

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

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S.W., a minor by S.G., his parent, and  
S.G., in her individual capacity,

Ca.R. a minor, and Ch.R., a minor,  
by D.R., their parent, and  
D.R. in her individual capacity,

Case No. 14-CV-792

P.F., a minor, by A.F., his parent, and  
A.F., in his individual capacity,

Plaintiffs,

vs.

TONY EVERS, in his official capacity  
as Wisconsin Superintendent of Public Instruction,  
STATE OF WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION,  
ELKHORN AREA SCHOOL DISTRICT,  
GREENDALE SCHOOL DISTRICT,  
MUSKEGO-NORWAY SCHOOL DISTRICT,

Defendants.

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**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT,  
MUSKEGO-NORWAY SCHOOL DISTRICT**

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The Defendant, Muskego-Norway School District, answers the Complaint as follows:

1. Admits that the State of Wisconsin has enacted a statute governing the open enrollment of students in Wisconsin Public Schools, namely, Wis. Stat. § 118.51 (the Open Enrollment Law). Admits that Wisconsin's Open Enrollment Law allows students to transfer to a School District other than the one in which they reside. Lacks knowledge as to the popularity of open enrollment transfers or the number of students applying for transfer under open enrollment.

2. Denies that children with disabilities do not have the same access to transfers under the Open Enrollment Law as children without disabilities. Denies that Wisconsin law permits School Districts to deny the open enrollment applications of children with disabilities solely on the basis that they have a disability. Lacks knowledge as to the number of disabled children whose applications for open enrollment were rejected solely on the basis of their disability. The final sentence of this paragraph is a statement of the plaintiffs' goals in this action and does not require a response; to the extent that it does require a response, defendant denies.

### **PARTIES**

3. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

4. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

5. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

6. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

7. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

8. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

9. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

10. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

11. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

12. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

13. Admits.

14. Admits that the DPI is a Wisconsin agency with principal place of business as identified. Admits that the DPI and the Superintendent of Public Instruction are responsible for overseeing and administering Wisconsin's Open Enrollment Law. The remaining allegations in this paragraph state conclusions of law that do not require a response; to the extent that any response is required, this answering defendant denies and puts the plaintiffs to their strict proof.

15. Admits.

16. Admits.

17. Admits.

18. Lacks knowledge as to whether the defendants are all recipients of federal funding, therefore denies the same and puts the plaintiffs to their strict proof. The remainder of the statements in this paragraph are legal conclusions and do not require a response; to the extent that they may require a response, the defendant denies and puts the plaintiffs to their strict proof.

#### **JURISDICTION AND VENUE**

19. This paragraph is a statement of plaintiffs' purpose in bringing this lawsuit and legal conclusions, and does not require a response. To the extent that the statement requires a response, defendant denies and puts the plaintiffs to their strict proof.

20. Admits.

21. Admits.

**CAUSE OF ACTION FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE OF  
THE FOURTEENTH AMENDMENT, THE ADA, AND SECTION 504**

*FACTUAL BACKGROUND*

22. Denies that education provided through and in accordance with the Open Enrollment Law is a service, program, or activity provided by the defendant. Admits that the Open Enrollment Law may sometimes informally be described as an Open Enrollment Program, but affirmatively alleges that this description has no bearing on whether the Open Enrollment Law qualifies as a service, program or activity, as those terms may be used under federal law.

23. Denies and puts the plaintiffs to their strict proof.

24. Denies and puts the plaintiffs to their strict proof.

25. Admits that a non-resident School District has the power to accept or deny an application for open enrollment. Admits that the criteria for acceptance or rejection are laid out in Wis. Stat. § 118.51(5). Admits that non-resident School Districts determine the number of students with disabilities that it can accept, including the option of none, even if it is accepting students without disabilities. Admits that School Districts in Wisconsin set limits for the number of students with disabilities they can accept under the Open Enrollment Law. Denies that this results in discrimination against children with disabilities. Denies that this denies them their right to equal protection under the Fourteenth Amendment to the U.S. Constitution. Lacks knowledge as to the remaining allegations in the paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

26. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

27. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

28. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

29. Denies that Wisconsin law permits discrimination against children with disabilities. Lacks knowledge about any adverse impact on the plaintiffs by Wisconsin's Open Enrollment Law, therefore denies the same and puts the plaintiffs to their strict proof.

***S.W.'s and S.G.'s experience with open enrollment***

30. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

31. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

32. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

33. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

34. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

35. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

36. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

37. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

***Ca.R.'s, Ch.R.'s and D.R.'s experience with open enrollment***

38. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

39. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

40. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

41. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

42. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

43. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

44. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

45. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

***P.F.'s and A.F.'s experience with open enrollment***

46. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

47. Denies that P.F.'s application was denied solely because he was disabled. Denies that Muskego-Norway approved 55 open enrollment spaces, and affirmatively alleges that Muskego-Norway approved 50 open enrollment spaces. Admits that zero open enrollment spaces were available for children with disabilities.

48. Lacks knowledge concerning Racine Unified School District's conduct, therefore denies the same and puts the plaintiffs to their strict proof. Affirmatively allege that P.F. and A.F. failed to exhaust all administrative remedies available to them under the law before commencement of this lawsuit. The plaintiffs' statement concerning the mootness of an appeal is a conclusion of law that does not require response; to the extent a response may be required, the defendant denies the same and puts the plaintiffs to their strict proof.

49. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

50. Denies that the Open Enrollment Law permits school districts to discriminate against children with disabilities. Lacks knowledge as to the remaining allegations the paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

51. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

*CLAIM FOR RELIEF*

52. Denies that Wisconsin's Open Enrollment Law prevents plaintiffs from transferring to and receiving an education from a school district other than the school district in which they reside solely because of their disabilities. The remainder of the statements are conclusions of law that do not require a response; to the extent a response may be required, the defendant denies the same and puts the plaintiffs to their strict proof.

53. Admits the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendant denies and puts the plaintiffs to their strict proof.

54. Denies that 42 USC § 12132 is accurately quoted. Admits that 42 USC § 12131 (A) is accurately quoted. However, the contents of the cited laws state legal conclusions not requiring a response. To the extent that a response is required concerning the contents of the cited laws, defendant denies and puts the plaintiffs to their strict proof.

55. Admits the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendant denies and puts the plaintiffs to their strict proof.

56. Admits the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendant denies and puts the plaintiffs to their strict proof.

57. Admits the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendant denies and puts the plaintiffs to their strict proof.

58. Admits the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendant denies and puts the plaintiffs to their strict proof.

59. Lacks knowledge concerning the reference of the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.



60. Admits the law is correctly cited; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendant denies and puts the plaintiffs to their strict proof.

61. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

62. Lacks knowledge as to whether all defendants are recipients of federal funding, therefore denies the same and puts the plaintiffs to their strict proof. Plaintiffs' statements that all defendants are public entities and covered by the ADA and Section 504 of the Rehabilitation Act are conclusions of law that do not require response; to the extent that a response is required, the defendant denies and puts the plaintiffs to their strict proof. Denies that defendants are violating the ADA and Section 504 of the Rehabilitation Act; denies that the defendants are excluding individuals with a disability on the basis of the disability from participating in or denying them benefits of services, programs or activities; and denies that defendants are subjecting plaintiffs to discrimination.

63. Denies the allegations of this paragraph and puts the plaintiffs to their strict proof.

64. Admits that the case cited is appropriately quoted; however, the content of the cited case states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited case, defendant denies and puts the plaintiffs to their strict proof.

65. Lacks knowledge concerning the allegations of this paragraph, therefore denies the same and puts the plaintiffs to their strict proof.

66. Denies the allegations of this paragraph and puts the plaintiffs to their strict proof.

67. The statements in this paragraph are conclusions of law that do not require response; to the extent that a response is required, the defendant denies and puts the plaintiffs to their strict proof.

**AFFIRMATIVE DEFENSES**

Defendant, Muskego-Norway School District, affirmatively alleges, upon information and belief, and shows to the Court as follows:

1. Wisconsin's Open Enrollment Law is not a service, program, or activity as those terms are used in Section 504 and/or the ADA.

2. The manner in which Muskego-Norway School District applied Wisconsin's Open Enrollment Law concerning P.F., a nonresident student, is rationally related to a legitimate state interest.

3. Muskego-Norway School District's determination of special education spaces available in its schools is based on factors permitted by state and federal law.

4. At all times material, Muskego-Norway School District acted with objective reasonableness and in compliance with applicable State law and is immune from liability if those laws are found to violate certain federal laws.

5. Muskego-Norway School District did not at any time act with deliberate indifference or discriminatory intent.

6. Muskego-Norway School District is not a "person" as that term is defined for purposes of 42 USC § 1983 claims.

7. Plaintiff, P.F., is not an "otherwise qualified individual" eligible for transfer to Muskego-Norway School District under Wisconsin's Open Enrollment Law.

8. Acceptance of P.F. as a transfer student to Muskego-Norway School District under the Open Enrollment Law would require substantial change to the programs offered by the School District.

9. Acceptance of P.F. as a transfer student to Muskego-Norway School District under the Open Enrollment Law would impose significant additional cost on the School District.

10. Plaintiff, P.F., was not prevented from attending Muskego-Norway School District solely on the basis of his disability.

11. Plaintiffs failed to exhaust administrative remedies before filing suit.

12. Plaintiffs failed to mitigate their damages.

13. Plaintiffs', P.F. and A.F., claims against Muskego-Norway School District stemming from its denial of transfer under Open Enrollment are moot because P.F.'s transfer was also denied by Racine Unified School District, and P.F. and A.F. did not exhaust administrative remedies available as to either denial.

14. Plaintiffs lacks standing to bring a claim against Muskego-Norway School District.

15. Plaintiffs failed to state a claim upon which relief may be granted under Section 504 of the Rehabilitation Act, 29 USC § 794.

16. Plaintiffs failed to state a claim upon which relief may be granted under the Americans with Disabilities Act (ADA), as to Muskego-Norway School District.

17. Plaintiffs failed to state a claim upon which relief may be granted under the Equal Protection Clause of the Fourteenth Amendment, as to Muskego-Norway School District.

18. Plaintiffs failed to state a claim upon which relief may be granted under 42 USC § 1983, as to Muskego-Norway School District.

19. Upon information and belief, PF has at all times been provided with a free and appropriate public education as required under state and federal law.

20. Upon information and belief, the conduct of Muskego-Norway School District, at all times material to this action, complied with statutes and regulations enacted by the State of Wisconsin and federal law. In the event it is determined that any provision of the law subject to this proceeding is invalid or unenforceable, no monetary award, including attorney's fees and costs, should be granted against Muskego-Norway School District.

21. Minor Plaintiffs, S.W., Ca.R., Ch.R. and P.F., are not represented by a guardian ad litem or other properly designated representative, in violation of Fed. R. Civ. Procedure, Rule 17(c).

22. Muskego-Norway School District reserves the right to assert any and all additional affirmative defenses.

WHEREFORE, Muskego-Norway School District requests that the Court grant judgment dismissing the Complaint of the Plaintiffs, upon the merits, together with the costs and disbursements of this action.

**A TWELVE-PERSON JURY TRIAL IS HEREBY DEMANDED.**

Dated this 20<sup>th</sup> day of January, 2015.

KASDORF, LEWIS & SWIETLIK, S.C.  
Attorneys for Defendant,  
Muskego-Norway School District

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