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

S.W., a minor, et al.,

Plaintiffs,

-vs-

Case No: 14-CV-792

Tony Evers, in his official capacity, et al,

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In 1997, the State of Wisconsin enacted a statute creating the interdistrict full-time open enrollment program for students in Wisconsin public schools, namely Wis. Stat. §118.51 (the "Open Enrollment Law"). The program created by Wisconsin's Open Enrollment Law gives parents a choice in their children's public education by allowing students to enroll in a public school district other than the one in which they reside (the "Open Enrollment Program.") The Open Enrollment Program is an excellent program and is immensely popular. For the 2013-2014 school year, 42,929 applications were submitted by Wisconsin students for participation in the Open Enrollment Program. (PPFOF ¶50.)

However, the right to participate in the Open Enrollment Program is not made available to all children on equal terms. Children with disabilities do not have the same access to the Open Enrollment Program as children without disabilities. Wis. Stat. §118.51(5)(a)4 permits school districts to deny the open enrollment applications of children with disabilities on the basis that they have a disability. That section of the Open Enrollment Law applies solely to children with disabilities and allows school districts to exclude children with disabilities from enrolling in their

districts on the basis of their disability status. In the 2013-2014 school year alone, public school districts in Wisconsin used §118.51(5)(a)4 to reject over 1,000 applications for open enrollment from children with disabilities. (PPFOF ¶51.)

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

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

Here, the Defendants have illegally discriminated against children with disabilities by denying them the opportunity to participate in and receive the benefits of the services, privileges and advantages of Wisconsin's Open Enrollment Program. Superintendent Evers and the Wisconsin Department of Public Instruction (the "DPI") (collectively the "State Defendants") administer a statute which, on its face, discriminates against children with disabilities. Moreover, the State Defendants administer the Open Enrollment Law in ways that specifically exclude such children from participation in the Open Enrollment Program by, among other things, promulgating administrative rules implementing the Open Enrollment Law that assist and facilitate such discrimination. Elkhorn School District, Greendale School District, Muskego-

Norway School District, Shorewood School District, and Paris School District (collectively the "School District Defendants") have discriminated against children with disabilities by rejecting their open enrollment applications and denying their right to transfer into their districts under the Open Enrollment Program because of their disability status.

Wis. Stats. §118.51(5)(a)4 violates Title II of the ADA and Section 504 and when the Defendants use §118.51(5)(a)4 to deny children with disabilities access to the Open Enrollment Program they are violating federal law. This lawsuit seeks a ruling that §118.51(5)(a)4 of the Open Enrollment Law violates the rights of children with disabilities under federal law to be treated the same as children without disabilities.

BACKGROUND FACTS

The Plaintiffs Have Been Discriminated Against Under the Open Enrollment Program Based Upon Disability.

The Plaintiffs are a group of minor children (each of whom is an individual with a disability as defined under federal law), and their parents.[1] (PPFOF ¶¶ 1, 4, 6, 8, 10, 12, 14, 16, 18, and 20.) The children are all students who have applied for and been denied the opportunity to participate in Wisconsin's Open Enrollment Program due to disability status. (PPFOF ¶¶ 88, 90, 100, 103, 109, 112, 116, 117, 130, 142, 149, and 157.)

One of the Plaintiffs, R.W., resides in the Kenosha Unified School District. (PPFOF ¶126.) In early 2012, R.W. and his identical twin brother applied under the Open Enrollment Program to attend the Paris School District ("Paris") for kindergarten because Paris is regarded as one of the top school districts in Wisconsin. (PPFOF ¶130.) Paris originally accepted the applications of R.W. and his identical twin, but later revoked its acceptance of R.W.'s

[1] Pursuant to this Court's Order dated February 12, 2015 the Plaintiffs are referred to herein solely by their initials in order to protect the privacy of the minor Plaintiffs.

application when it found out he had a disability. (PPFOF ¶¶133, 134, 142-144.) Paris revoked its acceptance of R.W.'s application under Wis. Stat. §118.51(5)(a)4, which applies solely to children with disabilities. (PPFOF ¶143.) There was no difference in the status of R.W. and his identical twin as qualified applicants for the Open Enrollment Program other than the fact that R.W. had a disability. (PPFOF ¶145.)

A second Plaintiff, P.F., resides in the Racine Unified School District. (PPFOF ¶107.) P.F. has applied under the Open Enrollment Law to transfer into a number of different school districts. (PPFOF ¶109.) P.F. has been rejected eleven times in the last five years, most recently by the Muskego-Norway School District. *Id*.

P.F. applied for open enrollment in the Muskego-Norway School District ("Muskego-Norway") for the 2014-2015 school year. (PPFOF ¶111.) P.F.'s application was denied by Muskego-Norway under Wis. Stat. §118.51(5)(a)4. (PPFOF ¶110.) For that school year, Muskego-Norway approved 55 open enrollment seats for children without disabilities, but *zero* open enrollment seats for children with disabilities. (PPFOF ¶113.)

The other Plaintiffs are similarly situated. S.W. lives in Wauwatosa. (PPFOF ¶79.) In 2014, S.G. applied, on behalf of S.W., for open enrollment into the Whitefish Bay School District, the Elmbrook School District, and the Elkhorn School District ("Elkhorn"). (PPFOF ¶88.) S.W. was rejected by all three districts. (PPFOF ¶90.) The rejection by Elkhorn was based upon Wis. Stat. §118.51(5)(a)4. (PPFOF ¶90.) For that school year, the Elkhorn School Board set no cap on open enrollment seats for children without disabilities, but rejected S.W.'s application because of his disability status. (PPFOF ¶90-91.)

S.B. lives in Milwaukee. (PPFOF ¶ 149.) In 2014, his mother applied under the Open Enrollment Program to enroll S.B. in the Shorewood Public School District ("Shorewood") for

3rd grade for the upcoming 2014-2015 school year. (PPFOF ¶ 149.) On May 27, 2014, S.B.'s open enrollment application was accepted by Shorewood. (PPFOF ¶ 152.) On September 2, 2014, S.B. started 3rd grade at Shorewood. However, on October 8, 2014, Shorewood revoked its acceptance of S.B.'s open enrollment application based upon Wis. Stat. §118.51(5)(a)4. (PPFOF ¶ 154.) On November 7, 2014, N.B. appealed Shorewood's decision to revoke its acceptance of S.B. as an open enrollment student to the Department of Public Instruction. (PPFOF ¶ 159.) On December 17, 2014, the DPI overturned Shorewood's decision. (PPFOF ¶ 160.) However, despite the December 17, 2014 Decision and Order by the DPI, Shorewood did not enroll S.B. and the DPI has taken no steps to enforce its December 17, 2014 Decision and Order. (PPFOF ¶ 161-163.)

D.R. and her daughters live in Milwaukee. (PPFOF ¶ 94.) In 2013, D.R. applied under the Open Enrollment Program to the Greenfield School District for both her daughters, Ca.R. and Ch.R. (PPFOF ¶ 98.) Both applications were rejected. (PPFOF ¶ 99.) In 2014, D.R. applied under the Open Enrollment Program for both children to the Greenfield and Greendale School Districts. (PPFOF ¶ 100.) The applications were rejected by both districts. (PPFOF ¶102.) Greendale rejected the applications because the girls had disabilities. (PPFOF ¶ 103.) The Greendale rejection was based on Wis. Stat. §118.51(5)(a)4. *Id.*

The Wisconsin Open Enrollment Law
Discriminates Against Children with Disabilities.

Under the Open Enrollment Law, children with disabilities do not have the same access to the Open Enrollment Program as children without disabilities. The Wisconsin statute governing the Open Enrollment Program is Wis. Stat. §118.51.[2] Here is how the statute works.

[2] A copy of the full statute is included in the Appendix of Unpublished Cases and Wis. Stat. ¶ 118.51 filed herewith.

Under that statute, the school district in which a student resides is referred to as the resident school district. Wis. Stat. §118.51(1)(f). The school district into which the student seeks to enroll is referred to as the nonresident school district. Wis. Stat. §118.51(1)(c). A nonresident school district may deny an open enrollment application only for the reasons set forth in Wis. Stat. §118.51(5)(a).

In order to make it financially equitable for a nonresident school district to educate a child that does not live within that district, the resident school district pays "tuition" to the nonresident school district. This is done through an adjustment of state aid to both the resident and the nonresident school districts as set forth in Wis. Stat. §118.51(16). State aid to the nonresident school district increases while the state aid to the resident school decreases in an equal amount. The legislature has determined the amount of the "tuition" based upon the statewide average per pupil cost for regular instruction, co-curricular activities, instructional support services and pupil support services. Wis. Stat. §118.51(16)(a)3. For the 2014-2015 school year the tuition was $6,635 per student. (PPFOF ¶ 37.) If the student has a disability, the nonresident school district determines the additional cost of providing necessary and appropriate services to that student and adds that amount to the tuition. Wis. Stat. §118.51(17).

The criteria pursuant to which a nonresident school district may reject an application for participation in the Open Enrollment Program are set forth in Wis. Stat. §118.51(5)(a), as follows: (1) there is no space in the school district, (2) the student has been expelled for one of the reasons listed in the statute, (3) the student is an habitual truant, or (4) the district has no space for children with disabilities. It is this fourth criterion that forms the basis for this lawsuit.

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

> Whether the special education or related services described in the child's individualized education program under s. 115.787(2) are available in the nonresident school district or

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

Wis. Stat. §118.51(5)(a)4.

To understand why this section of the statute leads to an illegal result requires a parsing of the section. First, it applies only to children who receive special education and related services under §115.787(2). Section 115.787 is a part of the Wisconsin statutes that apply to "Children with Disabilities" and requires that public schools provide an "individualized education program" to a child with disabilities. Thus, this section only applies to children with disabilities.

Second, with respect to such children, this section of the statute allows a nonresident school district to reject their open enrollment application if either the services described in the child's individualized education program are not available in the nonresident school district or if such services are provided, there is no space available in the nonresident school's program.

Under this section of the statutes, Paris could reject R.W. because he was disabled, but accept his twin brother, who was not disabled. In fact, this was the section of the statute that Paris relied upon. (PPFOF ¶ 143). Paris was able to claim that it had space available for children who were not disabled to open enroll into the district, but it had no space for R.W. The statute allowed Paris to limit the open enrollment seats for children with disabilities to zero.

The statute allowed Muskego-Norway to approve 55 open enrollment seats for children without disabilities in 2014, but *zero* open enrollment seats for children with disabilities and, thus, to reject P.F. Each of the School District Defendants relied upon Wis. Stat. §118.51(5)(a)4 to reject the open enrollment applications of the minor Plaintiffs. (PPFOF ¶¶ 90, 103, 110, 143 and 154.) This section of the statutes expressly authorized the School District Defendants to

exclude the minor Plaintiffs from enrolling in their districts and to reject their open enrollment applications because they were disabled. The School District Defendants decided that there would be "no seats on the bus" for children with disabilities.

The legal problem, as shown below, is that this result violates federal law. A nonresident school district is no more entitled under federal law to deny an education to a child who enrolls in the school district under the Open Enrollment Program than a child who physically moves into the district or lives in the district and becomes old enough to attend school. What would Paris say if R.W. moved into the school district? Could it say he could not attend school in Paris because there are "no more seats" for children with disabilities? No. What would it say if his family lived in Paris and he became old enough to attend school? "Go somewhere else – no more seats for children with disabilities?" No. Under Title II of the ADA and Section 504, Paris is not permitted to exclude a child from public school because of his disability status. If Paris, or any other school district, admits students to its district through the Open Enrollment Program, then Title II of the ADA and Section 504 require that it must admit students without regard to whether they have disabilities.

The Effect on the Plaintiffs.

The minor Plaintiffs were not able to enroll in the Defendant School Districts under the Open Enrollment Program. (PPFOF ¶¶ 90, 92, 103, 109, 142, and 154.) Paris did not reject R.W. until August, 2012—mere weeks before the first day of school—which made it impossible to enroll in any district other than R.W.'s resident school district for that school year. (PPFOF ¶ 146.)[3] As a result, E.W. enrolled R.W. in the local Kenosha School District. (PPFOF ¶ 147.) Because of R.W.'s rejection by Paris and the discriminatory effect of Wis. Stat. §118.51(5)(a)4,

[3] Paris' action in August, 2012 was actually a revocation of its May, 2012 acceptance letter and was improper under Wis. Stat. §118.51(5)(b). That subsection precludes revocation of acceptance except under very limited circumstances, none of which applied to R.W.

E.W. has kept R.W. in the Kenosha public school system. (PPFOF ¶¶ 142-147.) However, she now has one child in Kenosha schools and one child in another school district. (PPFOF ¶¶ 147-148.) This is causing E.W. to incur excessive costs for transportation and other items. (PPFOF ¶ 148.)[4]

Because A.F. has not been able to enroll P.F. in a public school of his choice and A.F. remains unsatisfied with the Racine School District, A.F. has decided to incur the cost of moving to the Waterford School District, which A.F. believes will provide a better education for P.F. (PPFOF ¶ 124.) He has purchased a lot and is building a home in the Waterford School District. (PPFOF ¶ 125.) He has incurred these costs and expenses solely because of problems in the Racine School District and the exclusion of P.F. from being able to use the Open Enrollment Program to enroll in another school district. (PPFOF ¶¶ 124-125.)

S.G. has not been able to enroll S.W. in the public school that S.G. would have chosen for S.W. and her only choice has been to send S.G. to a private school at the cost of over $30,000 for a full year of tuition and related services. (PPFOF ¶ 93.) These are costs that S.G. should not have to pay because her son is entitled to receive an education in the public schools and to do so through the Open Enrollment Program.

N.B. did not want to send her son back to the failing MPS school system, so she decided to home school S.B. and then later enrolled him in a private school. (PPFOF ¶ 158.) He finished 3rd grade in private school. (PPFOF ¶ 158.) As a result, N.B. is incurring damages as a result of the discrimination by Shorewood. (PPFOF ¶ 164.)[5]

[4] As part of this motion, the Plaintiffs seek a declaration that they are entitled to compensatory damages but both the causation element (did the illegal discrimination cause the claimed damages) and the amount of those damages would be a questions of fact to be decided at trial.

[5] Shorewood's rejection of S.B. occurred in October 2014 after school started (PPFOF ¶154). The revocation by Shorewood was improper under Wis. Stat. §118.51(5)(b). That subsection precludes revocation of acceptance except under very limited circumstances, none of which applied to S.B.

Because D.R. remains dissatisfied with MPS and because she has not been able to enroll her daughters in a school district outside of MPS under the Open Enrollment Program, D.R. decided to enroll her daughters in a private school. (PPFOF ¶ 104.) The cost of the private school and associated services needed by her daughters is approximately $37,500 per year. (PPFOF ¶ 105.)

ARGUMENT

I. THE DEFENDANTS HAVE VIOLATED TITLE II OF THE ADA AND SECTION 504.[6]

By denying the minor Plaintiffs the opportunity to participate in the Open Enrollment Program, the Defendants have unlawfully discriminated against them based upon their disabilities. Section 118.51(5)(a)4, on its face, discriminates against students with disabilities because it applies only to them. It sets forth a basis for public school districts to exclude students with disabilities from open enrollment because of their disability status. It allows school districts to deny the applications of students with disabilities for participation in the Open Enrollment Program, but has no application to non-disabled students. This constitutes discrimination that is unlawful under Title II of the ADA and Section 504 because it denies children with disabilities the opportunity to participate in and benefit from a service, program or activity (namely the Open Enrollment Program) provided by public entities who are recipients of federal funding.

Based upon their responsive pleadings, the Defendants intend to assert a host of affirmative defenses.[7] Because of the shotgun nature of the defenses contained in the responsive pleadings the Plaintiffs are compelled to go through the elements of their claims under Title II of

[6] The Plaintiffs have also asserted an Equal Protection claim but that claim is not ripe for summary judgment because there are likely disputed issues of material fact.

[7] Muskego-Norway and Paris assert 23 affirmative defenses, Greendale and Elkhorn assert 4 affirmative defenses and Superintendent Evers and DPI assert 12 affirmative defenses.

the ADA and Section 504 in some detail to attempt to anticipate and address the potential defenses. Moreover, at the outset it is important to distinguish between claims under Title II of the ADA and Section 504 on the one hand, and claims under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 ("IDEA"), on the other hand.

The IDEA deals with a school district's evaluation and educational placement of children with disabilities who are enrolled in their districts and the provision of a free appropriate public education to them. *Charlie F. v. Bd. Of Educ. Of Skokie Sch. Dist.*, 98 F.3d 989, 991 (7th Cir. 1996). See also *Board of Educ. Of Tp. High School Dist. 211 v. Ross,* 486 F.3d 267, 278 (7th Cir. 2007). A school district's obligations under the IDEA arise only after the child gains access to the district by residence or enrollment. The ADA and Section 504, on the other hand, deal with differential treatment between the disabled and non-disabled that excludes or denies access to individuals with disabilities on the basis of disability. *Brown v. District 299-Chicago Public Schools*, 762 F.Supp.2d 1076, 1084 (N.D. IL 2010). This case involves claims under Section 504 and the ADA. The Plaintiffs bring no claims under the IDEA and IDEA case law is irrelevant to this dispute.[8]

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

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

[8] The Defendants all contend, for example, that the Plaintiffs have failed to exhaust administrative remedies. But Section 504 and the ADA, unlike the IDEA, do not require the exhaustion of administrative remedies prior to bringing a private suit right of action in federal court. *Doe v. County of Milwaukee*, 871 F. Supp. 1072, 1075 (E.D. Wis. 1995); Similarly, *Petersen v. University of Wisconsin Board of Regents*, 818 F.Supp. 1276, 1278 (W.D. WI 1993) *citing Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990).

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. §12132.

Similarly, Section 504 prohibits discrimination on the basis of disability and provides that:

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

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

In order to state a claim under Title II of the ADA or under Section 504 a plaintiff must prove that: (1) she is a qualified individual with a disability; (2) she was excluded from the benefits or services of a public entity or otherwise was discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was because of her disability. *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015); *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir.1999). Each of those elements is present in this case.

The Plaintiffs will address both their ADA and Section 504 claims at the same time in this brief. The rights and responsibilities established by Section 504 and the ADA are nearly identical. *Wagoner v. Lemmon*, 778 F. 3d 586, 592 (7th Cir. 2015); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 845 n. 6 (7th Cir.1999). The primary difference is that Section 504 applies only to public entities receiving federal funding, while the ADA contains no such limitation. *Id*. That difference is immaterial here because all of the Defendants have admitted in response to discovery requests that they receive federal funding. (PPFOF ¶ 32.)

In addition, as the Seventh Circuit noted in *Washington v. Indiana High School Athletic Ass'n*, precedent under one statute typically applies to the other. *Id*. (citing *Grzan v. Charter Hosp. of Northwest Indiana*, 104 F.3d 116, 123 (7th Cir.1997); *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459–60 (6th Cir.1997) (en banc); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir.1996)). Moreover, the remedies, procedures, and rights set forth in Section 504 are the same remedies, procedures, and rights applicable to discrimination claims under Title II of the ADA. *Id*. Similarly, the Seventh Circuit has said that the elements for claims arising under Section 504 are "substantially similar" to the elements of an ADA claim. *See Silk v. City of Chicago*, 194 F.3d 788, 798 n 6 (7th Cir. 1999).

B. *The Plaintiffs are qualified persons with a disability.*

In discovery, the Plaintiffs requested that the Defendants admit that each of the minor Plaintiffs was a qualified person with a disability but the Defendants refused to do so. (PPFOF ¶ 52.) The Defendants' refusal is odd given that each of the minor Plaintiffs had their open enrollment applications rejected on the basis that they have a disability. (PPFOF ¶ 90, 103, 110, 143, and 154.) Nevertheless, the undisputed facts establish that each of the minor Plaintiffs is a qualified person with a disability.

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

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

42 U.S.C. §12131.

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

Enrollment Program. The undisputed facts show that each of the minor Plaintiffs meets these requirements.

1. Each of the minor Plaintiffs has a disability.

Under the ADA "The term 'disability' means, with respect to an individual **(**A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; **or** (C) being regarded as having such an impairment." 42 U.S.C. §12102. The Plaintiffs need satisfy only one of these subparts but each of the minor Plaintiffs satisfies all three.

Each of the minor Plaintiffs has a physical or mental impairment that substantially limits one or more of their life activities. (PPFOF ¶¶ 54, 60, 64, 69, 74, and 78.) Five of the minor Plaintiffs have been diagnosed with autism. (PPFOF ¶¶ 53, 59, 68, and 74.) Children with autism are explicitly recognized under Wis. Stat. §115.76(5) as being a "child with a disability." The sixth minor Plaintiff, S.B., has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). (PPFOF ¶¶ 78, 155.) Because of their disabilities each of the minor Plaintiffs has an Individual Education Plan ("IEP") under Wis. Stat. §115.787. (PPFOF ¶¶ 55, 61, 65, 70, 75 and 78.)

The physical and mental impairments of the minor Plaintiffs are detailed in the declarations filed by their parents, their medical diagnoses, and their IEP Evaluation Reports. (PPFOF ¶¶ 55-57, 61-62, 65-66, 70-71, 75-76, and 78.) The existence of these impairments and the records of them satisfy subparts A and B of 42 U.S.C §12102. They have physical and mental impairments that meet the statutory standard and there are records of their disabilities. The minor Plaintiffs also satisfy subpart C of 42 U.S.C §12102 because they were all rejected

from participation in the Open Enrollment Program under Wis. Stat. §118.51(5)(a)4 which means that they were regarded as having disabilities.

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

The only eligibility requirements to apply for the Open Enrollment Program are that the person be a student and that the student's resident school district offers the same type of program that the student seeks to attend in the non-resident school district. *See*, Wis. Stat. §118.51(2). Here, each of the minor plaintiffs is a student. (PPFOF ¶¶ 1, 6, 10, 14 and 18.) Further, each of them applied to attend a program in a non-resident school that was offered in their resident school district. (PPFOF ¶¶ 89, 101, 111, 131, and 150.)

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

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

The Plaintiffs satisfy the second element of their ADA and Section 504 claims because each of the minor Plaintiffs was excluded from participation in the Open Enrollment Program by the Defendants who are public entities. Based upon their Answers and discovery responses, the Defendants will apparently raise two defenses to this element; (1) that Defendant Evers is

allegedly not a "public entity" and (2) that the Open Enrollment Program is allegedly not a "program, service or activity."

Each of the School District Defendants and the DPI has admitted in response to discovery that they are "public entities" under Title II of the ADA and Section 504. Defendant Evers, however, denies that he is a public entity. (PPFOF¶ 167.)[9] But Defendant Evers is wrong as a matter of law. Individuals acting in their official capacities are public entities under Section 504 and Title II of the ADA. *See Bacon v. City of Richmond*, 3888 F.Supp.2d 700, 707 (E.D. Va. 2005) *citing Henrietta v. Bloomberg*, 331 F.3d 261, 288 (2nd Cir. 2003). *See also Bruggeman ex rel. v. Blagojevich*, 324 F.3d 906, 912 (7th Cir. 2003) (suits against individuals in their official capacity are permitted).

Superintendent Evers was acting in his official capacity at all times relevant herein. Among other official duties, he is responsible for supervising schools for children with disabilities (Wis. Stat. §115.28(3)), examining and determining all appeals which by law are made to the state superintendent (Wis. Stat. §115.28(5)), accepting federal funds and acting as agent for the receipt and disbursement of such funds (Wis. Stat. §115.28(9)), and most importantly, under Wis. Stat. §15.37 he has responsibility for the direction and supervision of DPI.

Between his individual duties under Section 115.28 and acting in his capacity of running DPI, Superintendent Evers is responsible for creating the application forms for the Open Enrollment Program (Section 118.51(15); providing information and assistance to parents about the Open Enrollment Program *Id*.; preparing an annual report regarding the Open Enrollment

[9] As referred to above, Section 504 has the additional requirement that it applies only to public entities that receive federal funding. The Defendants have all admitted that they are recipients of federal funding. (PPFOF ¶ 32.) As a result, all of the Defendants are covered by Section 504 as well as Title II of the ADA.

Program, *Id*.; determining the "tuition" paid by the resident school district to the nonresident school district (Section 118.51(16); hearing appeals from rejections (Section 118.51(9); and promulgating rules to implement and administer the Nonresident School District Acceptance criteria which are the direct subject of this action (Section 118.51(5)(d)3). Wisconsin Administrative Rules PI Chapter 36 contains the administrative rules promulgated by DPI which apply to the Open Enrollment Program and establish the procedures and requirements relating to pupil applications for the Open Enrollment Program, including the acceptance and denial of applications by school districts, filing by pupils of appeals with the DPI of denials by school districts, and the adjudication of such appeals by the DPI.

In these roles, Superintendent Evers is the officer (and DPI is the agency) charged with administering the Wisconsin Open Enrollment Law (along with school districts) and, in particular, for administering that part of the Open Enrollment Program dealing with applications for participation in the Open Enrollment Program. Thus, Superintendent Evers is an appropriate official, along with DPI, to be a defendant in this action challenging the legality of the Open Enrollment Law. *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 303, 240 N.W.2d 610, 623 (1976) (actions challenging a state statute are appropriately brought against "the officer or agency charged with administering the statute"). Because he is a "public entity" as a matter of law, and because he is the officer charged with administering Wisconsin's Open Enrollment Law, Superintendent Evers is an appropriate defendant herein in his official capacity.

The Defendants' second defense under this element is their contention that the Open Enrollment Program is not a "service, program or activity" within the meaning of Title II of the ADA and Section 504. (PPFOF ¶ 39.) But that argument is wholly inconsistent with the

purpose and language of Title II of the ADA and Section 504, case law, and the common understanding of the words "service, program and activity."

First, Congress has stated that Title II of the ADA prohibits discrimination "in such critical areas as … housing, public accommodations, *education,* transportation, communication, recreation, institutionalization, health services, voting and access to public services." 42 U.S.C. §12101(a)(3) (emphasis added). Thus, "education" has been expressly recognized in the statute as an intended area of application of the ADA.

Second, under Title II of the ADA "programs, services, or activity" is a "catchall phrase that prohibits all discrimination by a public entity, regardless of the context." *Disability Advocates, Inc. v. Paterson,* 653 F.Supp.2d 184, 192 (E.D. NY 2009) *quoting Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 45 (2nd Cir. 1997) *rev'd on other grounds by Zervos v. Verizon New York,* 252 F.3d 163, 171 n. 7 (2nd Cir. 2001). Moreover, Section 504 defines "program or activity" as <u>all the operations of</u> a public entity. 29 U.S.C. §749(b). In other words, the phrase "services, programs and activities" was not intended to be a limitation that constricts the application of disability protection but to be broadly inclusive to prevent as much discrimination against disabled persons by public entities as possible.

Third, Title II of the ADA has been specifically applied to protect qualified students with disabilities from exclusion from educational programs. *Bacon v. City of Richmond,* 3888 F.Supp.2d 700, 702 (E.D. Va. 2005) ("Program or activity" "is broad enough to include the operations of a school system, educational programs and related activities."). *See also, Toledo v. Sanchez,* 454 F.3d 24, 39 (1st Cir. 2006);); *Constantine v. Rectors and Visits of George Mason University,* 411 F.3d 474, 488 (4th Cir. 2005); *BPS v. Board of Trustees for Colorado School for*

the Deaf and Blind, 2013 WL 5382112 1, 15 (D. CO Aug. 21, 2013)[10] ("In the context of public education, Title II therefore requires that disabled students not be excluded from educational programs or activities, or otherwise discriminated against, because of their disabilities.")

Further, in interpreting the words in federal statutes courts may look to the common everyday understanding of those words. *Central States, Southeast and Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 895 (7th Cir. 2001) ("statutory terms or words will be construed to their ordinary, common meaning unless these are defined by the statute or the statutory context requires a different definition.")

According to Webster's Dictionary, "program" is defined as "a plan or system under which action may be taken toward a goal" (2015 Merriam-Webster Dictionary). This definition would certainly include the Open Enrollment Program. It is a plan under which action (enrolling in a nonresident school district) may be taken toward the goal of increasing students' educational options.

Moreover, it would be extraordinarily difficult to plausibly deny that the Open Enrollment Program is a "program" because it is called a "program" all of the time. In fact, it is referred to as a "program" in the Open Enrollment Law itself. See, e.g., Wis. Stat. §§118.51(2), 118.51(5) and 118.51(15). Furthermore, the Open Enrollment Program is described as a "program" by the DPI on its open enrollment website ("[t]he inter-district public school open enrollment *program* allows parents to apply for their children to attend public school in a school district other than the one in which they reside") (emphasis added). (PPFOF ¶ 41.) The non-partisan Legislative Fiscal Bureau also refers to open enrollment as a state program in its informational paper titled the "Open Enrollment *Program"*. (PPFOF ¶ 42.) The Open

[10] *BPS* and *Brewer* cited at page 23, supra, are unpublished. Copies of those decisions are included in the Appendix of Unpublished Cases filed herewith.

Enrollment Program was also referred to as a "program" by each of the Defendant School Districts in their rejection letters to the minor Plaintiffs. (PPFOF ¶ 43.)

Finally, even if this Court were to conclude that the Open Enrollment Program is not a program, service or activity under Title II of the ADA and Section 504, the Defendants are still liable because the Plaintiffs were "subjected to discrimination" by the Defendants (all of whom are public entities), which is a separate claim.

A claim based upon being denied participation in or the benefits of a "program, service, or activity" only applies to the first prong of a claim under those statutes. Again going back to the language of the statutes, Section 504 states that no qualified person with a disability shall solely by reason of her disability be excluded from participation in, be denied the benefits of, **or be subjected to discrimination** under any program or activity receiving federal funds. The language of Title II of the ADA states that no qualified individual with a disability shall on the basis of her 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 the public entity. The courts have held that the "or be subjected to discrimination" clause of the statutes is a separate basis for relief, frequently referred to as the "second prong."

The Seventh Circuit described this two-prong analysis as follows:

> Our sister circuits have helpfully divided § 12132 into two clauses for purposes of analysis: no otherwise eligible individual with a disability may be (1) "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity" by reason of such disability; or (2) "subjected to discrimination by" a public entity by reason of disability.

Brumfield v. City of Chicago, 735 F.3d 619, 626 (7th Cir. 2013) citing *Elwell*, 693 F.3d at 1306; *Zimmerman*, 170 F.3d at 1174, *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 821-822 (11 Cir. 1998). The second prong is distinguished because "[it] more

broadly prohibits disability based 'discrimination,' covering all forms of discrimination by state and local governments in the provision of public services." *Id*. at 627.

Here, the Defendants violated Title II of the ADA and Section 504 by denying children with disabilities the opportunity to participate in and receive the benefits of the services, privileges and advantages of Wisconsin's Open Enrollment Program or alternatively by subjecting them to discrimination based upon their disabilities.

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

The third element is that the Plaintiffs were excluded from or denied benefits or discriminated against *because of* their disabilities. This element is, in essence, the "causation" element. It is certainly met by the Plaintiffs in this case. Each of the minor Plaintiffs was denied the right to participate in the Open Enrollment Program under Wis. Stat. §118.51(5)(a)4. (PPFOF ¶¶ 90, 103, 110, 143 and 154.) A denial under that section can be issued only to children with disabilities and is based on the fact that the applicant has a disability. Section 118.51(5)(a)4, on its face, does not apply to students who are not disabled.

1. *The Standard for Proving Causation under the ADA and under Section 504 is "But for" Causation.*

The words used in Section 504 and the words used in the ADA to set forth the causation element are slightly different. The ADA provides that no qualified individual with a disability shall *on the basis of* her 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 the public entity. 42 U.S.C. §12131(A). In Section 504, the statute says no qualified person with a disability shall *solely by reason of* her disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal funds. 29 U.S.C. §794(a)

But the difference in words is a distinction without a legal difference. In the Seventh Circuit the causation element for claims under Section 504 are treated as "substantially similar" to the elements of an ADA claim. *See Silk v. City of Chicago*, 194 F.3d 788, 798 n. 6 (7th Cir. 1999). While a defendant might contend that "solely by reason of" is a stricter standard than "on the basis of," that is not the case. In *Washington v. Indiana High School Athletic Ass'n*, 181 F.3d 840, 849 (7th Cir. 1999), for example, the Seventh Circuit considered the causation element of both a Title II ADA claim and a Section 504 claim and treated them the same. The court noted in footnote 6 that the language was different, but when it came to the "solely by reason of" language in Section 504 the Seventh Circuit said that this language "merely indicates that [the plaintiff] must establish that, but for his learning disability, he would have been eligible to play sports in his junior year" (emphasis added). This "but for" standard was then also used by the Seventh Circuit to describe the causation element under Title II of the ADA. *Wisconsin Community Services v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006). Thus, the causation element is the same for both claims and it is "but for" causation. *See also*, *Flynn v. Doyle*, 672 F.Supp.3d 858, 878 (E.D. Wis. 2009) ("the minor differences between the ADA and the Rehabilitation Act are not relevant, so the Court will confine its analysis to the ADA").

Thus, the Plaintiffs herein must establish (1) that but for their disabilities, they would have been able to participate in the Open Enrollment Program, **or** (2) they were subjected to discrimination by a public entity by reason of disability. Although this is an either/or test, the Plaintiffs can establish both.

2. The Open Enrollment Law Imposes Different and More Stringent Requirements for Participation on Children With Disabilities than on Children Without Disabilities.

Wis. Stats. §118.51 distinguishes between disabled and non-disabled students. Section 118.51(5)(a)1, 2 and 3 provide grounds to deny the applications of non-disabled students and disabled students alike without regard to their disability status. Wis. Stats. §118.51(5)(a)4, however, provides additional grounds to deny the applications of disabled students and does not apply to non-disabled students. The differential treatment of disabled students from non-disabled students in Section 118.51(5)(a)4 is discrimination. In fact, it is intentional discrimination.

Plaintiffs under Title II of the ADA and Section 504 do not need to prove some sort of animus against the disabled or a specific intent to discriminate on the basis of disability. *Washington v. Indiana High School Athletic Ass'n* 181 F.3d 840, 846 (7th Cir. 1999). Rather, a discrimination claim under Section 504 and/or the ADA may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable accommodation, or (3) the defendant's rule disproportionally impacted disabled people. *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528-529 (7th Cir. 2014), *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d at 847.[11]

Having a rule that applies only to the disabled or applies differently to the disabled is illegal discrimination. *Brewer v. WI Bd. of Bar Examiners*, 2006 WL 3469598 (E.D. Wis. Nov. 28, 2006) ("to discriminate means merely to make a distinction on the basis of the prohibited factor.") In *Brewer*, the Plaintiff was a graduating law student seeking admission to the Wisconsin Bar. The Plaintiff had a mental disability. When the Board of Bar Examiners

[11] At a minimum, Section 118.51(5)(a)4 has a disparate impact on disabled children. Wisconsin had two options to pick from when it drafted its statute and chose the one that caused over 1,000 disabled children (but zero nondisabled children) to be excluded from the Open Enrollment Program in the 2013-2014 school year. That is a disparate impact. Whether the Defendants' conduct is treated as intentional discrimination, or a disparate impact it is a violation of the ADA and Section 504.

discovered that fact they required her to submit a psychological evaluation (a requirement not imposed on non-disabled applicants). This was done as part of the Board's character and fitness requirement.

The Court acknowledged that requesting further information from an applicant with a history of mental illness about the nature and extent of her impairment makes some logical sense, but the Court concluded that the Board's conduct of subjecting an individual with a disability to an additional requirement was a violation of the ADA. (Decision p. 7) The plaintiff in *Brewer* was treated differently than her non-disabled classmates. She received different treatment because of her disability. That difference in treatment, according to the Court, was exactly what the ADA was intended to prevent. *Id.* at 10. *See also, Stratton v. Handy Button Machine Co.,* 639 F.Supp. 425, 430 (N.D. Ill. 1986) ("To discriminate means merely to make a distinction on the basis of the prohibited factor"); *Walker v. NationsBank of Fla., N.A.,* 53 F.3d 1548, 1557 (11th Cir. 1995) ("evidence of the bank's different treatment of similarly situated branch managers is of probative value in determining whether the bank intentionally discriminated against [plaintiff]").

3. The School District Defendants Rejected the Applications of the Minor Plaintiffs Because they were Disabled.

The School District Defendants intentionally discriminated by rejecting the applications of the minor Plaintiffs because they had a disability. The School District Defendants will argue that they did not do anything wrong - they simply followed the statute - but the statute is elective. The School District Defendants were not required to deny the applications submitted on behalf of children with disabilities under Section 118.51(5)(a)4. They had the option of accepting those children into their schools but decided not to do so. By denying the applications of the minor Plaintiffs under that section the School District Defendants chose to discriminate against them by

relying upon a rule that treated children with disabilities differently than non-disabled students. That conduct was a violation of federal law

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

The decision by the Wisconsin legislature to include Section 118.51(5)(a)4 in the Open Enrollment Law was a deliberate policy choice. The Open Enrollment Law as it currently exists came into the statutes in 1997. As part of the drafting process, the legislature specifically considered how disabled children would be treated under the program. The DPI submitted a proposal stating that the criteria for selection into the program could not include "Physical, Mental, Emotional or Learning Disability" and the proposal stated that "No district may refuse to enroll an EEN[12] pupil." (PPFOF ¶ 165.) The legislature chose to reject that option.

In January, 1997 the Wisconsin Legislative Council Staff drafted a memo that is directly on point. The memo states that it was prepared to assist in the "review of issues related to the participation by children with exceptional educational needs [i.e., children with disabilities who need special education programs or services] in an interdistrict public school open enrollment program." (PPFOF ¶ 166.) The memo discusses the potential effects of Section 504 on the proposed legislation.[13]

The memo notes that the U.S. Department of Justice Office of Civil Rights ("OCR) administers Section 504. (Leg. Council Memo p. 4.) The memo then states that:

> OCR has determined that a public school district that is the recipient of federal financial assistance may not categorically deny interdistrict transfers to nonresident disabled students under a public school choice program. *[Fallbrook (CA) Union Elementary School District*, 16 EHLR 754 (OCR 1990).]

[12] EEN stands for "Exceptional Educational Needs."
[13] The memo also discusses the Individuals with Disabilities Education Act (the "IDEA") but as stated above the IDEA is not directly implicated in this case.

The memo went on to discuss whether the Open Enrollment Law could contain a provision which allowed disabled children to be excluded if the nonresident district did not have a place for the student in its program and concluded this was an unanswered question under the law as it then existed. (Leg. Council Memo at p. 7.) The Memo then proposed three alternatives. Alternative A was to "[p]ermit the nonresident school district to reject a transfer if the program or services described in the child's IEP are not available in the nonresident district or if there is not space available in the special education program identified in the child's IEP." Alternative B was to remain silent and have no specific provision. Alternative C was to "[s]pecifically provide that the nonresident school district: (1) may not reject a child based on the availability of an appropriate special education program or related services and (2) shall provide an appropriate special education program and related services." (Leg. Council Memo at pps 8-9.)

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

As a counter-example, Minnesota made the opposite choice. Its open enrollment statute provides that the standards for acceptance "may not include previous academic achievement, athletic or other extracurricular ability, **disabling conditions,** proficiency in the English language, previous disciplinary proceeding, or the student's district of residence." Minn. Stat. §124D.03(6) (emphasis added). The reason for pointing out a counter-example is to show that an open enrollment program can be successfully drafted to fully protect disabled children. Wisconsin simply chose not to do so.

5. The Rationale for Section 118.51(5)(a)4 violates the ADA and Section 504.

The Defendants will argue that by administering and implementing Section 118.51(5)(a)4 the way they do, they are not discriminating against disabled children but rather are actually doing them a favor. By allowing them to be rejected because there was not an existing program (or space in an existing program) to meet their needs per their IEP, the Defendants were protecting them and avoiding their placement in a school that would not meet their needs.[14] But this argument is both logically misplaced and ignores federal disability law.

It is logically misplaced because it ignores the fact that the nonresident school district could develop a program to meet the child's needs in the same way that the resident school district was required to do when the child entered that school system. What would the nonresident school district do if the child moved into that district or was born in the district and became old enough to attend school? Send them away because it did not have a space for them? That would be a blatant violation of federal law. Rather than protecting disabled children, the Defendants have denied them choices that they made available to nondisabled children.

The State Defendants could have required the nonresident school district to meet the needs of disabled children in the same way that the resident school is required to do but simply decided not to do so. The School District Defendants could have admitted the minor Plaintiffs and given them the same education they would if they moved into or aged into the district. But they also chose not to do so.

Even if cost were a defense, which it is not, the School District Defendants would have incurred no extra cost to educate the minor Plaintiffs. Under Section 118.51(12) the cost of that education is borne by the resident school district, not the nonresident district. Under the Open

[14] The Plaintiffs' arguments herein do not depend on whether or not there was actually space for the minor Plaintiffs in the school districts to which they applied. Section 118.51(5)(a)4 violates federal law either way.

Enrollment Program if a child with a disability attends a different school district, the money follows her. (PPFOF ¶ 36.) The nonresident school district calculates the cost of providing services and the resident school district pays those costs. (PPFOF ¶ 38.)

The logical fallacy underlying the Defendants' argument that it is actually protecting disabled children was illustrated by the Legislative Council memo back in 1997. The Court will remember that Alternative C was to "[s]pecifically provide that the nonresident school district: (1) may not reject a child based on the availability of an appropriate special education program or related services and (2) shall provide an appropriate special education program and related services." (Leg. Council Memo at pps 8-9.) Subpart (2) of this alternative solves the problem. The nonresident school district would have the same obligation to provide an appropriate education program for the student as the resident district had when the student entered that school district. This alternative allows children with disabilities to fully participate in the Open Enrollment Program and makes sure they receive an appropriate education in whatever district they attend.

The Defendants might also argue that Section 118.51(5)(a)4 is no different than Section 118.51(5)(a)1 which allows school districts to reject the applications of non-disabled children if there is no room for them in the nonresident district. This argument also fails. First, subsection (5)(a)1 applies to both disabled and non-disabled children alike. It does not discriminate based on disability status. Here, there is no dispute that the minor Plaintiffs were rejected under Section 118.51(5)(a)4 and not Section 118.51(5)(a)1. Thus, the question is whether subsection (5)(a)4 contains a neutral principle that does not discriminate on the basis of disability.

This goes to the heart of the "but for" standard of causation adopted by the Seventh Circuit. In *Washington v. Indiana High School Athletic Association*, 181 F. 3d 840 (7th Cir.

1999) the court considered; whether a rule that prohibited high school students from participating in interschool sports once they reached the age of 19 was a violation of the ADA.

The Sixth Circuit had approved such a rule in *Sandison v. Michigan High School Athletic Association*, 64 F.3d 1026 (6th Cir. 1999) as a neutral rule based on passage of time rather than disability. The Seventh Circuit, however, disagreed. The Seventh Circuit concluded that the only reason the plaintiff was still in high school at the age of 19 was because he was disabled. The Court reasoned that but for his learning disability he would have been able to play sports in his junior year of high school and excluding him from that activity was a violation of the ADA.

Applying that reasoning here is significant. As part of the process under Wisconsin's Open Enrollment Law, the State Defendants require the parents of children with disabilities to disclose that fact in the applications for the Open Enrollment Program that they submit for their children. (PPFOF ¶ 47.) If an application discloses the existence of a disability, the State Defendants then require the resident school district to send the student's IEP to the nonresident school district. (PPFOF ¶ 48.) The State Defendants then allow a nonresident school district to exclude the disabled student if the nonresident school district believes that it does not have room for that student. (PPFOF ¶ 49.)

But for their disabilities, the minor Plaintiffs would not have had IEPs, their applications would not have been flagged as being submitted on behalf of a student with a disability, and these children would not have been excluded under subsection (5)(a)4. Instead, they would have had the opportunity to participate in the Open Enrollment Program. That means they meet the 'but for" causation requirement under the ADA and Section 504.

Moreover, this conduct is a violation of 28 CFR §35.130(8) which prohibits a public entity from imposing or applying eligibility criteria that screen out or tend to screen out an

individual with a disability or any class of individuals with disabilities from participation in public programs.

The application process administered by the State Defendants, and used by the School District Defendants, screens out children with disabilities from participation in the Open Enrollment Program. By administering and implementing a statute that discriminates against children with disabilities the Defendants have intentionally violated the ADA and Section 504.

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

The remedies for violations of Title II of the ADA and Section 504 are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* (which prohibits racial discrimination in federally funded programs and activities).[15] *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 2100, 153 L. Ed. 2d 230 (2002).

Declaratory and injunctive relief are proper remedies and have been granted in many such cases. *Radaszewski ex rel. Radaszewski v. Maram,* 383 F.3d 599, 606 (7th Cir. 2004); *Bruggeman v. Blagojevich,* 324 F.3d 906, 913 (7th Cir. 2003); *Brewer v. Wisconsin Bd. of Bar Examiners,* 2006 WL 3469598 (E.D. Wis. Nov. 28, 2006); *Flynn v. Doyle,* 672 F.Supp.2d 858, 880 (E.D. Wis. 2009).

Compensatory damages are also available in private causes of action under Title II of the ADA and Section 504. *Barnes v. Gorman,* 536 U.S. 181, 184–85, 122 S.Ct. 2097, 153 L.Ed.2d

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

230 (2002), *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014). At this point, the Plaintiffs simply seek a declaration that they are entitled to damages. Whether the Defendants' actions were the cause of the claimed damages and the amount of damages would be issues left for trial.

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

CONCLUSION

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

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