No. 17-3266

In the United States Court of Appeals
For the Seventh Circuit

P.F., a minor, et al.

Plaintiffs – Appellants,

v.

TONY EVERS, in his official capacity, et al.

Defendants – Appellees.

Appeal from a Judgment of the United States District Court
for the Western District of Wisconsin, Honorable William M. Conley.
Case No. 14-CV-792

Brief of Defendants-Appellees, Muskego-Norway School District and Paris J1 School District

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Rule 26.1 Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the following disclosure statement is submitted by counsel for Defendants – Appellees.

(1) The full name of every party that the attorney represents in the case:

Muskego-Norway School District and Paris J1 School District

(2) The name of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kasdorf, Lewis & Swietlik, S.C.

(3) If the party or amicus is a corporation:

The parties are not corporations.

(i) Identify all its parent corporations, if any; and

Not applicable

(ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable

Dated this 9th day of February, 2018.

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Table of Contents

Table of Authorities

Wisconsin Cases

Federal Cases

Wisconsin Statutes

Federal Statutes

Wisconsin Administrative Code Provisions

Federal Administrative Code Provisions

Jurisdictional Statement

Plaintiffs – Appellants' jurisdictional statement is complete and correct.

Statement of Issues Presented

1. Did Muskego-Norway School District or Paris J1 School District violate the ADA or Rehabilitation Act in denying the minor Plaintiffs' open enrollment applications under Wisconsin's open enrollment law after determining that they did not have space in the special education programs required by the minor Plaintiffs' respective IEPs?

2. If the Court Concludes that Muskego-Norway School District or Paris J1 School District Violated the ADA or Rehabilitation Act, Are Plaintiffs Entitled to Damages?

Statement of the Case

I. Nature of the Case

This is an appeal of the District Court's order denying Plaintiffs' motion for summary judgment and granting summary judgment to Defendants dismissing all Plaintiffs' claims, with the exception of R.W. and E.W.'s claim against Paris for injunctive relief, which claim was subsequently dismissed.

II. Facts Relevant to the Appeal

The following provides some background on the applicable laws and then addresses their application to the open enrollment applications of R.W. and P.F.

A. IDEA and Section 504

1. Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487, was created "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs"; "to ensure that the rights of children with disabilities and parents of such children are protected"; and to enable the states and local agencies to meet those educational goals. 20 U.S.C. § 1400(d). Special education is defined

as "specially designed instruction, at no cost to parents . . . to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(a)(16). "Related services" include an array of developmental, corrective and other support services "as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(a)(17).

2. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 ("Section 504"), codified at 29 U.S.C. § 794, similarly requires that schools that receive federal funds provide a FAPE to qualified handicapped students. 34 C.F.R. § 104.33(a) (implementing Section 504). A pupil in Wisconsin enrolled in a nonresident school district under open enrollment is considered to be in the nonresident district's jurisdiction. (ECF 59-5 at 6).

IDEA and Section 504 are not always synonymous. Thus, a disabled student can be eligible for accommodations under Section 504 but not meet the criteria for an individualized education program ("IEP") under IDEA. In that circumstance, the student will have a 504 Plan, which will spell out how the District will accommodate the student's disability. *See, e.g., Zachary M. v. Bd. of Educ.*, 829 F. Supp. 2d 649, 653 n.3 (N.D. Ill. 2011). Under open

enrollment, students who have a 504 Plan, which by definition means they are disabled under § 504 and the ADA, are not separately identified in the open enrollment application and acceptance process (*See* ECF 76-B (P.F.'s open enrollment application) and ECF 77-3 (R.W.'s open enrollment application), respectively); *see generally* Wis. Stat. § 118.51 (2014)[1]. Unlike students with an individualized education program under IDEA, who necessarily require special education programs or services, students with only a 504 Plan might require accommodations, but do not require special education. *See* 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(9)(D); *see, e.g., CTL v. Ashland Sch. Dist.*, 743 F.3d 524 (7th Cir. 2014) (504 Plan for managing student's diabetes during school).

Consequently, contrary to the implication in the Plaintiffs' brief, the open enrollment process does not separate all disabled students from non-disabled students. Rather, it separates only those students whose disability creates unique special education legal obligations

[1] Unless otherwise indicated or apparent from context, all citations to the open enrollment law—Chapter 118 the Wisconsin Statutes and related regulations—are to the law as it stood at the time at issue. As Plaintiffs note, the law was subsequently amended in 2016.

requiring space in special education, which distinguishes them from the other students participating in open enrollment.

3. Individualized Education Program

The "free appropriate public education" mandated by IDEA requires "special education and related services that . . . are provided in conformity with the individualized education program required under [20 U.S.C.] section 1414 (d)." 20 U.S.C. § 1401(9)(D). The individualized education program identifies the pupil's individual capabilities and handicaps and the services required to meet that pupil's unique needs. The school districts are required to provide those programs and services. (*Id.*). A school district that fails to provide services identified in the pupil's individualized education program fails to provide a free appropriate public education, thereby violating IDEA.

B. Wisconsin's Open Enrollment Law

1. Wisconsin's open enrollment law is a narrow exception to Wisconsin's residency-based system.

Wisconsin's public education system is residency-based. *See, e.g., Vincent v. Voight*, 2000 WI 93, 236 Wis. 2d 588, 614 N.W.2d 388 (upholding the constitutionality of Wisconsin's residency-based school finance system). State law requires each school district to provide a free public education to all elementary and high school

students residing in its district. Wis. Stat. § 121.77(1)(a). Wisconsin's open enrollment law, found at § 118.51 Wis. Stats., is an exception to this rule, and was first implemented for the 1998-99 school year. 1997 Wis. Act 27 § 2843g (creating Wis. Stat. § 118.51).

Under Wisconsin's open enrollment law, "[a] pupil may attend a public school . . . in a non-resident school district" through an application process. Wis. Stat. § 118.51(2), (3). Parents may apply in early spring to enroll their pupil(s) in a non-resident school district for the upcoming fall. § 118.51(3).

2. Open enrollment is based on there being available space in the nonresident district.

Participation in open enrollment is mandatory. Before the application process begins, a school district must analyze its resources and its student body to determine the extent to which space is available to accommodate non-resident students. Wis. Stat. § 118.51(5)(a)1. In determining open enrollment availability, school districts are required to determine (1) the number of general education spaces *and* (2) the number of special education spaces, by program or services. *See* § 118.51(5)(a)1; Wis. Admin. Code § PI 36.06(5). As discussed above, that distinction is the result of the difference between general and special education.

3. The determination of available space for open enrollment transfers is based on class size limits, pupil-teacher ratios, and enrollment projections.

When determining space both in general education and in special education, districts are limited by statute in what they may consider. Districts may only consider "criteria such as class size limits, pupil-teacher ratios, or enrollment projections established by the nonresident school board[.]" § 118.51(5)(a)1. Neither § 118.51 nor the interpreting regulations permit consideration of a student's disability. *Id.*; Wis. Admin. Code § PI 36.06. Consequently, all students are accepted or rejected based solely on whether there is space available in the nonresident district to provide the education they require.[2]

4. Open enrollment as applied to individualized education programs

After receiving open enrollment applications, non-resident school districts forward copies of all applications to the applicants' respective resident school districts. Wis. Stat. § 118.51(3)(a). The application form includes a checkbox to indicate whether the applicant has an individualized education program. (*See* ECF 76-2 and ECF 77-3, open enrollment Applications of P.F. and R.W.,

[2] Other exceptions, such as for truants, are not relevant to this case.

respectively). The application does not ask whether the student has a disability, is disabled or has a § 504 plan. (*Id.*). If an applicant has an individualized education program, the resident school district must forward a copy of it to the non-resident school district(s) to which the student applied. Wis. Stat. § 118.51(3)(a)1m.

The nonresident school district then reviews the individualized education program to determine whether it has space in the programs and services necessary to provide the free appropriate public education outlined by the plan. (*See* ECF 59-7). The nonresident district must determine whether it offers the special education programs and related services required by the pupil's individualized education program at all, and if so, whether there is space in those services or programs for the non-resident pupil. Wis. Stat. § 118.51(5)(a)4.

If the school district does not have the programs required by the individualized education program, or does not have space in them, it denies the application. In making this determination, a school district is bound by its space determinations in the January school board meeting and is prohibited from granting more open enrollment applications than it determined it had space for, unless it can determine that additional spaces have become available since

the January board meeting. *See* Wis. Admin. Code § PI 36.06(5)(b),(d).

Regardless of whether it accepts or rejects the application, the nonresident school district is required to "prepare an estimate of the costs to provide the special education or related services required in the individualized education program[.]" Wis. Stat. § 118.51 (12)(am)1. Under the law applicable at the time, the resident district is responsible for the additional cost attributable to the student, but may deny the transfer if the cost is unduly burdensome. Wis. Stat. § 118.51(3m)(d) and (12)(b).

Additionally, if a new or amended IEP for an open enrollment pupil who has begun attending public school in a nonresident district requires special education or related services that are not available in the nonresident school district, or if there is no space available to provide the special education or related services identified in the IEP, including any class size limits, pupil-teacher ratios or enrollment projections established by the nonresident school board, the nonresident school board may notify the child's parent and the child's resident school board that the special education or related service is not available in the nonresident school district. If such notice is provided, the child shall be

transferred to his or her resident school district, which shall provide an educational placement for the child under Wis. Stat. § 115.79(1)(b). Wis. Stat. § 118.51(12)(a).

5. Appeal rights for unreasonable denials

Applicants and their parents have the right to appeal open enrollment denials to the Department of Public Instruction ("DPI") within 30 days after such decision is made. Wis. Stat. § 118.51(9). The DPI "shall affirm the school board's decision" to deny the application or prohibit the transfer "unless the department finds that the decision was arbitrary or unreasonable." (*Id.*).

C. Allegations concerning all Defendant school districts

Plaintiffs allege that the separate designation of available space in general education and special education under open enrollment is a discriminatory "quota" system. (ECF 20 at ¶33). They criticize this as a "'two-track' open enrollment system," but recognize that this system is mandated by Wisconsin law. (*E.g.*, *id.* at ¶68).

Plaintiffs' claims against the school districts are based on the districts' consideration of space available in special education in deciding open enrollment applications for students who have been found to require special education and who, therefore, have individualized education programs. Plaintiffs, however, have not

challenged the accuracy of the Defendant districts' determinations of available space. (ECF 33 at 27, fn. 14). They claim their argument in no way depends on whether or not there was actually space for Plaintiffs in special education. Plaintiffs, therefore, have conceded that the Defendant districts did not have space in the programs and services required by the students' individualized education programs.

D. Facts specific to Muskego-Norway School District

1. P.F.'s open enrollment application to Muskego-Norway

Going into the 2014-2015 school year, P.F. was an 11-year-old student with autism. (ECF 112 at ¶¶12-15, 17.a). He and his family lived in the Racine Unified School District ("Racine"). (ECF 20 at ¶54). P.F's parents applied under Wisconsin's open enrollment law for P.F. and his sister to attend any of Muskego-Norway, Norway J7, or Raymond #14 School Districts. (ECF 112 at ¶13). P.F. applied for entry into the sixth grade. (ECF 76 at ¶8, 76-2).

2. P.F.'s individualized education program set forth specific special education that P.F. required, and required that he be educated entirely in special education and not in general education classes.

P.F.'s open enrollment application indicated he had an individualized education program. (ECF 112 at ¶15). P.F.'s IEP

established that P.F. was a high-needs student. (*See id.* ¶17). At age 10–11, he had the cognitive and motor functioning of a 2- to 3-year-old. (*Id.* ¶17.b). P.F.'s IEP indicated that he was required to "receive instruction *primarily in the special education setting*." (*Id.* ¶17.j (emphasis added)). P.F.'s IEP dictated that he not participate in a general education setting, even with supplemental aids: "Due to [P.F.]'s needs, *removal from the general education classroom is necessary*. Supplementary Aids and Services alone cannot meet [P.F.]'s needs in general education. . . . ." (*Id.* ¶17.k (emphasis added)). P.F.'s IEP recommended that his academic instruction be matched with his cognitive level—that of a three-and-a-half-year-old—"so he can access academic content in a meaningful way." (*Id.* ¶17.l). According to his individualized education program, P.F. also required extended school year services (*id.* ¶17.n) and personal bus transportation due to the severity of his disability. (*Id.* ¶17.o).

When Muskego-Norway School District ("Muskego-Norway") received P.F.'s open enrollment application for the 2014-2015 year, it also received a copy of P.F.'s IEP. (*Id.* ¶¶14-16). Because Muskego-Norway indisputably did not have space in the special education programs called for in P.F.'s IEP, it denied P.F.'s application for open enrollment by letter dated June 5, 2014. (*Id.* ¶18). The letter

included information regarding the right to appeal to the DPI within 30 days. (*Id.*). P.F. and his parent did not appeal. (*Id.* ¶19; ECF 20 at ¶56).

3. Racine School District denied P.F.'s open enrollment transfer because the cost would have been an undue financial burden.

In accordance with Wisconsin law, after receiving the IEP, Muskego-Norway analyzed P.F.'s individualized education program and completed a cost estimate for the services he required. (ECF 112 at ¶¶20-25, ECF 76 at ¶¶16-20 and ECF 76-4). Muskego-Norway determined that in order to educate P.F. in accordance with his IEP—that is, to provide the free appropriate public education required by federal law—Muskego-Norway would have to obtain the services of an individual aid assigned exclusively to P.F. (at a cost of $7,560 per year); occupational therapy services ($1,422 per year); and special transportation ($41,400 per year). The total additional cost to educate P.F. was estimated to be $50,382 for the 2014-2015 school year. (*Id.*).

Muskego-Norway forwarded the cost estimate to Racine, P.F.'s resident school district. (ECF 112 at ¶23; ECF 76 at ¶20). Under the law in effect at the time, Racine determined that reimbursing Muskego-Norway for the additional costs to educate P.F., would

cause an "undue financial burden" on the district, and, therefore, denied the transfer. (ECF 20 at ¶56; ECF 112 at ¶24; ECF 76 at ¶21). P.F. and A.F. did not take advantage of their right to appeal Racine's denial of the transfer. (ECF 20 at ¶56; ECF 112 at ¶25; ECF 76 at ¶22). They indicate that they decided not to appeal because they did not think they would prevail. (ECF 148 at 110).

E. Facts specific to Paris J1 School District

1. R.W.'s open enrollment application to Paris

Paris J1 School District ("Paris") is a small, rural school district comprised of one school building that houses the entire K-8 district. (ECF 112 at ¶27). Paris serves approximately 280 total students. (*Id.* ¶28). Going into the 2012-2013 school year, Paris had only one full-time special education teacher (Kim Hansen) and one full-time special education aide to handle the special education needs of the entire district. (ECF 77 at ¶4). In addition to teaching, Ms. Hansen was also responsible for overseeing all IEPs by drafting annual goals for every student with an IEP and convening the IEP team to reevaluate IEPs tri-annually, staggered such that several students are evaluated each year. (*Id.* at ¶6).

Going into the 2012-2013 school year, R.W. was a 6-year-old kindergarten student diagnosed with Autism Spectrum Disorder.

(*See* ECF 112 at ¶36). Since his first diagnosis at approximately 18 months of age, R.W. completed "3 years of intensive in-home therapy (approximately 20-25 hours a week) through the Wisconsin Early Autism Program" as well as "private speech/language therapy . . . and private occupational therapy (twice a week since approximately 18 months of age . . .)." (*Id.* ¶55.b-c).

R.W. and his family lived in the Kenosha Unified School District ("Kenosha"). (*Id.* ¶35; ECF 20 at ¶60). His mother, E.W., applied under Wisconsin's open enrollment law for R.W. and his twin to attend kindergarten at either Paris, Brighton #1, or Wheatland J1 School Districts for the 2012-2013 year. (*Id.* ¶36). The individualized education program box on the application form was checked "no". (*Id.* ¶38; ECF 20 at ¶61). The special education program box on the application form was also checked "no." (ECF 112 at ¶40).

R.W. and his non-disabled twin both applied and were accepted into Paris's general education kindergarten curriculum for the 2012-2013 school year. (*Id.* ¶37). R.W. attended kindergarten registration and screening on May 16, 2012. (*Id.* ¶41). At that time, Paris learned from R.W.'s mother, E.W., that R.W. had autism. (*Id.* ¶42). This was the first time Paris learned that R.W. had this condition. (*Id.*). Roger Gahart, Paris's School Administrator, explained that

Paris was already over capacity in its special education program, and if R.W. required an IEP, Paris would unfortunately have to revoke its acceptance. (*Id.* ¶¶26, 43). This is specifically permitted under Wis. Stat. § 118.51(12)(a).

Plaintiffs do not dispute that Paris did not, in fact, have space in its special education program to provide the special education programs and related services in R.W.'s IEP. Paris's special education program was already stressed and over-capacity. (*See* ECF 112 at ¶29-31 and ECF 77 at ¶¶4-8, ECF 77-A, and 77-B). At its November 28, 2011 meeting, the Paris School Board had approved class sizes for the 2012-2013 school year in its general education and special education classes. (*Id.* ¶32). The Board set the special education class size at 20 students (a student to teacher ratio of 20/1). (*Id.*; ECF 77-2). However, Paris's projected special education enrollment for the 2012-2013 school year was 35 students (a projected 35/1 student/teacher ratio). (ECF 112 at ¶30). Consequently, Paris determined that there was no space in its special education program to accept new transfer students under open enrollment. (*Id.* ¶¶33-34).

2. R.W.'s Individualized Education Program

In accordance with Wis. Stat. § 115.78, an IEP evaluation team was convened. Mr. Gahart spoke with Sue Valeri, Kenosha's Director of Special Education, who elected to keep the evaluation in Kenosha. (*Id.* ¶¶46-47). The IEP team determined that R.W. required an IEP. (*Id.* ¶¶54, 59-62).

The IEP was completed on May 31, 2012. (ECF 77 at ¶29). R.W.'s IEP team concluded that R.W. "requires a maximum amount of support to safely participate in a general education classroom." (ECF 112 at ¶55.k). The team determined that R.W. would need direct supervision across all settings of the day, including at recess and when using the restroom. (*Id.* ¶55.l).

For placement, the IEP team determined that a "kindergarten classroom that is collaboratively taught by a general education and special education teacher will best meet his academic, personal-social and communication needs at this time." (*Id.* ¶55.o). The team therefore determined that R.W. should attend Kenosha's Pleasant Prairie Elementary School, rather than the closer Whittier Elementary School, which R.W. would have attended if he did not have an IEP, because it "is the closest school that houses a collaborative kindergarten class." (*Id.* ¶55.p). On June 26, 2012,

E.W. signed the Parent Consent/Permission for Initial Placement form, consenting to the suggested special education services, including placement at Pleasant Prairie. (*Id.* ¶55.q).

About a month later, on July 25, 2012, Paris received a copy of R.W.'s individualized education program. (*Id.* ¶56, ECF 77 at ¶31). Paris's special education teacher, Ms. Hansen, reviewed R.W.'s IEP and concluded that Paris did not have space to implement R.W.'s IEP. Critically, Paris did not (and still does not) have a collaborative kindergarten class. (ECF 112 at ¶58; ECF 77 at ¶34).

Based on R.W.'s IEP, Paris would have needed to hire one part-time special education teacher and one part-time aid to work with R.W. on a one-on-one basis, as well as contract for occupational therapy services through Cooperative Educational Service Agency ("CESA") #2. (ECF 77 at ¶36).

Because Paris did not have space or resources in its special education program to implement R.W.'s IEP and provide the programs and services it required, Paris had to revoke its acceptance of R.W.'s application for open enrollment pursuant to Wis. Stat. § 115.51(12)(a) on August 3, 2012. (ECF 77 at ¶37). Paris therefore mailed a denial letter to R.W.'s parent, E.W. (ECF 112 at ¶¶59-62). Paris's denial letter included information about the appeal

procedure under the open enrollment law. (*Id.* ¶62). E.W., however, did not appeal. (*Id.* ¶64). E.W. instead enrolled R.W. in the Kenosha School District (obviating any need for Paris to do a cost assessment). (ECF 20 at ¶67).

III. Procedural History

The Plaintiffs filed suit against Wisconsin DPI and several school districts alleging that Wisconsin's open enrollment law and its application to deny their open enrollment applications violated the ADA, Rehabilitation Act, and Equal Protection clause. (ECF 20). The parties filed cross motions for summary judgment (ECF 48, 50-51). The District Court denied the Plaintiffs' motion and granted in part and denied in part the summary judgment motion of Muskego-Norway and Paris, with the denial being R.W.'s claim for injunctive relief against Paris. (ECF 132). That claim was dismissed (ECF 134) and judgement was entered dismissing the Plaintiffs' case. (ECF 136). R.W., P.F., and S.B. and their parents appealed the dismissal of their claims under the ADA and Rehabilitation Act only. (ECF 137).

Summary of Argument

Plaintiffs are seeking a sea change in Wisconsin's open enrollment law. The law currently rests on the fundamental

principle that public school students are free to enroll in districts other than their resident districts, but only to the extent there is sufficient room, or space, in the nonresident district. This allows for additional educational options without subjecting school districts to a possibly unpredictable influx of more students than they have space for.

The open enrollment law looks at available space in two main categories: general education and special education. A district's general education program is its standard program generally offered to any and all students in the district. Special education, as is name implies, is *specially* designed instruction tailored to meet the unique needs of a child with any of thirteen categories of qualifying disability. Students who qualify under IDEA have their unique educational program set forth in an individualized education program.

Because having space in general education does not necessarily mean that a district would have space to provide the special education called for in an IEP, open enrollment requires districts to look at how much space they have in general education and also how much space they have in their special education programs. Then, when a student who has an IEP applies, the districts determine

whether they have space in their special education programs to provide the special education called for in that particular IEP.

In this case, Muskego-Norway and Paris performed that analysis and determined, for the school years at issue, that they did not have space in their special education programs. Although Plaintiffs insinuate that this was done capriciously or without a factual basis, they have not attempted to prove that. When P.F. and R.W. applied to open enroll in Muskego-Norway and Paris, respectively, the districts performed the required analysis by looking at their IEPs and determining whether they had the space in their special education programs to provide the special education and related services that these Plaintiffs required. Both districts determined that they did not have that space and so followed Wisconsin's open enrollment law and rejected the applications.

Plaintiffs never challenge that decision. They never argue, for example, that the districts actually did have space to provide the special education required in their IEPs. Plaintiffs are explicit in their argument—that space in special education is never a permissible factor to consider in deciding open enrollment applications. Plaintiffs' argument fails because it misconstrues open enrollment and misapplies the law.

Plaintiffs are not qualified individuals for purposes of successfully transferring into another district because open enrollment allows transfers only when there is space. Contrary to Plaintiffs' argument, they were not excluded from participation in open enrollment; they participated, but complain about being subject to different terms. But the terms are the same. For any student, open enrollment requires available space. The only space that is relevant to consider in determining whether the application would require the nonresident district to add capacity or suffer overcrowding is the actual space the student requires.

In seeking to force districts to look only at space in general education and ignore space in the special education programs the applicants will require, Plaintiffs seek to force districts to add space or suffer overcrowding. Since this is contrary to the principle of open enrollment as an excess capacity transfer program, what Plaintiffs seek would be a fundamental alteration.

In short, the law does not, as Plaintiffs argue, require open enrollment to be "blind" as to disability. The law clearly allows consideration of the legitimate and actual effects of a disability. Open enrollment simply considers the special education required in

IEPs to provide a meaningful definition of available space in a program premised on utilizing, but not exceeding, excess space.

The District Court's decision dismissing Plaintiffs' claims should, therefore, be affirmed in its entirety. To the extent Plaintiffs prevail in showing a violation of the law, however, their damages claims should be dismissed. Plaintiffs agree that damages are available only if the districts intentionally discriminated against them, and argue that the standard is deliberate indifference. Plaintiffs completely fail to apply that standard, however, and there is absolutely no support for the proposition that the districts, in applying longstanding state law, knew that Plaintiffs' federally-protected rights would likely be violated, but applied that law nonetheless. Plaintiffs' damages claims should be dismissed.

Statement of Appellate Standard of Review

A court of appeals reviews summary judgment *de novo*. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

Argument

I. The districts' application of Wisconsin's open enrollment law did not violate the ADA or Rehabilitation Act.

To minimize redundancy, we refer to and incorporate DPI's argument that Wisconsin's open enrollment statute, as intended to be applied by the school districts, does not violate the ADA or Rehabilitation Act. DPI's argument, standing alone, requires affirming the District Court's decision as to all Defendants because Plaintiffs do not argue that either Muskego-Norway or Paris deviated from the open enrollment law or misapplied it when considering Plaintiffs' open enrollment applications.

This Brief argues that Wisconsin's open enrollment law, as applied by the school districts, did not violate the ADA or Rehabilitation Act. In presenting this argument, it focuses on the application of the law to R.W. and P.F.'s open enrollment applications, but also necessarily briefly summarizes the argument, presented by DPI in more detail, that denial of open enrollment applications by school districts under Wis. Stat. § 118.51(5)(a)4 does not violate the Rehabilitation Act or the ADA because:

(1) applicants with IEPs that require special education programs in which the districts lack space are not qualified individuals;

(2) Plaintiffs' demand that their open enrollment applications be evaluated solely on the basis of the districts' available space in general education and then they be provided the special education required by their IEPs as a reasonable modification, actually requires a fundamental alteration to the open enrollment law that requires all districts to participate, but does not require overcrowding or creation of additional capacity; and

(3) denial of Plaintiffs' applications under the open enrollment law based on lack of space in the special education programs required in an IEP is not an exclusion or discrimination "because of" disability, but is rather the application of the same general rule, applicable to disabled and nondisabled alike, of not forcing overcrowding in the districts.

A. Plaintiffs are not individuals qualified to enroll into school districts that indisputably lack the special education space and resources required by their IEPs.

1. Plaintiffs were not qualified individuals because open enrollment requires the nonresident district to have existing space and resources to educate the applicant.

Plaintiffs argue that they are qualified individuals under Wis. Stat. § 118.51(2) with regard to obtaining an education in the school districts simply because they are school-age children. (Br. p. 24). But

the minor Plaintiffs have not been denied an education. Their complaint is that they were unable to enroll in different districts.

Thus, the "program" the Plaintiffs must be qualified for is the program they are challenging—open enrollment. Plaintiffs argue that they were qualified to participate in open enrollment, but were denied "participation." That is inaccurate. They were allowed to participate. As DPI's informational bulletin explains: "Pupils with disabilities can and do participate in open enrollment. For the most part, the procedures that apply for pupils with disabilities are the same as those that apply for non-disabled pupils. However, there are some additional provisions that apply for pupils with disabilities in all aspects of the open enrollment process." (ECF 59-5 at 1).

Plaintiffs challenge those additional provisions, which include the *terms* of participation. Plaintiff's real complaint is not that they were excluded from participation, but that the rules governing their participation were modified compared to nondisabled applicants. Ultimately, Plaintiffs challenge the denial of their applications under open enrollment. Thus, in examining whether Plaintiffs were qualified, the question is whether they possessed the necessary

qualifications for successful transfer under Wisconsin's open enrollment law.

Being qualified to open enroll requires more than being a school-age person in Wisconsin. Successful open enrollment for *any* student requires that the nonresident school district have sufficient existing capacity to accept and educate that student. The open enrollment system is premised on taking advantage of excess capacity. Contrary to Plaintiffs' argument, participation by the school districts in open enrollment is mandatory. The open enrollment law requires the school districts to determine how much available space they have in general education, by grade *and in special education*, according to programs and services. Wis. Stat. § 118.51(5)(a)1; Wis. Admin. Code § PI 36.06(5).

School districts are required to reject open enrollment applications if they do not have space. *See, e.g.,* Wis. Admin. Code § PI 36.06(5)(c). While participation in open enrollment is mandatory, participation is only required to the extent of a district's actual excess space. Open enrollment does not force a district to make space or suffer overcrowding. As the DPI's informational bulletin explains: "A nonresident school board is not required to

accept any open enrollment pupils for whom it does not have space. A nonresident school board is not required to hire any staff or create any program or services for a nonresident pupil." (ECF 59-5).

2. The districts indisputably did not have space available to provide the special education or related services identified in the minor Plaintiffs' IEPs.

Plaintiffs have never disputed that the school districts did not have space in the special education programs required under the Plaintiffs' personalized individualized education programs. Indeed, they have admitted that their arguments "do not depend on whether or not there was actually space for the minor Plaintiffs in the school districts to which they applied [because] Section 118.41(5)(a)4 violates federal law either way." (ECF 33 at 27, fn. 14).

Plaintiffs focus on the determination the districts are required to make in January under Wis. Stat. § 118.51(5)(a)(1) regarding how much space they have in general education and special education, complaining that this determination must be made before the particular needs of any student is known. They insinuate that because Paris and Muskego-Norway determined that they did not have space in any of their special education programs in the school years the Plaintiffs respectively applied, that they had simply decided capriciously and without any factual basis that they did not

want to take any special education students. Plaintiffs' argument misses the mark.

Both Paris and Muskego-Norway analyzed their then-current special education caseload in their schools. Based primarily on their actual and predicted special education class size and their pupil to teacher ratios, they concluded that they would be over-capacity in the upcoming year and did not have space in any of their special education programs to accept open enrollment applicants. (ECF 112 at ¶¶8-10, 27-34; ECF 76 at ¶3-7 and 76-1; ECF 77 at ¶1-11, 77-1 and 77-2). Insinuation aside, Plaintiffs never challenge these determinations.

More importantly, Plaintiffs gloss over the particularized process used when evaluating the open enrollment application of a student with an IEP. That process requires looking at the student's IEP and determining whether the special education programs and related services required by that particular student's IEP are available in the district and, if so, whether the nonresident district has space in them. Wis. Stat. § 118.51(5)(a)4. Paris and Muskego-Norway reviewed the IEPs and determined that they did not have space in the special education programs and related services R.W. and P.F.

required under their particular IEPs. (ECF 77 at ¶35; ECF 76 and 76-1).

Plaintiffs do not dispute that the districts either did not have the programs and related services required by the minor Plaintiffs' IEPs or did not have space in them. For example, R.W.'s IEP placed him in a collaboratively taught kindergarten, which Paris, with only one special education teacher for the entire district, indisputably did not have. (ECF 77 at ¶33-34; ECF 77-5). Paris would have had to hire an additional special education teacher and an additional aide and contract out for occupational therapy services to provide the special education and related services in R.W.'s IEP. (ECF 77 at ¶36).

P.F.'s IEP required special education and services relating to his severe autism. For example, at age 10-11, he had the cognitive and motor functioning of a 2-3 year-old. (ECF 112 at ¶17). His IEP required him to be educated completely within special education and completely removed from the general education classroom. (*Id.* ¶17k). Muskego-Norway analyzed its available space in special education according to areas of impairment and determined that it did not have space in special education for cognitive delays, severe educational autism and multiple handicaps. (ECF 76-1 at 7). Based on this lack of space in the special education P.F.'s IEP required,

Muskego-Norway denied P.F.'s application under Wis. Stat. § 118.51(5)(a)4. (ECF 112 at ¶18; ECF 38-3).

B. Plaintiffs' argument would require a fundamental alteration to Wisconsin's open enrollment law.

1. The proper analysis is whether requiring acceptance of open enrollment applications despite lack of space to provide the special education required in an applicant's IEP would be a fundamental alteration of the open enrollment law.

Plaintiffs analyze § 504's fundamental alteration issue incorrectly. They argue that § 504 requires that open enrollment must be completely blind to any special education programs or services the applicant requires and blind to the district's lack of available space or capacity to provide those special education programs. They argue that the open enrollment applications of students with IEPs must be evaluated based only on available space in general education. Further, they argue that once they are admitted based solely on capacity in general education, § 504 then applies to determine the extent that the school district is required to provide modifications.

That is the wrong analysis, and it stems from the Plaintiffs' focus on education as the program at issue instead of open enrollment, which is the program they explicitly challenge. The § 504 analysis regarding reasonable accommodations and fundamental alterations cannot apply

after a student with an IEP has transferred to then determine what special education and related services the student is entitled to by way of reasonable modification. Once a student with an IEP has transferred, the nonresident school district is *required* under IDEA to provide *all* of the special education and related services in the IEP without regard to whether they constitute reasonable modifications or accommodations or fundamental alterations. (ECF 59-5 at 6).

The "program" Plaintiffs challenge is open enrollment. The fundamental alteration analysis can *only* apply to the evaluation of open enrollment applications relative to whether an applicant may enroll in another district. An IEP student takes their education program with them, so the question is not what special education a district must provide, but whether it would fundamentally alter the open enrollment program to require nonresident districts to provide the education programs and services in the IEP when they indisputably do not have those programs or do not have sufficient space.

It would. Open enrollment requires that there be excess space in the nonresident district. This is an inherent and fundamental feature of Wisconsin's open enrollment statute, which does not give students unfettered access to any public school, regardless of space limitations.

What Plaintiffs are seeking is a fundamental alteration to open enrollment law, not to the educational programs at any district.

As currently constituted, open enrollment requires school districts to evaluate their available space in terms of both general education and special education. Wis. Stat. § 118.51(5)(a)(1). When applications come in, the districts look at their available space to see if the application seeks to take advantage of excess capacity, or instead seeks educational services that are either nonexistent or are overcrowded.

Plaintiffs explicitly seek to modify that program. They seek to force districts to look only at available general education space and resources and to prohibit them from considering their special education space and resources, even though an applicant with an IEP will necessarily utilize and take advantage of those special education spaces and resources in addition to any general education space. This is a fundamental alteration to the open enrollment regime because it would force districts to accept transfers regardless of whether it had the existing capacity to educate them.

The District Court seemed to follow this incorrect analysis, looking at whether providing the special education and related services in

Plaintiffs' IEPs would require only reasonable modifications by the districts or would require more, suggesting that the districts' decision on open enrollment applications could, and should, turn on the specific burden the district would face if it accepted the application. (ECF 139-3 at 23). The District Court therefore found a disputed factual issue regarding whether R.W.'s application would require more than a reasonable modification by Paris, and, therefore, denied summary judgment as to R.W.'s claim for injunctive relief (which has since been dismissed). (*Id.* and ECF 134, 135).

As explained above, however, this is the wrong focus because IDEA requires the district provide *all* special education and related services in an IEP, regardless of whether they qualify as a reasonable modification. Open enrollment does not permit districts to deny individual applications based on § 504's reasonable modification/fundamental alteration analysis—it only allows denial based on lack of space, a condition indisputably satisfied in this case.

At oral argument, the District Court similarly wondered whether some students with IEPs might be able to attend at a nonresident district with only a "minor" modification or accommodation. (ECF 148 at 38-39). This is a hypothetical question given the significant special

education required in R.W. and P.F.'s IEPs. What this hypothetical misses is that a denial under § 118.51(5)(a)4 requires that the district compare the special education specifically required by the student's IEP with its available special education and reasonably determined that it lacks space in the specific special education programs required by a student's IEP. Unreasonable determinations of lack of space, which would include a district claiming lack of space when it could easily accommodate an applicant by providing a minor accommodation, should be reversed by DPI on appeal. Wis. Stat. § 118.51(9); ECF 59-5, 59-7, 59-8, 59 at ¶¶ 40-41. The legislature has essentially built in a reasonable accommodation factor into open enrollment by allowing denials only upon a reasonable determination that the district lacks the space to provide the special education dictated in the IEP.

Plaintiffs have not disputed or challenged the determinations made by either Muskego-Norway or Paris that they lacked space to provide the special education required by the minor Plaintiffs' IEPs. In fact, Plaintiffs have conceded that whether the districts actually have space is *irrelevant* to their argument. (ECF 33 at 27, fn. 14). Plaintiffs' argument is that the space in the special education programs required in their

IEPs can never permissibly be considered in the open enrollment process.

C. Causation. Plaintiffs were not excluded from participation because of a disability.

1. Plaintiffs were not "denied participation" in open enrollment.

Plaintiffs claim that it is "undisputed" that they were denied participation in open enrollment. That is false. As explained above, Plaintiffs challenge the terms and parameters of their participation in open enrollment. Plaintiffs are arguing that their participation differed from the participation of those without IEPs because space in the programs required in their IEPs, not just space in general education, was considered. Considered properly, Plaintiffs' argument is not that they were barred from participating in open enrollment, but that they were discriminated against by application of the open enrollment rules.

2. Plaintiffs were not discriminated against because of a disability.

a) Section 504 does not require absolute equal treatment.

Plaintiffs' argument rests on the false premise that § 504 requires that they be treated exactly the same as applicants without IEPs. Plaintiffs incorrectly argue that § 504 bars any consideration of the

actual effects of a disability, and, therefore, requires open enrollment to be blind as to whether applicants require special education programs. However, although § 504 forbids discrimination based on stereotypes regarding disabilities, it "does not forbid decisions based on actual attributes of the [disability]." *Anderson v. Univ. of Wisconsin*, 841 F.2d 737, 740 (7th Cir. 1998).

Plaintiffs' mantra is that open enrollment creates two paths to enrollment or that there are two doors to the schoolhouse. It *certainly* sounds nefarious. Contrary to Plaintiffs' argument, however, the mere fact that open enrollment used modified provisions to address the unique space requirements necessitated by IEPs, it does not mean the law was violated or that Plaintiffs were discriminated against. For example, in the athletic cases the District Court relied on, the disabled students were allowed to participate in athletic programs, but under some rules that differed from the rules applicable to their able-bodied classmates. The rules were not "blind" as to the plaintiffs' disabilities. These rules were upheld and the courts refused to require that the disabled students participate in exactly the same way as the able-bodied classmates. *See, e.g., McFadden v. Grasmick*, 485 F.Supp.2d 642 (D. Md. 2007) and

Badgett ex. rel. Badgett v. Ala. High School Athletic Ass'n, 2007-CV-00573-KOB, 2007 WL 2461928 (N.D. Ala. May 3, 2007).

The same analysis applies to open enrollment. Students with IEPs are allowed to participate. But, because the IEPs necessarily require special education, space in that special education is considered in determining whether the districts have space, which is the same *desiderata* that applies to students without IEPs. Section 118.51(5)(a)4 is but a particularized application of the general space-based rules in § 118.51(5)(a)1. It is the same rule, applied to reflect the unique space required by IEPs.

Open enrollment simply looks at whether the district has space to educate the applicant. For students with IEPs, the educational requirements are set out in the IEPs. Nothing in § 504 requires ignoring this reality. Plaintiffs' open enrollment applications were not denied because they were disabled; they were denied because the districts indisputably did not have space to provide the education laid out in their IEPs.

3. The District Court correctly concluded with regard to Muskego-Norway that causation is precluded by the fact that the open enrollment application was denied by the resident district.

Plaintiffs' causation argument fails because none of the Plaintiffs were discriminated against because of a disability. Additionally, as the District Court held, P.F.'s causation argument fails because his application for open enrollment was denied by the resident district, as was permitted under the open enrollment statute, because it represented an "undue financial burden" on that district, which would have had to pay for the additional expenses incurred by Muskego-Norway solely attributable to P.F. (ECF 139-2 at 26).

Thus, even if Muskego-Norway had available space and had not denied the open enrollment application, P.F.'s application could not have been successful because it was denied by his resident district and never appealed. (ECF 20 at ¶56; ECF 112 at ¶25; ECF 76 at ¶22). This is not an intervening, superseding cause as Plaintiffs argue, but rather a straightforward "but for" causation analysis. They cannot say that "but for" Muskego-Norway's decision they would have successfully transferred. It was impossible.

Plaintiffs argue that the application might have been overturned. (Br. 30-31). However, Plaintiffs foreclosed that possibility when they

chose not to appeal because they had a prior appeal denied and "felt like [they were] never going to get one of these approved by the DPI, so [they] chose not to use the option of appealing." (ECF 148 at 110). Although Plaintiffs also argue that Muskego-Norway's denial made Racine's denial moot, they challenged Muskego-Norway's denial, presumably thinking they could reverse it, but still failed to appeal or otherwise challenge Racine's denial. Because P.F. did not appeal Racine's determination, the District Court was powerless to grant P.F.'s request for an injunction forcing Muskego-Norway to admit P.F. under open enrollment. The issue is moot.

Plaintiffs also argue that the denial by P.F.'s resident district based on the transfer imposing an undue financial burden was itself violative of § 504 and Title II, but they have not challenged that decision in this lawsuit, attacked that aspect of the open enrollment law or provided a legal analysis applying the law to that statutory section. Further, Plaintiffs have not sued the resident district (Racine) which, like Defendant districts, was simply following Wisconsin's open enrollment law, but which should share any potential liability.

Plaintiffs' willingness to attack the statutory provision that allowed the resident district to block open enrollment statutes based on "undue financial burden" demonstrates the excessive reach of Plaintiffs' position. The statutory provision allowing the resident district to block an open enrollment application based on the cost posing an undue financial burden dovetailed with the Rehabilitation Act's reasonable accommodation and fundamental alteration analysis under which an "[a]ccommodation is not reasonable if it either [1] imposes undue financial and administrative burdens on a grantee or [2] requires a fundamental alteration in the nature of the program." *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 288 n.17, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987) (quotation marks, alteration, and citations omitted).

Plaintiffs are willing to argue that even an "undue financial burden" would not be a legitimate impediment to an open enrollment application. They complain that no similar ability exists with regard to students without IEPs, but ignore the obvious fact that the resident districts were not being charged an additional fee for students whose IEPs do not require extra programs and services or for those student without IEPs. Plaintiffs' position clearly is that they are entitled to open enroll based solely on space in general

education, regardless of the effect on the districts—be it space or undue financial burden. They are not entitled to that under the law, however.

II. Plaintiffs are not entitled to damages because the districts did not intentionally discriminate against them.

The Court need not address this issue if it determines that the districts' application of Wisconsin's open enrollment law did not violate § 504, in which case no relief is available.

The lawsuit seeks damages Plaintiffs allegedly sustained when they were unable to attend school in their preferred district. Plaintiffs do not allege they were deprived of a free appropriate public education, and do not seek damages for the difference in education received in their resident districts compared to what they would have received in Defendant districts. Instead, they seek incidental expenses they allegedly incurred arranging for alternative education, such as by moving to a district they believed provided a better education. (*See, e.g.*, ECF 20 at ¶59). Notably, none of the students moved into a Defendant district—both P.F.'s family and R.W.'s family moved into the Waterford School District. (*Id.*; ECF 38 at ¶¶20-21; ECF 112 at ¶35). Plaintiffs' summary judgment motion seeks only a declaration that they are entitled to

damages generally, and does not address whether they have actually sustained any compensable damages.

Plaintiffs are not entitled to damages against Defendant districts because the districts did not intentionally discriminate against the minor Plaintiffs.

A. Plaintiffs' argument should be rejected as undeveloped.

After arguing that the correct standard should be deliberate indifference instead of malicious intent, Plaintiffs make no effort to apply that standard. Instead, they argue, in a single paragraph with no citation to the record, that because the districts intentionally applied Wis. Stat. § 118.51(5)(a)4 and did not "accidentally" exclude children with disabilities, they intentionally discriminated against them. Plaintiffs' perfunctory argument fails to apply the applicable law to the record facts. It should therefore be rejected as undeveloped. *See, e.g.*, *United States v. Brown*, 899 F.2d 677, 679 n.1 (7th Cir. 1990) (Perfunctory and undeveloped arguments and arguments that are unsupported by pertinent authority, are waived); *United States v. Petitjean*, 883 F.2d 1341, 1349 (7th Cir. 1989) (same); Fed. R. App. P. 28(a)(4).

If the Court is inclined to look beyond Plaintiffs' perfunctory argument, however, it will see that Defendant districts did not intentionally discriminate against the minor Plaintiffs.

B. Plaintiffs must prove, at a minimum that the Districts deliberately decided to apply the open enrollment statute despite being subjectively aware that doing so would very likely violate federally-protected rights.

Under the deliberate indifference standard that Plaintiffs argued for, but did not apply, Plaintiffs must demonstrate that the districts subjectively knew that their application of the open enrollment law would very likely violate federally-protected rights, but, in the face of that knowledge, nonetheless decided to apply the law. Only then does the law infer that discrimination was intentional. The "deliberate indifference" standard, 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, 1139 (9th Cir. 2001); *see also Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2nd Cir. 2009) (holding that "intentional discrimination may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the

implementation of the challenged policy or custom" (internal quotation marks and alterations omitted)).

Deliberate indifference is an exacting standard. *Doe v. Sch. Bd.*, 604 F.3d 1248, 1259 (11th Cir. 2010). It is not sufficient, as Plaintiffs' suggest, to show that a defendant intentionally applied a statute later held to violate a federally-protected right. Deliberate indifference is a subjective standard. *Boyce v. Moore*, 314 F.3d 884, 889 (7th Cir. 2002). Therefore, to demonstrate deliberate indifference, [plaintiff] must show that the defendants "acted with a sufficiently culpable state of mind." *Johnson v. Doughty*, 433 F.3d 1001, 1010 (7th Cir. 2006) (internal quotation omitted).

Deliberate indifference "is more than negligence and approaches intentional wrongdoing." *Collignon v. Milwaukee County*, 163 F.3d 982, 988 (7th Cir. 1998). "Deliberate indifference requires more than negligence or even gross negligence; a plaintiff must show that the defendant was essentially criminally reckless, that is, ignored a known risk." *Figgs v. Dawson*, 829 F.3d 895, 903 (7th Cir. 2016).

C. Plaintiffs have not shown that Defendant districts intentionally discriminated against them.

1. Plaintiffs offer no evidence that the districts applied the open enrollment law for the purpose of excluding the disabled.

Plaintiffs completely ignore the deliberate indifference standard and instead argue, without any citation to the record, that the districts denied the applications because the students had disabilities. (Br. p. 35). Plaintiffs could mean one of two things by this—neither of which successfully advances their damages argument. Plaintiffs might be alluding to their causation argument—that they were treated differently because of their disability because open enrollment considers available space in special education. Even assuming for the sake of argument that Plaintiffs prevail with their causation argument, however, it nonetheless fails to establish, under the deliberate indifference standard for damages, that Defendant districts subjectively knew that application of the open enrollment law would very likely result in violation of federally-protected rights.

Plaintiffs also could mean that Defendant districts applied the open enrollment law for the very purpose of excluding the disabled simply because of their status as disabled, *i.e.* with discriminatory

animus. But Plaintiffs provide nothing in support of that argument, which would also be out of place in the section of Plaintiffs' Brief espousing a deliberate indifference standard.

Plaintiffs also argue, again without any citation to the record, that Defendant districts "chose to adopt a policy of accepting non-disabled students for open enrollment but not disabled students." This is empty rhetoric, completely unsupported. It is also patently false. Nothing in the record indicates that the districts had a *policy* that they would only accept non-disabled students or that the districts only accepted non-disabled students.

Plaintiffs' hyperbole irresponsibly insinuates that the districts made a deliberate decision that they would not accept any disabled students—regardless of space available in the special education programs and related services required in an applicant's IEP—and then "gamed" the open enrollment statute to guarantee that result. Plaintiffs cite no evidence to that effect. Plaintiffs' entire argument rests on *insinuation* based on the fact that the Defendant districts determined for one school year that they did not have space in their special education programs. Plaintiffs fail to offer evidence that the districts did this pursuant to a policy of exclusion and not based on a

good faith evaluation of their space. The record supports no conclusion other than that the districts determined in good faith, as is required by statute, that they did not have space in their special education programs to provide the special education and related services required in the respective IEPs.

2. The fact that this is an issue of first impression in the nation belies any argument that the Defendant districts knew that application of the open enrollment statute would violate federally-protected rights.

As the District Court noted, the issue whether an open enrollment law that considers space in both general education and special education violates the ADA or Rehabilitation Act, is one of first impression. The District Court itself grappled with this issue, taking the relatively rare step of requesting oral argument to facilitate its analysis and deliberation. (ECF 148). Given the absence of on-point legal guidance, it strains credulity to suggest that the districts *knew* that their application of Wisconsin's open enrollment law would very likely violate the student's federally-protected rights, but nonetheless deliberately decided, in the face of that knowledge, to apply the statute.

3. The districts were following a longstanding state statute and guidance from the State.

Any suggestion that the districts intentionally discriminated against the minor Plaintiffs is further undermined by the fact that the districts were following a longstanding state statute as written and as per guidance from the Wisconsin Department of Public Instruction.

The school districts were following state law. The gravamen of Plaintiffs' complaint is their "two doors into the schoolhouse" argument: that, under open enrollment, the school districts separately determine space for general education and space for special education. (ECF 20 at ¶¶33, 34, 43, 50, 68, 80, 95).

School districts, however, are *required* to adopt resolutions specifying their criteria for accepting open enrollment students. Wis. Stat. § 118.51(4)(a)(2). In setting their enrollment criteria regarding available space, school districts are also required to separately "designate the number of regular education spaces, by grade, *and* the number of special education spaces, by program or services, in the district . . . ." Wis. Admin. Code § PI 36.06(5) (emphasis added); *see also* Wis. Stat. § 118.51(5)(a)1 (requiring school districts to

"determine the number of regular education *and* special education spaces available within the school district[.]" (emphasis added)).

The open enrollment law requires the districts to make determinations of available space in general education and in their special education programs. Section 118.51(5)(a), which requires school districts to determine space in general and special education programs, provides the only criteria school districts may use in limiting open enrollment applications based on available space. Section 118.51(5)(a)1 provides broadly that districts may consider "[t]he availability of space in the schools, programs, classes, or grades within the nonresident school district." And § 118.51(5)(a)4 specifies that for students with IEPs, the districts may compare the space in their special education programs with the special education programs required by the IEP.

Although Plaintiffs argue that the school districts should have refused to apply Wis. Stat. § 118.51(5)(a)4 and instead should have accepted students even if the districts did not have space in the required special education programs, school districts are allowed to accept open enrollment applicants only if they have space. *See, e.g.,* Wis. Admin. Code § PI 36.06(5)(c) ("Prior to the date specified in s. 118.651(3)(a)3., Stats., the nonresident school board may not

approve more applications submitted during the regular application period than the number of spaces it designated under par. (a) . . .".) After that date, school boards may approve applications it had previously denied if space becomes available. (*Id.* at par. (d)). The reasoning behind this is that allowing a school board to make exceptions to its determination of available space and to allow some students in when there is no space for them, would render the school board's decision unreasonable, arbitrary, and capricious. *See McMorrow v. State Superintendent*, 238 Wis. 2d 329, 617 N.W.2d 247 (Wis. Ct. App. 2000) (upholding the reversal of a school board's decision to grant open enrollment applications in excess of the space available according to its required resolution).

4. The Plaintiffs' footnote argument regarding discriminatory animus also fails.

The absurdity of Plaintiffs' argument is apparent in that they argue, in a footnote, that the record even supports a finding of discriminatory animus because the districts "regularly and intentionally" reject open enrollment applications from children from disabilities. (Br. pp. 34-35 fn. 10). Their purported support is that in the 2013-2014 school year, public school districts in Wisconsin rejected over 1,000 applications under § 118.51(5)(a)4.

(*Id.*). They conclude by asserting, without elaboration or analysis, that "[t]here is certainly no legitimate government interest that justifies this result." (*Id.*). This argument is a non-starter.

It is surprising that Plaintiffs chose to argue that there was no "legitimate government interest." The rational basis test is the standard for discrimination in violation of the Equal Protection clause and asks whether the law serves a legitimate government interest. *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283 (1964). But, it is the law of the case that the open enrollment law *is* supported by a legitimate government interest.

Unlike classifications based on race, alienage, or national origin, which are strictly scrutinized because they "are so seldom relevant to the achievement of any legitimate state interest", classifications based on mental disabilities do not offend the equal protection clause so long as they are rationally related to a legitimate governmental purpose. *Id.*, 379 U.S. at 193, *see*, *also*, *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 US 432, 441-42 (1985); *Heller v. Doe*, 509 U.S. 312, 319-21, 113 S.Ct. 2637, 2642-43 (1993).

The District Court rejected Plaintiffs' equal protection claim and Plaintiffs wisely decided not to appeal that decision. (Br. p. 1, n. 2). The legitimate government interest is obvious—to accept (all) students under open enrollment, if and only if, the district has the present existing capacity to provide the educational needs of the students, and to avoid forcing the districts into situations where their programs are overcrowded by open enrollment transfers.

Furthermore, Plaintiffs' half-hearted attempt to use the beginnings of a "disparate impact" argument to show discriminatory animus fail. The number of persons affected by the application of any law bears no *a priori* relationship with the motivation behind the law. A statute passed and applied with the purest of intentions could affect millions, while a statute passed and applied with raw discriminatory animus might affect only a few or none, despite the law's worst intentions.

The argument also fails because of a woefully incomplete factual basis. The only fact Plaintiffs cite is that the school districts in Wisconsin in one school year used § 118.51(5)(a)4 to reject approximately 1,000 open enrollment applicants. As DPI explains in more detail, not *all* students with disabilities, or even all students

with IEPs, are unable to switch districts through open enrollment. The total number of applications from students with IEPs was 5,822, so only roughly 17.6% of the applications of students with IEPs were denied because of lack of capacity in the special education programs those students required. (ECF 41 at ¶18 and ECF 41-1). Similarly, 29.1% of the applicants without IEPs were rejected due to lack of space in general education. (*Id.*) The total percent of denied applications of students with IEPs (for any reason, including under Wis. Stat. § 118.51(5)(a)4) is 38.2%, only about 9% higher than the rate for students without IEPs.

Even this analysis, had Plaintiffs supplied the full factual background, would not accurately capture how many students *with disabilities* successfully switched districts through open enrollment because not all students with disabilities require "special education," as that term is defined through IDEA, and, therefore, not all students with disabilities have individualized educational programs. Students who require reasonable accommodations or modifications in order to obtain a free adequate public education, but who do not require an individualized educational program, receive a § 504 plan under the Rehabilitation Act. *See, e.g., CTL v. Ashland Sch. Dist.,*

743 F.3d 524 (7th Cir. 2014). Thus, any disabled students under § 504 who did not qualify for an IEP under IDEA would be included in the "general education" statistics because space in special education is not a relevant consideration for them.

Any miniscule persuasive power Plaintiffs' statistic might have possessed is further eroded by its imprecision. The decisions of only three Districts are relevant to this appeal, yet Plaintiffs cite general statistics regarding open enrollment decisions across the entire state of Wisconsin by all public school districts (over 400) without even attempting to show how many of those 1,000 open enrollment decisions were attributable to any of the three Defendant Districts.

Plaintiffs have utterly failed to demonstrate intentional discrimination, and, therefore, the dismissal of their claim for damages should be upheld.

Conclusion

Paris and Muskego-Norway respectfully request that this Court affirm the grant of summary judgment and judgment of the District Court dismissing Plaintiffs' claims.

Dated this 9th day of February, 2018.

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Certificate Of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

The undersigned, counsel of record for Defendants-Appellees, Muskego-Norway School District and Paris J1 School District, furnishes the following in compliance with Fed. R. App. P. 32(a)(7)(B), Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6):

I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7)(B), Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) for a brief produced with a proportionally spaced font. The Brief has been prepared using Microsoft Word 2013 using 13 point Century. The length of this brief is **12,315** words.

Dated this 9th day of February, 2018.

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Certificate Of Service

I hereby certify that on February 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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