

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

S.W., et al.,

Plaintiffs,

v.

Case No. 14-CV-792-wmc

TONY EVERS, et al.,

Defendants.

DEFENDANTS TONY EVERS AND THE DEPARTMENT OF PUBLIC
INSTRUCTION'S ANSWER TO PLAINTIFFS' AMENDED COMPLAINT

Defendants Superintendent Tony Evers and the Department of Public Instruction, by their undersigned legal counsel, answer the plaintiffs' amended complaint as follows:

1. Admit in part; deny in part. Admit that the State of Wisconsin has enacted Wis. Stat. § 118.51, entitled "Full-time open enrollment." Admit that the open enrollment law provides opportunities for students to attend public schools in nonresident school districts. Deny that 49,929 *students* filed open enrollment applications for the 2013-2014 school year. Allege that 42,929 open enrollment *applications* were filed for the 2013-2014 school year. Allege that Wis. Stat. §§ 118.51(3)(a) and 118.51(3m)(a) allow a parent of a pupil to submit applications to "3 nonresident school boards in any school year."

2. Deny first three sentences. Last sentence consists of legal conclusion to which no responsive pleading is required.

PARTIES

3. Lack knowledge or information sufficient to form a belief and thus deny.

4. Lack knowledge or information sufficient to form a belief and thus deny.

5. Lack knowledge or information sufficient to form a belief and thus deny.

6. Lack knowledge or information sufficient to form a belief and thus deny.

7. Lack knowledge or information sufficient to form a belief and thus deny.

8. Lack knowledge or information sufficient to form a belief and thus deny.

9. Lack knowledge or information sufficient to form a belief and thus deny.

10. Lack knowledge or information sufficient to form a belief and thus deny.

11. Lack knowledge or information sufficient to form a belief and thus deny.

12. Lack knowledge or information sufficient to form a belief and thus deny.

13. Lack knowledge or information sufficient to form a belief and thus deny.

14. Lack knowledge or information sufficient to form a belief and thus deny.

15. Lack knowledge or information sufficient to form a belief and thus deny.

16. Lack knowledge or information sufficient to form a belief and thus deny.

17. Lack knowledge or information sufficient to form a belief and thus deny.

18. Lack knowledge or information sufficient to form a belief and thus deny.

19. Deny as stated. Admit that Tony Evers is the Superintendent of the Department of Public Instruction (DPI), that his principal place of business is at the location stated, and that Superintendent Evers is sued in his official capacity. Allege that Superintendent Evers' general duties and powers are set forth in Wis. Stat. §§ 115.28 and 115.29. Deny that Superintendent Evers and DPI are responsible for "overseeing and administering Wisconsin's Open Enrollment Law" because the terms "overseeing and administering" are

undefined. Allege that “the process for open enrollment applications” is set forth in Wis. Stat. § 118.51(3), (3m), and Wis. Admin. Code § PI 36.06-.07, which were drafted and/or approved by the legislature, and thus not “determin[ed]” by Superintendent Evers. Admit that DPI is responsible under the statute for preparing, distributing to school districts, and making available to parents open enrollment application forms. Admit that Superintendent Evers and DPI are responsible for hearing and deciding appeals from adverse open enrollment decisions. Admit that DPI is responsible for developing an outreach program to educate parents about open enrollment. Admit that DPI is required to submit an annual report to the Governor and the appropriate standing committees of the legislature about open enrollment.

20. Admit in part. Admit that DPI is an agency of the State of Wisconsin and has its principal place of business at the location stated. Deny that Superintendent Evers and DPI are responsible for “overseeing and administering Wisconsin’s Open Enrollment Law” because the terms “overseeing and administering” are undefined. The balance of this paragraph, containing statements about the Supremacy Clause of the United States Constitution and the doctrine of sovereign immunity, consists of legal conclusions to which no responsive pleading is required.

21. Lack knowledge or information sufficient to form a belief and thus deny.

22. Lack knowledge or information sufficient to form a belief and thus deny.

23. Lack knowledge or information sufficient to form a belief and thus deny.

24. Lack knowledge or information sufficient to form a belief and thus deny.

25. Lack knowledge or information sufficient to form a belief and thus deny.

26. Admit that DPI is a recipient of federal funding. The balance of this paragraph consists of legal conclusions to which no responsive pleading is required.

JURISDICTION AND VENUE

27. This paragraph consists of legal conclusions to which no responsive pleading is required.

28. This paragraph consists of legal conclusions to which no responsive pleading is required.

29. Admit that Superintendent Evers and DPI are residents of the Western District of Wisconsin. Deny that the alleged events or omissions giving rise to plaintiffs' claim occurred in the Western District of Wisconsin.

The balance of this paragraph consists of legal conclusions to which no responsive pleading is required.

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

FACTUAL BACKGROUND

30. Deny as stated. Superintendent Evers and DPI do not provide education to students. Admit that the quotations from the DPI website and the Legislative Fiscal Bureau document are accurate. The balance of this paragraph consists of legal conclusions to which no responsive pleading is required.

31. Deny.

32. Deny.

33. The first three sentences of this paragraph consist of legal conclusions to which no responsive pleading is required. Deny that Superintendent Evers, DPI, or Wisconsin law set “quotas” because the term “quota” is plaintiffs’ term and is undefined. Allege that school districts are not permitted to set “quotas” under Wisconsin law. Deny that Superintendent Evers and DPI permit school districts to set “quotas,” that they sanction such “quota”-setting when hearing appeals of adverse open enrollment decisions, or that they otherwise sanction or permit discrimination against children with disabilities.

34. Deny.

35. Deny. The policies and procedures governing the open enrollment program are set forth in Wis. Stat. § 118.51 and Wis. Admin. Code ch. PI 36, which were drafted and/or approved by the legislature, and thus not “established” by Superintendent Evers and DPI. Admit that, where required by statute and rule, Superintendent Evers and DPI “implement[]” these policies and procedures. Deny that the policies and procedures set forth in Wis. Stat. § 118.51 and Wis. Admin. Code ch. PI 36 permit school districts to discriminate against children with disabilities.

36. Deny as stated. Admit that DPI’s Open Enrollment form contains a line asking “Does the pupil have an individualized education program (IEP)?” and a line asking “Does the pupil currently receive special education services?” Admit that after a parent submits an application for his or her child to attend school in a nonresident school district, the resident school board is required to send to the nonresident school district a copy of the child’s individualized education program, if any.

37. Deny. Allege that Wisconsin law does not permit discrimination against children with disabilities.

S.W.’s and S.G.’s experience with open enrollment.

38. Lack knowledge or information sufficient to form a belief and thus deny.

39. Lack knowledge or information sufficient to form a belief and thus deny.

40. Lack knowledge or information sufficient to form a belief and thus deny.

41. Lack knowledge or information sufficient to form a belief and thus deny.

42. Lack knowledge or information sufficient to form a belief and thus deny.

43. Lack knowledge or information sufficient to form a belief and thus deny.

44. Deny that the open enrollment law permits school districts to discriminate against children with disabilities. Otherwise, lack knowledge or information sufficient to form a belief and thus deny.

45. Deny that the open enrollment law permits school districts to discriminate against children with disabilities. Otherwise, lack knowledge or information sufficient to form a belief and thus deny.

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

46. Lack knowledge or information sufficient to form a belief and thus deny.

47. Lack knowledge or information sufficient to form a belief and thus deny.

48. Lack knowledge or information sufficient to form a belief and thus deny.

49. Lack knowledge or information sufficient to form a belief and thus deny.

50. Lack knowledge or information sufficient to form a belief and thus deny.

51. Lack knowledge or information sufficient to form a belief and thus deny.

52. Deny that the open enrollment law permits school districts to discriminate against children with disabilities. Otherwise, lack knowledge or information sufficient to form a belief and thus deny.

53. Deny that the open enrollment law permits school districts to discriminate against children with disabilities. Otherwise, lack knowledge or information sufficient to form a belief and thus deny.

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

54. Lack knowledge or information sufficient to form a belief and thus deny.

55. Lack knowledge or information sufficient to form a belief and thus deny.

56. Lack knowledge or information sufficient to form a belief and thus deny.

57. Deny DPI or Superintendent Evers upheld a school district's decision to discriminate against children with disabilities. Admit DPI affirmed the denial. As to the remaining allegations, lack knowledge or information sufficient to form a belief and thus deny.

58. Deny that the open enrollment law permits school districts to discriminate against children with disabilities. Otherwise, lack knowledge or information sufficient to form a belief and thus deny.

59. Deny that the open enrollment law permits school districts to discriminate against children with disabilities. Otherwise, lack knowledge or information sufficient to form a belief and thus deny.

R.W.'s and E.W.'s experience with open enrollment

60. Lack knowledge or information sufficient to form a belief and thus deny.

61. Lack knowledge or information sufficient to form a belief and thus deny.

62. Lack knowledge or information sufficient to form a belief and thus deny.

63. Lack knowledge or information sufficient to form a belief and thus deny.

64. Lack knowledge or information sufficient to form a belief and thus deny.

65. Lack knowledge or information sufficient to form a belief and thus deny.

66. Lack knowledge or information sufficient to form a belief and thus deny.

67. Deny.

68. Deny that the open enrollment law permits school districts to discriminate against children with disabilities. Otherwise, lack knowledge or information sufficient to form a belief and thus deny.

69. Lack knowledge or information sufficient to form a belief and thus deny.

N.B.'s and S.B.'s experience with open enrollment

70. Lack knowledge or information sufficient to form a belief and thus deny.

71. Lack knowledge or information sufficient to form a belief and thus deny.

72. Lack knowledge or information sufficient to form a belief and thus deny.

73. Lack knowledge or information sufficient to form a belief and thus deny.

74. Lack knowledge or information sufficient to form a belief and thus deny.

75. Lack knowledge or information sufficient to form a belief and thus deny.

76. Admit.

77. Admit.

78. Deny that DPI has any statutory or regulatory authority to “enforce” its decisions. Otherwise, lack knowledge or information sufficient to form a belief and thus deny.

79. Lack knowledge or information sufficient to form a belief and thus deny.

80. Lack knowledge or information sufficient to form a belief and thus deny.

CLAIM FOR RELIEF

81. Deny that the open enrollment law permits school districts to discriminate against children with disabilities. Deny that Superintendent Evers and DPI “provide” open enrollment to pupils, with or without disabilities. Deny that Superintendent Evers and DPI “deny” children with disabilities access to the open enrollment program. Deny that Superintendent Evers and DPI have violated the stated laws or rights. The balance of this paragraph, concerning defendants’ alleged violations of federal statutes, consists of legal conclusions to which no responsive pleading is required.

82. This paragraph consists of legal conclusions to which no responsive pleading is required.

83. This paragraph consists of legal conclusions to which no responsive pleading is required.

84. This paragraph consists of legal conclusions to which no responsive pleading is required.

85. This paragraph consists of legal conclusions to which no responsive pleading is required.

86. This paragraph consists of legal conclusions to which no responsive pleading is required.

87. This paragraph consists of legal conclusions to which no responsive pleading is required.

88. This paragraph consists of legal conclusions to which no responsive pleading is required.

89. This paragraph consists of legal conclusions to which no responsive pleading is required.

90. Deny that Superintendent Evers acted, under color of law or otherwise, to deprive children with disabilities of their rights, privileges, or immunities secured by the Constitution “and laws.” The balance of this paragraph is directed at other parties to this lawsuit and therefore no response from Superintendent Evers or DPI is required.

91. Admit that DPI is a recipient of federal funding. Deny that Superintendent Evers and DPI are excluding individuals with disabilities from any program, service, or activity, denying them benefits in any program, service or activity, or otherwise discriminating against individuals with disabilities. The balance of this paragraph consists of legal conclusions to which no responsive pleading is required.

92. Deny that Superintendent Evers and DPI acted, under color of law or otherwise, to deprive plaintiffs of their rights under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, or the Equal Protection Clause.

93. Admit that the quotation from *Toledo v. Sanchez*, 454 F.3d 24, 38-39 (1st Cir. 2006), is accurate.

94. This paragraph consists of legal conclusions to which no responsive pleading is required. The documents cited in this paragraph speak for themselves and Superintendent Evers and DPI neither admit nor deny plaintiffs' characterization of those documents.

95. Deny that Superintendent Evers, DPI, or Wisconsin law set "quotas" because the term "quota" is plaintiffs' term and is undefined. Allege that school districts are not permitted to set "quotas" under Wisconsin law. Deny that the open enrollment law violates the rights of children with disabilities

under the Equal Protection Clause of the United States Constitution or the Americans with Disabilities Act.

96. Deny that plaintiffs are entitled to the relief requested or any other relief. Otherwise, the balance of this paragraph consists of legal conclusions to which no responsive pleading is required.

PRAYER FOR RELIEF

- A. Deny that plaintiffs are entitled to declaratory relief.
- B. Deny that plaintiffs are entitled to injunctive relief.
- C. Deny that plaintiffs are entitled to damages.
- D. No response. This claim for relief is not directed at Superintendent Evers or the Department of Public Instruction.
- E. Deny that plaintiffs are entitled to costs and attorneys fees.
- F. Deny that plaintiffs are entitled to any other relief.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim upon which relief may be granted against Superintendent Evers and the Department of Public Instruction.

2. The Department of Public Instruction and Superintendent Evers are immune from plaintiffs' claims under the Eleventh Amendment to the United States Constitution.

3. The Department of Public Instruction is not a "person" as that term is used in § 1983, and neither the Department of Public Instruction, nor

Superintendent Evers in his official capacity, may be held liable for damages under § 1983.

4. The plaintiffs are not entitled to damages because of qualified immunity, as they cannot show that Superintendent Evers or the Department of Public Instruction violated clearly established law.

5. The plaintiffs have not exhausted their administrative remedies.

6. The plaintiffs are not entitled to damages, including compensatory or punitive damages, because they cannot show that Superintendent Evers or the Department of Public Instruction engaged in intentional discrimination.

7. The plaintiffs' § 1983 claim is not actionable because plaintiffs' claims sound under federal statutes that constitute the comprehensive enforcement scheme available.

8. To the extent allegedly involved in Wisconsin's open enrollment law in a way relevant here, Superintendent Evers and the Department of Public Instruction acted according to that law and for legitimate, non-discriminatory reasons grounded in the law and its factors.

9. Plaintiffs' requested accommodations would require fundamental alterations to the open enrollment program, significant additional costs, unreasonable modifications of the open enrollment law, or otherwise constituted an undue burden.

10. Superintendent Evers and the Department of Public Instruction do not operate individual schools and lacked involvement in the schools' individual open enrollment application decisions and decisions about how many spaces were available in a school.

11. All or some of the plaintiffs may have failed to mitigate their damages.

12. To the extent they were involved in hearing appeals, Superintendent Evers and the Department of Public Instruction are entitled to immunity for quasi judicial functions.

13. The defendants reserve the right to name additional affirmative defenses as they become known through further discovery or otherwise in this action.

WHEREFORE, defendants Superintendent Evers and the Department of Public Instruction demand judgment in their favor and against plaintiffs, dismissal of the complaint in its entirety, an order awarding attorneys' fees to defendants, and any other relief the Court deems appropriate under the circumstances.

Dated this 13th day of March, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

s/Anthony D. Russomanno
ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for Defendants DPI and Evers

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2238 (AAG Russomanno)
(608) 266-3859 (AAG Whelan)
(608) 266-7656 (AAG Gibson)
(608) 267-2223 (fax)
russomannoad@doj.state.wi.us
whelanmf@doj.state.wi.us
gibsoncj@doj.state.wi.us