

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

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

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

Case No. 14-CV-792

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

R.W., a minor, by E.W., his parent, and
E.W., in her individual capacity,

S.B., a minor, by N.B., his parent, and
N.B., in her individual capacity,

Plaintiffs,

vs.

TONY EVERS, in his official capacity
as Wisconsin Superintendent of Public Instruction,
STATE OF WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION,
ELKHORN AREA SCHOOL DISTRICT,
GREENDALE SCHOOL DISTRICT,
MUSKEGO-NORWAY SCHOOL DISTRICT,
PARIS J1 SCHOOL DISTRICT, and
SHOREWOOD SCHOOL DISTRICT,

Defendants.

**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS,
MUSKEGO-NORWAY SCHOOL DISTRICT and PARIS J1 SCHOOL DISTRICT
TO AMENDED COMPLAINT**

The Defendants, Muskego-Norway School District and Paris J1 School District, answer the Amended Complaint as follows:

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

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

PARTIES

3. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

4. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

5. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

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12. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

13. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

14. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

15. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

16. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

17. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

18. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

19. Admit.

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

21. Admit.

22. Admit.

23. Admit.

24. Admit.

25. Admit.

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

JURISDICTION AND VENUE

27. This paragraph is a statement of plaintiffs' purpose in bringing this lawsuit and legal conclusions, and does not require a response. To the extent that the statement requires a response, defendants deny and put the plaintiffs to their strict proof.

28. Admit.

29. Admit.

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

FACTUAL BACKGROUND

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

31. Deny and put the plaintiffs to their strict proof.

32. Deny and put the plaintiffs to their strict proof.

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

34. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

35. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

36. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

37. Deny that Wisconsin law permits discrimination against children with disabilities. Lack knowledge about any adverse impact on the plaintiffs by Wisconsin's Open Enrollment Law, therefore deny the same and put the plaintiffs to their strict proof.

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

38. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

39. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

40. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

41. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

42. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

43. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

44. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

45. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

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

46. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

47. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

48. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

49. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

50. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

51. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

52. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

53. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

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

54. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

55. Deny that P.F.'s application was denied solely because he was disabled. Deny that Muskego-Norway approved 55 open enrollment spaces, and affirmatively allege that

Muskego-Norway approved 50 open enrollment spaces. Admit that zero open enrollment spaces were available for children with disabilities.

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

57. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

58. Deny that the Open Enrollment Law permits school districts to discriminate against children with disabilities. Lack knowledge as to the remaining allegations the paragraph, therefore deny the same and put the plaintiffs to their strict proof.

59. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

R.W.'s and E.W.'s experience with Open Enrollment

60. Upon information and belief, admit that R.W. resides in the Kenosha Unified School District and that R.W. applied under the Open Enrollment Law for transfer to Paris J1 School District. Deny the remaining allegations of this paragraph, and put the plaintiffs to their strict proof.

61. Admit that R.W. and his brother applied for transfer to Paris School District for Kindergarten; admit that Paris is regarded as one of the top schools in Wisconsin and is a 2011 National Blue Ribbon School, but lack knowledge as to whether this was the reason behind the

Open Enrollment application. Lack knowledge concerning the remaining allegations of this paragraph; therefore deny the same and put the plaintiffs to their strict proof.

62. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

63. Denies that if Paris had earlier knowledge of R.W.'s autism it would have denied his application. Denies that Paris does not accept open enrollment applications from children with disabilities, and affirmatively alleges that Paris J1 School District determines available open enrollment seats for children requiring special education services in accordance with state and federal laws. Lack knowledge concerning the remaining allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

64. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

65. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

66. Lack knowledge concerning the precise date, but admit that Paris denied R.W.'s open enrollment application and accepted his brother's application. Deny that the denial was "because of" R.W.'s disability, and affirmatively allege that the denial was based on Paris J1 School District's ability to provide the services required in R.W.'s IEP in accordance with state and federal law.

67. Deny that it was impossible for E.W. to appeal, and affirmatively allege that E.W. and R.W. failed to exhaust administrative remedies. Upon information and belief, admit that E.W. enrolled R.W. in his resident Kenosha Unified School District.

68. Deny and put the plaintiffs to their strict proof.

69. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

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

70. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

71. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

72. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

73. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

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77. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

78. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

79. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

80. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

CLAIM FOR RELIEF

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

82. Admit the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendants deny and put the plaintiffs to their strict proof.

83. Deny that 42 USC § 12132 is accurately quoted. Admit that 42 USC § 12131 (A) is accurately quoted. However, the contents of the cited laws state legal conclusions not requiring a response. To the extent that a response is required concerning the contents of the cited laws, defendants deny and put the plaintiffs to their strict proof.

84. Admit the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendants deny and put the plaintiffs to their strict proof.

85. Admit the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendants deny and put the plaintiffs to their strict proof.

86. Admit the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendants deny and put the plaintiffs to their strict proof.

87. Admit the law is accurately quoted; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendants deny and put the plaintiffs to their strict proof.

88. Lack knowledge concerning the reference of the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

89. Admit the law is correctly cited; however, the content of the cited law states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited law, defendants deny and put the plaintiffs to their strict proof.

90. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

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

92. Deny the allegations of this paragraph and put the plaintiffs to their strict proof.

93. Admit that the case cited is accurately quoted; however, the content of the cited case states a legal conclusion not requiring a response. To the extent that a response is required concerning the content of the cited case, defendants deny and put the plaintiffs to their strict proof.

94. Lack knowledge concerning the allegations of this paragraph, therefore deny the same and put the plaintiffs to their strict proof.

95. Deny the allegations of this paragraph and put the plaintiffs to their strict proof.

96. The statements in this paragraph are conclusions of law that do not require response; to the extent that a response is required, the defendants deny and put the plaintiffs to their strict proof.

AFFIRMATIVE DEFENSES

Defendants, Muskego-Norway School District and Paris J1 School District, affirmatively allege, upon information and belief, and show to the Court as follows:

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

2. The manner in which Muskego-Norway and Paris J1 School Districts applied Wisconsin's Open Enrollment Law concerning P.F. and R.W., nonresident students, is rationally related to a legitimate state interest.

3. Muskego-Norway and Paris J1 School Districts' determination of special education spaces available in their schools is based on factors permitted by state and federal law.

4. At all times material, Muskego-Norway and Paris J1 School Districts acted with objective reasonableness and in compliance with applicable State law and are immune from liability if those laws are found to violate certain federal laws.

5. Muskego-Norway and Paris J1 School Districts did not at any time act with deliberate indifference or discriminatory intent.

6. Neither Muskego-Norway School District nor Paris J1 School District is a “person” as that term is defined for purposes of 42 USC § 1983 claims.

7. Neither P.F. nor R.W. is an “otherwise qualified individual” eligible for transfer to Muskego-Norway or Paris J1 School District under Wisconsin’s Open Enrollment Law.

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

9. Acceptance of R.W. as a transfer student to Paris J1 School District under the Open Enrollment Law would require substantial change to the programs offered by the School District.

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

11. Acceptance of R.W. as a transfer student to Paris J1 School District under the Open Enrollment Law would impose significant additional cost on the School District.

12. Neither P.F. nor R.W. was prevented from attending Muskego-Norway or Paris J1 School District, respectively, solely on the basis of his disability.

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

14. Plaintiffs failed to mitigate their damages.

15. Plaintiffs’, P.F. and A.F., claims against Muskego-Norway School District stemming from its denial of transfer under Open Enrollment are moot because P.F.’s transfer was

also denied by Racine Unified School District, and P.F. and A.F. did not exhaust administrative remedies available as to either denial.

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

17. Plaintiffs failed to state a claim upon which relief may be granted under Section 504 of the Rehabilitation Act, 29 USC § 794, as to Muskego-Norway or Paris J1 School Districts.

18. Plaintiffs failed to state a claim upon which relief may be granted under the Americans with Disabilities Act (ADA), as to Muskego-Norway or Paris J1 School Districts.

19. Plaintiffs failed to state a claim upon which relief may be granted under the Equal Protection Clause of the Fourteenth Amendment, as to Muskego-Norway or Paris J1 School Districts.

20. Plaintiffs failed to state a claim upon which relief may be granted under 42 USC § 1983, as to Muskego-Norway or Paris J1 School Districts.

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

22. Upon information and belief, the conduct of Muskego-Norway and Paris J1 School Districts, at all times material to this action, complied with statutes and regulations enacted by the State of Wisconsin and federal law. In the event it is determined that any provision of the law subject to this proceeding is invalid or unenforceable, no monetary award, including attorney's fees and costs, should be granted against Muskego-Norway or Paris J1 School Districts.

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

24. Muskego-Norway and Paris J1 School Districts reserve the right to assert any and all additional affirmative defenses.

WHEREFORE, Muskego-Norway School District and Paris J1 School District request that the Court grant judgment dismissing the Complaint of the Plaintiffs, upon the merits, together with the costs and disbursements of this action.

A TWELVE-PERSON JURY TRIAL IS HEREBY DEMANDED.

Dated this 13th day of March, 2015.

KASDORF, LEWIS & SWIETLIK, S.C.
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District and Paris J1 School District

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