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

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

Plaintiffs-Appellant,

-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

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

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RULE 26.1 DISCLOSURE STATEMENT

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

P.F., A.F., R.W., E.W., S.B. and N.B.[1]

(2) The names 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:

Wisconsin Institute for Law & Liberty, Inc. appeared for the Plaintiffs in this case in the district court and appears for the Plaintiffs-Appellants in this Court.

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

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

There are no corporate Plaintiffs-Appellants.

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

Not applicable.

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[1] Plaintiffs-Appellants R.W., P.F. and S.B. are minors. E.W., A.F. and N.B. are their parents. Their initials are being used in order to protect the privacy of the minor Plaintiffs.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States. Specifically, the claims arise under federal disability law including both Title II of the Americans with Disabilities Act (42 U.S.C. § 12132) and Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a)).

This appeal is taken from the Opinion and Order of the U.S. District Court for the Western District of Wisconsin dated October 3, 2017, and the final judgment of the U.S. District Court for the Western District of Wisconsin entered on October 16, 2017, by the Honorable William Conley. In the Opinion and Order dated October 3, 2017, the district court decided and denied all of the Plaintiffs' claims on the merits, with the exception of R.W.'s and E.W.'s claim for injunctive relief against the Paris J1 School District requiring the district to enroll R.W. as a student. That claim was subsequently dismissed in the judgment entered on October 16, 2017. There are no claims left for disposition in the district court.

The Notice of Appeal was filed with the District Court on October 31, 2017. This Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE

Did the Defendants-Appellees violate Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act when they denied the minor Plaintiffs the right to participate in Wisconsin's Open Enrollment Program?[2]

[2] The Plaintiffs also asserted an Equal Protection Claim in the district court but are not pursuing that claim on appeal. As stated by the Plaintiffs to the district court, the Plaintiffs believe that there are disputed issues of fact relating to their Equal Protection claim that cannot be resolved on summary judgment. (Dkt. #33, p. 10, fn 6.) Because the final decision in this case on the ADA and Section 504 claims will be virtually dispositive of the Equal Protection claim, the Plaintiffs are not appealing from the part of the district court decision dismissing their Equal Protection Claim to avoid any need to remand the case to the district court for further proceedings on that claim.

STATEMENT OF THE CASE

Parties and Procedural Background

The Plaintiffs-Appellants ("Plaintiffs") are a group of minor children and their parents. (Dkt. #38 at ¶¶1, 4-9; Dkt. #37 at ¶¶1, 4-9, Dkt. #36 at ¶¶1, 10.) Two of the minor Plaintiffs have autism and the third suffers from ADHD. (Dkt. #38 at ¶4; Dkt. #37 at ¶4; Dkt. #36 at ¶10, Exs. B and C.) The Plaintiffs are all residents of the State of Wisconsin. (Dkt. #38 at ¶1; Dkt. #37 at ¶1; Dkt. #36 at ¶1.) The minor Plaintiffs have applied for and been denied the opportunity to participate in Wisconsin's Open Enrollment Program, which allows students to transfer from one public school district to another. (Dkt. #38 at ¶¶13-14, 16; Dkt. #37 at ¶¶12, 21; Dkt. #36 at ¶¶4, 9.)

The Defendants-Appellees ("Defendants") are Tony Evers, the State Superintendent of Public Instruction, and the Wisconsin Department of Public Instruction ("DPI") (together the "State Defendants") along with three public school districts: the Muskego-Norway School District ("Muskego-Norway"), the Paris J1 School District ("Paris"), and the Shorewood School District ("Shorewood") (collectively the "School District Defendants").

The parties filed cross-motions for summary judgment, which were decided by the district court on October 3, 2017. (Dkt. #132.) The district court granted summary judgment to the Defendants and denied all of the Plaintiffs' claims on the merits, with the exception of R.W. and E.W.'s claim for injunctive relief against Paris requiring the district to enroll R.W. as a student. That claim was subsequently dismissed, and judgment in favor of defendants was entered on October 16, 2017. (Dkt. #136.) There are no claims left for disposition in the district court. The Notice of Appeal was filed with the District Court on October 31, 2017.

The Wisconsin Open Enrollment Law

In 1997, Wisconsin enacted a statute creating the interdistrict full-time open enrollment

program for students in Wisconsin public schools, namely Wis. Stat. § 118.51 (the "Open Enrollment Law"). The program created by Wisconsin's Open Enrollment Law gives parents a choice in their children's public education by allowing students to enroll in a public school district other than the one in which they reside (the "Open Enrollment Program"). The Open Enrollment Program is an excellent program and is immensely popular. For the 2013-2014 school year (the school year prior to the filing of the complaint), 42,929 Wisconsin students applied to participate in the program. (Dkt. #41 at ¶18.)

This is how the program works. The school district in which a student resides is referred to as the resident school district. Wis. Stat. § 118.51(1)(f). The school district into which the student seeks to enroll is referred to as the nonresident school district. Wis. Stat. § 118.51(1)(c). In order to make it financially equitable for a nonresident school district to educate a child who does not live within that district, the resident school district pays "tuition" to the nonresident school district. This is done through an adjustment of state aid to both the resident and the nonresident school districts as set forth in Wis. Stat. § 118.51(16). Aid to the nonresident school district increases while aid to the resident school decreases in an equal amount. (*Id.*)

For the 2014-2015 school year (the year in which the complaint was filed), the adjustment was $6,635 per student. (Dkt. #41 at ¶13.) If the student has a disability, the resident school district directly pays an additional amount to the nonresident school district, reflecting the additional cost of providing necessary and appropriate services to that student. Wis. Stat. § 118.51(17). For the 2016-2017 school year, the law was amended to cap the additional payment at $12,000 with potential increases in that amount if the nonresident school district can establish that they are spending more than that amount to provide services to the student. *See* Wis. Stat. § 118.51(17)(b)2.

The nonresident school district may deny an open enrollment application only for the reasons set forth in Wis. Stat. § 118.51(5)(a). Briefly summarized, a nonresident school district may reject an open enrollment application if: (1) the nonresident district has determined that it has no space for general or special needs open enrollment students; (2) the individual applicant has been expelled for one of the reasons listed in the statute; (3) the individual applicant is a habitual truant; or (4) the district has made a determination that it has no space for children with disabilities. *Id.*. It is this fourth criterion that forms the basis for this lawsuit.

The actual statutory language for this fourth exception is as follows:

> Whether the special education or related services described in the child's individualized education program under s. 115.787(2) are available in the nonresident school district or whether there is space available to provide the special education or related services identified in the child's individualized education program, including any class size limits, pupil-teacher ratios or enrollment projections established by the nonresident school board.

Wis. Stat. § 118.51(5)(a)4.

The most noteworthy aspect of the fourth criterion is that it applies only to students who qualify for special education and related services under Wis. Stat. § 115.787(2). That statute applies to "Children with Disabilities" and requires that public schools provide an "individualized education program" ("IEP") to all such children. Thus, the last open enrollment exception applies only to children with disabilities and allows nonresident school districts to reject their applications on the ground that it has determined that it has no space for disabled students.

Under the Open Enrollment Law, school boards must make decisions about whether to participate in the Open Enrollment Program and decisions as to how many students (including how many students with disabilities) to accept through open enrollment no later than the end of January prior to the relevant school year. *See* Wis. Stat. § 118.51(5)(a)1. Significantly, the law

permits separate determinations as to "regular" and "special needs" children. *Id.* ("The nonresident school board shall determine the number of **regular education and special education spaces** available within the school district in the January meeting of the school board . . . . ") (emphasis added). Thus the statute allows districts to establish "dual" open enrollment programs for regular and special needs students and even to permit open enrollment by "regular" students while excluding disabled students altogether. As we shall see, that's precisely what the Paris and Muskego-Norway districts did here.

This has nothing to do with an individualized determination of the burden that might be required to accommodate any particular student. By statute, applications from students cannot be submitted until after the first Monday in February (a date after the districts' January meetings). Wis. Stat. § 118.51(3)(a)1. A district that decides it has no space for disabled students in January does so without having any idea who might apply to attend their district, whether or not any applicants will have disabilities, or what those disabilities might be. It has simply made a categorical decision to exclude all disabled students.

The Plaintiffs' Experience under the Open Enrollment Program

In 2012, Plaintiff R.W. resided in the Kenosha Unified School District. (Dkt. #37 at ¶3.)[3] In early 2012, R.W. and his identical twin brother applied under the Open Enrollment Program to attend Paris for kindergarten. (Dkt. #37 at ¶12.) Paris originally accepted both of their applications, but later revoked its acceptance of one of these identical twins, R.W., when it found out he had a disability. (Dkt. #37 at ¶¶14, 21-22.) Paris revoked its acceptance of R.W.'s application under Wis. Stat. § 118.51(5)(a)4., which applies solely to children with disabilities.

[3] Because of the length of time that this case has been pending the facts and circumstances relating to the individual minor Plaintiffs have changed in various ways. The facts set forth herein are the facts as they existed when the case was presented to the district court for summary judgment in 2015.

(Dkt. #37 at ¶21.) There was no difference in the status of R.W. and his identical twin as qualified applicants for the Open Enrollment Program other than the fact that R.W. had a disability (Dkt. #37 at ¶23), and no reason offered for R.W.'s rejection other than a determination in January that no special needs students would be accepted.

In 2014, Plaintiff P.F. resided in the Racine Unified School District. (Dkt. #38 at ¶3.) At its January 2014 Board Meeting, Muskego-Norway decided to participate in the Open Enrollment Program, approving 55 seats for students without disabilities. But, at the same time, it decided that it would take zero children with disabilities. (Dkt #40 at ¶10, Ex. G; Dkt #76 at ¶¶5-7, Ex. A; Dkt #20 at ¶55.) When P.F. applied under the Open Enrollment Program to attend Muskego-Norway, P.F.'s application was denied by Muskego-Norway under Wis. Stat. § 118.51(5)(a)4. (Dkt. #38 at ¶14-15.)

The third minor Plaintiff, S.B., lived in Milwaukee. (Dkt. #36 at ¶3.) In 2014, his mother applied under the Open Enrollment Program to enroll S.B. in Shorewood for 3rd grade. (Dkt. #36 at ¶4.) On May 27, 2014, S.B.'s open enrollment application was accepted by Shorewood. (Dkt. #36 at ¶7.) On September 2, 2014, S.B. started 3rd grade at Shorewood. (Dkt. #36 at ¶8.) However, Shorewood discovered that S.B. had a disability and on October 8, 2014, revoked its acceptance of S.B.'s open enrollment application based upon Wis. Stat. § 118.51(5)(a)4., expelling S.B. from the Shorewood school he was attending. (Dkt. #36 at ¶9, Ex. A.)

SUMMARY OF ARGUMENT

Each of the School District Defendants denied enrollment to the Plaintiffs because they were disabled. Each of the districts relied upon Wis. Stat. § 118.51(5)(a)4. to reject or revoke the applications. That section improperly permits students with disabilities to be denied open

enrollment whenever a school district denies that it has "space" for them. In no case did these Defendants determine a Plaintiff insisted upon an accommodation (*i.e.*, the receipt of special education services) that were unreasonable in that they would fundamentally alter the school district's programing.

In permitting this, both state law and the actions of the School District Defendants violated federal law. A public school district is not entitled to discriminate against children with disabilities by denying them access to the Open Enrollment Program. The district court disagreed. It held that school districts could actually deny students with disabilities the right to participate in Wisconsin's Open Enrollment Program, if the school district would be required to provide extra services that might be burdensome. That holding is inconsistent with federal law.

This is not a minor problem. In the 2013-2014 school year alone (the year prior to the filing of the Complaint), public school districts in Wisconsin used § 118.51(5)(a)4. to reject over 1,000 applications for open enrollment from children with disabilities. (Dkt. #41 at ¶19.) The Plaintiffs seek a ruling that the section of the Open Enrollment Law that permits school districts to exclude students with disabilities from enrollment because of their disabilities violates their rights under federal law.

ARGUMENT

Title II of the Americans with Disabilities Act (the "ADA") prohibits discrimination on account of disability in programs and services furnished by public entities. 42 U.S.C. §§ 12131–12165. Specifically, Title II of the ADA provides that: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Section 504 of the Rehabilitation Act ("Section 504") also prohibits discrimination on account of disability, and provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

These mandates of non-discrimination are clear. They require public entities to permit persons with disabilities to participate in all programs, services and activities and make reasonable accommodations to allow them to do so. 28 CFR § 35.130(b)(7). These accommodations – *e.g.*, the modification of facilities to permit access by disabled persons or the provision of certain services such as special education – may be denied only if providing them would require an undue financial or administrative burden or constitute "fundamental alteration" of the program to which the disabled person seeks access. *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 782-783 (7th Cir. 2002). Because a nonresident district incurs no cost under the Open Enrollment Program (the costs are borne by the resident district), only the "fundamental alteration" justification for refusal to make an accommodation could be applicable here.

These laws are clear. **A person with a disability cannot be denied the right to participate in the programs, services, or activities of public entities**. There is a long history of such exclusion in public education. That unhappy history is thoroughly described in *Toledo v. Sanchez*, 454 F.3d 24, 37 (1st Cir. 2006) ("Historically, children with mental disabilities were labeled 'ineducable' and were categorically excluded from public schools to 'protect nonretarded children from them."). The federal government first tried to correct this problem by providing

grants to the states to initiate and improve programs for the education of handicapped children. *See* Elementary and Secondary Education Act of 1965.

But this did not solve the problem. As the *Sanchez* Court pointed out, a series of cases from the 1970s found that the states continued to violate the rights of disabled children. *See, e.g.*, *Fialkowski v. Shapp*, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975) (mentally retarded children who were completely denied an educational opportunity had stated a valid equal protection claim); *Harrison v. Michigan*, 350 F. Supp. 846, 847 (E.D. Mich. 1972) (noting that the state's denial of an education to handicapped children until 1971 raised serious equal protection issues); *Mills v. Bd. of Ed. of D.C.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (holding that District of Columbia violated due process by denying handicapped students a publicly supported education); *Pa. Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279, 293, 297 (E.D. Pa. 1972) (finding the state's treatment of mentally retarded children "crass and summary" and expressing "serious doubts" about any rational basis for the state's exclusion of approximately 75,000 mentally retarded children from any public education services).

The *Sanchez* court explained that it was against this backdrop that Congress passed the Rehabilitation Act of 1973, but that was yet another unsuccessful effort to resolve the problem. States (including Wisconsin) continued to violate the rights of disabled students. *See, e.g.*, *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (holding that Wisconsin violated equal protection rights of handicapped children by denying them an education at public expense); *see also N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487, 503-04 (E.D.N.Y. 1979) (segregation of mentally retarded students with hepatitis B found to be without rational basis).

Despite the efforts of the federal government, it remained the case that:

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

Sanchez, 454 F.3d. at 38.

Faced with that history, Congress passed the ADA. (*Id*.) It is now indisputably clear that public entities (like the State Defendants and the School District Defendants) cannot deny students with disabilities the full right to participate in public education.

There is no dispute here that Wisconsin's Open Enrollment Program is a program, service or activity of public entities and there is no dispute that the Plaintiffs were denied the right to participate in that program based upon the provisions of the Open Enrollment Law and the actions of the Defendants. That denial turned on the fact that they had a disability. There is no other reason offered for their exclusion. The Defendants can avoid liability only if they can point to something else in federal law that excuses their discrimination. As we shall see, there is nothing. The district court's decision would allow Wisconsin to have one enrollment program for regular students and another one for the disabled - with different rules and different "spaces." That is not the law.

I. THE DISTRICT COURT COMMITTED ERROR WHEN IT HELD THAT WIS. STAT. § 118.51 DOES NOT VIOLATE TITLE II OF THE ADA AND SECTION 504.

In order to state a claim under Title II of the ADA or under Section 504, a plaintiff must prove three elements: (1) she 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. *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015). As shown in detail at pages 19-25, *infra*, each of those elements is present in this case.

The district court's analysis starts by discussing the elements of an ADA/504 claim (Dec. at 16-17; App. 116-117), but it never finishes that analysis and never says what element, if any, the Plaintiffs failed to meet. The district court agreed that an a priori determination that no special needs students would be accepted – something that both Paris and Muskego-Norway did – would be unlawful. But it concluded that the defendants might still avoid liability if they could show that a more "nuanced' consideration of whether space was available based on a "specific, practical assessment of the needs of the child and the capacity of the school district" somehow justified the exclusion. (Decision, p. 20; App. at 120) The district court does not explain just what this "nuanced consideration" is to determine or what standard it is to apply, *i.e.*, what needs of a child or burden on a school district would justify exclusion. Nor does it explain where in federal law, this "nuanced" justification for exclusion of a disabled student might be found.

In fact, federal law permits a public entity to refuse an accommodation – but not acceptance – to a disabled student only under a particular set of circumstances. Perhaps because it used concepts applicable only to constitutional challenges ("facial" and "as applied" challenges) to this question of statutory interpretation, the district court failed to root its analysis in federal law. Although the district court refers to the way in which the "fundamental alteration" standard limits the need to provide an accommodation, it proceeds to conclude that consideration of space (however that might be accomplished) serves a "legitimate nondiscriminatory purpose." (Dec. p. 22, App. At 120.) This is wrong.

Although a defendant could prevail by showing that the refusal to enroll a student had

nothing to do with his or her disability, the district court suggested that limiting the space for disabled students – something clearly done "by reason" of their status as disabled – might be justified if done for "legitimate, non-discriminatory" reasons. The difficulty with that reasoning is that federal law has carefully circumscribed – and set a standard for – what those reasons can be. In considering whether there were material issues of fact as to the claims of each individual plaintiff, the district court proceeded to ask whether "each plaintiff's unique educational needs constituted a reasonable modification." (Dec. p. 23; App. at 123) But, again, the law is not so deferential. As noted above, a modification is unreasonable only if it imposes an undue financial or administrative burden or fundamentally alters the district's program. In the context of the Open Enrollment Program, costs are borne by the resident district, so only the latter prong could be applicable.

But there is a more fundamental problem. The fact that a school district might not have to provide a particular set of services does not justify completely excluding students who could use those services from the Open Enrollment Program. By deciding that they would not accept any disabled students at all – a determination that they proceeded to enforce against the minor Plaintiffs – the School District Defendants violated federal law. By deciding that each of the plaintiffs would be excluded because they were disabled, whether or not they would insist upon the accommodation of special services and without regard to whether the provision of those services would constitute a fundamental alteration, all of the Defendants violated federal law.

A. The District Court Committed Error When It Concluded that School Districts Could Make Enrollment Decisions Based upon the Disabilities of Individual Students.

In fact, the court's "nuanced" approach (even if it were legal) is impossible given the way the rest of the statute works. Under the Open Enrollment Law, school boards must make decisions about whether to participate in the Open Enrollment Program and decisions as to how

many students (including how many students with disabilities) to accept through open enrollment no later than the end of January prior to the relevant school year. *See* Wis. Stat. § 118.51(5)(a)1. But by statute, applications from students cannot be submitted until after the first Monday in February (a date after the districts' January meetings). Wis. Stat. § 118.51(3)(a)1. A district that decides it has no space for disabled students in January does so without having idea as to who might apply to attend their district and whether or not any applicants are children with disabilities, much less the nature of those disabilities.

The statute does not call for a case by case analysis. It says only that the school district "shall determine the number of regular education and special education spaces available within the school district." § 118.51(5)(a)1. For example, Muskego-Norway decided at that time that it would take **zero** children with disabilities. (Dkt #40 at ¶10, Ex. G; Dkt #76 at ¶¶5-7, Ex. A; Dkt #20 at ¶55.) They conducted no case by case analysis or consideration of individual disabilities of any type. Paris did the same. (Dkt. #77 at ¶11.) Again no case by case analysis or consideration. When Shorewood expelled S.B. in October 2014 because he had ADHD, it did not consider whether it could provide whatever services he needed. In fact, at that time he was not receiving – or even requesting – any extra services. (Dkt. #101 at ¶¶11-13.) In each case, the school district simply decided well in advance not to take any students with disabilities through open enrollment. There is not – and could not be – a "more nuanced" approach.

And even if there had been, the untethered consideration of whether exclusion of a disabled student was reasonable is not what federal law requires. ADA and Section 504 require public schools to practice disability-blind enrollment. 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). There are no exceptions.

This does not just apply to a student's resident school district as the district court assumed. It applies to all public schools. *See* U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions about the rights of students with disabilities in public charter schools under Section 504 of the Rehabilitation Act of 1973* (December 28, 2016). Under the law, charter schools are not the student's resident school district. However, because they are public schools, the Department of Education has said that Section 504 prohibits a charter school from having a policy that excludes students with disabilities. *Id.* at 13, 20.

This means that all schools in which a disabled student is otherwise eligible to enroll must accept her. 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* 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.

Thus, "fundamental alteration" does not enter into the enrollment decision, it relates solely to the services to be provided upon enrollment and the district court was wrong when it held otherwise. The two cases relied upon by the district court cites at page 21 of its decision are not to the contrary and, if anything, support the Plaintiffs' position. Those cases pertain to what the district court says is the closest analogy to this case – disabled athletes.

The district court characterized the first case, *McFadden v. Grasmick*, 485 F. Supp. 2d 642 (D. Md. 2007), as one in which a wheelchair athlete sought to be allowed to compete with non-wheel chair athletes. That is not quite right. In fact, as the *McFadden* court noted, "McFadden does not contend that she is legally entitled to race against non-wheelers . . . ." *Id.* at 651 In fact, the plaintiff was allowed to participate in the program. She "met all of the conditions set forth by defendants for participation in its athletic programs, and she, in fact, participates. As discussed above, she is a full member of the track team." *Id.* at 648 (emphasis added). What the plaintiff complained about is that the points earned by "wheelers" were not counted toward team totals. But, the court concluded, this was not because she was disabled but because not enough schools participated in wheel-chair racing as an event. *Id.* at 649-50. She was not, therefore, treated differently from similarly situated athletes without disabilities.

In *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), it appears that the plaintiff did wish to compete against non-wheel chair athletes (as well as have her points count). But as in *McFadden*, she was not excluded from the track team. The issue according to the court was "whether the ADA and the Rehabilitation Act require Defendants to accommodate [the plaintiff's] requests" to participate with able-bodied athletes rather than wheel-chair athletes. *Id.* at *2. The court concluded that the athletic association could require her to compete with wheel-chair athletes because allowing athletes in wheel chairs to compete in track and field events with able-bodied athletes would likely cause safety problems for the athletes from bumping or otherwise. *Id.* at *5. The court concluded that the only way to deal with what the court referred to as "competitive, fairness and administrative concerns" would be to fundamentally change the way that track and field events are run and to do so in ways that would negatively affect all of the

athletes involved. *Id.* Because the requested accommodation would have resulted in a fundamental alteration, the athletic association did not have to make the accommodation. *Id.*

In both cases, the plaintiff was 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 Plaintiffs should have been allowed to participate in the Open Enrollment Program and enroll in their chosen nonresident school districts. The question would then be what accommodations were requested and whether they were reasonable or constituted a fundamental alteration.

The result of the above is that even if the school district was given the disability information of individual applicants ahead of time, the school district is prohibited from making enrollment decisions based on the student's disability status. That is as illegal as discriminating based on more generalized policies. It is a violation of the ADA and Section 504 to say either: (1) we will not accept any students with emotional disabilities, or (2) we will not accept Jane Doe because she has an emotional disability.

Federal disability law prohibits having one set of enrollment criteria for general education and a separate program for special education. Indeed, as described at pages 8-10, *supra*, that type of discrimination is precisely what these laws sought to end. 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 297 (W.D. Wis. 2009). Likewise, it cannot do so with respect to disabled and non-disabled children.

In *N.N.* the plaintiffs sued to declare Wis. Stat. § 118.51(7) unlawful. That section of the statutes allowed school districts to take race into consideration in rejecting applications under the

Open Enrollment Program. The Wisconsin Attorney General did not even attempt to defend the statute. Just as the State cannot run two different Open Enrollment Programs based on race, it cannot do so based on disability.

The district court agreed with this point when it rejected the Defendants' argument regarding space as an eligibility requirement. It said that accepting that 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.) But while the district court got it right in the context of space as a qualification, it ignored its own reasoning in that part of its decision when it refused to strike down the Open Enrollment Law. This Court should not commit the same error.

B. The District Court Misunderstood the Effect of the IDEA on this Dispute.

The District Court seemed to believe that requiring nonresident school districts to accept disabled open enrollment "imposes an IDEA requirement of a 'free appropriate public education' […] on a non-resident school district. (Dec. pp. 21-22; App. at 121-122.) The requirement of a "free appropriate public education" (often referred to as "FAPE") is not based on Title II of ADA or Section 504, but is found in the Individual with Disabilities Education Act. *See generally* 20 U.S.C. § 1400 *et seq*. It is far more extensive than the requirements of nondiscrimination and accommodation that are mandated by the laws at issue here.[4] Even if it were possible to argue that, by enacting an open enrollment law, Wisconsin has obligated nonresident school districts to provide a FAPE to all nonresidents, plaintiffs are not making that claim. (Dkt. #92 at 13 ("The

[4] For example, a school district cannot decline to provide FAPE rights on the grounds that it would constitute a fundamental alteration of its programming. *K.M. ex rel. Bright v. Tustin Unified School Dist.*, 725 F.3d 1088, 1101 (9th Cir. 2013) ('The IDEA does not provide schools with any analog to Title II's fundamental alteration and undue burden defenses.").

minor Plaintiffs are not enrolled in the schools of the School District Defendants and are not suing them for failure to comply with the IDEA.").)

The Plaintiffs agree that the IDEA does not require nonresident school districts to accept and educate students from outside their district. But the Plaintiffs have also been consistently clear that based upon the ADA and Section 504, if a school district elects to take nonresident students through the Open Enrollment Program, it cannot discriminate against disabled students in choosing who they will accept and must comply with federal nondiscrimination and accommodation requirements. (*Id.*) The Plaintiffs' claim is under the ADA and Section 504 and not the IDEA.

A "nuanced consideration" of the plaintiffs' needs is permitted only to determine what accommodating their needs will require and whether it would constitute a fundamental alteration. If it would, then the accommodation need not be provided under the ADA. Even if a school district could refuse to enroll a student because of the need to provide such accommodations, it could only do so if the accommodations exceed the fundamental alteration standard. In making that determination, the district court seems to have concluded that a nonresident school district's enrolling a disabled student with more costly service needs because of a disability can legally rise to the level of "fundamental alteration" under the ADA/504. But the district court completely overlooked the undisputed fact that it is the resident school district that pays the extra cost not the nonresident district, Wis. Stat. § 118.51(17), and the resident district would have to bear that cost whether the student enrolled in the resident district or the nonresident district.[5]

Related to this point, in the portion of its decision discussing the Equal Protection claim,

[5] The district court notes that, beginning in 2016-2017, the amount a nonresident district can receive is capped at $ 12,000. (Dec. at 4, n. 3; App. at 104.) This is an incomplete statement of the law. A nonresident district can receive more if it can show that serving the student will cost more.

the district court even says that in addition to actual monetary costs that "there are other intangible costs associated with a non-resident school district serving the needs of a disabled child." (Dec. at 30; App at 130.) As more fully explained in *Sanchez* (*see supra* at pages 8-10), ADA and Section 504 do not permit such a generalized and unsubstantiated assumption about disabled children. Those assumptions are what led to the creation of the ADA in the first instance. In assessing whether an accommodation would constitute a fundamental alteration, only costs and burdens that can be identified and substantiated count.

The district court failed to follow well-established federal disability law when it ruled that § 118.51(5)(a)4. does not violate Title II of the ADA and Section 504. On that basis, the Plaintiffs ask this Court to reverse the decision of the district court dismissing the Plaintiffs' ADA and Section 504 claims on summary judgment. In addition, even if the Court agrees with the Plaintiffs regarding the errors made by the district court, the Defendants will likely argue that there are other reasons that they should prevail. Thus, the Plaintiffs will show not only why the other defenses are wrong as a matter of law but also why the district court should have granted summary judgment to the Plaintiffs on their ADA and Section 504 claims.

II. THE PLAINTIFFS HAVE MET ALL OF THE ELEMENTS OF THEIR CLAIMS UNDER TITLE II OF THE ADA AND SECTION 504.

A. The Elements of a Discrimination Claim under Title II of the ADA and Section 504.

As stated above, Title II of the ADA prohibits discrimination in services furnished by public entities on the basis of disability. 42 U.S.C. §§ 12131–12165. Specifically, Title II of the ADA provides that:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Similarly, Section 504 prohibits discrimination on the basis of disability and provides that:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a).

Applying that language here, the Defendants discriminated against Plaintiffs in violation of Title II of the ADA and Section 504 by denying the minor Plaintiffs the opportunity to participate in and receive the benefits of the services, privileges and advantages of Wisconsin's Open Enrollment Program on the basis of their disability.

In order to state a claim under Title II of the ADA or under Section 504, a plaintiff must prove that: (1) she 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. *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015). Each of those elements is present in this case.

The Plaintiffs will address both their ADA and Section 504 claims at the same time in this brief. The rights and responsibilities established by Section 504 and the ADA are nearly identical. *Id.*; *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 845, n. 6 (7th Cir. 1999). The primary difference is that Section 504 applies only to public entities receiving federal funding, while the ADA contains no such limitation. *Id*. But as the district court agreed, that difference is immaterial here because all of the Defendants have admitted that they receive federal funding. (Dkt #132 at 16; Dkt. #40 at ¶3.)

In addition, as this Court noted in *Washington v. Indiana High School Athletic Ass'n*, precedent under one statute typically applies to the other. 181 F.3d at 845, n. 6; (citing *Grzan v.*

Charter Hosp. of Northwest Indiana, 104 F.3d 116, 123 (7th Cir.1997)). Moreover, the remedies, procedures, and rights set forth in Section 504 are the same remedies, procedures, and rights applicable to discrimination claims under Title II of the ADA. *Id.* Similarly, this Court has said that the elements for claims arising under Section 504 are "substantially similar" to the elements of an ADA claim. *Silk v. City of Chicago*, 194 F.3d 788, 798, n. 6 (7th Cir. 1999).

B. 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.

This definition leads to two different questions: (1) do the minor Plaintiffs have a disability; and (2) do they meet the essential eligibility requirements for participation in the Open Enrollment Program? The district court agreed the both R.W. and P.F. have disabilities but erroneously concluded that S.B. did not. (Dec. at 17-18, 27-28; App. at 117-118, 127-128.) The facts regarding S.B. are undisputed so the question of whether S.B. has a disability is a question of law.

1. S.B. has a disability.

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). The statute uses the disjunctive and S.B. need satisfy only one of these subparts, but he satisfies all three.

First, S.B. has a physical or mental impairment that substantially limits one or more of his life activities. (Dkt. #36 at ¶10, Ex. B & C.) It is undisputed that S.B. has Attention Deficit Hyperactivity Disorder ("ADHD"). (*Id.*) Based on his ADHD, he has an Individual Education Plan ("IEP") under Wis. Stat. § 115.787. (Dkt. #36, Ex. B & C.)

The district court said that the only evidence that was submitted to show that S.B. had a disability was a simple averment by his mother (Dec. at 27; App. at 127), but that was not the case. His 2010 and 2015 IEP evaluations were in the record (Dkt. # 36, Ex. 2 & 6), and N.B highlighted key sections of the IEP in the Plaintiffs' Brief in Opposition to Defendant's Summary Judgment Motion (Dkt # 92 at 22-24).

Per his 2010 IEP evaluation, S.B. has a "health problem" (Dkt. #36-2 at 6), which is chronic. (*Id.*) His "documented health problem" affects his behavior, social/emotional functioning and classroom behavior. (*Id.*) **The report expressly states that "The IEP team has determined that this student is a student with a disability."** (Dkt. #36-3 at 4 (emphasis added).) The report also checked the box "yes" for the question: "By reason of the impairments(s) identified does this student need or continue to need special education." (*Id.* at 5.)

His 2015 IEP evaluation confirms that his disability still existed in 2015 stating, among other things that "[S.B.] is a student with OHI (Other Health Impairment) and significant lags in the area of reading, language, and math. . . . [S.B.'s] significant academic delays and his needs for behavioral support interfere with his ability to be successful in the general education setting." (Dkt.#36-6 at 3.)

There is no way to read the IEP evaluations other than to conclude that S.B.'s impairments substantially limit his ability to learn. "Learning" is expressly listed as a "major life

activity" in 42 U.S.C. § 12102(2)(A). The district court did not even address these undisputed facts and pointed to nothing in the record that contradicts them.

Second, S.B. also satisfies subpart B of § 12102(1). He has a record of having a disability. He has an IEP and an IEP is created only for students who have a disability. Wis. Stat. § 115.787(1) ("At the beginning of each school year, each local education agency shall have in effect, for each child with a disability, an individualized education program.").

And third, S.B. had been regarded as having a disability. It is undisputed that Shorewood revoked S.B.'s admission to Shorewood under Wis. Stat. § 118.51(5)(a)4. **because S.B. had a disability**. Shorewood would not and could not have relied on that section unless it regarded S.B. as having a disability. Shorewood cannot now claim that S.B. does not have a disability when they revoked his acceptance from Shorewood for the very reason that he had a disability.

Rather than consider the undisputed facts that show that S.B. has a disability, the district discussed two cases: *Peters v. Univ. of Cincinnati Coll. of Med.*, No. 1:10-CV-906, 2012 WL 3878601 (S.D. Ohio Sept. 6, 2012), which held that a particular student with ADD had a disability, and *Healy v. Nat'l Bd. of Osteopathic Med. Examiners, Inc.*, 870 F. Supp. 2d 607, 621 (S.D. Ind. 2012), which held that a particular student with ADD did not have a disability. Neither of them have much to do with this case, as they both involved disputed facts regarding the level of impairment of adult students at a professional postsecondary educational institution. They are not pertinent to a case involving a third grader with an IEP who was expelled based on a statute that applies only to students with disabilities.

Finally, the district court found that it was significant that N.B. had revoked consent for S.B. to receive special education services (Dec. at 28; App. at 128), but that means nothing with respect to whether S.B. has a "disability." It was undisputed that N.B.'s decision to decline

special education services for S.B. was based on her dissatisfaction with the services S.B. was receiving. (Dkt. #101 at ¶¶11-12.) Her withdrawal of consent says nothing regarding whether S.B. actually had a disability or is a "qualified person with a disability." The district court was in error when it found that S.B. did not have a disability.

2. Each of the minor Plaintiffs meets the eligibility requirements under the Open Enrollment Program.

The second question relating to whether the minor Plaintiffs were *qualified individuals with a disability* is whether they met the essential eligibility requirements for participation in the Open Enrollment Program. The Defendants argue that the eligibility requirements for the Open Enrollment Program include whether the nonresident district decides it has no space for disabled students. (Dec. at 18; App at 118.) This argument divides the Open Enrollment Program into two separate programs – one for children without disabilities and one for children with disabilities. The Defendants argue that the minor Plaintiffs are not "qualified" for the regular student program because they are disabled, and they cannot "qualify" for the disabled student program if the district involved has decided it has no space for the disabled.

But under the "APPLICABILITY" section of the Open Enrollment Law the only eligibility requirements for participation in the Open Enrollment Program are that the person be a student and that for early kindergarten the student's resident school district must offer the same type of program that the student seeks to attend in the non-resident school district. *See* Wis. Stat. § 118.51(2). Here, each of the minor Plaintiffs is a student. (Dkt. #38 at ¶1; Dkt. #37 at ¶1; Dkt. #36 at ¶1.) And while none of them applied for an early kindergarten program, the record is undisputed that each of them applied to attend a program in a nonresident school that was offered in their resident school district. (Dkt. #38 at ¶15; Dkt. #37 at ¶15; Dkt. #36 at ¶5.) Thus, the minor Plaintiffs met the state eligibility requirements.

Under federal law, a student is "qualified" for primary and secondary educational services merely if he is "of an age during which non-handicapped persons are provided such services." 34 C.F.R. § 104.3(l)(2)(i); *see also St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 174, n.9 (2d Cir. 2001). Thus, the minor Plaintiffs were "qualified" to participate in the Open Enrollment Program so long as they were of the same age as nondisabled children. No one has contested that the minor Plaintiffs were not of the right age.

The district court rejected the Defendants' argument regarding space as an eligibility requirement. It agreed 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.)

Thus, the Plaintiffs meet the first element of a claim under Title II of the ADA and Section 504. The minor Plaintiffs are each a qualified individual with a disability and the Plaintiffs who are parents of the minor Plaintiffs also have standing under Title II of the ADA and Section 504. As a parent of a child with a disability, the parents have a particular and personal interest in preventing discrimination against their children which provides them with standing. *Stanek v. St. Charles Community Unit School Dist. No. 303*, 783 F.3d 634, 643 (7th Cir. 2015) (a parent can sue under Rehabilitation Act and ADA "'at least insofar as she is asserting and enforcing the rights of [her] son and incurring expenses for his benefit'") (quoting *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007)).

C. The Plaintiffs Were Excluded from the Benefits or Services of a Public Entity or Otherwise Were Discriminated Against by a Public Entity.

The district court agreed with the Plaintiffs that they satisfied 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. (Dec.

at 17; App. at 117.) In fact, the district court stated that there was no dispute on this question. (*Id*.)

Each of the School District Defendants and the DPI has admitted in response to discovery that they are "public entities" under Title II of the ADA and Section 504. Defendant Evers, however, denied that he is a public entity. (Dkt. #40 at ¶11, Ex. B.) But Superintendent Evers was acting in his official capacity at all times relevant herein and individuals acting in their official capacities are public entities under Section 504 and Title II of the ADA. *See Bacon v. City of Richmond*, 386 F. Supp. 2d 700, 706 (E.D. Va. 2005) (citing *Henrietta v. Bloomberg*, 331 F.3d 261, 288 (2d Cir. 2003)); *see also Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th Cir. 2003) (suits against individuals in their official capacity are permitted).

Superintendent Evers is the officer (and DPI is the agency) charged with administering the Wisconsin Open Enrollment Law (along with school districts) and, in particular, for administering that part of the Open Enrollment Program dealing with applications for participation in the Open Enrollment Program. Thus, Superintendent Evers is an appropriate official, along with DPI, to be a defendant in this action challenging the legality of the Open Enrollment Law. *See Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 303, 240 N.W.2d 610, 623 (1976) (actions against the state to challenge a state statute may be properly brought against the officer or agency charged with administering the statute).

D. 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 element is, in essence, the "causation" element. 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.) 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.

In *Washington v. Indiana High School Athletic Ass'n*, 181 F.3d 840, 849 (7th Cir. 1999), this Court considered the causation element of both a Title II ADA claim and a Section 504 claim and treated them as the same. The "solely by reason of" language in Section 504 "merely indicates that [the plaintiff] must establish that, but for his learning disability, he would have been eligible" for the program in question. *Id.* (emphasis added). The same "but for" standard has been used by this Court to describe the causation element under Title II of the ADA. *Wis. Comm'y Servs. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006). Thus, the causation element is the same for both claims. The Plaintiffs must establish that "but for" their disabilities, they would have been able to participate in the Open Enrollment Program.

2. The Open Enrollment Law imposes different and more stringent requirements for participation on children with disabilities than on children without disabilities.

"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. provide 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 additional grounds 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 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.") In *Brewer*, the plaintiff was a graduating law student seeking admission to the Wisconsin Bar. The plaintiff had a mental disability. When the Board of Bar Examiners discovered that fact, they required her to submit a psychological evaluation (a requirement not imposed on non-disabled applicants).

The *Brewer* court acknowledged that requesting further information from an applicant with a history of mental illness about the nature and extent of her impairment makes some logical sense, but the Court concluded that the Board'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; *see also Walker v. NationsBank of Fla., N.A.*, 53 F.3d 1548, 1557 (11th Cir. 1995) ("[E]vidence of the bank's different treatment of similarly situated branch managers is of probative value in determining whether the bank intentionally discriminated against [plaintiff]."); *Stratton v. Handy Button Machine Co.*, 639 F. Supp. 425, 430 (N.D. Ill. 1986) ("To discriminate means merely to make a distinction on the basis of the prohibited factor.").

In *Washington v. Indiana High School Athletic Association*, 181 F. 3d 840 (7th Cir. 1999), 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), as a neutral rule based on passage of time rather than disability. This Court disagreed, concluding that the only reason the plaintiff was still in high school at the age of 19

was because he was disabled. "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. 181 F.3d at 849.

The same reasoning applies here. The State Defendants require the parents of children with disabilities to disclose their disability in the applications for the Open Enrollment Program. (Dkt. #26 at ¶36; Dkt. #41 at ¶9.) If an application discloses the existence of a disability, the State Defendants then require the resident school district to send the student's IEP to the nonresident school district. (Dkt. #41 at ¶10.) The State Defendants then allow a nonresident school district to exclude the disabled student if the nonresident school district has determined under § 118.51(5)(a)1. that it will not admit disabled students or now decides that it does not have "space" for that student under § 118.51(5)(a)4.. (Dkt. #41 at ¶11.)

But for their disabilities, the minor Plaintiffs would not have had IEPs, their applications would not have been flagged as being for a "disabled" child, and these children would not have been excluded. Instead, they would have had the opportunity to participate in the Open Enrollment Program. They meet the "but for" causation requirement under the ADA and Section 504.

3. The other rationales set forth by the district court for denying the minor Plaintiffs participation in the Open Enrollment Program are not valid.

The district court appeared to be dealing with the causation element when it discussed what it called the "As Applied Challenges" at pages 23-30 of its decision. It concluded that there were reasons that prevented the minor Plaintiffs from participation in the Open Enrollment Program other than the Open Enrollment Law and that those other reasons were grounds for dismissal of the Plaintiffs' ADA and Section 504 claims. The district court erred.

R.W.

The district court held that Paris may have rejected R.W. because it might have been burdensome for Paris to accommodate him. (Dec. at 23-24; App. at 123-24.) But this fact, even if true, is not a defense. As explained above, Paris was required to enroll R.W. and then determine what reasonable accommodations he needed and then provide those that did not amount to a fundamental alteration. The district court cited *Staron v. McDonald's Corp*., 51 F.3d 353 (2d Cir. 1995), but that case has nothing to do with the duties of a public entity such as a school district under the ADA. Private entities that constitute public accommodations such as McDonald's are governed by Title III of the ADA and not Title II, which applies to public entities.

Moreover, it is important to understand the full import of the district court's decision. If the district court is correct, then R.W.'s own resident school district could reject him for enrollment. For example, consider what would happen if R.W. moved into the Paris School District. The "burden" of educating him would be the same as when he applied to Paris via open enrollment. Under the district court's way of looking at things, Paris could reject him as a resident student without violating the ADA and Section 504. No one would want to make that argument.

S.B.

The district court rejected S.B.'s claim based upon the conclusion that he was not disabled. (Dec. at 27-28; App. at 127-28.) The Plaintiffs have already dealt with that legal error at pages 21-24, *supra.*

P.F.

The district court agreed that P.F. was rejected by Muskego-Norway because he was

disabled (Dec. at 26, App. at 126), but found what amounts to a superseding cause, *i.e.*, that P.F.'s resident school district (Racine) rejected the transfer due to cost considerations. (*Id.*) Muskego-Norway never made this argument below, so the Plaintiffs never briefed it. Here is what the district court missed.

First, allowing a resident school district to deny a student with a disability the right to participate in the Open Enrollment Program based upon cost (when no such denial is available with respect to non-disabled students)[6] is, itself, a violation of the ADA and Section 504. Why is the resident school district entitled to object to cost only when a disabled student is involved? Imagine a situation in which thousands of non-disabled students leave a major urban school district to participate in the Open Enrollment Program, costing the district millions of dollars. The effect on the school district could be substantial, but the school district has no basis to object in that scenario. The resident school district loses state aid no matter whether the student is disabled or not, but only has the right to object to the participation of disabled students (and not non-disabled students) based upon cost. That form of discrimination is also illegal under the ADA and Section 504.

Second, the district court treated Racine's objection to P.F.'s application as a fact that could not be questioned. But that is not the case. The student has the right to challenge that objection under Wis. Stat. § 118.51(9). In fact, the undisputed testimony of P.F.'s father (A.F.) was that they would have appealed Racine's objection, but "the rejection by the Muskego-Norway School District made such an appeal moot." (Dkt. #38 at ¶19.) The undisputed testimony was that if Muskego-Norway had not rejected P.F. based upon his disability, A.F. would have appealed the Racine objection and under the law should have prevailed.

[6] *See* Wis. Stat. § 118.51(12)(b).

The district court cites no cases for its conclusion that Racine's objection was an "intervening act" that "broke the causal link." (Dec. at 26; App at 126.). It appears that the district court was relying on what is most commonly called "superseding cause." "A superseding cause is something culpable that intervenes between the defendant's negligence and the plaintiff's injury, some action of a third party that makes the plaintiff's injury an unforeseeable consequence of the defendant's negligence." *Scottsdale Ins. Co. v. Subscription Plus, Inc.*, 299 F.3d 618, 621 (7th Cir. 2002). Under that doctrine, an original wrong-doer can be relieved of liability 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). But 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).

Here, Muskego-Norway offered no such evidence. The undisputed evidence showed the opposite. P.F.'s injury as caused by Muskego-Norway was not unforeseeable based upon Racine's objection. He was injured because Muskego-Norway rejected him under Section 118.51(5)(a)4. Once Muskego-Norway rejected P.F., it simply did not matter what Racine did. Racine's objection was either moot because Muskego-Norway had already turned him down or a case of "piling on," but there is no reason that it should relieve Muskego-Norway of liability for its own actions.

III. THE PLAINTIFFS ARE ENTITLED TO A DECLARATION, AN INJUNCTION, AND DAMAGES BASED UPON THE VIOLATIONS OF TITLE II OF THE ADA AND SECTION 504.

The remedies for violations of Title II of the ADA and Section 504 are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964., 42 U.S.C. § 2000d *et seq.* (prohibiting racial discrimination in federally funded

programs and activities).[7] *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 2100, 153 L.Ed. 2d 230 (2002). Declaratory and injunctive relief are proper remedies and have been granted in many such cases. *See, e.g.*, *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 606 (7th Cir. 2004); *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th Cir. 2003); *Flynn v. Doyle*, 672 F. Supp. 2d 858, 880 (E.D. Wis. 2009); *Brewer v. Wisconsin Bd. of Bar Examiners*, 2006 WL 3469598 (E.D. Wis. Nov. 28, 2006).

Compensatory damages are also available in private causes of action under Title II of the ADA and Section 504. *Barnes*, 536 U.S. at 184–85; *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014). The district court, however, held that the Plaintiffs are not entitled to damages because they could not prove intentional discrimination. (Dec. at 24-25; App at 124-125.) More accurately, that holding was directed solely towards R.W., but only because the district court had dismissed the claims of the other Plaintiffs on other grounds. However, intentional discrimination exists in this case. The State Defendants administered and the School District Defendants implemented the Open Enrollment Program in a way that excluded disabled children and the School District Defendants intentionally rejected the Open Enrollment applications of the minor Plaintiffs because they were disabled. Those acts resulted in discrimination against the Plaintiffs and support an award of compensatory damages.[8]

Circuits are split on the standard for determining intentional discrimination under Title II of the ADA and the Rehabilitation Act for purposes of receiving damages, applying either the

[7] The remedies under the ADA for a violation of 42 U.S.C. § 12132 are contained in 42 U.S. C. § 12133, and include "[t]he remedies, procedures, and rights set forth in section 794a of title 29," which in turn incorporates the remedies, procedures, and rights set forth in a variety of other provisions of the U.S. Code including Section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16) and Title VI of the Civil Rights Act of 1964. Under Section 504, the remedies for a violation are the remedies and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

[8] The Plaintiffs ask this Court to issue only a declaration that they are entitled to compensatory damages. The amount of damages, if any, would be determined at trial.

"deliberate indifference" or "discriminatory animus" standard. The Ninth Circuit selected the "deliberate indifference" standard, which requires "both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001). Most other circuits (Second, Third, Eighth, Tenth, and Eleventh) have followed the Ninth Circuit and have adopted the "deliberate indifference" standard for proving intentional discrimination.[9] This Court has not yet decided which standard is required to show intentional discrimination when determining whether a plaintiff can recover compensatory damages. *See Strominger v. Brock*, 592 F. App'x 508, 511-12 (7th Cir. 2014) (noting the circuit split but not deciding on a standard).

The Eastern District of Wisconsin has followed the Ninth Circuit's "deliberate indifference" standard and in further describing the standard has stated, "The failure to act must be 'a result of conduct that is more than negligent, and involves an element of deliberateness.'" *Karvelas v. Milwaukee Cnty.*, No. 09-C-771, 2012 WL 3881162, *5 (E.D. Wis. Sept. 5, 2012) (quoting *Bartlett v. NY State Bd. of Law Exam'r*, 156 F.3d 321, 331 (2d Cir. 1998)). Because the "deliberate indifference" standard is the majority rule, the Plaintiffs believe it is the one that should be followed here. Under that standard, the Defendants engaged in intentional discrimination.[10]

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[9] *See S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262–64 (3d Cir. 2013); *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009); *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999).

[10] Should the Court conclude that the discriminatory animus standard applies then the Plaintiffs would still have sufficient evidence to establish intentional discrimination. Under *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 111 (2d Cir. 2001), discriminatory animus can be shown by ill will or government action that is wholly lacking a legitimate government interest. Here, the State Defendants (as proxies for the State of Wisconsin) are defending a statutory scheme that was deliberately chosen over one that would have not discriminated against children with disabilities and have adopted and

A. The School District Defendants Rejected the Applications of the Minor Plaintiffs Because They Were Disabled.

The School District Defendants intentionally discriminated by rejecting the applications of the minor Plaintiffs because they had a disability. The School District Defendants were not required to deny the applications submitted on behalf of children with disabilities under Section 118.51(5)(a)4. They had the option of accepting those children into their schools but decided not to do so. By denying the applications of the minor Plaintiffs under Section 118.51(5)(a)4., the School District Defendants chose to discriminate against them. The School District Defendants also chose to adopt a policy of accepting non-disabled students for open enrollment but not disabled students. The School District Defendants did not accidently exclude children with disabilities; they did so intentionally.

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

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, *6 (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."). The law expressly treats disabled and nondisabled students differently. 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

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administered rules that make the situation worse for children with disabilities. The School District Defendants regularly and intentionally reject open enrollment applications from children with disabilities. In the 2013-2014 school year alone, public school districts in Wisconsin used § 118.51(5)(a)4. to reject over 1,000 applications for open enrollment from children with disabilities. (Dkt. #41 at ¶19.) There is certainly no legitimate government interest that justifies this result.

"Physical, Mental, Emotional or Learning Disability," and the proposal stated that "No district may refuse to enroll an EEN[11] pupil." (Dkt. #40 at ¶7, Ex. D.) The State chose to reject that option.

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

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

If the Plaintiffs prevail, they would also be entitled to seek an award of attorneys' fees. 42 U.S.C. § 12205 ("In any action . . . commenced pursuant to [the ADA], the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."); *see also* 29

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

U.S.C. § 794a(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.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Cir. Rule 32 because it contains 12,013 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 11th day of December, 2017.

/S/ RICHARD M. ESENBERG

CERTIFICATE OF SERVICE

I certify that on December 11, 2017, 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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/S/ RICHARD M. ESENBERG

APPENDIX
PLAINTIFFS-APPELLANTS' COURT OF APPEALS BRIEF
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CIRCUIT RULE 30(d) CERTIFICATION

I certify that this appendix contains all of the materials required by Circuit Rule 30 (a) and (b).

/s/ RICHARD M. ESENBERG

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

S. W., S. G., Ca. R., Ch. R., D. R., P. F., A. F., R. W., E. W., S. B. and N. B.,

Plaintiffs,

v.

TONY EVERS, STATE OF WISCONSIN DEPARTMENT OF PUBLIC INSTITUTION, ELKHORN AREA SCHOOL DISTRICT, GREENDALE SCHOOL DISTRICT, MUSKEGO-NORWAY SCHOOL DISTRICT, SHOREWOOD SCHOOL DISTRICT and PARIS J1 SCHOOL DISTRICT,

Defendants.

OPINION AND ORDER

14-cv-792-wmc

In this civil action, the plaintiffs are children with disabilities who seek to open enroll as non-residents in one of the school districts named as defendants, as well as their parents. Plaintiffs allege that Wisconsin's Open Enrollment Law, Wis. Stat. § 118.51, blocks their enrollment in violation of Title II of the Americans with Disability Act, 42 U.S.C. § 12132, the Rehabilitation Act, 29 U.S.C. § 794(a), and the Equal Protection Clause of the United States Constitution. Before the court are the parties' cross-motions for summary judgment, on which the court already heard oral argument. For the reasons that follow, the court will now grant summary judgment to defendants on plaintiffs' challenges to the Open Enrollment Law under both the ADA and Rehabilitation Act. As for plaintiffs' individual, as-applied challenges, the court will also grant summary judgment to the school district defendants, save one -- R.W.'s claim against the Paris School District. Finally, the court will grant summary judgment to defendants on

plaintiffs' Equal Protection claims. Accordingly, only R.W.'s ADA and Rehabilitation claim will proceed to a bench trial.

UNDISPUTED FACTS

A. Challenged Statute

Plaintiffs challenge Wisconsin's Open Enrollment Law, which provides in pertinent part:

> (5) Nonresident school district acceptance criteria.
>
> (a) Permissible criteria. Except as provided in sub. (3)(a)2., the criteria for accepting and rejecting applications from nonresident pupils under subs. (3)(a) and (3m)(a) may include only the following:
>
> 1. The availability of space in the schools, programs, classes, or grades within the nonresident school district. The nonresident school board shall determine the number of regular education and special education spaces available within the school district in the January meeting of the school board . . . In determining the availability of space, the nonresident school board may consider criteria such as class size limits, pupil-teacher ratios, or enrollment projections established by the nonresident school board and may include in its count of occupied spaces all of the following:
>
> a. Pupils attending the school district for whom tuition is paid under s. 121.78(1)(a).
>
> b. Pupils and siblings of pupils who have applied under sub. (3)(a) or (3m)(a) and are already attending the nonresident school district.
>
> c. If the nonresident school district is a union high school district, pupils who have applied under sub. (3)(a) or (3m)(a) and are currently attending an underlying elementary school district of the nonresident school district under this section.

> 2. Whether the pupil has been expelled from school by any school district during the current or 2 preceding school years for any of the following reasons or whether a disciplinary proceeding involving the pupil . . .
>
> 3. Whether the nonresident school board determined that the pupil was habitually truant from the nonresident school district during any semester of attendance at the nonresident school district in the current or previous school year.
>
> **4. Whether the special education or related services described in the child's individualized education program under s. 115.787(2) are available in the nonresident school district or whether there is space available to provide the special education or related services identified in the child's individualized education program, including any class size limits, pupil--teacher ratios or enrollment projections established by the nonresident school board.**
>
> 6. Whether the child has been referred to his or her resident school board under s. 115.777 (1) or identified by his or her resident school board under s. 115.77 (1m)(a) but not yet evaluated by an individualized education program team appointed by his or her resident school board under s. 115.78 (1).

Wis. Stat. § 118.51(5)(a).[1]

Of course, the parties' focus in this case is primarily on the bolded criteria #4, which expressly allows school districts to consider the availability of specific service or space needs set forth in a non-resident child's "individualized education plan" or "IEP."[2]

The parties' submissions provide additional detail on the process for applying for open enrollment, including the role of defendant State of Wisconsin Department of Public Instruction in that process. The court need not recount these facts in detail, other

[1] Section 118.51(5)(a) has no subpart 5.

[2] In fairness, criteria #1 also allows consideration of a district's "space," specifically including "special education space," albeit not on an individualized basis.

than to note that the intent of the Open Enrollment Program is to be cost neutral by requiring a child's resident district to pay "tuition" to a nonresident district who accepts that child for admission. This is done through an adjustment to the state aid awarded both the resident and non-resident district, with state aid to the nonresident school district increased by an equal amount to the decrease in aid to the resident school district. *See* Wis. Stat. § 118.51(16). As an example, the state provided $6,635 in aid per student for the 2014-15 school year. If the student has a disability, the non-resident school district determines the additional cost of providing services to the student and adds that amount to the tuition.[3] Wis. Stat. § 118.51(17); *see also* Wis. Stat. § 118.51(12)(b) (providing that a resident district may deny an application to leave that resident district based on a determination that the estimated cost will cause an "undue financial burden" on the resident district.").

B. The Parties

Along with their respective parents, plaintiffs consist of six children, two of whom are sisters. Plaintiffs contend that one of the named school districts denied each child the opportunity to open enroll as a non-resident student because of a disability. Plaintiffs have also named the State of Wisconsin Department of Public Instruction ("DPI") and Wisconsin Superintendent Tony Evers in his official capacity. For ease of reference, the court organizes the undisputed facts by child and the accused school district.

[3] As counsel for the state advised the court at oral argument, the amount a nonresident school district can receive for a student is capped at $12,000 starting with the 2016-17 school year.

i. R.W. and the Paris School District

Plaintiff R.W. resides in the Kenosha Unified School District and has autism. Plaintiff R.W. and his identical twin brother sought to open enroll in the Paris School District. Paris is a small, rural school district comprised of one school building that houses 280 students, comprising all K-8 students for the entire district. Going into the 2012-2013 school year, Paris had one full-time special education teacher and one full-time special education aide. Also going into that school year, Paris expected 35 students with IEPs, each of whom require varying levels of special education services based on their particular disabilities. For the 2012-2013 school year, open enrollment spaces were determined at a School Board meeting held on November 28, 2011. Paris concluded that "there were no seats available in special education, but there was space available in the incoming general education kindergarten class." (M-N & Paris's PFOFs (dkt. #75) ¶ 34.)

At the time R.W.'s parents submitted his application, he did not have a formal IEP in place. Accordingly, the box on his application form asking whether the child had an IEP was checked "no." RW and his twin brother were both accepted. R.W. attended a kindergarten screening on or about May 16, 2012, at which time, his mother disclosed that R.W. was autistic. Paris's School Administrator Roger Gahart then informed R.W.'s mother that Paris did not have space for him in its special education program.

The parties dispute whether Gahart told R.W.'s mother that the Paris School District would have rejected his application had R.W.'s autism diagnosis been disclosed on the application, and whether Gahart told her that Paris does not accept open

enrollment applications from children with disabilities. (Pls.' Resp. to M-N & Paris's PFOFs (dkt. #98) ¶¶ 44-45.) Moreover, while informing R.W.'s mother that there was no space for him, the school district apparently never formally revoked R.W.'s acceptance, choosing instead to wait for the results of the IEP.

As R.W.'s resident district, the Oshkosh Unified School District did end up evaluating him for an IEP. The resulting report set forth various requirements for therapy and other services, concluding that R.W. should be placed in a "kindergarten classroom that is collaboratively taught by a general education and special education teacher." (Gahart Decl., Ex. E (dkt. #77-5) 9.) Paris's special education teacher reviewed the report and IEP, and then confirmed that the Paris School District did not have space in its special education program to implement R.W.'s IEP. While plaintiffs purport to dispute that the special education teacher reached this opinion, based on that same teacher telling R.W.'s mother's that she was excited to work with R.W. *and* believed there was room for him (Pls.' Resp. to M-N & Paris's PFOFs (dkt. #98) ¶ 590), there is no dispute that to meet R.W.'s IEP, the school district would have had to hire a part-time special education teacher and a part-time aide to work with R.W. on a one-on-one basis, as well as contract for occupational therapy services.

ii. P.F. and the Muskego-Norway School District

Plaintiff P.F. resides in the Racine Unified School District, but has applied to a number of nonresident schools over some five years, having been rejected 11 times, including most recently by defendant Muskego-Norway School District as a sixth grader for the 2014-15 school year. P.F. also has autism.

At the end of 2013, Muksego-Norway audited its enrollment numbers and determined that it had 50 seats available in its general education program for the 2014-2015 school year, including 6 seats for sixth grade, but *no* available spaces in its "special education program." (M-N and Paris's PFOFs (dkt. #75) ¶ 10.) The Board approved these numbers at its January 2014 meeting.

P.F.'s application for open enrollment to Muskego-Norway's sixth grade class for the 2014-2015 school year disclosed that he currently received special education services and had an IEP in place. (Thompson Decl., Ex. B (dkt. #76-2).) P.F.'s resident school district in Racine forwarded a copy of that IEP to Muskego-Norway. Among other things, the IEP disclosed that P.F. was diagnosed with autism, had the cognitive and motor functioning of a 2- to 3-year old, is not fully toilet trained, requires frequent sensory breaks, and needs close adult supervision throughout the day, as well as that his "removal from the general education classroom is necessary." (Thompson Decl., Ex. C (dkt. #76-3).) Critical to P.F.'s application, the IEP also required "personal bus transportation for P.F.'s safety, due to the severity of the disability." (*Id.*)

After analyzing P.F.'s IEP, the Muskego-Norway School District completed an open enrollment special education cost estimate and invoice, which found that the total additional cost to educate P.F. would be $50,382, the bulk of which was due to special transportation needs ($41,400 per year alone) between P.F.'s home in Racine and the school in the Muskego-Norway district. Given the amount of this estimate and invoice, the Racine Unified School District decided to disallow the transfer because of the undue financial burden on its school district. Despite *Racine* rejecting the transfer after receiving

its analysis, however, Muskego-Norward informed P.F.'s parents that his application was rejected because "[s]pace is not available in the special education or related services required in your child's individuals education program (IEP). [Wis. Stats. § 118.51(5) (a) 4.]" (A.F.'s Decl., Ex. C (dkt. #38-3).)

iii. S.W. and the Elkhorn School District

Plaintiff S.W. lives in Wauwatosa. Like the first two plaintiffs discussed above, S.W. has autism. In 2014, S.W. sought open enrollment from three non-resident school districts, including defendant Elkhorn School District. He was rejected by all three.

For the 2014-2015 school year, Elkhorn School District's Board accepted the recommendation of the District Administrator Jason Tadlock not to cap the number of spaces available for the 2014-2015 school year. The DPI Open Enrollment Application Log shows that Elkhorn received 142 applications for open enrollment and accepted 139 -- one application was denied because of an earlier expulsion and two were denied because they were incomplete. S.W.'s application apparently was counted as an accepted application.

The application itself indicated that (1) S.W. received special education services and (2) he had an IEP in place. (Essman Decl., Ex. A (dkt. #47-1).) The application also indicates that S.W.'s "preferred program" was "Lakeland School (for special needs)," and it checked "yes" in response to the question, "Limit to specific school and/or program listed above?" (*Id.*) Lakeland School is a self-contained facility that offers special education services for all school districts within Walworth County. Elkhorn does *not* control or determine Lakeland School's space or student placement capacities.

After receiving S.W.'s application in May 2014, Elkhorn requested that S.W.'s resident district send his IEP in order to prepare a cost estimate. At the same time, Elkhorn reached out to Lakeland to seek assistance in preparing a tuition estimate. Lakeland responded that it did "not know if there will be room in that program or not." (Van Dyke Decl., Ex. C (dkt. #52-3).) Based on that, an Elkhorn School District administrator reached out to Administrator Tadlock to determine whether Elkhorn should send the estimate and place S.W. on a waitlist or deny his application based on space. Tadlock responded that Elkhorn should send S.W.'s resident district an estimate, place him on the waitlist, and inform the family that he was on a waitlist and the timeframe for a decision.

In communicating this plan, Tadlock intended -- consistent with the district plan not to cap enrollment that year -- for S.W.'s application for open enrollment to be accepted, but that he would be placed on a waitlist for Lakeland. Nonetheless, the Elkhorn administrator prepared a letter dated May 20, 2014, stating that S.W.'s open enrollment application was denied based on § 118.51(4)(a)(4) but that he had placed on a waitlist for special education services. Tadlock signed that letter, although he represents that he did not intend for the school district to deny S.W.'s application. Consistent with Tadlock's stated intent, moreover, the District's entry into DPI's Open Enrollment Application Log reflects that S.W.'s application was accepted.

On November 20, 2014, upon learning that Elkhorn was named as a defendant for a denial in 2014, Tadlock reports being surprised because, in his view, the district had not denied anyone a spot in 2014. Only after the email exchange with his assistant, who

he asked to review S.W.'s application, does Tadlock report discovering the misunderstanding over which waitlist S.W.'s application belonged -- the one for the District as a whole versus one for Lakeland school specifically. The next day, Tadlock sent S.W.'s parents an email explaining the District's error and offering "to accept an open enrollment exception application, arrange for an IEP meeting to determine placement, and put in place the services needed." (Tadlock Decl., Ex. G (dkt. #49-7).) Counsel for plaintiff responded to Tadlock's email, explaining that "[b]ecause litigation was pending, it would be inappropriate for us to deal with Mr. Tadlock but I would be happy to talk with Elkhorn's counsel if Mr. Tadlock would have that attorney contact me." (McGrath Decl. (dkt. #104) ¶ 11.) S.W. did not enroll, and there was no further communication.

iv. S.B. and the Shorewood School District

Plaintiff S.B. lives in Milwaukee and was diagnosed with ADHD in 2010. On June 3, 2014, S.B.'s mother withdrew her consent for S.B. to receive all special education and related services in the district where he resides, although plaintiffs maintain that she made this decision because she was dissatisfied with the services S.B. received in his resident district. She then sought to open enroll S.B. into the Shorewood School District for the 2014-2015 school year.

On the application, his mother indicated that S.B. did not currently receive special education services and did not have an IEP. (Nicholas Decl., Ex. A (dkt. #67-1).) On May 27, 2014, S.B.'s open enrollment application was accepted for the 2014-15 school year by Shorewood.

On October 8, 2014, S.B.'s open enrollment acceptance at Shorewood was revoked because of his special education need. Wis. Stat. § 118.51(5)(a)(4). On December 17, 2014, DPI overturned Shorewood's revocation, specifically finding that S.B. "is no longer entitled to receive special education." (Nicholas Decl., Ex. C (dkt. #67-3).) Shorewood asserts that it has never refused to enroll S.B. since D.P.I.'s decision, and it remains willing to do so.

In particular, Shorewood maintains that on January 28, 2015, a Shorewood administrator called S.B.'s mother and left her a message about the process for registering and re-enrolling to attend school during the spring semester of 2015. In response, however, S.B.'s mother represents that she never received such a voicemail. To the contrary, she reports filling out a written form provided to her by DPI within a week of its December 17th decision, as well as following up with phone calls, but receiving no response until a May 11, 2015, letter sent to plaintiffs' counsel. (Pollard Decl., Ex. A (dkt. #69-1).)

Plaintiffs further contend that the proposed terms in that May 11th letter were not acceptable, because Shorewood purported to impose "conditions and burdens on S.B. that were not imposed on other students." (Pls.' Resp. to Shorewood's PFOFs (dkt. #96) ¶ 8.) In fact, the letter simply references D.P.I.'s December 17, 2015, decision and offers of enrollment without any "conditions." (Pollard Decl., Ex. A (dkt. #69-1).) Moreover, on August 6, 2015, Shorewood sent another letter to S.B.'s mother advising her that Shorewood remained willing to enroll S.B. for the 2015-16 school year. (Nicholas Decl.,

Ex. D (dkt. #67-4).) S.B.'s mother also did not respond to this offer, and S.B. attended a non-Shorewood school for the 2015-2016 school year.

v. Ca.R. and Ch.R. and the Greendale School District

Finally, sisters Ca.R. and Ch.R. reside in Milwaukee. Both have been diagnosed with autism. In 2014, their mother filed applications on their behalf to two school districts under the Open Enrollment Program, including defendant Greendale School District. Ch.R. applied to enroll in fifth grade, while Ca.R. applied to enroll in seventh grade. Both Ca.R.'s and Ch.R.'s applications also indicated that they received special education services and that each had IEPs in place.

For the 2014-15 school year, Greendale determined that there were open enrollment spaces available in grades four, eight, nine and twelve, but denied all applications for open enrollment into fifth and seventh grade. In a letter to their parents, the District explained that Ca.R. and Ch.R. were denied space both because there was no space in the regular education program for fifth and seventh grades, *and* because the District did not have space in the special education programs or related services required under the students' IEPs. (McHugh-Moore Decl., Exs. D, E (dkt. ##57-6, 57-7).)

OPINION

Plaintiffs bring claims under Title II of the ADA and Section 504 of the Rehabilitation Act. They also assert claims under 42 U.S.C. § 1983 for violations of the Equal Protection Clause of the Fourteenth Amendment. Pending before the court are

plaintiffs' motion for summary judgment on their ADA and Rehabilitation Act claims and defendants motion for summary judgment on all claims.

I. Proper Defendants

As an initial matter, defendants argue that they cannot be held liable for any of the violations under the claims as alleged. DPI and its Superintendent Evers contend that they cannot be held liable for the decisions of individual school districts under the open enrollment law. In particular, they argue that DPI's role is limited to administering the law as written. DPI does not process or review applications, and it has no authority to approve or deny applications; rather, its role is limited to deciding appeals, which involve whether a school board's decision was arbitrary or unreasonable.

In response, plaintiffs contend that the two state defendants can be liable for simply administering the law, as "state proxies" for the entities who enacted the law. *See Goodvine v. Gorske*, No. 06-C-0862, 2008 WL 269126, at *5 (E.D. Wis. Jan. 30, 2008) (explaining that the state agencies and officials who run those agencies stand in as "proxies of the state" in defending against ADA and Section 504 claims); *Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 303, 240 N.W.2d 610, 623 (1976) (actions challenging a Wisconsin state statute are appropriately brought against "the officer or agency charged with administering the statute"). Consistent with plaintiff's argument, the court agrees that DPI and Evers can be held liable, but only if plaintiffs are successful in demonstrating a facial, as opposed to individual, as-applied challenges to the statute, *or* the state defendants are involved in an appeal of the individual school district's denial.

Second, the school district defendants argue that they are simply following a state statute, so they cannot be held liable. Judge Crabb previously considered a similar challenge to another provision of the open enrollment law, one requiring the consideration of race in reviewing applications. *N.N. v. Madison Metro. Sch. Dist.*, 670 F. Supp. 2d 927 (W.D. Wis. 2009). In that case the defendant school district effectively conceded that the provision was unconstitutional in light of the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), holding that school districts violated the equal protection clause by using a student's race in determining placement at a particular school. Nonetheless, the court granted summary judgment to the school district, holding that it could not be held liable under § 1983 for instituting a policy *mandated* by state statute. *N.N.*, 670 F. Supp. 2d at 941.

In so holding, Judge Crabb described the standard of municipal liability when a state or federal policy is implicated: "a municipality cannot be liable under section 1983 for acts that it did under the *command* of state or federal law." *Id.* at 936 (citing *Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998)). This holding closely tracked the Seventh Circuit explanation in *Bethesda Lutheran* that:

> The plaintiff who wants a judgment against the municipality under that statute must be able to trace the action of the employees who actually injured him to a policy or other action of the municipality itself. When the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury.

154 F.3d at 718.

In *N.N.*, however, the challenged provision of the open enrollment law *mandated* rejection of an application of transfer into a non-resident application if it would increase racial imbalance in the resident school district. *N.N.*, 670 F. Supp. 2d at 930 (quoting Wis. Stat. § 118.51(7) ("The school board . . . *shall* reject . . . ." (emphasis added)).) Here, the challenged provision simply sets forth permissible criteria for rejecting applications but does not require the non-resident school board to reject applications on this basis or in a way that would violate federal anti-discrimination law. As such, the court finds *N.N.* distinguishable, and further finds that the discretion expressly extended to non-resident school districts in weighing the statutory factors for acceptance or rejection of applications by students with special education needs may open them up to municipal liability.

II. Title II ADA and Section 504 Rehabilitation Act Claims

A. Facial Challenge

Title II of the ADA prohibits discrimination in services furnished by public entities on the basis of disability. *See* 42 U.S.C. § 12131 *et seq.* Specifically, Title II provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Similarly, Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded

> from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

Consistent with this parallel language, the requirements of equal treatment under both acts are essentially the same, with the minor exception being that Section 504 of the Rehabilitation Act only applies to entities receiving federal funding. *See, e.g.*, *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) ("The Rehabilitation Act claim is functionally identical[.]"); *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 845 n.6 (7th Cir. 1999) ("We have held previously that the standards applicable to one act are applicable to the other. Title II of the ADA was modeled after § 504 of the Rehabilitation Act; the elements of claims under the two provisions are nearly identical, and precedent under one statute typically applies to the other.").[4] All defendants have admitted that they received federal funding. (*See* Pls.' PFOFs (dkt. #34) ¶ 32.) To prove a claim here under Title II or Section 504, therefore, a plaintiff must demonstrate: (1) she is a "qualified individual with a disability;" (2) she was excluded from benefits or services or otherwise discriminated against; and (3) such exclusion, denial of benefits or discrimination was because of her disability. *See Wagoner*, 778 F.3d at 592.

[4] From the plain language of the statutes, one *could* argue that there is another distinction: Section 504 prohibits exclusion or denial of benefits "solely by reason of" disability, whereas Title II prohibits exclusion or denial of benefits "by reason of" disability. *See Washington*, 181 F.3d at 845 n.6 ("Another difference is that the Rehabilitation Act requires that the exclusion be solely by reason of disability, while the ADA requires only that the exclusion be by reason of the disability."). Regardless of this difference in language, however, both claims require a showing of "because of" or "but for" causation.

Taking the most straightforward element out of order, there is no dispute with respect to the *second* that plaintiffs were excluded from participating in the open enrollment program. Plaintiffs anticipate an argument that the open enrollment law is not a program, but defendants do not pursue this defense, and for good reason. "Program" is defined broadly to encompass a wide range of actions on the part of public entities, and the term has specifically been applied in the educational setting. (*See* Pl.'s Opening Br. (dkt. #33) 18.) Moreover, at least under the ADA, the alleged violation need not be exclusion from a program; the Act also covers individuals "subjected to discrimination" more generally. *See Brewer v. Wis. Bd. of Bar Examiners*, No. 04-C-0694, 2006 WL 3469598, at *5 (E.D. Wis. Nov. 28, 2006) ("The language of the statute is disjunctive; it prohibits exclusion from participation, denial of benefits, *or* discrimination against be reason of disability.").

Instead, the parties' dispute plaintiffs' proof as to the other two elements of the claim. As for the *first*, Title II defines "qualified individual with a disability" as

> 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 (emphasis added). With the exception of plaintiff S.B. (the student with ADHD, whose parent withdrew the IEP), it appears that defendants do not dispute that the plaintiffs -- all diagnosed with autism -- have a disability. Instead, the focus of defendants' challenge is on whether plaintiffs are "qualified," and specifically whether

they meet "the essential eligibility requirements." Similarly, with respect to the *third* element, the parties dispute whether plaintiffs' open enrollment applications were denied because of their disability or because of a legitimate, non-discriminatory reason concerning the availability of space.

Plaintiffs contend that the sole eligibility requirement is that "the person be a student and that the student's resident school district offers the same type of program that the student seeks to attend in the non-resident school district." (Pl.'s Opening Br. (dkt. #33) 15 (citing Wis. Stat. § 118.51(2)).)[5] On the other hand, defendants contend that the eligibility requirements also encompass the non-resident district's availability of space, including space for children with special education needs. From this, defendants reason that they are not denying spots because the children are disabled, but rather because the districts do not have available special education space. Using defendants' logic, however, one could also argue that a person in a wheelchair is not denied access to a building because of her disability, but rather because the building lacks handicapped-accessible ramps.

Stated another way, the problem with defendants' argument is that the law could be read as contemplating two different, discrete types of space -- one for "general education" and one for "special education." As such, children with disabilities are treated differently because the availability of space is treated differently. As plaintiffs argue in

[5] In the "applicability" section, the requirement that the student's resident district must provide the same program as that in the non-resident district appears limited to "prekindergarten, 4-year-old kindergarten, or early childhood or school-operated child care program." Wis. Stat. § 118.51(2). Regardless, plaintiffs disavow any attempt to enroll in a program that is not available in their resident school districts.

reply, treating space for special education as an eligibility requirement could 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 enacted to prevent. *See* 28 C.F.R. § 35.130(b)(6) (prohibiting public agencies from establishing requirements for programs or activities "that subject qualified individuals with disabilities to discrimination on the basis of disability").

Accordingly, the court agrees with plaintiffs that categorizing children and making decisions on eligibility under Wisconsin's open enrollment law solely based on whether they have an IEP is problematic at best. The educational needs of children with IEPs vary broadly. For example, some children may spend *all* of their time in a general education population, with the only modification being extra time to take tests; while other children may spend most of their time in a general education classroom, with limited pull-out time for special instruction or therapy; still other children may, of course, require instruction wholly outside of a general education classroom for a significant portion of the school day, with more limited inclusion opportunities (for example, for music or art); of course, other children may attend a school that only serves children with disabilities. Here, the concept of separate space for children with IEPs necessarily generalizes across that broad array of children with disabilities, a problem that is present under both the ADA / Rehabilitation Act.

At the hearing, however, defendants (particularly counsel for the State and Evers) argued for an interpretation of the statute that requires the school districts to perform a more nuanced analysis of the availability of space for non-resident students. Under the

statute and accompanying regulations, counsel specifically explained that each school district is tasked with assessing the availability of space as it pertains to specific services or specialized teachers or other providers (*e.g.*, number of children that a hearing counselor or speech pathologist can serve, or the number of spots available in a specialized autism program). Under defendants' interpretation of the statute and accompanying regulations, therefore, space is not assessed based on broad generalizations about the educational needs of children with IEPs, rather, it based on a specific, practical assessment of the needs of the child and the capacity of the school district. Accepting this reasonable interpretation of the law to avoid a conflict with federal requirements, the question remains whether the Open Enrollment Law still violates the ADA and Rehabilitation Act.

To further their respective positions, the parties point to other education-related cases considering discrimination claims, but for various reasons, the facts of those cases do not fit the challenge presented here very well. Some cases concern a disabled student's request for an accommodation with respect to a program that on its face treats all students the same. *See, e.g.*, *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999) (holding that the disabled plaintiff's requested modifications to a medical school program were not reasonable modifications). Other cases involve challenges to programs only available to the disabled. *See, e.g.*, *Mallett v. Wis. Div. of Vocational Rehab.*, 130 F.3d 1245, 1257 (7th Cir. 1997) (rejecting plaintiff's Rehabilitation Act claim because the plaintiff could not show that a non-handicapped person "received the treatment denied to the 'otherwise qualified' handicapped").

Here, plaintiffs challenge a system that on its face treats children with IEPs differently. In the court's review, cases concerning whether a school district can treat disabled athletes differently than other athletes provide the closest analogy. In those cases, courts have affirmed differential treatment because it is tied to some legitimate reason separate from inappropriate generalizations about disabilities. *See, e.g.*, *McFadden v. Grasmick*, 485 F. Supp. 2d 642, 651 (D. Md. 2007) (wheelchair-bound plaintiff unlikely to prevail on the merits of challenge to be allowed to compete with non-wheelchair athletes); *Badgett ex rel. Badgett v. Ala. High Sch. Athletic Ass'n*, No. 2:07-CV-00572-KOB, 2007 WL 2461928, at *5 (N.D. Ala. May 3, 2007) (wheelchair bound student athlete's request to be allowed to compete with non-wheelchair student athletes did not constitute a reasonable modification under the ADA and Rehabilitation Act). In the context of high school athletics, for example, courts have upheld track programs that treat children competing in wheelchairs different than those not competing in wheelchairs. The courts found that the dual system made sense in light of safety and competitiveness concerns, and that the proposed modification -- upending that dual system -- would fundamentally alter the program. *Badgett*, 2007 WL 2461928, at *5-6.

Nevertheless, plaintiffs persist that a non-resident school district must evaluate eligibility and accept children without *any* regard to disability. For example, plaintiffs' counsel argued at the hearing that while there are two figurative doors into a school -- one for resident children and one for non-resident children -- a school is under the same obligation to educate disabled children outside of its district as it is required to educate children residing in its district. This argument, however, imposes an IDEA requirement

of a "free appropriate public education," 20 U.S.C. §§ 1400, 1412, on a non-resident school district. There is *no* support for this premise in the law. No doubt, if one of the plaintiffs were to move into a district that did not have available space or services to meet the needs of that child, the district would have to take the necessary steps -- regardless of whether the modifications to that school's space and services were reasonable -- to ensure that the requirements of IDEA are met. In contrast, the ADA and Rehabilitation Act do not require the *same* steps.[6] Instead, true to the laws at issue in this lawsuit, the defendants, as non-resident school districts, are required to "make reasonable modifications" to avoid "discrimination on the basis of disability," but are not required to take measures that would "fundamentally alter" the nature of the entity's programs. 28 C.F.R. § 35.130(b)(7).

Therefore, the court finds that: (1) that Wisconsin's Open Enrollment Law can be applied in such a way as to avoid generalizations about children with disabilities, divorced from actual educational service and space needs; and (2) consideration of the availability of space serves a legitimate, non-discriminatory purpose. For those reasons, the court also concludes that plaintiffs' facial challenge to Wisconsin's Open Enrollment Law, Wis. Stat. § 118.51, fails as a matter of law.[7]

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[6] Whether a disability-blind admission process -- like that embraced by the State of Minnesota -- would make sense from a policy perspective is another question, one which appears left to the Legislature, at least under current law.

[7] If school districts find it too taxing to assess available capacity and determine eligibility in a way that complies with the requirements of the ADA and Rehabilitation Act, the state could opt to simply do away with the open enrollment program for all students.

B. As Applied Challenges

Having rejected a facial challenge to § 118.51, the court must still consider whether any of the individual plaintiffs have put forth sufficient evidence to raise a genuine issue of material fact challenging an individual school district's treatment of his or her application under the open enrollment law. As set forth above, to prevail on an "as applied" challenge, a plaintiff must demonstrate that: (1) she is a "qualified individual with a disability;" (2) she was excluded from benefits or services or otherwise discriminated against; and (3) such exclusion, denial of benefits or discrimination was because of her disability. *See Wagoner*, 778 F.3d at 592. This inquiry necessarily encompasses whether each plaintiff's unique educational needs constituted a reasonable modification.

i. R.W.

As described above, the Paris School District rejected plaintiff R.W.'s application because it would have had to hire a part-time special education teacher and a part-time aide to work with him on a one-on-one basis, plus contract for occupational therapy services. Moreover, R.W.'s IEP concluded that he should be placed in a "kindergarten classroom that is collaboratively taught by a general education and special education teacher." (Gahart Decl., Ex. E (dkt. #77-5) 9.) Likely because of its relatively small size, the Paris School District does not appear to have had a collaborative classroom. Despite these additional demands on a small school district appearing to be quite burdensome, the record is not sufficiently developed to determine whether a reasonable fact finder could conclude that the modifications are not reasonable, either from a financial,

classroom or management perspective, or for some other reason. *See Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) ([T]he determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.'"). As such, the court concludes that plaintiff R.W.'s as-applied challenge should proceed to trial.

The next question is whether that trial should be to a jury or the bench. Plaintiffs made no jury demand, but defendant Paris School District did. If the only relief available is equitable, however, neither side has a right to a jury trial. *See Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 966 (7th Cir. 2004) ("There is no right to a jury where the only remedies sought (or available) are equitable."); Fed. R. Civ. P. 39(a)(2) ("The trial on all issues so demanded must be by jury unless . . . the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.").

Because Title II of the ADA and Section 504 of the Rehabilitation Act both provide for damages, there is no sovereign immunity bar to monetary damages. *See Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F. 3d 906, 912 (7th Cir. 2003). Plaintiffs acknowledge, however, that damages are only available if they demonstrate intentional discrimination. (Pls.' Reply (dkt. #91) 21 (citing *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 278 (7th Cir. 2007)).) Under both statutes, there is a circuit split as to what constitutes intentional discrimination, and the Seventh Circuit has yet to weigh in on this issue. Still, the Second, Third, Eighth, Ninth, Tenth and Eleventh

Circuits have all adopted a "deliberate indifference" standard, which the Ninth Circuit articulated as requiring "both knowledge that a harm to a federally protected right is substantially likely" and "a failure to act upon that likelihood." (Pls.' Reply (dkt. #91) 23 (quoting *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001)).) *See also* 7th Cir. Civil Jury Instructions § 7.14, *available at* http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_cir_civil_instructions.pdf (defining deliberate indifference in the Eighth Amendment context). In contrast, the First and Fifth Circuits require a showing of "discriminatory animus." (State Defs.' Opening Br. & Opp'n (dkt. #87) 47.)

The court need not guess as to which side the Seventh Circuit, or ultimately the Supreme Court, will come out on this split in authority, given that R.W. has no realistic claim to monetary damages under either standard. Certainly, there is nothing in the record to support a finding of discriminatory animus on the part of defendant the Paris School District. Admittedly, evaluating plaintiff's demand under the lower standard of deliberate indifference proves a closer question, but only *relatively* so, since the deliberate indifference standard is still a taxing one, requiring more than negligence. *See S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013) ("[D]eliberate indifference must be a 'deliberate choice, rather than negligence or bureaucratic inaction." (internal citation and quotation marks omitted)).

The record at summary judgment shows that the Paris School District treated R.W.'s application with care, initiating a process to secure an IEP for him *and* considering his educational needs in light of the available services and space configurations of the

one-school district. While Paris's apparent failure to consider explicitly whether implementing R.W.'s specific plan would prove a reasonable modification or whether its refusal to implement the plan might violate the ADA and Rehabilitation Act, no reasonable trier of fact could find on this record that Paris was deliberately indifferent to R.W.'s rights. Accordingly, even if R.W. is successful in demonstrating a violation of the ADA and Rehabilitation Act, his only available remedies are equitable in nature. Accordingly, R.W.'s claim will proceed to a trial to the bench.

ii. P.F.

While the letter rejecting P.F.'s application stated that his application was rejected because of a lack of space "in the special education or related services required in your child's individual education program (IEP)," the undisputed facts also establish that the application was rejected because P.F.'s *resident* district (the Racine Unified School District) rejected the transfer due to cost considerations. As such, a reasonable fact finder could not conclude that but for P.F.'s disability, defendant Muskego-Norway School District would have accepted his application. In other words, an intervening act by a non-party, the Racine School District, broke the causal link.

iii. S.W.

As for S.W., the undisputed facts demonstrate that his application was denied in error. Indeed, the school district's own, contemporaneous records show that it intended to accept all students, regardless of whether they had an IEP or not. As a result, no

reasonable jury could find that S.W.'s application was rejected because of his disability; rather, it was rejected because of an administrative error.[8]

iv. S.B.

As for S.B., other than his diagnosis of ADHD, plaintiff failed to put forth any evidence to demonstrate that he is even disabled and, therefore, entitled to the protections of the ADA and Rehabilitation Act.[9] To demonstrate that he is disabled, S.B. must show that he is substantially limited in a major life activity. 42 U.S.C. § 12102(1)(A). Case law is mixed as to whether individuals with ADHD are disabled, suggesting that consideration of an individual's specific limitations are necessary. *Compare Healy v. Nat'l Bd. of Osteopathic Med. Examiners, Inc.*, 870 F. Supp. 2d 607, 621 (S.D. Ind. 2012) (finding that ADHD diagnosis "does not substantially limit his abilities to read, learn, concentrate, and think, as compared to the general population"), *with Peters v. Univ. of Cincinnati Coll. of Med.*, No. 1:10-CV-906, 2012 WL 3878601, at *6-7 (S.D. Ohio Sept. 6, 2012) (finding plaintiff disabled due to ADD).

Here, S.B.'s mother simply avers that S.B. was diagnosed with ADHD, with no any description of how (nor how much) this diagnosis impacts his learning or life activities. If anything, the record reflects that S.B.'s ADHD diagnosis is *not* a disability.

[8] Even if there were *some* arguable factual dispute on the reason(s) for this administrative snafu, *no* reasonable jury could not find intentional discrimination on this record for purposes of assessing damages, and any equitable relief is moot in light of Elkhorn's repeated offers to enroll S.W.

[9] Plaintiff also challenges S.B.'s standing to bring this claim on the basis that his claim is moot because the denial was reversed on appeal. (Shorewood's Br. (dkt. #62) 3.) As described above, there appears to be a factual dispute as to whether Shorewood had adequately communicated S.B.'s acceptance. As such, the court will deny the motion to dismiss for lack of subject matter jurisdiction.

Specifically, his mother withdrew her consent for S.B. to receive special education and related services, and DPI concluded that S.B. is "no longer entitled to receive special education." (Nicholas Decl., Ex. C (dkt. #67-3).) On this record, the court concludes that a reasonable jury could not find that S.B. meets the threshold requirements of the ADA and Rehabilitation Act. *See Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) (describing summary judgment as the time when the party with the burden of proof at trial must "'put up or shut up,' when a party must show what evidence it has that would convince a trier of fact to accept its version of events") (quoting *Schnacht v. Wis. Dep't of Corr.*, 175 F.3d 497, 504 (7th Cir. 1999)).

v. Ca.R. and Ch.R.

As for sisters Ca.R. and Ch.R., the record demonstrates that they were denied enrollment because of a lack of space in their respective grades and not because of a disability. Specifically, the undisputed facts show that the Greendale School District determined it had *no* space available in the fifth and seventh grades well before Ca.R. and Ch.R. had even applied for open enrollment. As such, even though the rejection letter referenced the lack of space in the special education programs, the lack of overall space in the sisters' respective grades serves as an *independent* basis for rejecting their applications. As such, the court concludes that no reasonable jury could find that their respective applications would have been accepted but for their disabilities.

III. Equal Protection Claim

Plaintiffs do not move for summary judgment on their equal protection claim, but defendants do. First, defendants argue that plaintiffs' equal protection claims should be dismissed because the ADA and Rehabilitation Act claims are comprehensive and, therefore, § 1983 cannot be used "to expand or supplant the [Act's] comprehensive remedial scheme." *Sneed v. City of Harvey, Ill.*, No. 14-1125, 2015 WL 151715, at *3 n.1, 598 F. App'x 442, 446 n.1 (7th Cir. Jan. 13, 2015). Nevertheless, because the case law in support of this argument appears limited, this court is generally disinclined to bar constitutional claims to proceed in parallel to statutory clams (*e.g.*, equal protection claim based on race discrimination and Title VII). Regardless, the court need not fully resolve this basis for dismissal.

This leaves defendants' challenge to plaintiffs' equal protection claims on the merits. Defendants argue that plaintiffs are not similarly situated to non-disabled students, and the open enrollment law is rationally related to a legitimate government interest. *See United States v. Harris*, 197 F.3d 870, 876 (7th Cir. 1999) (applying rational basis review to claim premised on alleged disabilities); *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 774 (7th Cir. 2013) (applying rational basis review to education-related claims). In opposing defendants' motions for summary judgment on this claim, plaintiffs primarily rely on the fact that the program is cost neutral.

Beginning with the 2016-2017 academic year, however, the open enrollment program is no longer cost neutral, having capped the amount a nonresident school district can receive at $12,000. Even if the program were still cost neutral, moreover,

there are other intangible costs associated with a non-resident school district serving the needs of a disabled child. Allowing school districts to consider space and resource needs unique to a disabled child in determining whether to accept non-resident applications is rationally related to a legitimate government interest, namely the efficient management of the state's school districts. *See Srail v. Vill. of Lisle, Ill.*, 588 F.3d 940, 943 (7th Cir. 2009) (explaining that a plaintiff must demonstrate that the differential treatment was not reasonably related to a legitimate state interest to prove an equal protection violation). As such, plaintiffs' equal protection claims may not proceed.

ORDER

IT IS ORDERED that:

1) Plaintiffs' motion for summary judgment (dkt. #32) is DENIED.

2) Defendants Tony Evers and State of Wisconsin Department of Public Instruction's motion for summary judgment (dkt. #48) is GRANTED. The clerk of court is directed to enter judgment in favor of these state defendants and terminate them as parties in this case.

3) Defendant Elkhorn School District's motion for summary judgment (dkt. #45) is GRANTED. The clerk of court is directed to enter judgment in favor of Elkhorn School District and terminate it as a party in this case.

4) Defendant Greendale School District's motion for summary judgment (dkt. #55) is GRANTED. The clerk of court is directed to enter judgment in favor of Greendale School District and terminate it as a party in this case.

5) Defendant Shorewood School District's motion to dismiss for lack of jurisdiction, or for summary judgment dismissing plaintiffs' claims (dkt. #61) is GRANTED IN PART AND DENIED IN PART. The motion to dismiss is denied; the motion for summary judgment is granted. The clerk of court is directed to enter judgment in favor of Shorewood School District and terminate it as a party in this case.

6) Defendants Muskego-Norway School District and Paris School District's motion for summary judgment (dkt. #73) is GRANTED IN PART AND DENIED IN PART. The motion is granted as to claims asserted against Muskego-Norway. The clerk of court is directed to enter judgment in favor of Muskego-Norway School District and terminate it as a party in this case. The motion is also granted with respect to plaintiffs' Equal Protection claim and any claim for damages under the ADA and Rehabilitation Act asserted against the Paris School District. In all other respects, Paris's motion is denied.

7) With respect to plaintiff R.W.'s remaining claim for injunctive relief against defendant Paris School District, the court will hold a scheduling conference on October 11, 2017, at 10:00 a.m. to establish pretrial deadlines and set this case for an expedited bench trial in December 2017. Plaintiff's counsel shall initiate the call to the court.

Entered this 3rd day of October, 2017.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

☑

CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on December 11, 2017, 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.

s/ RICHARD M. ESENBERG

☐

CERTIFICATE OF SERVICE

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on _____, 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.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

counsel / party:	address:
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s/_____