*, 454 F.3d 24, 37 (1st Cir. 2006) as follows:

> Historically, children with mental disabilities were labeled "ineducable" and were categorically excluded from public schools to "protect nonretarded children from them."

The federal government first tried to correct the problem by providing grants to the states to initiate and improve programs for the education of handicapped children. *See* Elementary and Secondary Education Act of 1965. But having the federal government provide additional funding did not solve the problem. The *Sanchez* Court pointed out that in a series of cases from

the 1970s numerous courts found that the states were violating the Due Process and Equal Protection rights of disabled children; *See, e.g., Pa. Ass'n for Retarded Children v. Commonwealth,* 343 F. Supp. 279, 293, 297 (E.D.Pa. 1972) (finding the state's treatment of mentally retarded children "crass and summary" and expressing "serious doubts" about any rational basis for the state's exclusion of approximately 75,000 mentally retarded children from any public education services); *Mills v. Bd. of Ed. of D.C.,* 348 F. Supp. 866, 876 (D.D.C.1972) (holding that District of Columbia violated due process by denying handicapped students a publicly supported education and suspending or expelling such children from regular schooling or special instruction without a hearing); *Harrison v. Michigan,* 350 F. Supp. 846, 847 (E.D.Mich. 1972) (noting that the state's denial of an education to handicapped children until 1971 raised serious equal protection issues); *Fialkowski v. Shapp,* 405 F. Supp. 946, 958 (E.D.Pa. 1975) (mentally retarded children who were completely denied an educational opportunity had stated a valid equal protection claim).

The *Sanchez* Court also pointed out that the problem of school districts segregating children with disabilities in separate programs continued to be a problem:

> Congress found that the disabled children who were not excluded from public education were "simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig v. Doe,* 484 U.S. 305, 309–11 (1988) (citing H.R.Rep. No. 94–332, p. 2 (1975)).

*Sanchez,* 454 F.3d at 37-38. It explained that it was against this backdrop that Congress passed the Rehabilitation Act of 1973 but that still did not resolve the problem. The Court cited a series of cases showing that states (including Wisconsin) continued to violate the rights of disabled students. *See, e.g., Hairston v. Drosick,* 423 F. Supp. 180, 184 (S.D.W.Va.1976) (public school violated Due Process Clause by excluding a student with spina bifida from regular public classroom without procedural safeguards); *Cuyahoga County Ass'n for Retarded Children &*

*Adults v. Essex*, 411 F. Supp. 46, 58–59 (N.D. Ohio 1976) (finding Ohio regulations governing the placement and dismissal of mentally retarded children violated due process); *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D.Wis. 1977) (holding that Wisconsin violated equal protection rights of handicapped children by denying them an education at public expense); *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487, 504 (E.D.N.Y. 1979) (segregation of mentally retarded students with hepatitis B found to be without rational basis).

The *Sanchez* Court also cited to a report before Congress in 1983 that:

> indicated that tens of thousands of disabled children continued to be excluded from public schools or placed in inappropriate programs. U.S. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* 28–29 (1983). Testimony before the House Committee on Education and Labor and the Senate Subcommittee on Disability Policy included statements by numerous disabled individuals who had been excluded from participation or faced irrational prejudice at all levels of public education. *See generally,* Staff of House Comm. on Education and Labor, 101st Cong., *Legislative History of Pub.L. No. 101–336: The Americans with Disabilities Act* (Comm. Print 1990).

*Id.* at 38. Faced with that history, Congress passed the ADA. (*Id.*)

But the Defendants would have this Court go back to pre-ADA, pre-Section 504 days and conclude that the State of Wisconsin can discriminate against children with disabilities and have them in separate programs from children without disabilities, with different rules, and in a different "space." But that is not the law. There cannot be one open enrollment program for children without disabilities and a separate one for children with disabilities. There are not public school "spaces" that are reserved solely for children without disabilities. Under federal law, children with disabilities are entitled to equal access to public education and that includes Wisconsin's Open Enrollment Program.

## II. THE PLAINTIFFS ARE ENTITLED TO DAMAGES BECAUSE THE DEFENDANTS ENGAGED IN INTENTIONAL DISCRIMINATION.

In addition, to opposing the Plaintiffs' motion for summary judgment on the merits, the Defendants argue that even if they violated the ADA and Section 504, the Plaintiffs would still

not be entitled to damages because the Plaintiffs cannot show intentional discrimination. As a starting point, the Plaintiffs acknowledge that they must establish intentional discrimination to receive an award of compensatory damages under the ADA and Section 504. *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 278 (7th Cir. 2007); *Morris v. Kingston*, 368 Fed. App'x. 686, 690 (7th Cir. 2010).[3]

However, intentional discrimination exists in this case. Here, the State Defendants administer and the School District Defendants implemented the Open Enrollment Program in a way that excluded disabled children and the School District Defendants intentionally rejected the Open Enrollment applications of the minor Plaintiffs. Those acts resulted in discrimination against the Plaintiffs and support an award of compensatory damages.[4]

Circuits are split on the standard for determining intentional discrimination under Title II of the ADA and the Rehabilitation Act for purposes of receiving damages, applying either the "deliberate indifference" or "discriminatory animus" standard. The Ninth Circuit selected the "deliberate indifference" standard, which requires "both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001). Most other circuits have followed the Ninth Circuit and have adopted the "deliberate indifference" standard for proving intentional discrimination. As pointed out in the State Defendants' brief at page 47, in addition to the Ninth Circuit, that includes the Second, Third, Eighth, Tenth and Eleventh Circuits. The Seventh Circuit has not yet decided which standard is required to show intentional discrimination when

[3] If the Plaintiffs prevail, they would also be entitled to seek an award of attorneys' fees. 42 U.S.C. §12205 (The ADA specially authorizes a court to award attorneys' fees to the prevailing party "[i]n any action … commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party … a reasonable attorney's fee.") *See also* 29 U.S.C. §794(a)(2)(b) (The Rehabilitation Act permits the prevailing party to recover "a reasonable attorney's fee as part of the costs."). At this point, the Plaintiffs simply seek a declaration that they are entitled to attorneys' fees. The amount of such fees would be determined in a separate proceeding.

[4] As stated in their previous brief, in this motion the Plaintiffs request that the Court declare that they are entitled to compensatory damages. The amount of damages, if any, would be determined at trial.

determining whether a plaintiff can recover compensatory damages. *Strominger v. Brock*, 592 F. App'x 508, 512 (7th Cir. 2014).

Recently, the Eastern District of Wisconsin followed the Ninth Circuit's "deliberate indifference" standard and in further describing the standard stated "The failure to act must be 'a result of conduct that is more than negligent, and involves an element of deliberateness.'" *Karvelas v. Milwaukee Cnty.*, No. 09-C-771, 2012 WL 3881162, at *5 (E.D. Wis. Sept. 5, 2012)[5] (quoting *Bartlett v. NY State Bd. Of Law Exam'r,* 156 F.3d 321, 332 (2d Cir. 1998)). Because the "deliberate indifference" standard is the majority rule and has been adopted in the Eastern District of Wisconsin, the Plaintiffs believe it is the one that should be followed here. Under that standard, the Defendants engaged in intentional discrimination.[6]

*A.* *The School District Defendants Rejected the Applications of the Minor Plaintiffs Because they were Disabled.*

The School District Defendants intentionally discriminated by rejecting the applications of the minor Plaintiffs because they had a disability. The School District Defendants were not required to deny the applications submitted on behalf of children with disabilities under Section 118.51(5)(a)4. They had the option of accepting those children into their schools but decided not to do so. By denying the applications of the minor Plaintiffs under Section 118.51(5)(a)4 the School District Defendants chose to discriminate against them.

[5] All unpublished cases cited herein are included in the Plaintiffs' Supplemental Appendix of Unpublished Cases.

[6] Should the Court conclude that the discriminatory animus standard applies then the Plaintiffs would still have sufficient evidence to establish intentional discrimination. Under *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 111 (2d Cir. 2001) discriminatory animus can be shown by ill will or government action that is wholly lacking a legitimate government interest. Here, the State Defendants (as proxies for the State of Wisconsin) are defending a statutory scheme that was deliberately chosen over one that would have not discriminated against children with disabilities and have adopted and administered rules that make the situation worse for children with disabilities. The School District Defendants regularly and intentionally reject open enrollment applications from children with disabilities. In the 2013-2014 school year alone, public school districts in Wisconsin used §118.51(5)(a)4 to reject over 1,000 applications for open enrollment from children with disabilities. (PPFOF ¶51.) There is certainly no legitimate government interest that justifies this result.

That conduct was not negligent; it was deliberate. It was so deliberate that the Defendants continue to argue that they have a right to exclude children with disabilities from participating in the Open Enrollment Program because they are allegedly "not qualified" to participate. The School District Defendants did not accidently exclude children with disabilities; they did so intentionally. They acted with specific knowledge that a harm to a federally protected right would occur (children with disabilities would be discriminated against) because they did not want those children in their schools.

*B.* *The Legislative History of Section 118.51(5)(a)4 Shows Intentional Discrimination.*

As explained by the Plaintiffs in the opening brief at pages 25-26, the decision by Wisconsin to include Section 118.51(5)(a)4 in the Open Enrollment Law was a deliberate policy choice. In this case, the State Defendants (as proxies of the State) are required to defend that decision. *Goodvine v. Gorske*, 2008 WL 269126 *5 (E.D. Wis Jan 30, 2008) (when the "entity" that violates the ADA and Section 504 is the state, then the state agencies and officials who run those agencies stand in as "proxies for the state."); *see also Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office"). As part of the drafting process, the legislature specifically considered how disabled children would be treated under the program. A proposal was submitted stating that the criteria for selection into the program could not include "Physical, Mental, Emotional or Learning Disability" and the proposal stated that "No district may refuse to enroll an EEN[7] pupil." (PPFOF ¶ 165.) The State chose to reject that option.

[7] EEN stands for "Exceptional Educational Needs."

In January, 1997 the Wisconsin Legislative Council Staff drafted a memo that is directly on point. (PPFOF ¶ 166.) The memo discusses the potential effects of Section 504 on the proposed legislation and proposed three alternatives. Alternative A was to "[p]ermit the nonresident school district to reject a transfer if the program or services described in the child's IEP are not available in the nonresident district or if there is not space available in the special education program identified in the child's IEP." Alternative B was to remain silent and have no specific provision. Alternative C was to "[s]pecifically provide that the nonresident school district: (1) may not reject a child based on the availability of an appropriate special education program or related services and (2) shall provide an appropriate special education program and related services." (Leg. Council Memo at pps 8-9.)

Thus, the legislature had a proposal before it to allow disabled children to fully participate in the Open Enrollment Program and a proposal to allow them to be excluded from participation for the reasons ultimately set forth in §118.51(5)(a)4 and deliberately chose the latter. The decision to allow them to be excluded on this basis was an intentional act to ultimately exclude them based upon their disabilities.

As a counter-example, Minnesota made the opposite choice. Its open enrollment statute provides that the standards for acceptance "may not include previous academic achievement, athletic or other extracurricular ability, **disabling conditions,** proficiency in the English language, previous disciplinary proceeding, or the student's district of residence." Minn. Stat. §124D.03(6) (emphasis added). The reason for pointing out a counter-example is to show that an open enrollment program can be successfully drafted to fully protect disabled children. Wisconsin simply chose not to do so.

In addition, the State Defendants have done a number of things that cause discrimination against children with disabilities: (1) they promulgated the rules to implement and administer the Nonresident School District Acceptance criteria which are the direct subject of this action; (2) they allow school districts to decide in January of the relevant year to set separate quotas for children with disabilities (including a quota of zero) without the school districts having any idea as to what disabilities future applicants might have; (3) they require the parents of children with disabilities to disclose that fact in the applications for the Open Enrollment Program they submit for their children, which in turn allows nonresident school districts to exclude the disabled student based upon the existence of the disability; and (4) if a child with a disability appeals her rejection by a non-resident school district, they deny the appeal because they permit students with disabilities to be rejected by school districts solely because they have disabilities.

Both the policy choice to adopt Section 118.51(5)(a)4 and the decisions to administer and implement Section 118.51(5)(a)4 so as to exclude children with disabilities from participation in the Open Enrollment Program are deliberate choices that result in discrimination and the State Defendants are the "State" for purposes of defending that decision. The Plaintiffs are entitled to a declaration that damages are available in this case.

### *C. Defendant Muskego-Norway Erroneously claims that Bad Faith is the Standard under the ADA and Rehabilitation Act for Compensatory Damages.*

Defendant Muskego-Norway claims that the standard for compensatory damages under Section 504 and the ADA claims is "bad faith." (Muskego-Norway Br. at 33-35) Muskego-Norway relies on older cases regarding the Education for All Handicapped Children Act, the statutory provision prior to the IDEA. Those cases have nothing to do with the compensatory damages available under the ADA and 504.

Muskego-Norway is confused on this issue but it is not alone in that confusion. Prior to the creation of the Americans with Disability Act in 1990 and the Individuals with Disabilities Act (IDEA) in 2004, the Seventh Circuit held Section 504 was parallel to the EAHCA and applied the bad faith standard for compensatory damages. See *Timms v. Metropolitan Sch. Dist.*, 722 F.2d 1310, 1318 n. 4 (7th Cir. 1983). More recently, however, the Seventh Circuit has noted the standard is intentional discrimination. *CTL ex rel. Trebatoski v. Ashland School Dist.*, 743 F.3d 524, 529 n. 4 (7th Cir. 2014). Defendant Muskego-Norway cites both *Timms* and *Trebatoski* but the results of those cases are different. *Trebatoski* says nothing about "bad faith."

This confusion on the standard for compensatory damages was explained in great detail in a case from the District of Minnesota. *See AP ex rel. Peterson v. Anoka-Hennepin Independent School Dist. No. 11*, 538 F. Supp. 2d 1125, 1144-48 (D. Minn. 2008). The court articulated that the Eighth Circuit's decision in *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982) (relied upon by Muskego-Norway), which applied the bad faith standard, should not be extended beyond cases dealing with the disabled child's individualized plan, i.e. the requirements previously under the EAHCA and currently under the IDEA. *Id.* at 1146 The court further explained why that standard would not apply outside of that context based on several U.S. Supreme Court cases that post-dated *Monahan*. The court pointed out that the remedial reach of the ADA and Section 504 were defined in reference to other laws and that intentional discrimination was the proper standard for such cases. *Id.* at 1146. This is consistent with the modern statement by the Seventh Circuit in *Trebatoski*. *Timms* and *Monahan* are outdated and at most apply only to cases involving the EAHCA and/or IDEA.

## CONCLUSION

As shown above, and in the Plaintiffs Opening Brief in support of their motion for summary judgment the Plaintiffs were discriminated against because they have a disability. As a result, they are entitled to: (a) a declaration that certain sections of the Open Enrollment Law are unlawful, (b) equitable relief including an injunction prohibiting the Defendants from administering or implementing Section 118.51(5)(a)4, (c) a declaration that Plaintiffs are entitled to compensatory damages, and (d) a declaration that Plaintiffs are entitled to attorneys' fees.

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WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs

/s/ RICHARD M. ESENBERG
Richard M. Esenberg, WI Bar No. 1005622
414-727-6367; rick@will-law.org
Brian McGrath, WI Bar No. 1016840
414-727-7412; brian@will-law.org
Charles J. Szafir, WI Bar No. 1088577
414-727-6373; cj@will-law.org
1139 East Knapp Street
Milwaukee, WI 53202-2828
414-727-9455; FAX: 414-727-6385