Appeal No. 17-3266

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

Tony Evers, in his official capacity, et al.,

Defendants-Appellees

On Appeal from the U.S District Court for the Western District of Wisconsin
Honorable William M. Conley, Presiding
Originating Case No. 1:14-cv-00792

BRIEF OF DEFENDANT-APPELLEE SHOREWOOD SCHOOL DISTRICT

Submitted by:

BUELOW VETTER BUIKEMA OLSON & VLIET, LLC
Kevin C. Pollard (WI Bar No. 1074929)
kpollard@buelowvetter.com
20855 Watertown Road, Suite 200
Waukesha, WI 53186
Telephone: (262) 364-0300
Facsimile: (262) 364-0320

Counsel for Defendant-Appellee
Shorewood School District

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Seventh Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Defendant-Appellee, Shorewood School District, hereby submits its Corporate Disclosure Statement:

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3).

Shorewood School District

(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.

Buelow Vetter Buikema Olson & Vliet, LLC

(3) If the party or amicus is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's or amicus' stock.

N/A

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement in Plaintiffs-Appellants' Brief is correct with respect to the date of entry of judgment sought to be reviewed, and the filing date of the notice of appeal. However, Defendant-Appellee Shorewood School District (herein "Shorewood") maintains that the District Court, and now this Court, both lack subject matter jurisdiction over the claims of S.B. and N.B.

This Court lacks subject matter jurisdiction over S.B. and N.B.'s claims against Shorewood for at least two reasons. First, S.B. and N.B.'s claims for relief against Shorewood are moot because Shorewood has been willing to accept S.B.'s enrollment at all times material to this case, and, therefore, there is no "case or controversy" for this Court to adjudicate within the meaning of that phrase in Article III of the Constitution. *Powell v. McCormack*, 395 U.S. 486, 512-13, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) ("a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") Second, S.B. and N.B. lack standing to seek any declaration regarding Wis. Stat. § 118.51(5)(a)4 because S.B. "is no longer entitled to receive special education," and, therefore, the open enrollment statute at issue in this case is not applicable to S.B. [Dkt. #67 at ¶ 8, Ex. C]. Further, S.B. now resides in Shorewood, and, therefore, he is entitled to a free education at Shorewood regardless of any interpretation or effect of Wisconsin's open enrollment statute. [Dkt. #116 at ¶¶ 6-7, Ex. A].

Federal courts lack subject matter jurisdiction over a moot claim because "Article III, § 2 of the Constitution limits the jurisdiction of federal courts to 'Cases' or 'Controversies'. As such, federal courts are prohibited from rendering advisory opinions; they cannot divine on abstract disputes about the law." *Milwaukee Police Association v. Bd of Fire & Police Commissioners,* 708 F.3d 921, 929 (7th Cir.2013). In order for a federal court to have subject matter jurisdiction,

"both litigants must have a personal interest in the case at the beginning of the litigation, and their interests must persist throughout its entirety." *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994). "A case becomes moot when the dispute between the parties no longer rages, or when one of the parties loses his personal interest in the outcome of the suit." *Id.*, 29 F.3d at 1147.

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. Rule Civ. Proc. 12(h)(3); *see also Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884) (challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question *sua sponte*).

STATEMENT OF THE ISSUES

1. Does this Court lack subject matter jurisdiction over the claims of S.B. and N.B. against Shorewood?

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

STATEMENT OF THE CASE

i. Parties and Procedural Background

Shorewood agrees with the description of Parties and Procedural Background in the Statement of the Case presented in Plaintiffs-Appellants' Brief [App. Dkt. #19 at p. 2], except Shorewood disputes that S.B. has been denied the opportunity to participate in Wisconsin's Open Enrollment Program at any time material to this case.

ii. The Wisconsin Open Enrollment Law

Plaintiffs-Appellants incorrectly assert that Wis. Stat. § 118.51(5)(a)(4) permits nonresident school districts to broadly reject applications on the ground that it has determined that "it has no space for disabled students." [App. Dkt. #19 at p. 4]. However, that is not what the statute says. In reality, the statute provides the "criteria" for accepting and rejecting applications from nonresident pupils "may include" "[w]hether the special education or related services described in the child's individualized education program . . . 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 district." Wis. Stat. § 118.51(5)(a)(4).

iii. S.B. and Shorewood [1]

On or about April 23, 2014, S.B.'s mother, N.B., submitted an application for S.B.'s open enrollment at Shorewood. [Dkt. #67 at ¶ 1, Ex. A]. In the application, N.B. indicated that S.B. did not receive special education services and did not have an individualized education plan (IEP). [2]

On May 27, 2014, S.B.'s open enrollment application for the 2014-15 school year was accepted by Shorewood. [Dkt. #67 at ¶ 4]. However, unbeknownst to Shorewood, at the time when S.B.'s open enrollment application was submitted he *did* in fact have an IEP in place, and was receiving special education services from his resident district, Milwaukee Public Schools.

[1] S.B. and his mother N.B. are the only Plaintiffs-Appellants alleging claims against Shorewood.

[2] At the time Shorewood first received S.B.'s open enrollment application, to Shorewood's knowledge S.B. was a non-resident of Shorewood.

On October 8, 2014, upon receiving records from Milwaukee Public Schools reflecting that N.B. had falsified S.B.'s open enrollment application, Shorewood revoked its acceptance of S.B.'s open enrollment application pursuant to Wis. Stat. § 118.51(5)(a)(4). [Dkt. #67 at ¶ 7].[3]

On December 17, 2014 the Wisconsin Department of Public Instruction ("DPI") overturned Shorewood's revocation. [Dkt. #67 at ¶ 8, Ex. C]. In so ruling, DPI specifically ordered that S.B. "is no longer entitled to receive special education" [Dkt. #67 at ¶ 8, Ex. C at p. 5]. At no time has Shorewood refused to comply with the DPI's Decision and Oder, and Shorewood has affirmatively notified N.B. that S.B. may enroll in Shorewood on multiple occasions. [Dkt. #67 at ¶ 9]. Despite being invited to enroll in school at Shorewood, S.B. has chosen to attend school in another district. [Dkt. #67 at ¶¶ 10-11].

S.B. now resides in Shorewood. [Dkt. #116 at ¶¶ 6-7, Ex. A]. Therefore, S.B.is entitled to enroll at Shorewood regardless of any interpretation or effect of Wisconsin's open enrollment statute.

STANDARD OF REVIEW

Plaintiffs-Appellants appeal the District Court's grant of Shorewood's Motion for Summary Judgment. This Court reviews the District Court's grant of summary judgment *de novo*, using the same test utilized by the District Court. *Squibb v. Memorial Med. Ctr.*, 497 F.3d 775, 780 (7th Cir. 2007).

Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying where to look in the record for evidence "which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v.*

[3] Shorewood later learned that on June 3, 2014, *after* S.B.'s open enrollment application was submitted to Shorewood, N.B. had formally withdrawn consent for S.B. to receive all special education and related services. [Dkt. #67 at ¶ 6].

Catrett, 477 U.S. 317, 323,106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the opposing party who must set out specific facts showing "a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250, 106 S.Ct. 2502, 91 L.Ed.2d 202 (1986).

It is not enough for the non-moving party to point to any alleged factual dispute between the parties. *Anderson*, 477 U.S. at 247-48. Nor is a mere scintilla of evidence in support of the non-moving party's position sufficient to survive summary judgment." *Id*. at 251. Rather, the non-moving party must come forward with specific facts to demonstrate there is a genuine issue for trial. *Celotex*, 477 U.S. at 323.

A genuine issue for trial is presented only when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. The non-moving party must do more than show there is some metaphysical doubt as to the material facts; it must present significant probative evidence in support of its opposition, in order to defeat a motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1985) (citations omitted). Therefore, "[i]f the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50.

SUMMARY OF THE ARGUMENT

I. Shorewood joins in, and incorporates by reference as if fully set forth herein, the arguments of the State of Wisconsin Department of Public Instruction, Muskego-Norway School District, and Paris J1 School District, as set forth in their respective Briefs in response to Plaintiffs-Appellants' Brief, regarding whether Wis. Stat. § 118.51 violates Title II of the ADA and/or Section 504 of the Rehabilitation Act. Fed. R. App. P. 28(i).

II. The District Court correctly determined that, "[i]f anything, the record reflects that S.B.'s ADHD diagnosis is *not* a disability," and granted summary judgment to Shorewood accordingly. [Dkt. # 132 at p. 27]. However, even assuming *arguendo* S.B. had put forth sufficient evidence to demonstrate a disability, for the reasons stated below he is nonetheless not a "qualified" individual with a disability, and, moreover, he has not been excluded from Shorewood's open enrollment *because of* any disability.

III. This Court lacks subject matter jurisdiction over S.B. and N.B.'s claims, and no relief is available from Shorewood under any legal theory.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN HOLDING WIS. STAT. § 118.51 DOES NOT VIOLATE TITLE II OF THE ADA AND/OR SECTION 504 OF THE REHABILITATION ACT.

Pursuant to Fed. R. App. P. 28(i), Shorewood joins in, and incorporates by reference as if fully set forth herein, the arguments of the State of Wisconsin Department of Public Instruction, Muskego-Norway School District, and Paris J1 School District, as set forth in their respective Briefs in response to Plaintiffs-Appellants' Brief, regarding whether Wis. Stat. § 118.51 violates Title II of the ADA and/or Section 504 of the Rehabilitation Act. For all the reasons set forth therein, Shorewood requests this Court affirm and uphold the District Court's conclusion that Wis. Stat. § 118.51 does not violate the Title II of the ADA and/or Section 504 of the Rehabilitation Act.

II. PLAINTIFFS-APPELLANTS HAVE FAILED TO ESTABLISH ANY VIABLE CAUSE(S) OF ACTION AGAINST SHOREWOOD.

Plaintiffs-Appellants allege violations of Title II of the ADA and Section 504 of the Rehabilitation Act by Shorewood. Specifically, Plaintiffs-Appellants allege Shorewood discriminated against S.B. because of his alleged disability when it revoked his open enrollment

acceptance to Shorewood during the 2014 – 2015 school year. In so doing, Plaintiffs-Appellants rely on the following provisions:

> [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; and:

> 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).

The rights and responsibilities, as well as the remedies and procedures, established by Title II of the ADA and Section 504 of the Rehabilitation Act are nearly identical. *See Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015); *Washington v. Ind. High Sch. Athletic Ass'n, Inc*., 181 F.3d 840, 845 n.6 (7th Cir. 1999). Shorewood will therefore address both claims concurrently. In order to state a claim under Title II and/or Section 504, Plaintiffs-Appellants must establish: (1) S.B. is a qualified individual with a disability; (2) S.B. was excluded from the benefits or services of a public entity or otherwise was discriminated against; and (3) such exclusion, denial of benefits, or discrimination was because of S.B.'s disability. *Wagoner*, 778 F.3d at 592. Plaintiffs-Appellants cannot establish any of the foregoing.

A. Plaintiffs-Appellants Have Failed To Establish S.B. Is A Qualified Individual With A Disability Within The Meaning Of The ADA And/Or Section 504.

As a threshold matter, Plaintiffs-Appellants have not established, and cannot establish, S.B. is an individual with a disability within the meaning of Title II of the ADA and/or Section

504 of the Rehabilitation Act. Moreover, even assuming *arguendo* Plaintiffs-Appellants could somehow establish S.B. is an individual with a disability within the meaning of the laws at issue, they have not established, and cannot establish, S.B. is a qualified individual with a disability. Without any such proof, Plaintiffs-Appellants cannot establish S.B. was subject to the projections of Title II and/or Section 504 in the first instance, dooming his claims.

1. *S.B. Is Not An Individual With A Disability.*

Plaintiffs-Appellants' Brief is devoid of any legally cognizable evidence establishing S.B. is an individual with a disability within the meaning of the law. Title II defines "disability," with respect to an individual, as:

> (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) A record of such an impairment; or (3) Being regarded as having such an impairment.

42 U.S.C. § 12102(1). Plaintiffs-Appellants have failed to present any evidence establishing as much with regard to S.B.

The entirety of Plaintiffs-Appellants' argument with regard to S.B.'s alleged disability hinges on the fact that, while in his resident district of Milwaukee Public Schools, S.B. had IEPs in place from October 22, 2009, to October 21, 2010, and May 20, 2014, to June 3, 2014,[4] based on the condition of ADHD. This alone, Plaintiffs-Appellants seemingly argue, mechanically fulfills all three prongs comprising the definition of "disability." Beyond that, as the District Court properly noted, Plaintiffs-Appellants present nothing more than a conclusory averment by S.B.'s mother that S.B. was diagnosed with ADHD in 2010.

[4] The 2014 IEP states it was to be in effect until February 17, 2015. [Dkt. #36-6 at p. 1]. However, S.B.'s mother explicitly revoked consent for S.B. to receive any and all special education services on June 3, 2014, rendering the 2014 IEP null as of June 3, 2014. [Dkt. #67, Ex. B].

Mere identification of a condition in an IEP and/or an affidavit does not automatically establish a disability under the law. Similarly, the mere fact that an "IEP team determined [S.B.] is a student with a disability" for purposes of creating an IEP and implementing certain special education services does not automatically establish S.B. is an individual with a disability within the meaning of Title II of the ADA and/or Section 504 of the Rehabilitation Act. Indeed, the statutory definition of "disability" unequivocally requires more than simple identification of a purported impairment or conclusory statement that an IEP team has determined a student has a disability. *See Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) (explaining a "disability" under the ADA requires more than a diagnosis of a mental or physical impairment). To the contrary, the legal standard explicitly requires that the impairment substantially limit one or more major life activities. Thus, more than a simple recitation of S.B.'s alleged diagnosis of ADHD is required to fulfill Plaintiffs-Appellants' burden of establishing a disability.

As the District Court properly noted, consideration of S.B.'s specific limitations is therefore necessary in order to determine whether S.B. is an individual with a disability. [Dkt. #132 at p. 27]. However, Plaintiffs-Appellants have not provided any facts or arguments detailing S.B.'s specific condition and/or the limitations of same, beyond simply pointing to S.B.'s expired 2009 and nullified 2014 IEPs, without further explanation.[5] In fact, in their Brief,

[5] These IEPs consist of 46 total pages, which the Court is not required to scour for evidence supporting Plaintiffs-Appellants' claim that S.B.'s alleged ADHD substantially limits one or more major life activities. *See Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892 (7th Cir. 2003) ("We have repeatedly assured the district courts that they are not required to scour every inch of the record for evidence that is potentially relevant to the summary judgment motion before them.") (citations omitted); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996) ("It is not [the district court's] function to scour the record in search of evidence to defeat a motion for summary judgment; we rely on the [ ] party to identify with reasonable particularity the evidence upon which he relies.") (citation omitted); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Plaintiffs-Appellants highlight only the following isolated statements contained within S.B.'s expired 2009 IEP and/or nullified 2014 IEP in an attempt to establish S.B.'s alleged ADHD substantially limits his ability to learn:

- "S.B. has a 'health problem', which is 'chronic'" and "affects his behavior, social/emotional functioning and classroom behavior."
- "The IEP team has determined that [S.B.] is a student with a disability."
- "The report also checked the box 'yes' for the question: 'By reason of the impairments(s) [sic] identified does this student need or continue to need special education.'"
- "'[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.'"

[App. Dkt. #19, at p. 22]. (internal and record citations omitted). However, this is not enough to present a genuine issue for trial as to whether S.B. is an individual with a disability. The foregoing statements simply do not establish S.B.'s ADHD substantially limits one or more major life activities of S.B., including but not limited to learning. This conclusion is buttressed by the fact that the foregoing statements were contained in expired and/or nullified documents, as well as directly contradicted by the DPI's subsequent findings regarding S.B.'s lack of qualification for special education services. [Dkt. #67, Ex. C at p. 5]. Plaintiffs-Appellants fail to provide any evidence and/or arguments to the contrary.

In sum, Plaintiffs-Appellants do not present any evidence from a health care provider confirming S.B.'s alleged diagnosis of ADHD.[6] Plaintiffs-Appellants do not present any specific evidence, facts, and/or arguments regarding the limitations, if any, of S.B.'s purported ADHD.

[6] S.B.'s mother states S.B. was diagnosed with ADHD in 2010, but, does not provide any documentation evincing as much. Notably, S.B.'s 2009 IEP states only that S.B. "appears to demonstrate several behaviors consistent with [ADHD]." [Dkt. #36-2 at p. 8].

Plaintiffs-Appellants do not present any specific evidence, facts, and/or arguments describing how, or how much, S.B.'s alleged ADHD diagnosis impacts his life and/or ability to learn, if at all. And, Plaintiffs-Appellants do not present any specific evidence, facts, and/or arguments demonstrating how S.B.'s purported ADHD substantially limits, if at all, one or more of S.B.'s major life activities, including but not limited to learning. Without identification of any such specific evidence, facts, and/or arguments, there is no scenario under which Plaintiffs-Appellants could fulfill their burden of establishing S.B. is an individual with a disability under the ADA and/or Section 504, pursuant to the first prong of the analysis.

In fact, as the District Court properly concluded, the evidence of record actually establishes the opposite conclusion—that S.B. is not an individual with a disability within the meaning of the law. [Dkt. #132 at pp. 27 – 28]. Specifically, on April 23, 2014, S.B.'s mother submitted an open enrollment application to Shorewood for S.B., in which S.B.'s mother in no uncertain terms indicated S.B. was not receiving any special education services, did not have an IEP, and had not been referred for a special education evaluation that had not been completed. [Dkt. #67, Ex. A]. Furthermore, on June 3, 2014, S.B.'s mother submitted a Parent Withdrawal of Consent for Special Education to S.B.'s resident district of Milwaukee Public Schools, in which S.B.'s mother explicitly withdrew her consent for S.B. to receive any and all special education and related services. [Dkt. #67, Ex. B]. Finally, in its December 17, 2014, Decision and Order, the DPI unambiguously concluded S.B. was "no longer entitled to receive special education." [Dkt. #67, Ex. C at p. 5]. The foregoing facts, whether viewed collectively or in isolation, plainly support the conclusion that S.B. is not an individual with a disability. Rather, the facts paint a picture of an individual whose alleged diagnosis of ADHD does not even rise to the level of necessitating special education services, let alone substantially limiting one or more

major life activities, such as learning. Thus, as the District Court properly concluded, Plaintiffs-Appellants failed to establish S.B. is an individual with a disability.

Notwithstanding the foregoing, Plaintiffs-Appellants erroneously argue S.B. can also establish his disability under the second two prongs of the definition of "disability." In support of the "record of" prong, Plaintiffs-Appellants state only the following: "[S.B.] has a record of having a disability. [S.B.] has an IEP and an IEP is created only for students who have a disability." [App. Dkt. #19 at p. 23] (internal and record citation omitted). This establishes only that an IEP team determined there were certain special education services S.B. should be receiving at that time; that is, until S.B.'s mother revoked consent for same, thereby nullifying S.B.'s 2014 IEP. Plaintiffs-Appellants once again simply rely on the prior general existence of an IEP, which is not enough.

Furthermore, Plaintiffs-Appellants' argument completely ignores the fact that the "record of" prong still requires that the physical or mental impairment at issue substantially limit one or more major life activities. *See, e.g., Equal Employment Opportunity Comm'n v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999) ("[I]t is not enough for [a] ... plaintiff to simply show that he has a record of a cancer diagnosis; in order to establish the existence of a 'disability' ... there must be a record of an impairment that substantially limits one or more of the ... plaintiff's major life activities."); *Adams v. Rice*, 531 F.3d 936, 946 (D.C.Cir. 2008) ("[E]vidence of a prior illness, without more, is insufficient to show a record of disability." Instead, plaintiff "must show that her alleged impairment substantially limited one or more major life activities.") (internal quotation marks omitted). As such, for all the reasons Plaintiffs-Appellants cannot establish S.B.'s alleged ADHD substantially limits a major life activity, including but not limited to learning, Plaintiffs-Appellants similarly cannot establish S.B. had a record of such a disability.

In support of the "regarded as" prong, Plaintiffs-Appellants provide only the following conclusory and circular argument: "It is undisputed that Shorewood revoked S.B.'s admission to Shorewood under Wis. Stat. § 118.51(5)(a)4. [sic] **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." [App. Dkt. #19 at p. 23] (emphasis in original). However, Plaintiffs-Appellants fail to explain this argument and/or provide any support therefor. Moreover, although Shorewood temporarily revoked S.B.'s open enrollment acceptance because it received information from the Milwaukee Public School District contradicting the information S.B. provided in his application, and determined it did not have any space to accommodate an open enrollment applicant with a disability, the District's actions were not because they regarded S.B. as having a disability. In reality, the District's decision hinged on the legitimate, non-discriminatory factors expressed in Wis. Stat. § 118.51(5)(a)4 regarding Shorewood's preexisting lack of "space" and resources to accommodate an open enrollment position for S.B. pursuant to the terms of his IEP. In any event, Shorewood ultimately allowed S.B. to re-enroll in the District based on the DPI's determination S.B. was not entitled to receive special education services. Shorewood therefore did not and does not regard S.B. as having a disability under the law, and has at all times remained willing to re-enroll S.B. in the District.

Plaintiffs-Appellants conclude their argument regarding S.B.'s alleged disability by cursorily dismissing the District Court's analysis for two reasons, neither of which is compelling, and neither of which provides any legally cognizable support for this Court to reverse the District Court's findings. First, Plaintiffs-Appellants attack the cases cited by the District Court on the basis that they involve "disputed facts regarding the level of impairment of adult students at a professional postsecondary educational institution," which apparently renders them inapplicable

to the case at hand. [App. Dkt. #19 at p. 23]. However, Plaintiffs-Appellants entirely miss the purpose of the Court's citation to these cases, i.e. to set forth the legal requirement that S.B. must provide specific facts and evidence establishing his level of impairment as related to his alleged disability, without which a disability cannot be found under the law. As explained above, Plaintiffs-Appellants have wholly failed to provide any such specific facts, evidence, and/or arguments to fulfill S.B.'s burden in this regard, and instead have only argued S.B. has a disability because his ADHD necessitated the implementation of an IEP to assist S.B. at school. As the District Court properly noted through utilization of the two aforementioned cases, however, much more is required—a requirement Plaintiffs-Appellants have undeniably failed to fulfill. Plaintiffs-Appellants' argument in this regard is therefore wholly misplaced, and serves only to highlight the District Court's proper analysis.

Secondly, Plaintiffs-Appellants attack the District Court's argument regarding S.B.'s mother's act of revoking her consent for S.B. to receive special education services. They claim this has nothing to do with establishing a disability, and rather was based only on S.B.'s mother's dissatisfaction with the services S.B. was receiving in the Milwaukee Public School District. [App. Dkt. #19 at pp. 23 – 24]. However, Plaintiffs-Appellants contradict their own position in arguing as much, because Plaintiffs-Appellants' entire argument is based on the mere existence of S.B.'s two IEPs. In other words, the operability of S.B.'s IEP(s) alone establishes a disability according to Plaintiffs-Appellants. Yet, Plaintiffs-Appellants disavow the opposite conclusion, arguing that revocation of an IEP and/or the non-existence of an IEP and/or special education services does not similarly affect the question of whether an individual has a disability. Plaintiffs-Appellants cannot have it both ways—that an IEP automatically establishes a disability, without further analysis, and that the non-existence of an IEP and/or special education

services does not have any bearing on whether an individual has a disability under the law. Regardless, as fully set forth above, the record is complete with evidence supporting the conclusion S.B. is not an individual with a disability, including but not limited to S.B.'s open enrollment application, S.B.'s mother's revocation of S.B.'s IEP and her consent for S.B. to no longer receive special education services, and the DPI's decision finding S.B. was not entitled to receive special education services. Plaintiffs-Appellants' arguments in this regard are therefore without any merit.

Based on the foregoing, it is evident Plaintiffs-Appellants have not fulfilled, and cannot fulfill, their burden of establishing S.B. is an individual with a disability within the meaning of Title II of the ADA and/or Section 504 of the Rehabilitation Act. Thus, as the District Court properly determined, Plaintiffs-Appellants' claims of discrimination with regard to S.B. fail at the outset, as a dispositive matter.

2. *S.B. Is Not Qualified.*

Even assuming *arguendo* Plaintiffs-Appellants could somehow establish S.B. is an individual with a disability, they cannot establish he is qualified within the meaning of the law. Title II defines "qualified individual with a disability" as:

> [A]n 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 of the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131. Once again, Plaintiffs-Appellants fail entirely to present any evidence establishing S.B. is qualified for the program to which he alleges he was denied access.

Plaintiffs-Appellants erroneously focus their arguments on S.B. being entitled to receive educational services in general, as opposed as to the proper inquiry—whether S.B. was qualified

for admission as an open enrollment special education student in a non-resident district. In other words, the focus must be on whether S.B. met the essential eligibility requirements to receive a special education open enrollment spot at Shorewood for the 2014 – 2015 school year. *See, e.g.*, *CG v. Penn. Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013) ("qualified" element asks if "they are otherwise qualified to participate in the program *at issue*.") (emphasis added).

When the proper inquiry is posed, it is undisputed the only conclusion that follows is S.B. was not qualified for special education open enrollment in his non-resident district of Shorewood for the 2014 – 2015 school year. Shorewood evaluated the statutory factors and determined the District did not have space available to provide S.B. with the special education services identified in his IEP. S.B. was therefore not qualified for open enrollment as a special education student at Shorewood.[7] Plaintiffs-Appellants provide no facts or evidence to the contrary, and therefore have not established a genuine issue for trial on the issue of whether S.B. is "qualified."

Based on the foregoing, it is evident Plaintiffs-Appellants have not fulfilled, and cannot fulfill, their burden of establishing S.B. is a qualified individual with a disability within the meaning of Title II of the ADA and/or Section 504 of the Rehabilitation Act. Plaintiffs-Appellants' claims of discrimination with regard to S.B. therefore fail.

[7] After lengthy discussion, the District Court properly concluded consideration of these factors was legitimate and non-discriminatory, and did not run afoul of the ADA and/or Section 504. [Dkt. #132 at pp. 18 – 22]. *See also, e.g.*, *Alexander v. Choate*, 469 U.S. 287, 303-04, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (The Rehabilitation Act "does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." The Act calls for "evenhanded treatment" in existing programs, not a "guarantee" for "equal results."); *Mallett v. Wis. Div. of Vocational Rehab.*, 130 F.3d 1245, 1257 (7th Cir. 1997) ("An otherwise qualified person is one who is able to meet all of a program's requirements *in spite* of his handicap."); *Knapp v. Nw. Univ.*, 101 F.3d 473, 482 (7th Cir. 1996) ("[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."); *Anderson v. Univ. of Wis.*, 841 F.2d 737, 740 (7th Cir. 1988) (federal law "forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap."). Plaintiffs-Appellants fail to provide any legally cognizable arguments to the contrary and/or any case law establishing otherwise.

B. S.B. Is Not Excluded From Enrollment With Shorewood.

S.B.'s failure to satisfy the first element of his ADA and Section 504 claims is dispositive and was fatal to his claims in the District Court. Nonetheless, regardless of S.B.'s status as a qualified individual with a disability, the fact remains that S.B. is not being excluded from enrollment at Shorewood. S.B. is and has been eligible for enrollment at Shorewood, yet he has failed and/or refused to enroll with Shorewood. [Dkt. #67 at ¶¶ 9 – 11]. Therefore, S.B. cannot establish the second element of him claim, i.e. that he is excluded from benefits or services or otherwise discriminated against.

C. Shorewood Revoked its Acceptance of S.B.'s Open Enrollment Application for Non-Discriminatory Reasons in Accordance with Wis. Stat. § 118.51(5)(a)(4).

S.B.'s open enrollment acceptance was revoked because Shorewood received information from the Milwaukee Public School District contradicting the information S.B. provided in his application, and, as a result, Shorewood determined it did not have space to accommodate S.B.'s open enrollment application. Therefore, the District's decision hinged on the legitimate, non-discriminatory factors expressed in Wis. Stat. § 118.51(5)(a)4.

Wisconsin's open enrollment statute requires school districts to make determinations of available space in general education and in their special education programs. Wis. Stat. § 118.51(5)(a), which requires school districts to determine space in general and special education programs, provides the only criteria school districts may use in limiting open enrollment applications based on available space. Section 118.51(5)(a)1 permits school districts to consider "[t]he availability of space in the schools, programs, classes, or grades within the nonresident school district," and specifies that for students with IEPs, the districts may compare the space in their special education programs with the special education programs required by the IEP.

While the Plaintiffs-Appellants argue that Shorewood and the other school districts should have refused to apply Wis. Stat. § 118.51(5)(a)4 and instead should have accepted students even if the districts did not have space in the required special education programs, school districts are allowed to accept open enrollment applicants only if they have space.

In any event, at no time since the DPI's Decision and Order dated December 17, 2014 has Shorewood ever refused to re-enroll S.B. For all of these reasons, Shorewood did not, and does not, refuse to enroll S.B. *because of* any disability.

III. S.B. AND N.B.'S CLAIMS ARE MOOT AND NO RELIEF IS AVAILABLE FROM SHOREWOOD UNDER ANY LEGAL THEORY.

This Court does not have jurisdiction over S.B. and N.B.'s claims because Shorewood has never refused to comply with the DPI's December 17, 2014 order, and therefore, their claims are moot. Even assuming *arguendo* there was any case or controversy related to their claims, S.B. and N.B. have nonetheless failed to set forth any evidence to plausibly suggest they are entitled to monetary damages. Accordingly, no relief is available from Shorewood under any legal theory, and the District Court properly dismissed S.B. and N.B.'s claims.

A. S.B. And N.B.'s Claims For Declaratory Or Injunctive Relief Are Moot.

As discussed in the Jurisdictional Statement above, S.B. and N.B.'s claims for declaratory or injunctive relief against Shorewood are moot. S.B. and N.B. are ultimately seeking a declaration that "Shorewood must permit S.B. to enroll into Shorewood School District pursuant to the December 17, 2014 decision of the DPI." [Dkt. #20 at p. 22]. That claim is moot for several reasons, and therefore, there is no "case or controversy" for this Court to adjudicate.

In order to satisfy the Article III case or controversy requirement it must appear that the injury about which the plaintiff complains is continuing or that the plaintiff is under an immediate threat that the injury complained of will be repeated. *City of Los Angeles v. Lyons,*

461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects" *Id.*; see e.g. *Young v. Lane*, 922 F.2d 370, 373-74 (7th Cir. 1991) (plaintiffs' requests for injunctive and declaratory relief regarding their exercise of religion are mooted by their transfer from institution where allegedly illegal restrictions took place without a strong showing that they are likely to be transferred back to that institution). In the present matter, there is no continuing injury to S.B. or N.B., nor is there any threat of injury.

The Wisconsin Constitution entitles a pupil to a free education in the school district in which she or he resides. Wis. Const. Art. X, § 3. As acknowledged by S.B.'s attorney, S.B. now resides in Shorewood. [Dkt. #116 at ¶¶ 6-7, Ex. A]. Therefore, S.B. is entitled to a free education in Shorewood.

Regardless of any factual dispute which N.B. and S.B. are attempting to create, Shorewood has been willing to accept S.B.'s enrollment at all times material to this case. Shorewood has made multiple efforts to contact N.B. and advise her of S.B.'s ability to enroll at Shorewood, but N.B. has declined to do so or to even respond to Shorewood. Shorewood's most recent correspondence, sent directly to N.B. on August 6, 2015, stated the following:

> Dear [N.B.]:
>
> On behalf of the Shorewood School District, I am writing to advise you that the District remains willing to enroll [S.B.] under the District's open enrollment program for the 2015-16 school year, in accordance with the State of Wisconsin Department of Public Instruction's Decision and Order dated December 17, 2014. If you do intend to enroll [S.B.] for this school year, then please contact Ms. Katherine Sliker at the District, phone number 414-963-6903, to facilitate [S.B.'s] enrollment. We would also be happy to arrange a meeting with you and [S.B.] to discuss any questions you may have regarding [S.B.'s] enrollment.
>
> Thank you,
> Tabia Nicholas, E.D.
> Executive Director of Curriculum,
> Instruction, and Pupil Services

[Dkt. #67, Ex. D, E] Shorewood has never received any response to this letter.

Lastly, S.B. and N.B. lack standing to seek any declaration regarding Wis. Stat. § 118.51(5)(a)4 because S.B. "is no longer entitled to receive special education," [Dkt. #67 at ¶ 8, Ex. C], and because N.B. has formally withdrawn consent for S.B. to receive special education services. [Dkt. #67 at ¶ 3, Ex. B]. Therefore, the open enrollment statute at issue in this case does not apply to S.B.

To have standing to sue in federal court a plaintiff must allege (1) that he has suffered an injury in fact (2) that is fairly traceable to the action of the defendant and (3) that will likely be redressed with a favorable decision. *Books v. City of Elkhart*, 235 F.3d 292, 299 (7th Cir.2000) The test is whether the relief sought would "make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation)." *Air Line Pilots Ass'n v. UAL Corp.*, 897 F.2d 1394, 1396–97 (7th Cir.1990). A plaintiff must show that she is "likely to suffer some future injury" in order to obtain injunctive relief. *Meagley v. City of Little Rock*, 639 F.3d 384, 391 (8th Cir. 2011).

There is no "continuing, present adverse effects" to any alleged unlawful conduct on the part of Shorewood, and, therefore, S.B. and N.B.'s request for injunctive or declaratory relief against Shorewood is completely moot. See *Young*, 922 F.2d at 373-74; *City of Los Angeles*, 461 U.S. at 102, 103 S.Ct. 1660, 75 L.Ed.2d 675. For all of these reasons, the Court does not have subject matter jurisdiction over S.B. and N.B.'s claims.

B. Neither S.B. Nor N.B. Have Sustained Monetary Damages.

Yet again assuming *arguendo* that S.B. is a qualified individual with a disability and could satisfy the other elements of his ADA and/or Section 504 claims, he still cannot recover damages from Shorewood absent a showing that Shorewood "intentionally discriminated"

against him. *Phipps v. Sheriff of Cook Cnty.*, 681 F. Supp. 2d 899, 917 (N.D. Ill. 2009) ("it is necessary to show intentional discrimination in order to recover compensatory damages"); *Nieves–Marquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003) ("private individuals may recover compensatory damages under § 504 and Title II only for intentional discrimination"); *Delano–Pyle v. Victoria County*, 302 F.3d 567, 574 (5th Cir. 2002) ("A plaintiff asserting a private cause of action for violations of the ADA or [Section 504] may only recover compensatory damages upon a showing of intentional discrimination"); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152–53 (10th Cir. 1999) (district court committed reversible error in failing to instruct jury that plaintiff needed to show intentional discrimination to recover compensatory damages).

"[T]he remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action under Title VI of the Civil Rights Act of 1964." *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002). Supreme Court precedent construing Title VI governs enforcement of the Rehabilitation Act as well as the ADA. *See Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir.2011). In *Guardians Association v. Civil Service Commission of New York*, the Supreme Court unequivocally held that private individuals who brought suit under Title VI could not recover compensatory relief in the absence of a showing of intentional discrimination. 463 U.S. 582, 597, 607, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983); *see Alexander v. Sandoval*, 532 U.S. 275, 282–83, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (restating *Guardian's* holding that "private individuals [can] not recover compensatory damages under Title VI except for intentional discrimination"); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 261 (3d Cir. 2013). Accordingly, "[a] plaintiff asserting a private cause of action for violations of the ADA

or the RA may only recover compensatory damages upon a showing of intentional discrimination." *Delano–Pyle v. Victoria County,* 302 F.3d 567, 574 (5th Cir.2002).

To establish "intentional discrimination" under the ADA or the Rehabilitation Act, "[a] showing of discriminatory animus is required to have a colorable claim." *Zayas v. Commonwealth of Puerto Rico*, 378 F. Supp. 2d 13, 21 (D.P.R.) *aff'd sub nom. Zayas v. Puerto Rico*, 163 F. App'x 4 (1st Cir. 2005). That is, "[s]omething more than a mere failure to provide the 'free appropriate education' required . . . must be shown." *Id.* (*citing Monahan v. State of Nebraska,* 687 F.2d 1164, 1170 (8th Cir.1982)); *see also Colin v. Schmidt,* 715 F.2d 1, 10 (1st Cir.1983) ("'[s]omething more' such as 'bad faith or gross misjudgment'" is required); *Nieves–Márquez v. Commonwealth of Puerto Rico*, 353 F.3d 108, 125 n. 17 (1st Cir. 2003).

In *Zavas*, the court held that no money damages were recoverable under the Rehabilitation Act or the ADA to parents of a student with special needs in a lawsuit against the department of education challenging the department's refusal to pay for the placement of the student in a private school, absent a showing that the department of education intentionally discriminated. 378 F. Supp. 2d 13, 21 (D.P.R.) *aff'd sub nom. Zayas v. Puerto Rico*, 163 F. App'x 4 (1st Cir. 2005). In so ruling, the court found that the plaintiffs had presented no evidence of deliberate indifference or bad faith by the defendant. Instead, the court found that "a genuine disagreement existed between the parties as to what constituted an 'appropriate' education" for the plaintiff student. *Id.* Accordingly, the court dismissed the plaintiffs' claims under Section 504 of the Rehabilitation Act.

As a preliminary matter, the Plaintiffs-Appellants do not allege "intentional discrimination" on the part of Shorewood anywhere in their Amended Complaint. [Dkt. #20]. Therefore, they may not recover compensatory damages under the ADA or the Rehabilitation

Act. *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 757 (S.D. Tex. 2011) (plaintiffs could not recover compensatory damages under ADA or Rehabilitation Act due to failure to allege intentional discrimination in their complaint). Even assuming *arguendo* that Plaintiffs-Appellants had alleged such conduct on the part of Shorewood, Plaintiffs-Appellants have failed to set forth any facts or present any evidence to support such an allegation. In reality, Plaintiffs-Appellants could not support such an allegation, as Shorewood acted at all times within the plain language of the Wisconsin statutes governing its rights and responsibilities under open enrollment laws.

As demonstrated above, Plaintiffs-Appellants' allegation that "[d]espite the December 17, 2014 Decision and Order by the DPI, Shorewood still refuses to enroll S.B." is simply false. *See* [Dkt. #20 at ¶ 78]. In reality, Shorewood has never refused to enroll S.B. at any time after the DPI decision. Shorewood contacted N.B. on January 28, 2015 to facilitate S.B.'s re-enrollment at Shorewood, but N.B. never responded. [Dkt. #68 at ¶ 5, Ex. A]. Nor has N.B. responded to any of Shorewood's subsequent attempts to communicate with her. [Dkt. #69 at ¶ 2, Ex. A]. Since January 28, 2015, Shorewood has never received any communication from N.B. or S.B. [Dkt. #67 at ¶ 11]; [Dkt. #68 at ¶ 6].

The *only* plausible damages identified by N.B. and S.B. as a result of alleged discrimination by Shorewood is an alleged tuition payment incurred by N.B. to send S.B. to a private school for the spring semester in 2015 school year. [Dkt. #69, Ex. B, Interrogatory No. 8]. In reality, however, N.B. *chose* to incur this expense *after* the December 17, 2014 Decision and Order, and she *declined* to re-enroll S.B. in Shorewood. In the spring of 2015, N.B. had the option of enrolling S.B. in either Shorewood or the Milwaukee Public School District, at no cost, but she elected to instead enroll S.B. in a private school at her own expense. Thus, while N.B. had multiple options regarding S.B.'s education for the spring 2015 semester, including

enrollment at Shorewood for free, she nonetheless *chose* to enroll S.B. in private school at her own cost. Therefore, assuming *arguendo* N.B. or S.B. had suffered any alleged damages based on unlawful conduct by Shorewood, they failed to mitigate them.

CONCLUSION

For all the reasons set forth herein, Defendant-Appellee, Shorewood School District, hereby respectfully requests the United States Court of Appeals for the Seventh Circuit affirm in their entirety Judge William M. Conley's October 3, 2017, Opinion and Order and October 16, 2017, Judgement, rendered in the United States District Court for the Western District of Wisconsin, in which the Court dismissed with prejudice all claims brought by Plaintiffs-Appellants and entered final judgment in favor of Defendants-Appellees.

Dated this 9th day of February, 2018.

BUELOW VETTER BUIKEMA
OLSON & VLIET, LLC

s/ Kevin C. Pollard
Kevin C. Pollard (Bar No. 1074929)
kpollard@buelowvetter.com
20855 Watertown Road, Suite 200
Waukesha, WI 53186
Telephone: (262) 364-0300
Facsimile: (262) 364-0320

Counsel for Defendant-Appellee
Shorewood School District

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Seventh Circuit Rule 32(c) because this Brief contains 7,602 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Seventh Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6), because this Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 12 point font.

Dated this 9th day of February, 2018.

BUELOW VETTER BUIKEMA
OLSON & VLIET, LLC

s/ Kevin C. Pollard
Kevin C. Pollard (Bar No. 1074929)
kpollard@buelowvetter.com
20855 Watertown Road, Suite 200
Waukesha, WI 53186
Telephone: (262) 364-0300
Facsimile: (262) 364-0320

Counsel for Defendant-Appellee
Shorewood School District

CERTIFICATE OF SERVICE

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

Dated this 9th day of February, 2018.

BUELOW VETTER BUIKEMA
OLSON & VLIET, LLC

s/ Kevin C. Pollard
Kevin C. Pollard (Bar No. 1074929)
kpollard@buelowvetter.com
20855 Watertown Road, Suite 200
Waukesha, WI 53186
Telephone: (262) 364-0300
Facsimile: (262) 364-0320

Counsel for Defendant-Appellee
Shorewood School District