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

ST. AUGUSTINE SCHOOL, et al.,

Plaintiffs,

v. Case No. 16-CV-575-LA

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

Defendants.

DEFENDANT TONY EVERS MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S COMPLAINT AGAINST HIM

INTRODUCTION

The Friess Lake School District ("District") determined it was not required to provide transportation to three students, the Forro children, to St. Augustine School, Inc. ("St. Augustine") and thus denied St. Augustine's request for transportation. Pursuant to Wis. Stat. § 121.51(1), St. Augustine and the District requested the State Superintendent of Public Instruction ("State Superintendent") to determine whether the District was required to provide transportation to the Forro children. The State Superintendent determined that the law did not require the District to provide transportation to the students attending St. Augustine and therefore upheld the decision of the District.

St. Augustine did not file a petition for judicial review of the State Superintendent's administrative decision in state court under Wis. Stat. § 227.52, as was its right. Instead, St. Augustine and the Forros brought this action for damages under 42 U.S.C. § 1983, alleging that Friess Lake and Superintendent Evers violated their First and Fourteenth Amendment rights.

Their complaint also seeks a declaratory judgment and/or certiorari, alleging that the decisions of Friess Lake and Superintendent Evers violated Wis. Stat. §§ 121.51-121.55.

The Plaintiffs' constitutional claims against State Superintendent Anthony Evers under 42 U.S.C. § 1983 must be dismissed with prejudice because: (1) the Eleventh Amendment precludes suit against a State by one of its citizens unless consent to suit has been otherwise granted or the *Ex parte Young* exception applies; and (2) the Plaintiffs have failed to allege facts which would allow the suit to proceed against him individually. Additionally, the Plaintiffs' claims against Evers alleging violations of state law must be dismissed because the Plaintiffs failed to exhaust their administrative remedies under state law.

STATEMENT OF FACTS

The following are the relevant factual allegations from Plaintiffs' Complaint which are taken to be true for the purpose of this motion. Plaintiff St. Augustine is a Wisconsin corporation and an independent religious school that teaches in the tradition of the Catholic faith. (Compl. ¶ 2.) Plaintiffs Joseph and Amy Forro are Wisconsin citizens who have three children who attend St. Augustine. (Compl. ¶ 3.) They bring this action against the Friess Lake School District and Anthony Evers. (Compl. ¶ 1.) Defendant Evers is sued in his official capacity as the Wisconsin State Superintendent of Public Instruction. (Compl. ¶ 4.)

The Forro children live within the Friess Lake School District, attend St. Augustine, and live more than two miles from St. Augustine. (Compl. ¶¶ 14, 16.) On April 27, 2015, St. Augustine requested that Friess Lake provide transportation to the Forro children to and from St. Augustine pursuant to Wis. Stat. § 121.51(1). (Compl. ¶ 18.) On April 29, 2015, the District denied St. Augustine's request to provide transportation to the Forro children. (Compl. ¶ 21.)

Specifically, the District determined that the Forro children lived in the attendance area of St. Gabriel School ("St. Gabriel"). (Compl. ¶ 21.) The District also determined that under relevant statutes, St. Augustine and St. Gabriel could not have overlapping attendance areas. (Compl. ¶ 21.) The District therefore declined to approve St. Augustine's attendance area and concluded that it was not required to transport the Forro children to St. Augustine. (Compl. ¶ 21.)

In December of 2015, St. Augustine and the District jointly requested the State Superintendent review the District's decision pursuant to Wis. Stat. § 121.51. (Compl. ¶¶ 46-47.) The State Superintendent, through his designee, Deputy State Superintendent Michael Thompson, issued a decision dated March 10, 2016, upholding the District's determination. (Compl. ¶ 48.) On April 8, 2016, the Plaintiffs filed a summons and complaint in the Circuit Court for Washington County, Wisconsin. On or about May 13, 2016, the case was removed to this Court pursuant to a motion by the District.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may, by motion, assert a defense of failure to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Sanjuanv. American Bd. Of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (C.A.7 1994)). "Factual allegations must be

enough to raise a right to relief above the speculative level." *Id.* A complaint must set forth "sufficient factual matter" to show that the claim is facially plausible." *Iqual*, 556 U.S. at 663.

ARGUMENT

I. PLAINTIFFS' CONSITUTIONAL CLAIMS UNDER 42 U.S.C. § 1983 AGAINST EVERS, IN HIS OFFICIAL CAPACITY, MUST BE DISMISSED BASED ON ELEVENTH AMENDMENT IMMUNITY.

The Eleventh Amendment to the United States Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment has long stood for the presumption that each state is a sovereign entity and, therefore, is not amenable to the suit of an individual without its consent. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Employees v. Missouri Public Health & Welfare Dep't*, 411 U.S. 279, 283 (1973) ("an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) ("This jurisdictional bar applies regardless of the nature of the relief sought."). In other words, federal courts are not authorized to entertain suits by a private party against a state without the state's consent because of Eleventh Amendment protections. *See Penhurst*, 465 U.S. at 100.

"A state may claim immunity from suit in federal court and must be dismissed from the litigation unless there exists one of two well-established exceptions." *Kroll v. Board of Trustees of University of Illinois*, 934 F.2d 904, 907 (1991). The first exception occurs when a state unequivocally waives the protections of the Eleventh Amendment by consenting to suit in

federal court. The second exception occurs when Congress unequivocally abrogates the states' Eleventh Amendment immunity through its Fourteenth Amendment enforcement powers. See *Id.* (citations omitted.) Neither of these exceptions applies here.

Further, because suits against state officials acting in their official capacity are deemed to be suits against the "entity of which an officer is an agent," they are suits against the state. *See Id.* at 907 quoting *Pennhurst*, 465 U.S. 101 at 165. The Eleventh Amendment "bars actions in federal court against a state, state agencies, or state officials acting in their official capacities." *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603F.3d 365, 370 (7th Cir. 2010); see also *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Plaintiffs have named Evers a defendant in his official capacity. Sovereign immunity under the Eleventh Amendment bars the action against Evers. The *Ex Parte Young* exception to sovereign immunity does not apply.

A. The State did not consent to suit so as to waive its defense of Eleventh Amendment Sovereign Immunity.

The State has not waived its immunity under the Eleventh Amendment. "A State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-240 (1985) (citations omitted). "The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* at 241. In order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." *Id.* (citations omitted). Nowhere in Wis. Stat. Chapter 121 does the State waive its Eleventh Amendment immunity. The Plaintiffs have not alleged any such waiver.

B. Congress did not, in enacting 42 U.S.C. § 1983, abrogate the State's immunity from suit under the Eleventh Amendment.

Likewise, Congress did not abrogate the State's immunity from suit. "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* at 242. The Plaintiffs request relief under 42 U.S.C. § 1983 to enforce the provisions of the Fourteenth Amendment. "The Supreme Court, however, long ago dispelled the notion that section 1983 abrogated the states' eleventh amendment immunity, and suits filed under that statute must still play heed to the eleventh amendment." *Kroll*, 934 F.2d 904 at 909. *See also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 58, 109 S. Ct. 2304, 2306, 105 L. Ed. 2d 45 (1989) ("the doctrine of sovereign immunity is one of the well-established common-law immunities and defenses that Congress did not intend to override in enacting § 1983"). Congress therefore has not abrogated the State's Eleventh Amendment immunity against suit in this case.

C. The State Superintendent, in his official capacity, is not liable for damages under 42 U.S.C. § 1983 because state officials are not "persons" under the statute.

The Plaintiffs claim the State Superintendent is liable for damages pursuant to 42 U.S.C. § 1983. Section 1983 creates a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. It is well-established law that a state agency or a state official sued in an official capacity is not a "person" in a § 1983 action. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65-66 (1989). "[S]tate officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . [and] is no different from a suit against the State itself." *Id.* at 71 (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985)). See also *Mercado v. Dart*, 604 F.3d. 360,

361-62 (7th Cir. 2010) ("a state (including a state officer sued in an official capacity) is not a 'person' for the purpose of § 1983").

Plaintiffs fail to state a claim upon which they can prevail. The State Superintendent, in his official capacity, cannot be sued for damages under § 1983. Suing the State Superintendent in his official capacity is no different from a suit against the State itself. *Will*, 491 U.S. at 71. The Plaintiffs therefore fail to state a claim against Evers under 42 U.S.C. § 1983 that can overcome an Eleventh Amendment sovereign immunity defense.

D. The *Ex parte Young* exception does not apply to allow the Plaintiffs' claims to proceed against Evers under 42 U.S.C. § 1983.

A party may bring a suit under 42 U.S.C. § 1983 against a state official in his or her official capacity if the *Ex parte Young* exception applies. *Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* doctrine "allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law." *Council 31 of the AFSCME v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012) (citations omitted). The rationale behind the doctrine is that an official who enforces an unconstitutional law is in conflict with the Constitution and is, therefore, stripped of his official or representative character and subjected to the consequences of his individual actions as an individual. *See Council 31*, 680 F.3d at 882; *Va. Office for Prot. & Advocacy v. Stewart*, --- U.S. ---, 131 S.Ct. 1632, 1638 (2011) (quoting *Ex parte Young*, 209 U.S. at 159-60). Thus, "a private party can sue a state officer in his or her official capacity to enjoin a prospective action that would violate federal law." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999).

Taking the facts advanced by the Plaintiffs as true, the *Ex parte Young* exception does not apply. It is important to review the actions the State Superintendent is alleged to have taken in

this matter. Wis. Stat. § 121.51(1) defines "attendance area" for purposes of determining a school district's requirement to provide transportation for private school students under Wis. Stat. § 121.51. It requires the district and the private school to work together to define a private school's attendance area. Here, the District and St. Augustine disagreed on St. Augustine's attendance area. Therefore, they jointly requested the State Superintendent "make a final determination of the attendance area." Wis. Stat. § 121.51(1).

The State Superintendent reviewed St. Augustine's request for an attendance area that would encompass the entire District's boundaries. St. Gabriel, a Roman Catholic school, already had an attendance area that encompassed the entire District's boundaries. Wis. Stat. § 121.51(1) prohibits overlapping attendance areas for schools affiliated with the same denomination, system or sponsoring organization. The State Superintendent also reviewed St. Augustine's Nonstock Corporation Amendment (which changed its name), its bylaws, and St. Augustine's public website. The Superintendent concluded that St. Augustine holds itself out as a Roman Catholic school. The State Superintendent engaged in a quasi-judicial function and upheld the District's determination that the District was not required to provide transportation to St. Augustine students because St. Augustine's attendance area overlapped with St. Gabriel's, a school affiliated with the same religious denomination. In other words, the State Superintendent heard an appeal of the District's decision and upheld it.

The State Superintendent did not engage in any further action. The State Superintendent has no continuing action or involvement in denying the pupils' transportation or payment in lieu of transportation; the District does. There is no factual basis in the complaint for an ongoing violation of federal law by the State Superintendent. Even if this Court determines that the District incorrectly decided the Plaintiff's transportation claim (and, therefore, that the State

Superintendent erred in upholding the decision), no injunction need be or should be issued to the State Superintendent. The State Superintendent would simply apply a different standard to any future attendance area disputes. Therefore, the *Ex parte Young* exception to Eleventh Amendment immunity does not apply to the Plaintiff's federal action against the State Superintendent in his official capacity. The Plaintiff fails to allege facts that, if proven, would demonstrate an ongoing violation of federal law by the State Superintendent. *See Council 31*, 680 F.3d. at 882.

II. THE PLAINTIFFS CANNOT PROCEED AGAINST EVERS UNDER 42 USC § 1983 IN HIS INDIVIDUAL CAPACITY.

A. Even if Evers were sued in his individual capacity, Evers is not subject to suit under 42 U.S.C. § 1983 because no facts are alleged showing he was personally involved in the alleged constitutional violations.

The Plaintiffs named the State Superintendent only in his official capacity. However, even if they had named Evers as a defendant in his individual capacity, the Plaintiffs allege no facts showing the State Superintendent's personal involvement in the actions they claim violated their constitutional rights. The Complaint acknowledges that Evers designated the Deputy State Superintendent to sign and issue the decision upholding the District's decision. (Compl. ¶ 48.) Even if Evers were sued in his individual capacity, § 1983 does not permit actions against individuals merely for quasi-judicial or supervisory roles. *Zimmerman v. Tribble*, 226 F.3d. 568, 574 (7th Cir. 2000). Section 1983 "does not allow actions against individuals merely for their supervisory role of others. 'An individual cannot be held liable in a § 1983 action unless he caused or participated in [the] alleged constitutional deprivation.'" *Id.* (quoting *Starzenski v. City of Elkhart*, 87 F.3d 872, 879 (7th Cir.1996).

The complaint alleges no facts showing that Evers acted in anything other than a quasi-judicial or supervisory role with respect to the review of the District's decision. He had no

personal involvement which could sustain a claim against him in his personal capacity under 42 U.S.C. § 1983.

B. The doctrine of qualified immunity shields State Superintendent Evers from suit.

Even if the lawsuit against the State Superintendent were not barred under Eleventh Amendment sovereign immunity, the doctrine of qualified immunity shields Evers from suit. His conduct, as alleged in the complaint, did not violate clearly established constitutional rights of which a reasonable person would have been aware. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is not simply a defense to liability on the merits, but a right "not to stand trial or face the other burdens of litigation conditioned [upon] whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell*, 472 U.S. at 526.

The entire body of law underlying the Plaintiff's claims of constitutional violations includes the state statute itself, which the State Superintendent followed, and two Wisconsin Supreme Court decisions interpreting the statute, both of which are distinguishable and do not address the central issue in this case. In *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206 (1971), the Wisconsin Supreme Court upheld the constitutionality of the private school transportation statute because the court interpreted the provision on overlapping attendance areas to apply "to all private schools affiliated or operated by a single sponsoring group, whether such school operating agency or corporation is secular or religious." *Id.* at 215. The Court further held: "if the Franciscan Order of the Roman Catholic church operates a school in the northern part of the Racine district, and the Jesuit Order operates a school in the southern part of the district, they are to be considered, along with diocesan schools, as part of the Catholic school system of Racine because all are 'affiliated with the same religious denomination'" *Id.* at 215-216.

The other case, *Holy Trinity Community School, Inc. v. Kahl*, 82 Wis.2d 139 (1978), involved a school that had formerly been a Roman Catholic school, but subsequently incorporated as a nondenominational school with a religious purpose. The school district found the school to still be affiliated with the Roman Catholic Church and, therefore, concluded that it could not have an attendance area that overlapped with another Roman Catholic school. The Superintendent upheld the school district's decision. The Wisconsin Supreme Court held that: "*Under the facts peculiar to this case*, the attempt of the Superintendent of Public Instruction to administer the law results in excessive entanglement of state authority in religious affairs." *Id.* at 149-150 (Emphasis added). The facts of that case, as described by the Wisconsin Supreme Court, included the State Superintendent's "continued examination and surveillance of the religious composition of both the instructional staff and the students of the Community School." *Id*. at 149. By contrast, in this case the State Superintendent looked at St. Augustine's public website, on which St. Augustine holds itself out as a school in the Roman Catholic faith.

There is no well-established body of law clearly establishing constitutional rights arising from the State Superintendent's administration of Wis. Stat. § 121.51. Even if the Plaintiffs had named the State Superintendent individually, they have not alleged facts that withstand a challenge on qualified immunity grounds.

III. PLAINTIFFS' STATE LAW CLAIMS MUST BE DISMISSED BASED ON THEIR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A. The law on the exhaustion doctrine.

The courts have held that a failure to exhaust administrative remedies deprives a court of subject matter jurisdiction or, alternatively, should be addressed in a Rule 12(b)(6) motion with the court taking judicial notice of the failure to exhaust administrative remedies. See *Frey v.*

EPA, 270 F.3d 1129, 1135-36 (7th Cir. 2001); *Feistel v. USPS*, 2008 WL 2048278 (E.D. Wisconsin, 2008). Federal courts have consistently held that where a statutory scheme specifies a method of recovery, a plaintiff must follow that scheme or risk having the action dismissed. See *Garcia v. Meza*, 235 F.3d 287, 290 (7th Cir.2000); *Brady v. United States*, 211 F.3d 499, 502 (9th Cir.2000).

Wis. Stat. § 121.51(1) provides a statutory method for school districts and private schools to have a third party, the State Superintendent, resolve disputes of attendance areas for transportation purposes. Final decisions of the State Superintendent and DPI are subject to judicial review under Wis. Stat. § 227.52. The specifics of filing for judicial review are contained in Wis. Stats. §§ 227.53 et. seq. Wisconsin law has long stated "where a statute sets forth a procedure for review of administrative action and court review of the administrative decision, such remedy is exclusive and must be employed before other remedies are used." *Nodell Investment Corp. v. City of Glendale, County of Milwaukee*, 78 Wis.2d. 416, 422 (1977). The doctrine states that "judicial relief will be denied until the parties have exhausted their administrative remedies; the parties must complete the administrative proceedings before they come to court." *Id.* at 424. The Court goes on to say:

> The premise of the exhaustion rule is that the administrative remedy (1) is available to the party on his initiative, (2) relatively rapidly, and (3) will protect the party's claim of right. The reasons for the rule requiring exhaustion are essentially the same as those for the rule that appeals may be taken only from a final judgment of a trial court.

Id. In that case, the Court further made a distinction between cases seeking to have a law invalidated and one seeking a change in decision without invalidating the underlying law. *Id.* at 426.

B. Plaintiffs failed to exhaust their administrative remedies when they failed to petition for judicial review of the decision of the agency.

St. Augustine did not petition for judicial review of the decision. Instead, St. Augustine and the Forros attempted to overturn the decision by filing a separate action in state circuit court alleging violations of their statutory and constitutional rights and requesting a decision overturning the State Superintendent's decision. This action is improper and attempts to circumvent the statutory scheme established under Wis. Stat. § 227.53 for reviewing state agency decisions. *Nodell* is directly on point for this case. The Plaintiffs ask the court to overturn the decision of the District, upheld by the State Superintendent, without invalidating the underlying law. In *Vanko v. Kahl*, 52 Wis. 2d. at 216-217, the Wisconsin Supreme Court even stated:

> The statute anticipates disagreement between the public school district boards and the private school administrations and provides that the state superintendent of public instruction shall make a 'final determination' of the attendance area boundaries. This does not cut off the right of recourse and review by the courts, but it makes seeking such determination by the state superintendent a prerequisite to securing judicial review as to compliance with the statute and constitution of the attendance areas thus determined.

The court clearly contemplated continuing disagreements about attendance areas would be subject to judicial review, not new action requesting relief which includes defining the attendance area in the manner in which the Plaintiffs were denied.

Dismissal is required under *Nodell* because the Plaintiffs failed to file for judicial review of the administrative decision, a remedy that was readily available to them. Therefore, the Court should decline to exercise supplemental jurisdiction upon any state law claims that may remain after application of Eleventh Amendment immunity. Plaintiffs' Complaint must be dismissed with prejudice.

CONCLUSION

For the reasons stated, the Court should grant State Superintendent Anthony Evers' motion to dismiss and dismiss him from this lawsuit.

Respectfully submitted this 29th day of November, 2016.

/s/ Laura M. Varriale
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