No. 17-3266

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

P.F., a minor, by A.F., his parent, et al.,

Plaintiffs-Appellants,

v.

TONY EVERS, in his official capacity as Wisconsin Superintendent of Public Instruction, et al.,

Defendants-Appellees.

APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, THE HONORABLE WILLIAM M. CONLEY, PRESIDING

RESPONSE BRIEF OF DEFENDANTS-APPELLEES WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION AND STATE SUPERINTENDENT TONY EVERS

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JURISDICTIONAL STATEMENT

The jurisdictional statement of the plaintiffs-appellants is complete and correct.

STATEMENT OF THE ISSUES

1. Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, when applicable, prohibit disability discrimination that denies a qualified individual the benefits of a program. However, someone invoking those laws is not entitled to a fundamental alteration of a program. Here, Wisconsin's open enrollment law sometimes permits public school students to transfer outside of their local districts, but the core premise of the law is that students may not transfer when an outside district lacks preexisting capacity. Does the existing-capacity transfer law violate Title II and Section 504?

The district court answered no.

This Court should answer no.

2. Where a violation is found, Title II and Section 504 permit damages for intentional discrimination. Here, the Wisconsin Department of Public Instruction simply administers the open enrollment law as written and instructs local districts to make decisions based on the actual needs of students and capacity of a district, not based on the existence of a disability.

DPI runs no school district. Would Plaintiffs be entitled to damages against DPI if they could otherwise state a Title II or Section 504 claim?

The district court did not need to reach this question and did not.

If this Court reaches this question, it should answer no.

INTRODUCTION

Wisconsin's open enrollment law sometimes allows students to transfer to a different public school, outside their resident districts—*if* that outside district has existing extra capacity for that student. In all cases, students remain entitled to services in their resident districts, something not at issue in this lawsuit. The issue here relates only to the limited state-law-created exception to the rule.

Under the open enrollment law, the core analysis is the same regardless whether the student has a disability. The question is always whether the nonresident district has the capacity for a particular student. Some students require nothing more than a seat in a classroom; others require daylong one-on-one instruction in a separate classroom with a specially-trained teacher; others fall somewhere in between. The open enrollment transfer program simply permits an outside district to consider what capacity is demanded by a particular transfer request. It does not violate prohibitions on discrimination in Title II of the ADA or the parallel restrictions in Section 504 of the Rehabilitation Act.

Plaintiffs' argument to the contrary depends on attributing something to the transfer law that it does not do: that the law tells districts they may deny transfer simply because a student, in some sense, has a disability. That is not the case. The statute and evidence show that, under the law, "space is not assessed based on broad generalizations" about the educational needs of children with disabilities; "rather, it is based on a specific, practical assessment of the needs of the child and the capacity of the school district." (Dkt. 132:20; P. App. 120.) If a district were to act otherwise—denying transfer without considering the capacity needs of a particular student—then that district would violate the open enrollment law.

STATEMENT OF THE CASE

Several students and their parents (Plaintiffs) brought suit against public school districts, and also the State Superintendent of Public Instruction Tony Evers, in his official capacity, and the Wisconsin Department of Public Instruction (collectively, DPI). (Dkt. 20:6.) DPI was sued for purposes of challenging a portion of Wisconsin's open enrollment law, Wis. Stat. § 118.51, on its face. (*See* Dkt. 91:9.) The portion at issue is found in Wis. Stat. § 118.51(5)(a), which governs "nonresident school district acceptance criteria."

This brief addresses the challenge directed at DPI that attacks the law on its face. DPI does not operate the defendant school districts, which are represented by separate counsel.

I. Wisconsin's open enrollment law and related laws.

A. State and federal law related to public education and services for students with disabilities.

To help show how open enrollment fits into public education, the following summarizes some aspects of the framework. The default structure for public education is that students are entitled to a free public education and individualized services for a disability in the public school district where the student resides.

Wisconsin law entitles students to attend public school without charge in the district where they reside; state law also forbids discrimination based on disability. *See* Wis. Const. art. X, § 3 (public education by "district"); Wis. Stat. § 118.13 (disability discrimination prohibited). Wisconsin law provides a child with a disability a "free appropriate public education": if needed, districts must provide special education and related services at public expense that conform to a student's "[i]ndividualized education program." Wis. Stat. §§ 115.76(7), (8), 115.77(1m)(b).

An individualized education program is commonly referred to as an IEP. It is a customized document for a student with a disability who requires aid

related to "academic achievement and functional performance." Wis. Stat. §§ 115.76(9), 115.787(2)(a). The IEP must include the "special education and related services" or "program modifications or supports" that will be provided to the student, and "[a]n explanation of the extent to which the child will not participate with nondisabled children in regular classes." Wis. Stat. § 115.787(2)(c), (d). The IEP team developing the document must consider behavioral interventions, language and communication needs, visual impairment, and assistive technology needs, among others. Wis. Stat. § 115.787(3); *see also* Wis. Admin. Code § PI 11.36 (further detail on areas of impairment).

By way of example, an IEP in the record assesses the student's speech, language, and occupational therapy needs (among others), states goals and how to achieve improvement, and lists specific types of special education services and their duration and frequency. (Dkt. 76-3:2–3, 18–19.) Among other things, that student's IEP requires "[s]peech [t]herapy" at "2 (20 min.)/week" in a separate classroom and "1:1 and/or small group instruction" outside of a general education classroom for each academic subject. (Dkt. 76-3:18–19.)

By default, "the school district in which the child with a disability resides" is the "[l]ocal educational agency" required to provide the needed services, unless that student transfers districts. Wis. Stat. §§ 115.76(10), 115.77.

The state-law provisions reflect federal law. The federal Individuals with Disabilities Education Act (IDEA) requires that resident districts provide a "free appropriate public education." *See* 20 U.S.C. §§ 1400, 1412(a)(1). "States must implement the IDEA's requirement by developing 'individualized education programs' ('IEPs') for disabled children, and the IDEA describes in detail what IEPs should contain and how they are to be developed." *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 529 (7th Cir. 2014); 20 U.S.C. § 1414(d). The IDEA defines "disability" for purposes of IEPs more narrowly than Section 504 defines "disability." *CTL ex rel. Trebatoski*, 743 F.3d at 529.

State and federal laws also reflect that a student with an IEP may, or may not, require space outside of a regular classroom. *See*, *e.g.*, 20 U.S.C. § 1414(d)(1)(A)(i)(V) (an IEP includes "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class"); Wis. Admin. Code § PI 11.35(3)(b) (the IEP evaluation considers "[m]odifications, if any, that can be made in the regular education program").[1]

[1] State and federal laws also reflect a principle called "mainstreaming" that directs schools to educate students with disabilities alongside those without disabilities, if feasible. *See*, *e.g.*, *Beth B. v. Van Clay*, 282 F.3d 493, 498 (7th Cir. 2002); Wis. Stat. §§ 115.787(2)(c)3., 115.782(2)(a)1.; Wis. Admin. Code § PI 11.35(3)(b).

B. Wisconsin's open enrollment law.

Wisconsin's open enrollment law creates a limited exception to the default rule of attending public school where a student lives. *See State ex rel. Sch. Dist. Bd. v. Thayer*, 74 Wis. 48, 41 N.W. 1014, 1017 (1889) (free public education is based on district of residence). It allows a student to attend a public school in an outside district and generally applies to grades from kindergarten to twelve (but sometimes covers prekindergarten and the like). Wis. Stat. § 118.51(2). The district in which a student resides is called a "resident" district; the district to which a student wishes to transfer is the "nonresident" district. Wis. Stat. § 118.51(1).

The mechanism is as follows. At the January meeting of the school board, and before accepting open enrollment applications, school districts determine how much "space" is available in both regular classrooms and special education services. Wis. Stat. § 118.51(5)(a)1. The space determination may consider "class size limits, pupil-teacher ratios, or enrollment projections established by the nonresident school board." Wis. Stat. § 118.51(5)(a)1. These are "permissible criteria" that a district "may" establish if it wishes to potentially limit transfers; however, the district may elect to accept all applications by making no space determination. Wis. Stat. § 118.51(4)(a)2., (5)(a).

To illustrate, regular education spaces are designated by grade level based on factors such as "class size limits, pupil-teacher ratios, or enrollment projections." Wis. Stat. § 118.51(5)(a)1. Districts often calculate capacity based on a maximum average class size for a grade, multiplied by the number of classes or full-time equivalent staff for the fall, and then subtract projected fall enrollment. (Dkt. 59:5 ¶ 22.)

Likewise, if a district intends to make determinations based on space in special education classrooms or services, then it also must use criteria like "class size limits, pupil-teacher ratios, or enrollment projections" applied to special education classes and related services. Wis. Stat. § 118.51(5)(a)1., 4. As the administrative code reiterates, "special education spaces" must be determined "by program or services." Wis. Admin. Code § PI 36.06(5)(a); (*see* Dkt. 59:5–6 ¶¶ 23–26). Thus, for example, space in speech and language therapy may be determined by taking the maximum caseload for the district's therapists, multiplying that by the total full time equivalent therapists, and subtracting the projected caseload for the fall. (Dkt. 59:5–6 ¶ 25.)

After those calculations are complete, students may submit applications to up to three nonresident districts between February and April to seek transfer for the following fall. Wis. Stat. § 118.51(3)(a)1. For students who apply, the resident district sends the nonresident district a copy of the IEP developed, if any, for that student. Wis. Stat. § 118.51(3)(a)1m.

After the application process is complete, on May 1, the nonresident district begins comparing the capacity limits it calculated in January to the applications it has received and determines if a given student may transfer. Wis. Stat. § 118.51(3)(a)2. For a student with an IEP, the capacity analysis may include that student's IEP to the extent it requires capacity in other class settings. The district asks:

> 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.[2]

Applicants are notified whether they may transfer by the first week of June. Wis. Stat. § 118.51(3)(a)3. Districts may create waiting lists for students initially denied transfer. Wis. Stat. § 118.51(5)(d). In addition, after the initial June determinations, districts may open up additional spaces if

[2] Taking special education capacity into account is not unique to Wisconsin. Although not exhaustive, examples include the Iowa open enrollment statute, which provides that "the request to transfer to the other district shall only be granted if . . . the enrollment of the child in the receiving district's program would not cause the size of the class in that special education instructional program in the receiving district to exceed the maximum class size." Iowa Code § 282.18(8). Nebraska's code states that, when deciding transfer applications, "[s]tandards may include the capacity of a program, class, grade level, or school building or the availability of appropriate special education programs operated by the option school district." Neb. Rev. Stat. § 79-238(1). And Ohio's statutes provide that "a board may refuse to admit a student receiving services under Chapter 3323 of the Revised Code, if the services described in the student's IEP are not available in the district's schools." Ohio Rev. Code § 3313.98(C)(2).

they become available: for example, if a parent notifies the nonresident district that her accepted pupil will not be attending; or else if the "school board determines that additional spaces have become available since its determination at the January board meeting." Wis. Admin. Code § PI 36.06(5)(d)1., 3.; (*see generally* Dkt. 59 (describing process)).

Although not all students are accepted for transfer (with or without an IEP), students with IEPs usually are. (*See* Dkt. 41-1.) For example, in 2013–14, nonresident schools approved transfer of 3,718 students with IEPs or related documentation out of 5,822 applicants, which was 63.86% of those who applied; in the same year, about 71% of students without IEPs were approved by nonresident schools. (Dkt. 41-1 ("SPED" and "NONSPED" columns for 2013–14 at "Nonresident" and "% Approved").) Of the 2,104 students denied, 760 were denied for reasons unrelated to their IEPs' requirements and an additional 317 were denied for multiple reasons, leaving 1,027 (or 17.6% of the applicants) who were denied only because of a lack of space in a special education service. (Dkt. 41-1 ("SPED" column for 2013–14 at "NONSPED Reasons Only," "SPED and NONSPED Reasons," and "SPED Reasons Only").)

C. Open enrollment cost-shifting.

The open enrollment law also contains a cost-shifting mechanism, which has changed over time. At the times underlying Plaintiffs' claims, the

nonresident district would bill the resident district for the cost of the pupil's special education and related services specific to the student, but not including averaged or prorated costs. Wis. Stat. § 118.51(17) (2013–14); (Dkt. 60:3 ¶ 15). Under this previous regime, resident schools could reject a transfer based on an "[u]ndue financial burden" to the resident district. Wis. Stat. § 118.51(12)(b) (2013–14).

That mechanism came into play as to Plaintiff P.F. A resident school (non-defendant Racine Unified School District) rejected P.F.'s transfer application to defendant Muskego-Norway based on financial burden. (Dkt. 132:26.) However, there is no claim in this case about the undue-financial-burden statutory mechanism.

The current open enrollment law treats cost shifting differently. There is now a default amount shifted from the resident to the nonresident district. For example, for the 2016–17 school year, the default was $12,000 per transferring pupil. Wis. Stat. § 118.51(17)(b)2.a. The resident district no longer has the ability to stop a transfer based on undue financial burden, as that subsection was repealed. 2015 Wis. Act 55, § 3306t.

II. DPI's administration of the open enrollment law.

DPI administers the open enrollment law on the state level, but only in limited ways. The calculations and decisions about capacity and whether there is room for a particular student are made on the local school district

level. Wis. Stat. § 118.51(4), (5); (Dkt. 59:7 ¶¶ 34–36). Neither DPI nor any other state entity runs the public school districts. Rather, DPI has three main tasks: it creates application forms, issues guidance, and hears administrative appeals.[3]

First, DPI creates the open enrollment application forms. The form has spaces for general student information, transfer requests, and a checkbox for whether the student has an IEP. Wis. Stat. § 118.51(15)(a); (Dkt. 59-1:3).

Second, DPI provides training and guidance to districts and families. Wis. Stat. § 118.51(15)(b). That guidance states that "a student may not be denied open enrollment based on the student's disability" (emphasis omitted); "[t]he application may only be denied based on the availability of or space in the special education or related services required in the student's IEP." (Dkt. 59-4:2; *see* Dkt. 59:8–10 ¶¶ 45–50.) The guidance also states that "[t]he number of special education spaces is designated by program or service" and, by way of example, explains that "if a kindergarten pupil needs speech and language therapy, the board must consider whether there is space for the pupil in both kindergarten and in the speech and language program." (Dkt. 59-5:3.)

[3] DPI also has data-collection and aid-adjustment duties. *See* Wis. Stat. § 118.51(15)(c), (16).

Third, DPI has authority to hear administrative appeals from denials of transfer applications, if a student chooses to file an appeal. Wis. Stat. § 118.51(9). DPI's statutory authority is limited to reviewing whether, based on the administrative record provided, the denial was "arbitrary or unreasonable" under state law. *Id*. Thus, if an appeal is filed, DPI overturns a nonresident district's denial if the record supports that the denial was based on a student having a disability, rather than on capacity for that student's needed services in her IEP. (Dkt. 59:8 ¶ 41.) DPI otherwise lacks authority to enforce the open enrollment law, and lacks any authority to enforce the ADA or Rehabilitation Act. (Dkt. 59:7–8 ¶¶ 36–42.) Judicial review of DPI's administrative decisions is available in state court. Wis. Stat. § 227.52–.53 (judicial review); (Dkt. 59-9:6 (appeal rights)).

Regarding the three Plaintiff students P.F., R.W., and S.B. and the denials by Defendants Muskego-Norway, Paris J1, and Shorewood, DPI reviewed only one decision administratively—regarding S.B.—and DPI ruled in favor of S.B. DPI had no involvement in P.F.'s denial by Muskego-Norway School District[4] or R.W.'s denial by Paris J1 School District. Neither student

[4] P.F. did challenge a different, non-defendant school district's decision administratively. (Dkt. 59:10 ¶ 53.) DPI sustained that denial based on the administrative record that showed that the district (Union Grove J1) had "reviewed the pupil's IEP to determine whether the specific special education and related services the pupil needs are available in the district." (Dkt. 59-9:4.) P.F. did not seek review of that decision in state court, or sue Union Grove here. (Dkt. 110:28 ¶ 51.)

challenged those denials administratively. (Dkt. 59:11 ¶ 62.) DPI has thus rendered no decision on whether the denials were proper under the open enrollment law.

As to S.B.'s denial by Shorewood, S.B. did appeal. DPI reversed Shorewood's denial because S.B.'s parent revoked consent for special education services. (Dkt. 59:11 ¶ 61; 59-10.) Thus, the only question was whether Shorewood had sufficient capacity in its regular education classroom, and it did. (Dkt. 59-10:7.)

III. Litigation history.

In an amended complaint, six students and their parents alleged that the open enrollment law was invalid under the ADA, Rehabilitation Act, and equal protection principles to the extent that Wis. Stat. § 118.51(5)(a)4. allegedly "permits school districts to deny the open enrollment applications of children with disabilities, solely on the basis that they have a disability." (Dkt. 20:8 ¶ 32.) Plaintiffs also named five school districts as defendants, all of which had allegedly denied open enrollment applications as nonresident districts. (Dkt. 20:6–7.)

The parties filed cross-motions for summary judgment. (*See*, *e.g.*, Dkt. 48; 50–51.) The district court granted judgment to DPI on all claims and to all but one district, and that remaining claim was later dismissed by stipulation. (Dkt. 132; 134; P. App. 130–31.) As to the ADA and Rehabilitation Act claims

against DPI, the court held: "(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." (Dkt. 132:22; P. App. 122.)

The court entered final judgement on all claims. (Dkt. 136.) Three students (P.F., R.W., and S.B.) and their parents appeal the dismissal of the ADA and Rehabilitation Act claims. (Dkt. 137; 7th Cir. Dkt. 17.)

SUMMARY OF THE ARGUMENT

Plaintiffs seek something that Title II of the ADA and Section 504 of the Rehabilitation Act do not offer. They propose a state-law-based transfer program that does not take their special education capacity needs into account. But Wisconsin's open enrollment law is an existing capacity law: it allows a student to attend public school where she does not live, but only if that nonresident district has extra space for her. It never requires creating new capacity for a student who lives somewhere else.

Discrimination claims under the ADA and Rehabilitation Act do not address that scenario. They do not mandate new or different state programs, but rather have the narrower aim of prohibiting disability discrimination in existing ones. The elements further bear that out. Under Plaintiffs' legal theory, they are not qualified for the program's essential eligibility

requirement: existing capacity. They also do not meet the discrimination element because open enrollment does not turn on generalizations about the disabled; it may have no impact at all on some students with disabilities because it is only about capacity. And, in any event, what Plaintiffs propose runs afoul of the ADA's other limit. They seek a new state law, one without a consideration of documented space needs, but that would make the ADA fundamentally alter a law, something it does not do.

Lastly, even if they otherwise could state a claim, Plaintiffs present no colorable damages theory against DPI. That would require evidence of intentional discrimination, but Plaintiffs ultimately point to nothing more than the law itself, which evinces no intentional discrimination.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *Ball v. Kotter*, 723 F.3d 813, 821 (7th Cir. 2013).

ARGUMENT

I. Plaintiffs state no claim under Title II of the ADA, or Section 504 the Rehabilitation Act, against DPI.

Plaintiffs' discrimination claims under Title II of the ADA, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), contain

elements and standards that are "functionally identical."[5] *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015). Here, references to the ADA are meant as references to both laws, and vice versa.

Under the ADA's Title II, a plaintiff must prove three elements: (1) "that he is a 'qualified individual with a disability,' [2] that he was denied 'the benefits of the services, programs, or activities of a public entity' or otherwise subjected to discrimination by such an entity, and [3] that the denial or discrimination was 'by reason of' his disability." *Id.* (citation omitted); *see Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783–84 (7th Cir. 2002) (plaintiff's burden). Even if a plaintiff meets the three requirements, a claim fails if it "would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i); *see also Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (same).

A. Plaintiffs' legal theory is incompatible with the general principles governing ADA Title II claims.

As discussed below, Plaintiffs' claims fail no matter how they are analyzed under the elements. There also is an overarching flaw. They ask for a different state-law-based program based on a different concept—one that ignores existing capacity in nonresident districts for their documented needs. The ADA is not a vehicle for that kind of request.

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[5] For the Rehabilitation Act to apply, the relevant entity must accept federal funds; there is no dispute that DPI does. *Wagoner*, 778 F.3d at 592.

"States must adhere to the ADA's nondiscrimination requirement *with regard to the services they in fact provide*," but the nondiscrimination provisions do not require "a certain level of benefits to individuals with disabilities." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999) (emphasis added) (citations omitted). Similarly, the Rehabilitation Act "does not require the State to alter [the] definition of the benefit being offered simply to meet the reality that the handicapped have greater . . . needs," nor does it "guarantee . . . equal results." *Alexander v. Choate*, 469 U.S. 287, 303–04 (1985).

To illustrate, *Olmstead* addressed whether the ADA's antidiscrimination mandate would require placement of a person with mental disabilities in a community setting instead of an institution. *Olmstead*, 527 U.S. at 587, 593–94. The Court held that, because the state *already had* a non-institutional option of community-based treatment, and because the plaintiffs were qualified for non-institutional care, the ADA required the state to provide that placement (unless it was a fundamental alteration to the state's program). *Id.* at 602. Notably, however, the Court made clear that this result turned on the fact that the plaintiffs were qualified for "services [the state] in fact provide[s]," as opposed to the state having to create new benefits or programs that did not already exist. *Id.* at 603 n.14. Put differently, where "[a]ppellees want [a state] to provide a new benefit," the claims

fails: "*Olmstead* reaffirms that the ADA does not mandate the provision of new benefits." *Rodriguez v. City of New York*, 197 F.3d 611, 619 (2d Cir. 1999).

Similarly, the Supreme Court held in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), that the antidiscrimination aspect of the Rehabilitation Act does not generally impose affirmative obligations to create new programs. The Court upheld a decision excluding a plaintiff with a serious hearing disability who sought training as a nurse, where the disability was sufficiently severe that the applicant could not realize the benefits of the clinical portion of the program. *See id.* at 400–02, 409–10. The Court explained that the law reflects "a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." *Id.* at 410.

Applying those principles in *Urban by Urban v. Jefferson County School District R-1*, 89 F.3d 720 (10th Cir. 1996), the Tenth Circuit observed that "courts in other circuits have held that section 504 does not require school districts to modify school programs in order to ensure neighborhood placements" when those students otherwise have access to services. *Id.* at 728. The court held that a neighborhood school did not need to make

modifications when "that child is already receiving educational benefits in another environment." *Id.* at 728.

The principles in these cases make clear that ADA discrimination claims have limits. Other federal laws, not at issue here, more generally govern the extent of access to special education. As this Court explained, "the Rehabilitation Act is broader than the EAHCA [the precursor to the Individuals with Disabilities Act, or IDEA] in the range of federally-funded activities it reaches, but narrower in the kind of actions it regulates." *Timms v. Metro. Sch. Dist. of Wabash Cty.*, 722 F.2d 1310, 1317 (7th Cir. 1983). "[S]ection 504 is prohibitory, forbidding exclusions from federally-funded programs on the basis of handicap, rather than mandatory, creating affirmative obligations. The EAHCA, by contrast, because of its focus on appropriate education, imposes affirmative duties regarding the content of the programs that must be provided to the handicapped." *Id.* at 1317–18 (citation omitted).

Here, the open enrollment law does something specific. It asks whether there is "space" (i.e. capacity) for a student in a nonresident district. That includes whether there is space for "the special education or related services described in the child's individualized education program [IEP]." Wis. Stat. § 118.51(5)(a)4. That is a term of art: an IEP is a tailored program for each eligible student that specifically explains whether that student "will not

participate with nondisabled children in regular classes," to what extent, and with regard to what (for example, regarding a visual impairment or special services related to autism). Wis. Stat. § 115.787(2)(c), (d), (3); Wis. Admin. Code § PI 11.36. Armed with each transfer candidate's IEP, the statute instructs a district to determine whether there is capacity for additional "services" required by "the child's [IEP]" based on factors like "class size limits, pupil-teacher ratios or enrollment projections." Wis. Stat. § 118.51(5)(a)4. Just as the IEP is child and service-area specific, so is that capacity analysis—for example, considering capacity in a speech and language therapy class. *See id.*; (*see also* Dkt. 59:5–6 ¶¶ 23–25). If there is capacity, and only if there is capacity, then a child is permitted to attend a school district outside of the one in which she lives.

On the other hand, Plaintiffs' approach sets aside capacity. They thus propose a type of program that Wisconsin does not "in fact provide." *See Olmstead*, 527 U.S. at 603 n.14.

Wisconsin already provides what federal law requires. Plaintiffs' resident school districts must provide them with special education and related

services stated in their IEPs.[6] *See*, *e.g.*, Wis. Stat. §§ 115.76(10), 115.77. If Plaintiffs believe their local districts do not follow these or the related federal laws, then there are remedies available against districts, both administrative and in court. *See*, *e.g.*, *Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603 (7th Cir. 2004); Wis. Stat. § 115.80(1)–(7).

None of that is at issue here. Here, rather, the open enrollment program has a narrow capacity-based mechanism. And it does not shut out students with IEPs; it allows for transfer more often than not. (Dkt. 41-1.) Plaintiffs' desire for a different transfer program states no ADA claim.

B. In particular, Plaintiffs' claim fails under the "otherwise qualified individual" element.

The specific elements confirm that Plaintiffs state no ADA claim. They cannot meet the first one: being a "qualified individual with a disability." The term means not only that a plaintiff is disabled but also that she is "qualified" in the sense that she can meet "essential eligibility" requirements of a program, despite a disability. A qualified individual 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*

[6] Plaintiffs note a "frequently asked questions" document related to charter schools. (Appellants' Br. 14.) They do not, however, explain how general rules that may apply to charter schools are relevant here. As a general matter, charter schools are not capacity-based transfer programs, and so how they might generally treat IEPs is not relevant.

> *requirements for* the receipt of services or *the participation in programs* or activities provided by a public entity.

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

"[E]ssential" means requirements "that bear more than a marginal relationship to the [program] at issue." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 462 (4th Cir. 2012) (citation omitted). When considering whether someone meets these requirements, this Court has recognized that federal law "forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap." *Anderson v. Univ. of Wis.*, 841 F.2d 737, 740 (7th Cir. 1988). "[A]lthough a disability is not a permissible ground for assuming an inability to function in a particular context, the disability is not thrown out when considering if the person is qualified for the position sought." *Knapp v. Nw. Univ.*, 101 F.3d 473, 482 (7th Cir. 1996).

For example, the Supreme Court has found that a nursing student seeking a change that would include "full-time, personal supervision whenever she attended patients and elimination of all clinical courses" affected "the essential nature of the college's nursing program" and, thus, did not state a proper ADA claim. *Alexander*, 469 U.S. at 300 (summarizing the Supreme Court's holding in *Davis*). Likewise, the Ninth Circuit has found that learning disabled students' request to "rearrange their clerkship

schedule" was not covered because it got at something essential to the educational program. *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1049 (9th Cir. 1999).

Also notable is this Court's *Mallett v. Wisconsin Division of Vocational Rehabilitation*, 130 F.3d 1245 (7th Cir. 1997). There, the Section 504 discrimination claim was premised on a denial of benefits allegedly guaranteed by a different section of the Rehabilitation Act, related to providing vocational rehabilitation services. *Id.* at 1247. This Court explained that the plaintiff was not "qualified" for purposes of a discrimination claim because "[a]n otherwise qualified person is one who is able to meet all of a program's requirements *in spite of* his handicap." *Id.* at 1257 (citation omitted). The discrimination provision did not apply because the plaintiff "would not have been eligible to receive any rehabilitative services in the absence of his handicap," and "[w]ithout a showing that the non-handicapped received the treatment denied to the 'otherwise qualified' handicapped, the appellant[ ] cannot assert that a violation of section 504 has occurred." *Id.* at 1257 (alteration in original) (citation omitted).

Under these standards, Plaintiffs do not meet the "essential eligibility requirements" of Wisconsin's open enrollment program.[7]

[7] This assumes that Plaintiffs are individuals "with a disability," as would be required. *See* 42 U.S.C. § 12131(2).

First, Plaintiffs' disabilities are related to what they request—expanding capacity at a nonresident district—and so it is proper for a law to consider the impacts of the disability. *See Anderson*, 841 F.2d at 740; *Knapp*, 101 F.3d at 482. Other students open enroll based on existing capacity for regular classroom seats. What those other students receive is an existing seat in a regular classroom and nothing more. Plaintiffs have not asked to transfer *without* special education classroom services—although parents may revoke consent for IEP services and make that request (as S.B.'s parent did). (Dkt. 59:10.) Rather, their proposal is intertwined with their assertion of rights to disability-related services. Their claim fails like in *Mallet*.

Second, and relatedly, instead of meeting the "essential eligibility requirement" of the law, Plaintiffs seek to nullify it. That turns the essential-eligibility inquiry on its head. Under the open enrollment law, existing capacity is not only an essential requirement but it is the requirement upon which the law turns. Because Plaintiffs do not, by their own admissions, qualify based on existing space, their claim fails under the "qualified individual" element.[8]

[8] In addition to these general reasons, Plaintiff S.B. would not be "qualified" because her parent withdrew consent for her services (Dkt. 59:10), meaning she would no longer fall under the challenged subsection.

C. Plaintiffs' claim also fails because they are not denied participation in open enrollment based on the fact of a disability.

Plaintiffs also cannot meet another required element of their claim: that denials under the open enrollment law are "'by reason of' his disability." *Wagoner*, 778 F.3d at 592.[9] Where, as here, Plaintiffs rely on evidence of a disparate impact—that "nondisabled students were treated more favorably"—the claim is one of indirect disability discrimination.[10] *Novak v. Bd. of Trs. of S. Ill. Univ.*, 777 F.3d 966, 974 (7th Cir. 2015); (*see* Dkt. 33:23 & n.11; 41-1). Those claims fail if a defendant can "articulate a legitimate, non-discriminatory reason for any alleged adverse action toward the plaintiff." *Novak*, 777 F.3d at 974.

Consistent with those principles, the district court observed that the ADA was not violated where, as here, alleged differential treatment was "tied to some legitimate reason separate from inappropriate generalizations about disabilities." (Dkt. 132:21; P. App. 121.) By way of example, the district court

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[9] 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." *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 845 n.6 (7th Cir. 1999).

[10] Plaintiffs assert at certain points that the Legislature, by choosing to pass the law at all, intentionally discriminated. (Appellants' Br. 35–36.) However, as discussed below in the damages context, Plaintiffs point to no evidence of intentional discrimination on the part of the State or DPI, which simply passed and administer a law of general application that turns on existing capacity.

noted athletics cases like *McFadden v. Grasmick*, 485 F. Supp. 2d 642 (D. Md. 2007), which addressed an ADA challenge to a state's track and field program. The student-athlete plaintiff, who used a wheelchair, alleged that defendants unlawfully discriminated against her because the rules for assigning points precluded her from earning points for her team. *Id.* at 644. However, the court ruled that the claim would not succeed because "there are inherent and relevant differences between the class of wheelers and the class of non-wheelers that education officials are entitled to consider in operating a fair and equitable system," *id.* at 650—in other words, those with different characteristics can be differently impacted under the ADA, if there is a bona fide reason.[11]

There is a bona fide reason here because the law does not turn on the mere fact of a disability. Sometimes, a student with a disability will have no IEP because the disability does not matter to performance in school. *See* Wis. Stat. § 115.787(2)(a); *CLT ex rel. Trebatoski*, 743 F.3d at 529 (the IDEA defines "disability" for purposes of IEPs more narrowly than Section 504). Or, at times, an IEP may require no additional capacity: for example, if an IEP provides extended time to take tests in a regular classroom. *See*, *e.g.*, Wis. Stat. § 115.787(2)(c) (covering "program

[11] Plaintiffs argue that *McFadden* is distinguishable on its facts (Appellants' Br. 15), but it is the general principle that "legitimate, non-discriminatory" reasons defeat a claim that matters here. *See*, *e.g.*, *Novak*, 777 F.3d at 974.

modifications or supports"). In those instances, a disability or an IEP are wholly irrelevant to a transfer.

For other students, some amount of time may be needed in other classrooms. Or, as with Plaintiff P.F., nearly all-day separate instruction may be required. That triggers a capacity analysis for the relevant type and quantity of special education service. Wis. Stat. § 118.51(5)(a)1., 4.; (Dkt. 59:5–6 ¶¶ 24–25; 76-3:18–19). The point is that the law turns on those kinds of calculations, not the fact of disability. That is not disability discrimination.

D. In addition, Plaintiffs' claim fails because their theory requires fundamentally altering the existing-capacity transfer program.

The ADA also comes with another limit. It does not require a "fundamental alteration": "A public entity shall make reasonable modifications . . . when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i). "[M]odification to 'an essential aspect' of the program constitutes a 'fundamental alteration.'" *Halpern*, 669 F.3d at 464 (citation omitted).

Plaintiffs fail under that analysis for reasons similar to those discussed. For example, as the Supreme Court in *Southeastern Community College*

explained, it did not matter that the plaintiff pointed to benefits she believed a differently-structured nursing program might offer. Asking for a different structure was "a fundamental alteration in the nature of a program" and took the inquiry into an "unauthorized extension" of the federal laws. *Se. Cmty. Coll.*, 442 U.S. at 410; *see also Timms*, 722 F.2d at 1317–18 (ADA does not create new types of programs).

Plaintiffs do not ask to fit into an existing program. They seek a different one. Whether viewed as a fundamental alteration, or under the elements above, that is not an ADA matter.

II. Plaintiffs' arguments do not come to terms with how the open enrollment law functions or how the statutory elements apply.

A. Plaintiffs' arguments attribute to the open enrollment law something it does not do.

Plaintiffs' theory largely turns on attributing to the open enrollment law something it does not do—that it endorses generic denials based on a disability. (*See*, *e.g.*, Appellants' Br. 4–5, 27–29.) That characterization cannot be squared with the statute and its administration. It also is contrary to the rule that, when courts are presented with a "plausible interpretation[ ]" that is legal, that is how the law should be interpreted. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (applied in the constitutional context).

For example, Plaintiffs assert that the law allows districts to "categorical[ly]" decide whether there is "space for disabled students in

January." (Appellants' Br. 5, 12–13.) But that is not what the law allows. The law requires a capacity analysis for a district's "special education or related services" in January.[12] Wis. Stat. § 118.51(5)(a)1., 4; Wis. Admin. Code § PI 36.06(5). Whether a student *needs* any available space is determined on a case-by-case basis—after applications are submitted between February and April, and based on the "services described in the child's individualized education program under s. 115.787(2)." Wis. Stat. § 118.51(3)(a)3.–4., (5)(a)1., 4. Contrary to Plaintiffs' proposal, it would be impossible (and illegal) to decide in January if services required by a child's IEP are available because, in January, a district has not seen any applicant's IEP to make that determination.

To the extent Plaintiffs also assert that defendant school districts did not make proper capacity determinations (Appellants' Br. 13), that assertion has no bearing on the open enrollment law itself. If a district fails to analyze capacity based on a particular student's needs, it would violate the open enrollment law. Plaintiffs could have, but did not, appeal the decisions administratively to DPI.[13] (Dkt. 59:11 ¶ 62.)

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[12] Districts also may open up new spaces later: for example, if an accepted pupil decides not to attend or if the school board finds that more space is actually available. Wis. Admin. Code § PI 36.06(5)(d).

[13] The exception is S.B., who prevailed before DPI. (Dkt. 59:11 ¶ 61.)

B. Plaintiffs' arguments do not show that they satisfy the ADA's elements.

Plaintiffs assert that the ADA broadly requires that public entities "provide full access to their services, programs and activities to students with disabilities" and that there "are no exceptions." (Appellants' Br. 13–14.) However, the cases show that this unqualified proposition is incorrect. For example, the Supreme Court has specifically "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504." *Alexander*, 469 U.S. at 299; *see also Anderson*, 841 F.2d at 740–41 (plaintiff must "satisfy the program's requirements despite [a] handicap"). Plaintiffs' arguments do not come to terms with what the ADA requires.

1. Plaintiffs do not fully address the "qualified individual" element as applied to the open enrollment law.

Under the qualified individual element, Plaintiffs have two proposals for meeting "essential eligibility requirements," *see* 42 U.S.C. § 12131(2), but both fail.

First, Plaintiffs propose that it only matters that they are, in a general sense, eligible to enroll in public school. (Appellants' Br. 14, 16, 25.) But that addresses the wrong question. An ADA lawsuit necessarily asks if a plaintiff is "otherwise qualified to participate in the program at

issue." *CG v. Penn. Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013); *Davis v. Univ. of N.C.*, 263 F.3d 95, 99 (4th Cir. 2001) (same). The "program" challenged here is the ability to transfer to a nonresident school under Wis. Stat. § 118.51. Plaintiffs' general rights to attend public school are governed by other laws.

Second, Plaintiffs assert they are eligible for open enrollment based on one subsection labeled "applicability," Wis. Stat. § 118.51(2). (Appellants' Br. 24.) But that leaves out the rest of the open enrollment law. "An otherwise qualified person is one who is able to meet *all* of a program's requirements . . . ." *Se. Cmty. Coll.*, 442 U.S. at 406 (emphasis added); *see also Waggoner v. Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999) (same).

Wisconsin Stat. § 118.51(2) simply provides that, as a general matter, the transfer program may apply to a "pupil" and a "public school," and may include "prekindergarten, 4-year-old kindergarten," etc. However, the core requirements of the law are stated in later subsections: that nonresident districts must adopt criteria about "[t]he availability of space" using calculations, and then compare them to IEPs. Wis. Stat. § 118.51(3)(a)2., (4)(a)2., (5)(a)1., 4. Plaintiffs' analysis leaves that core

mechanism out: it shows that they do not qualify for what is essential to the law.[14]

2. Plaintiffs' arguments about disability discrimination leave aside the law's legitimate basis.

Plaintiffs' discrimination theory relies on characterizing the open enrollment law as simply "deny[ing] the applications of disabled students," (Appellants' Br. 27–29), when it is in fact based on the legitimate consideration of capacity.

Plaintiffs' citations are not on point and do not rebut that it is legitimate. (*Id.* at 28–29.) For example, they cite a district court denial of summary judgment in *Brewer v. Wisconsin Board of Bar Examiners*, No. 04-C-0694, 2006 WL 3469598 (E.D. Wis. Nov. 28, 2006). That decision addressed whether, as a precondition to bar admission, a Board could require a mental examination for someone with a history of mental illness. *Id.* at *1. The court first explained that ordering a mental health history was not one of the eligibility requirements for bar admission. *Id.* at *7. As for discrimination, the court found that, "[i]f the reason the Board required [the applicant] to undergo . . . evaluation was *because she is disabled*, then it discriminated against her by reason of her disability." *Id.* at *10 (emphasis added). Even

[14] Plaintiffs assert that the district court rejected DPI's argument about "space as an eligibility requirement," but the passage cited by Plaintiffs is at the beginning of a discussion; it ends by agreeing that the law's capacity analyses is valid. (Appellants' Br. 25; Dkt. 132:19–22; P. App. 119–22.)

then, the court recognized that the requirement may not violate the ADA because it may be "necessary" to the program; but the defendants did not move for summary judgment on that basis. *Id.* at *12.[15]

Here, in contrast, Plaintiffs are not "otherwise qualified" for open enrollment; further, open enrollment denials may not be because someone "is disabled." (*E.g.*, Dkt. 59-4:2.) Also unlike *Brewer*, the open enrollment law does not require anyone to undergo an evaluation; rather, it is the IDEA that provides students that opportunity.

Plaintiffs also cite *Washington*, 181 F.3d 840, but that case is no more on point. It addressed waiver of an "eight semester rule" related to athletic eligibility, where a learning-disabled player was out of school for a period of time. *Id.* at 842–43. Ineligibility was triggered automatically eight semesters from the first day of enrollment, regardless whether the student was attending school for the entire time. *Id.* at 852.

This Court applied a "reasonable modification" analysis to "the particular case" of that plaintiff. *Id.* at 847–48, 50. In those circumstances, the Court concluded there was no fundamental alteration requested: simply not counting the semesters when the player was out of school did no violence to the "eight semester" rule that was intended to "control redshirting, to prevent

[15] This Court never weighed in on the substance of the claims. On appeal, all of Brewer's claims were either moot or otherwise foreclosed. *Brewer v. Wis. Bd. of Bar Examiners*, 270 F. App'x 418 (7th Cir. 2008).

the preeminence of athletics over academics, and to keep larger, more advanced players from dominating competition." *Id.* at 852. Waiver in those circumstances had no discernable effect on the rule's "protections"; further, the defendants already allowed other waivers, and disability-based waivers were rare. *Id.*

Here, in contrast, Plaintiffs seek to *remove* capacity from a capacity-based law for all those like them. The challenged mechanism is central to the program. *Washington* is not similar factually or legally; that plaintiff-specific claim had no discernable impact on the rule.[16]

Other arguments from Plaintiffs are not about the law on its face, and so are not addressed here. They are about the district court's alternative bases to dismiss, premised on individual facts. (Appellants' Br. 29–32.) A response to those points is left to Defendant school districts.[17]

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[16] Plaintiffs also cite an inapt case about race, *N.N. ex rel. S.S. v. Madison Metropolitan School District*, 670 F. Supp. 2d 927 (W.D. Wis. 2009). (Appellants' Br. 16–17.) That case was not about students with IEPs or the ADA, but rather addressed a school district's denial of a transfer because it "would 'increase racial imbalance' in the school district." *N.N. ex rel. S.S.*, 670 F. Supp. 2d at 928. It was undisputed that this race-based decision was subject to strict scrutiny under the equal protection clause and that the district could not meet the compelling government interest test. *Id.* at 929. *N.N.* had nothing to do with the ADA or space for students' needed services.

[17] In passing, Plaintiffs assert that a different (now-repealed) aspect of the open enrollment law would be illegal. (Appellants' Br. 31.) That section allowed a resident school district to deny transfer based on an undue financial burden caused by cost-shifting. *See* Wis. Stat. § 118.51(12)(b) (2013–14). However, this lawsuit contains no challenge to that aspect of the law. (*See* Dkt. 20.) And, in any event, it no longer exists. 2015 Wis. Act 55, § 3306t.

3. Plaintiffs do not address fundamental alteration in the context of the statute.

To the extent they discuss fundamental alteration at all, Plaintiffs do not address the effect of their theory on the open enrollment statute. Rather, they comment on a different topic: whether what they propose fundamentally alters a particular district's financial or administrative operation. (*Id*. at 12–14.) But the claims against DPI are not about a particular district's educational programming. Rather, they are about the open enrollment law itself.

Plaintiffs leave unaddressed why their proposal does not fundamentally alter the capacity-based open enrollment law. Under it, districts may order their affairs by calculating openings and teaching capacity in January for the upcoming school year. Wis. Stat. § 118.51(5)(a)1. The law contemplates filling space that is already there. Plaintiffs apparently would require the nonresident district to either overcrowd its special education and related services or add staff. (Dkt. 59:7 ¶ 32.) A district would have to do that after having already determined its staffing and resources. Plaintiffs do not explain why that different system—which may undermine a district's planning process and ability to comply with other laws—is not a

fundamentally different proposition.[18] It is. Their request for a different law must be directed to Wisconsin's Legislature. The ADA has nothing to say about it.

III. Plaintiffs are not entitled to damages from DPI because there is no evidence of intentional discrimination.

As this Court has observed, "all circuits to consider the question have held that compensatory damages [under the ADA] are only available for *intentional* discrimination, though there is a split over the appropriate standard for showing intentional discrimination." *CTL ex rel. Trebatoski*, 743 F.3d at 528 n.4. Some circuits apply "discriminatory animus." *See*, *e.g.*, *Carmona–Rivera v. Puerto Rico*, 464 F.3d 14, 18 (1st Cir. 2006). Most apply "deliberate indifference." *See*, *e.g.*, *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012). This Court has yet to decide which applies, and need not decide here. *See Strominger v. Brock*, 592 F. App'x 508, 512 (7th Cir. 2014). If the Court reached the issue, the lower bar of deliberate indifference would not be met.

[18] There are other potential problems with their proposal. For example, the law provides some compensation per student to the nonresident school district. For the 2016–17 school year, the default amount was $12,000 per transferring pupil. Wis. Stat. § 118.51(17)(b)2. That amount may not cover the costs of a particular student, and potential shortfalls would increase under Plaintiffs' proposal, as it would lead to transfers where districts must hire additional staff or obtain additional space.

Deliberate indifference under Title II and Section 504 requires a showing that (1) "the defendant knew that harm to a federally protected right was substantially likely" and (2) "failed to act on that likelihood." *Liese*, 701 F.3d at 344 (citation omitted). It "requires more than gross negligence" but rather "that the indifference be a 'deliberate choice.'" *Id.* (citation omitted); *see also Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) (same, in medical context). "[A]n entity is only liable for the deliberate indifference of someone whose actions can fairly be said to represent the actions of the organization." *Liese*, 701 F.3d at 350.

Here, there is no evidence of discriminatory intent by DPI. Plaintiffs list (with some inaccuracies) what the open enrollment law does, but that is not evidence of intentional discrimination. For example, they point out that districts calculate capacity in January, which is simply what the law states. *See* Wis. Stat. § 118.51(5)(a)1.; (Appellants' Br. 36). With no citation, Plaintiffs also assert that DPI denies administrative appeals "because they permit students with disabilities to be rejected . . . solely because they have disabilities." (Appellants' Br. 36.) However, there is no evidence of that; rather, it is all to the contrary.

The only evidence is that DPI applies the open enrollment law as written and as described above, to the extent it applies it at all. It instructs

against making decisions based on a disability. (Dkt. 59-4:2; 59-5:3 (guidance); 59:5–6, 8–10 ¶¶ 24–26, 44–50 (process).) Appeals are decided on the same basis. *See* Wis. Stat. § 118.51(9); (Dkt. 59-9:4 (appeal decision); 59:8 ¶ 41). None of this remotely evinces knowledge that harm to a federally protected right was substantially likely. Rather, it reveals that DPI seeks to prevent unlawful discrimination by school districts.

Plaintiffs also allege that there was something discriminatory in the Wisconsin Legislature's passage of the law in 1997. (Appellants Br. 35–36.) This theory has at least two flaws.

First, it is left mostly unexplained. Although the ADA may allow liability "for the deliberate indifference of someone whose actions can fairly be said to represent the actions of the organization," *Liese*, 701 F.3d at 350, Plaintiffs cite no rule that would impose damages on DPI and the State Superintendent—an agency and its head—based on legislative decision-making. Rather, Plaintiffs cite *Goodvine v. Gorske*, No. 06-C-0862, 2008 WL 269126, *6 (E.D. Wis. Jan. 30, 2008), which simply holds that, for purposes of injunctive relief, a suit against a state employee in his official capacity is a suit against the state. (Appellants' Br. 35.)

Second, and in any event, Plaintiffs point to no supporting evidence. Their argument is based on a document from 1997 called "DPI Public School Choice Proposal," which appears to discuss a different version of the

law. (Appellants' Br. 36 (citing Dkt. 40-4).) Plaintiffs provide no explanation of how that document evinces legislative intent. And it would be meaningless here, even if it did. It would suggest that the Legislature simply chose between different possible versions of a law—in other words, the typical legislative process.

Before the district court, Plaintiffs also submitted a contemporaneous Wisconsin Legislative Counsel Memo. (Dkt. 40-5.) The memo explained that the Legislature was in the mainstream: "Most of the other states with open enrollment programs limit participation by children who need special education if the nonresident school district does not have an appropriate program or space in an appropriate program." (Dkt. 40-5:7.) That does not suggest deliberate indifference. To the contrary, it suggests that there is no barrier to the open enrollment law.[19]

[19] Plaintiffs also request attorneys fees. (Appellants' Br. 36–37.) Whether fees under 29 U.S.C. § 794a(b) are available would be a question addressed to the district court's discretion, if necessary. A request at this juncture is premature.

CONCLUSION

The district court's grant of summary judgment to the Wisconsin Department of Public Instruction and State Superintendent should be affirmed.

Dated this 9th day of February, 2018.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), typeface requirements of Fed. R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6).

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Dated this 9th day of February, 2018.

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CERTIFICATE OF SERVICE

I certify that on February 9, 2018, I electronically filed the foregoing Response Brief of Defendants-Appellees Wisconsin Department of Public Instruction and State Superintendent Tony Evers with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 9th day of February, 2018.

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