UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Appeal No. 17-3266

P.F., a minor, et al.,

Plaintiffs-Appellants,

-vs-

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS P.F., A.F., R.W., E.W., S.B. and N.B.

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INTRODUCTION

There is no question that Title II of the Americans with Disabilities Act ("ADA") as well as Section 504 of the Rehabilitation Act ("Section 504") prohibit the Defendants-Appellees ("Defendants") from operating any public program that discriminates against children with disabilities. It is equally clear that Wisconsin's Open Enrollment Program is a public program to which both the ADA and Section 504 apply. Wisconsin need not have such a program – it could have retained a residency-based system of public education – but it chose otherwise. Having done so it may structure the program in any number of ways, but it cannot lawfully structure it in a way that discriminates against children with disabilities.

But it has. Wisconsin's open enrollment program imposes obstacles on participation by disabled children that it does not impose on children without disabilities. The problem here is best explained in the brief from the Wisconsin Department of Public Instruction and Superintendent Evers (the "State Defendants"). At page 15 it says:

> Plaintiffs seek something that Title II of the ADA and Section 504 of the Rehabilitation Act do not offer. They propose a state-law-based transfer program that does not take their special education capacity needs into account.

The State Defendants are exactly right when they say that the Plaintiffs do not want the Open Enrollment Program to take their special education capacity into account. The State Defendants are exactly wrong when they say that this is something that the ADA and Section 504 do not offer. It is, in fact, exactly what they require.

It is fine for Wisconsin to have a residency-based public school system. It is acceptable for the state to permit open enrollment only when a nonresident school district has capacity. But federal law makes clear that, whatever program the State provides, it cannot make participation turn on lack of a disability. It cannot establish one program for disabled students and another reserved solely for students without disabilities.

The Defendants concede that if a student with a disability enrolls in a public school as a resident, then under the ADA and Section 504 the school must enroll the child notwithstanding any disability. But they say that if a student with a disability enrolls in a public school as an open enrollment applicant, the ADA and Section 504 somehow no longer apply and the school can deny her enrollment because she has a disability. In other words, the Defendants contend that although all other government programs are covered by the ADA and Section 504, the Wisconsin Open Enrollment Program is special and is not covered. The Defendants cite no statute, rule, or case that supports this contention.

I. WIS. STAT. § 118.51 VIOLATES THE ADA AND SECTION 504.

The elements of a claim under the ADA and Section 504 are not disputed. They were set forth by this Court in *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) as follows: (1) the plaintiff is a qualified individual with a disability; (2) she was excluded from the benefits or services of a public entity or otherwise was discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was because of her disability. The Plaintiffs have established each of the elements of their claim.

A. The Plaintiffs are qualified persons with a disability.

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

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

42 U.S.C. § 12131(2) (emphasis added).

Thus, for purposes of this case, the minor Plaintiffs are *qualified persons with a disability* if: (1) they have a disability; and (2) meet the essential eligibility requirements for the Open

Enrollment Program. The Defendants admit that the minor Plaintiffs other than S.B. have disabilities. With respect to S.B. there is no dispute as to the underlying facts – only a dispute as to whether those facts satisfy the definition of "disability" under the ADA. The Plaintiffs addressed this issue in their Opening Brief at pages 21-24. They will not repeat their argument here, except to remind the Court that: (1) S.B. has ADHD; (2) at the time of his application, S.B. had an Individualized Education Plain ("IEP") under Wis. Stat. §115.787 – something that is only prepared for a child with a disability; (3) the IEP expressly states that "the IEP team has determined that this is a student with a disability"; and (4) his disability impairs his ability to learn and "learning" is one of the major life activities which when impaired constitutes a disability under the ADA. That S.B.'s family disagreed with the IEP and was dissatisfied with the services provided under the IEP does not mean that he is not "disabled."

Shorewood does not negate any of this and, faced with this information, it expelled S.B. from school under Wis. Stat. § 118.51(5)(a)4 which would only apply if Shorewood regarded him as disabled. The law provides, and Shorewood concedes (Shorewood Br. at 13), that if, in fact, it regarded S.B. as having a disability, he would qualify as disabled for purposes of the ADA.[1] Even if there were not other reasons that plainly support the conclusion that S.B. is disabled, Shorewood should not be permitted to ignore its own conduct in deciding to treat him as disabled.

But, the Defendants say, although the minor Plaintiffs may be disabled they are not *qualified* individuals with a disability. This is because state law says that in implementing the Open Enrollment Program, school districts may distinguish between disabled and nondisabled

[1] Under the ADA, the term "disability" means any of the following: **(**a) a physical or mental impairment that substantially limits one or more major life activities of such individual; **or** (b) a record of such an impairment; **or** (c) being regarded as having such an impairment. 42 U.S.C. § 12102(1).

students in determining capacity. In other words, the minor Plaintiffs are not *qualified* individuals with a disability because, of all things, they have a disability. The State Defendants straightforwardly assert that lack of a disability is an eligibility requirement for participation in the Open Enrollment Program. (State Defendants Br. 31-33).[2] This is, to put it mildly, an audacious position.

Under federal law, a student with a disability is "qualified" for primary and secondary educational services merely if he is "of an age during which non-handicapped persons are provided such services." 34 C.F.R. § 104.3(*l*)(2)(i). *See also, St. Johnsbury Acad. v. D.H.,* 240 F.3d 163, 174 (2d Cir. 2001). All of the minor Plaintiffs meet this requirement. The Open Enrollment Program is simply a door to enroll in a public school district. Wisconsin might have decided that residency is the only door it would permit. It need not have created an "open enrollment" door. But having done so, it cannot bar that door to students with disabilities. Under the ADA and Section 504, children with disabilities are entitled to walk through all of the doors into the school district in the same way and on the same basis as children without disabilities.

The district court agreed with the Plaintiffs on this point. It directly rejected the Defendants' argument regarding the lack of a disability as an eligibility requirement. It stated that accepting the argument would create "a dual system – one for children without a disability and one for children with a disability – which the ADA and Rehabilitation Act were expressly designed to prevent." (Dec. at 19; App. at 119.) Just as the State of Wisconsin cannot authorize two different open enrollment programs – one for white children and a separate one for African-American children, *N.N. ex rel. S.S. v. Madison Metropolitan School District,* 670 F. Supp. 2d

[2] Muskego-Norway and Paris agree. (Muskego-Norway/Paris Br. at 28-30). Shorewood did not brief the issue.

297 (W.D. Wis. 2009), it cannot do so with respect to disabled and non-disabled children.

In response, the State Defendants rely on a group of cases (*Halpern v. Wake Forest*, 669 F. 3d 454 94th Cir. (2012), *Anderson v. Univ. of Wis.*, 841F. 2d 737 (7th Cir. 1988), *Knapp v. Nw. Univ.* 101 F. 3d (7th Cir. 1996) and *Alexander v. Choate*, 469 U.S. 287 (1985)) that relate to the definition of "qualified individual with a disability" as it applies, for example, to professional schools. *See* State Defendants' Brief at 23-24. But those cases stand for no more than the proposition that to be "qualified" a person must show that they meet the essential eligibility requirements for the school or profession involved. The Plaintiffs have done so. No one disputes that they meet the requirements to participate in primary school education under federal law. None of these cases suggest that a school district can decide that an essential requirement to participate in a primary or secondary school education is that a student not be disabled. The proposition that in some school districts only the non-disabled can be educated would be obviously unsustainable.

Nor does *Mallett v. Wisconsin Division of Vocational Rehabilitation*, 130 F. 3d 1245 (7th Cir. 1997) (State Defendants Br. at 24), support the Defendants' argument. In *Mallett*, this Court dealt with a claim relating to rehabilitative services that were available only to someone who had a disability. The Court held that the plaintiff could not establish a violation of Section 504 without "a showing that the non-handicapped received the treatment denied to the "otherwise qualified" handicapped." *Id*. at 1257. That was impossible to show in *Mallett* because the claim involved services that were only available to individuals with disabilities. It is easy to show here because the Open Enrollment Program is open to children without disabilities – in the words of *Mallett*, the non-handicapped do receive the treatment denied to children with disabilities.

The State Defendants also cite *Zukle v. Regents of Univ. of Cal.*, 166 F. 3d 1041, 1047

(9th Cir. 1999) (State Defendants' Br. at 23-24) but *Zukle* has nothing to do with this case. In *Zukle*, unlike this case, the plaintiff was admitted into the program at issue (medical school). However, she had failing grades and the Board dismissed her for "failure to meet the academic standards of the School of Medicine." *Id.* at 1044. Those facts – dealing with a student failing out of medical school – have nothing to do with this case involving primary school students who were not allowed to participate in the Open Enrollment Program.

The disabled athlete cases cited by the district court and by Muskego-Norway/Paris at page 39-40 of its brief also do not support the Defendants' argument. In both cases, *McFadden v. Grasmick*, 485 F. Supp. 2d 642 (D. Md. 2007) and *Badgett ex rel. Badgett v. Ala. High Sch. Athletic Ass'n*, No. 2:07-CV-00573-KOB, 2007 WL 2461928 (N.D. Ala. May 3, 2007), the plaintiffs were allowed to participate in the athletic program and the issue was whether a requested accommodation had to be granted. Applying those cases here, under the ADA and Section 504, the minor Plaintiffs should have been allowed to participate in the Open Enrollment Program and enroll in their chosen nonresident school districts. Perhaps the question would then have been what accommodations were requested and whether they were reasonable or constituted a fundamental alteration. But since the Defendants in this case simply denied enrollment based on disability, they never got to that question.

The Defendants do not cite any case from anywhere that supports the conclusion that an eligibility requirement for a public program can include a requirement that the participant not be disabled.

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

The Plaintiffs satisfy the second element of their ADA and Section 504 claims because each of the minor Plaintiffs was excluded from participation in the Open Enrollment Program by

the Defendants who are public entities. None of the Defendants have contested this element in their briefs on appeal.

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

The third element of their claim is that the Plaintiffs were excluded from or denied benefits or discriminated against *because of* their disabilities. This "causation" element is met here. Each of the minor Plaintiffs was denied the right to participate in the Open Enrollment Program under Wis. Stat. § 118.51(5)(a)4. (Dkt. #38 at ¶14; Dkt. #37 at ¶21; Dkt. #36 at ¶9, Ex. A (Dkt. #36-1).) A denial under that section can be issued only to children with disabilities and is based on the fact that the applicant has a disability.

1. The Standard for proving causation under the ADA and under Section 504 is "but for" causation.

None of the Defendants dispute that the standard for proving causation under the ADA and Section 504 is "but for" causation. See, *Washington v. Indiana High School Athletic Ass'n*, 181 F.3d 840, 849 (7th Cir. 1999), *Wis. Comm'y Servs. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006).

2. The Plaintiffs have established that "but for" their disabilities, they would have been able to participate in the Open Enrollment Program.

"But for" causation is built into the Open Enrollment Law itself. The statutory construction of Wis. Stat. § 118.51 distinguishes between disabled and non-disabled students. Sections 118.51(5)(a)1, 2, and 3 all set forth grounds to deny the applications of non-disabled students and disabled students alike without regard to their disability status. Section § 118.51(5)(a)4, however, provides an additional ground to deny the applications of disabled students only and does not apply to non-disabled students. The differential treatment of disabled students from non-disabled students in Section 118.51(5)(a)4 is discrimination in violation of the

ADA and Section 504.

Having a rule that applies only to the disabled or that applies differently to the disabled is illegal discrimination. *Brewer v. Wis. Bd. of Bar Examiners*, 2006 WL 3469598, *10 (E.D. Wis. Nov. 28, 2006) ("[T]o discriminate means merely to make a distinction on the basis of the prohibited factor.") The State Defendants attempt to distinguish *Brewer* on the facts, but it is the reasoning of Brewer that is important.[3] The Plaintiffs cited *Brewer* because of its holding as to what discrimination means in the context of the ADA. The court held that the defendant's conduct of subjecting an individual with a disability to an additional requirement was a violation of the ADA. *Id*. at *7. The plaintiff in *Brewer* was treated differently than her non-disabled classmates because of her disability. That difference in treatment, according to the court, was exactly what the ADA was intended to prevent. *Id.* at *10. That holding is directly applicable here.

The State Defendants also try to distinguish this Court's decision in *Washington v. Indiana High School Athletic Association*, 181 F. 3d 840 (7th Cir. 1999), but in doing so completely ignore the important point made in that decision regarding "but for" causation. In *Washington* this Court considered whether a rule that prohibited high school students from participating in interschool sports once they reached the age of 19 was a violation of the ADA. The Sixth Circuit had approved such a rule in *Sandison v. Michigan High School Athletic Association*, 64 F.3d 1026 (6th Cir. 1995). This Court disagreed. It held that the only reason the plaintiff was still in high school at age 19 was because he was disabled. This Court concluded that "but for" his learning disability, the plaintiff would have been able to play sports in his junior year and excluding him from that activity was a violation of the ADA. *Washington*, 181

[3] Although the facts actually are similar – *Brewer* involved a disabled applicant to the Wisconsin State Bar upon whom the Bar imposed obstacles to admission not imposed on applicants without a disability.

F.3d at 849.

The same reasoning applies here. But for their disabilities, the minor Plaintiffs would have been able to participate in the Open Enrollment Program. The Defendants do not even seriously contest this point. Nevertheless they contend that the Plaintiffs cannot meet this element because the exclusion of children with disabilities from participation in the Open Enrollment Program is not because of their disabilities; it is about "space." The Defendants are wrong.

3. The Issue is not about "Space," it is about Discrimination.

The issue squarely before the Court is whether the ADA and Section 504 require public schools to practice disability-blind enrollment with respect to enrollment in the district. The Defendants say there is no such requirement. They are wrong as a matter of law.

Under both Title II of the ADA and Section 504, public schools as "public entities" are required to provide full access to their services, programs, and activities to students with disabilities. 42 U.S.C. § 12132; 29 U.S.C. § 794. The ADA and Section 504 and their implementing regulations are explicit. School districts may not exclude children with disabilities from participation and may not have policies that directly cause or even indirectly result in discrimination on the basis of disability. *See* 28 CFR § 35.130(b)(1) & (8); 34 C.F.R. § 104.4(b)(4). This is the law. There are no exceptions.

This means that all school districts to which a student is allowed to apply must accept her without regard to her disability. Once the student is enrolled, *then*, under the ADA, the school must provide reasonable accommodations to the student unless to do so would require a fundamental alteration of the program. 28 CFR § 35.130(b)(7). If the accommodation meets that fundamental alteration standard, *then* under the ADA and Section 504 the school district

does not need to provide the accommodation. *Id.* The student is still enrolled and served by the school, but the student may not get the requested accommodation. The Defendants have gotten all this backwards. They say that they can decide at the outset whether they can reasonably accommodate any disabled students at all, regardless of what actual accommodations might be involved for an actual student. Then, because they have decided they do not have any space for children with a disability, they can deny open enrollment to each and every disabled student. That is not the way it works.

The Defendants assert that the Plaintiffs' reasoning here is faulty because once the student is enrolled the Defendants say that under a different law – the Individuals with Disabilities Education Act ("IDEA") - the nonresident district would be required to provide all of the services in the student's IEP. *See, e.g.* Muskego-Norway/Paris Br. at 34.[4] As we noted in our opening brief, the Plaintiffs are not making an IDEA claim.

But even if the Defendants are right, it does not matter. If a student with disabilities (perhaps one of the minor Plaintiffs) moves into the district, then the Defendants agree that they must enroll her. As a matter of law there would be space for her. That "space" does not disappear because she enrolled through Open Enrollment. It does not matter whether a student comes into the school district through a door marked "residency" or a door marked "open enrollment" – the sign on the door does not make a legal difference.

[4] The Defendants are only partially right about this. It is the State of Wisconsin that has the obligation under the IDEA to ensure that a Free and Appropriate Public Education (FAPE) is available to each eligible child. 34 C.F.R. 300.101 and 20 U.S.C.A. 1412(a)(1). Wisconsin chose to put the obligation for FAPE on the nonresident school district for a child participating in the open enrollment program. See Wis. Stat. 115.77. The State could have decided otherwise. and required the resident school district to provide FAPE for a child participating in the open enrollment program. *See* Letter to Tatel, 16 EHLR 349 (OSERS -OCR 1990). See also Legislative Council Staff memo No. 9, January 6, 1997. (Dkt. #40-5.) If it had done so then the nonresident school district's obligations would have only been those under the ADA and Section 504.

Wisconsin has decided to permit students to enroll in nonresident districts. It has qualified that right by stating that open enrollment is permitted only into a district that has space. The Plaintiffs do not challenge that requirement. But in deciding what "space" is available, the state may not permit and the district may not engage in unlawful discrimination. Having opened this door, it cannot condition the ability to use it on whether or not a student is disabled.

The Defendants' argument about "space" is also wrong based upon the undisputed facts. The minor Plaintiffs were not denied admission because the defendant districts did not have space determined without regard to disability. For the 2014-2015 school year, Muskego-Norway determined it had open seats in every class except kindergarten, including 8 spaces in sixth grade. (Dkt. #76 ¶¶ 4, 5-7, Ex. A (Dkt #76-1).) P.F.'s chronological age would have put him in the sixth grade and P.F. applied to Muskego-Norway for one of those sixth grade spaces. (Dkt. #40 ¶ 10, Ex. G (Dkt #40-7).) But none of the eight open sixth grade spaces were available to him because he is disabled. There was space but those spaces were set aside solely for children without disabilities.[5]

S.B. was actually accepted by Shorewood into a third grade classroom and filled a spot in such a classroom from the start of the 2014-2015 school year until Shorewood expelled him in October 2014 because he had a disability. (Dkt. # 36 ¶ 9, Ex. A (Dkt #36-1).) It was not a question of "space." Shorewood had a third grade space; S.B. filled the third grade space; and

[5] Muskego-Norway asserts that Plaintiffs' concede that Muskego-Norway had no space for P.F (Muskego-Norway Br. at 12). It is more accurate to say that the Plaintiffs have not challenged this because it is legally irrelevant. The record does show that while Muskego-Norway asserts that all their elementary schools were at capacity for special education students based on their "recommended ratios" (Dkt. #76-1), at four of their five elementary schools Muskego-Norway was at the low end of the actual range of ratios for schools across Waukesha County. (*Id.*) If Muskego-Norway had accepted P.F. it would still have remained at the low end of the range of ratios across the County.

then a month into the school year S.B.'s acceptance into that space was retroactively revoked based upon Section 118.51(5)(a)4 because he had a disability.

R.W. was accepted at Paris to fill an available space in their kindergarten class and then his acceptance was revoked under Section 118.51(5)(a)4 because of his disability, (Dkt. #37 ¶ 21), not because of a lack of space. There was space for him in the kindergarten class and he could have filled that space, but Paris refused to allow him to fill that space because of his disability.

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

In the State Defendants' brief at p.18 the State Defendants crystallize this issue when they point out that under *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999) the Supreme Court held that "States must adhere to the ADA's nondiscrimination requirement *with regard to the services they in fact provide*," but that the nondiscrimination provisions do not require "a certain level of benefits to individuals with disabilities." (emphasis in State Defendants' Brief) The Plaintiffs' claim is consistent with *Olmstead*. All that the Plaintiffs ask is that the Defendants adhere to the ADA's nondiscrimination requirements with respect to *a service that they in fact provide* - the Open Enrollment Program.

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

By statute, school boards make decisions about whether to participate in the Open Enrollment Program and decisions as to how many students to accept through open enrollment in January of the relevant year. Wis. Stat. §118.51(5)(a)1. For example, in its January, 2014 Board meeting Muskego-Norway decided to participate in the Open Enrollment Program and decided at

that time that it would take *zero* children with disabilities. (Dkt. # 40 ¶10, Ex. G (Dkt. #40-7); Dkt. #20 ¶55, Dkt. #76 ¶6-7, Ex. A (Dkt. #76-1).)

When Muskego-Norway made this decision it had no way to know what disabled students would apply. The applicants might have visual impairments, speech impairments, hearing impairments, or a variety of other problems. They might need minor adjustments or significant accommodations. There was no way of knowing any of that at the time Muskego-Norway (and the other districts) made their decisions. Thus the nature of the future applicants' disabilities and what might be required to deal with them did not matter to the school districts. In their January meetings they do not take into account the disabilities of specific children and determine if they can meet their needs. By law, they make blanket decisions about "general education spaces" and "special education spaces" without regard to specific children with specific disabilities and the statute requires them to do so. Based on the statute, Muskego-Norway determined that it had 8 spaces in sixth grade, but decided that none of them could be filled by a child with a disability, no matter what the disability was.

Moreover, as Muskego-Norway, itself, acknowledges, once it has made this decision in January it cannot reconsider once it sees the actual applications. (Muskego-Norway/Paris Br. at 9) ("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.")[6] Thus, once Muskego-Norway said it had zero spaces for children with disabilities that meant it could not change its decision based upon the applications it receives.

[6] WISC ADMIN CODE PI 36.06(5)(d) specifies the very limited reasons for which nonresident schools can change the decision made at the January meeting.

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

When school districts set separate quotas for disabled children under the Open Enrollment Program in January of the relevant year, they do so with no knowledge as to the nature of the disabilities applicants will have. They decide to reject any and all children with disabilities and then when they receive applications from children with disabilities they automatically deny them under Wis. Stat. §118.51(5)(a)4. This really has little or nothing to do with the question of "space". It has to do with not being bothered to deal with disabled students under the Open Enrollment Program. The ADA and Section 504 do not permit school districts to act in that fashion.

II. SHOREWOOD AND MUSKEGO-NORWAY RAISE TWO SPECIFIC DEFENSES NOT RAISED BY THE OTHER DEFENDANTS, NEITHER OF WHICH HAVE MERIT.

A. THE COURT HAS SUBJECT MATTER JURISDICTION BECAUSE S.B.'s CLAIMS ARE NOT MOOT.

Shorewood argues that the Court lacks subject matter jurisdiction based on mootness.

Shorewood says that S.B.s claim are moot because Shorewood has allegedly been willing to re-admit S.B. at all times material to this case. (Shorewood Br. at 19). These claims are directly contradicted by the Declaration of N.B. filed on July 29, 2015 (Dkt. #36), the Supplemental Declaration of N.B. (Dkt. #101), and the Declaration of Brian McGrath (Dkt. #104).

Thus, the Plaintiffs expressly dispute that Shorewood has been willing to enroll S.B. Within seven days of the December 17, 2014 Decision and Order by DPI overturning Shorewood's decision to revoke its acceptance of S.B.'s open enrollment application, N.B. notified Shorewood that she wanted to enroll S.B. for the Spring semester by filling out the written form provided to her by DPI and sending the form to Shorewood. (Dkt. #36 ¶14, Ex. D (Dkt. #36-8).) No one from Shorewood responded. (Dkt. #101 ¶4.)

N.B. followed up with phone calls to Shorewood but still no one ever responded. (Dkt. #36 ¶15.) Shorewood contends that on January 28, 2015, someone from Shorewood called N.B. and left her a voice message but N.B. denies receiving such a call or such a message. (Dkt. #101 ¶5.) Based on this history, Shorewood's statement that "Shorewood has been willing to accept S.B.'s enrollment at all times material to this case" is hardly undisputed. The district court denied Shorewood's mootness motion for precisely that reason. (Dec. at 27, fn. 9; P. App. 127, fn. 9), but there is also a separate basis to reject this defense. Even if Shorewood's view of the facts is accepted, S.B. has a valid claim under the ADA and Section 504.

Shorewood contends that on August 6, 2015 it offered to enroll S.B. (Shorewood Br. at 19.) That is 10 months after he was expelled.[7] That means that from October 8, 2014 (when Shorewood expelled S.B.), through August 6, 2015 (the date of Shorewood's letter), S.B. was not allowed to attend Shorewood based upon Shorewood's decision to revoke his acceptance

[7] And almost 9 months after the complaint was filed herein.

under Wis. Stat. § 118.51(5)(a)4. Shorewood advances no argument as to why that period of discrimination standing alone (a period of 10 months) is insufficient to support S.B.'s ADA and Section 504 claims. Even if Shorewood's view of the facts were true, S.B. and N.B would be entitled to relief (including damages) for the discrimination that occurred for the period of time from October 8, 2014 through August 6, 2015.

B. That Racine Objected to P.F.'s transfer to Muskego-Norway does not preclude Muskego-Norway as the cause of P.F.'s Damages.

Muskego-Norway argues that it is not responsible for P.F.'s damages based upon what amounts to a superseding cause, *i.e.*, that P.F.'s resident school district (Racine) rejected the transfer due to cost considerations. (Muskego-Norway Br. at 41-43.) This Court should reject that argument.

Muskego-Norway cites no cases that contradict the case law cited by the Plaintiffs in their Opening Brief. A superseding cause is something that intervenes between the defendant's conduct and the plaintiff's injury that makes the plaintiff's injury unforeseeable to the defendant. *Scottsdale Ins. Co. v. Subscription Plus, Inc.*, 299 F.3d 618, 621 (7th Cir. 2002). The burden of proving that some following event was a "superseding cause" is on the defendant. *BCS Servs. Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 757 (7th Cir. 2011). And under that doctrine a wrong-doer should be relieved of liability only where it would be wholly unreasonable to make the original wrong-doer answer in damages for his actions. *Stewart v. Wulf*, 85 Wis. 2d 461, 476, 271 N.W.2d 79, 86 (1978).

Here, Muskego-Norway offered no evidence to meet its burden. For Racine's decision to even matter in the first place, Muskego-Norway would have had to have accepted P.F. through open enrollment. Once Muskego-Norway rejected P.F., it simply did not matter what Racine did. Racine did not cause the problem; it simply added to it, and it is undisputed that P.F.'s

father (A.F.) would have appealed Racine's objection to DPI (which he could do under Wis. Stat. § 118.51(9)), but in his mind "the rejection by the Muskego-Norway School District made such an appeal moot." (Dkt. # 38 at ¶19.)

Nor does Muskego-Norway offer any reason whatsoever why it would be unreasonable for Muskego-Norway to answer in damages for its actions. If this Court concludes that Muskego-Norway violated P.F.'s rights under the ADA and Section 504, what possible policy reason would there be to excuse Muskego-Norway for its violation? Muskego-Norway offers none.

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

The Defendants argue that even if they violated the ADA and Section 504, the Plaintiffs are still not be entitled to damages because the Plaintiffs cannot show intentional discrimination. The Plaintiffs do not dispute that they must establish intentional discrimination to receive an award of compensatory damages under the ADA and Section 504. *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 278 (7th Cir. 2007); *Morris v. Kingston*, 368 Fed. App'x. 686, 690 (7th Cir. 2010).[8]

Intentional discrimination exists in this case. Here, the State Defendants administer and the School District Defendants implemented the Open Enrollment Program so as to exclude disabled children, and the School District Defendants intentionally rejected the Open Enrollment applications of the minor Plaintiffs. Those acts resulted in discrimination against the Plaintiffs

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

and support an award of compensatory damages.

A. The School District Defendants Intentionally Rejected the Applications of the Minor Plaintiffs because they were disabled.

The School District Defendants were not required to deny the applications submitted on behalf of children with disabilities under Section 118.51(5)(a)4. They had the option of accepting those children into their schools but intentionally chose not to do so. That conduct was not negligent; it was deliberate. It was so deliberate that the Defendants continue to argue that they have a right to exclude children with disabilities from participating in the Open Enrollment Program because they are allegedly "not qualified" to participate.

The Defendants argue that despite the fact that they made the choice to deny children with disabilities the right to enroll in their schools, this conduct does not satisfy the standard of deliberate indifference. They say they did not necessarily know that they were acting illegally. They are setting up straw men, then knocking them down.

None of the School District Defendants assert that they were unaware of the ADA and Section 504. It is undisputed that the School District Defendants knew that the minor Plaintiffs were disabled. They had copies of their IEPs and rejected their applications under Wis. Stat. § 118.51(5)(a)4 which only applies to children with disabilities. It is also undisputed that the School District Defendants could have decided to accept applications from students with disabilities on the same basis as students without. For example, Muskego-Norway could have said that it had 40 spaces and made them available to all applicants. It, however, decided to make its 40 spaces available only to applicants without disabilities.

Using the language of the cases, they knew that the minor Plaintiffs had federally-protected rights (the right not to be discriminated against based upon their disabilities) and nevertheless acted in a way that was substantially likely to harm those rights. *Reed v. Illinois*,

119 F. Supp. 3d 879, 885 (N.D. Ill. 2015); *Zachary M. v. Board of Educ. of Evanston*, 829 F.Supp.2d 649, 662 (N.D. Ill. 2011).

After they were rejected, the plaintiffs and their families were forced to make alternative arrangements for their education – arrangements that cost money. The Plaintiffs seek to recover those expenses in this case. If this Court holds that there has been a violation of the Plaintiffs' ADA and Section 504 rights, the Plaintiffs ask this Court to allow them to present their evidence to a jury and let a jury determine if the School District Defendants acted with deliberate indifference to their rights. *Cook v. Illinois Department of Corrections*, 2018 WL 294515 (Slip Copy) (S.D. Ill. 2018) (denying summary judgment because jury could conclude defendant's actions were deliberately indifferent); *Prakel v. Indiana*, 100 F. Supp. 3d 661, 686 (S.D. Ind. 2015) (denying Defendant's motion for summary judgment on ADA and Title II claims and ruling question of "deliberate indifference" must go to a jury). The district court will instruct the jury as to what that means and the jury can determine whether the Plaintiffs can meet the required standard.

B. The State Defendants Engaged in Intentional Discrimination.

As explained by the Plaintiffs in their opening brief at pages 34-35 the decision by Wisconsin to include Section 118.51(5)(a)4 in the Open Enrollment Law was a deliberate policy choice. In this case, the State Defendants (as proxies of the State) are required to defend that decision. *Goodvine v. Gorske*, 2008 WL 269126 *5 (E.D. Wis. Jan 30, 2008) (when the "entity" that violates the ADA and Section 504 is the state, then the state agencies and officials who run those agencies stand in as "proxies for the state."); *see also Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office"). As part of the drafting

process, the legislature specifically considered how disabled children would be treated under the program. A proposal was submitted stating that the criteria for selection into the program could not include "Physical, Mental, Emotional or Learning Disability" and the proposal stated that "No district may refuse to enroll an EEN[9] pupil." (Dkt. #40 ¶ 7, Ex. D (Dkt. #40-4).) The State chose to reject that option.

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

In addition, the State Defendants did a number of things that caused discrimination against children with disabilities:

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

2. The State Defendants, by rule, allow school districts to decide in January of the relevant year to set separate quotas for children with disabilities (including a quota of zero) without the school districts having any idea as to what disabilities future applicants might have. (Wis. Admin. Code PI 36.06(5)(a).) (Section 118.51(5)(a)1.) (Dkt. #59 ¶ 20.)

3. The State Defendants require the parents of children with disabilities to disclose that fact in the applications for the Open Enrollment Program that they submit for their children. (Dkt. #26 ¶ 36, Dkt. #41 ¶ 9.)

4. If an application discloses the existence of a disability, the State Defendants then allow a nonresident school district to exclude the disabled student based upon the existence of the disability if the nonresident school district asserts that it does not have room for that student. (Dkt. #41 ¶¶ 10-11.)

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

5. If a child with a disability appeals her rejection by a non-resident school district, the State Defendants deny the appeal because they permit students with disabilities to be rejected by school districts solely because they have disabilities. (Dkt. #59 ¶ 40, 51-53, Ex. 9 at 4-6 (Dkt. #59-9); Dkt. #38 ¶ 16.)

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

CONCLUSION

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

Respectfully submitted,
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1. This brief complies with the type-volume limitation of Cir. Rule 32 because it contains 6,898 words.

2. This brief complies with the typeface requirements of Cir. Rule 32 because it has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** in **12 point Times New Roman and with 11 point Times New Roman for the footnotes**.

Dated this 23rd day of February, 2018.

/S/ RICHARD M. ESENBERG

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I certify that on February 23, 2018, I electronically filed the foregoing Brief with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the cases, who are registered CM/ECF users:

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I hereby certify that on February 23, 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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