

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN DOE, by his parents and next friends,
JAMES DOE AND JANE DOE,

Plaintiffs,

v.

Case No. 03-CV-892

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION;
ELIZABETH BURMASTER, in her official capacity as
State Superintendent of Public Instruction; and
HARTLAND-LAKESIDE JOINT NO. 3 SCHOOL DISTRICT;

Defendants.

ORDER

WHEREFORE, the parties in the above-captioned matter, by their respective attorneys, have filed a consent judgment for judicial approval and the Court has satisfied itself as to the fairness, adequacy and propriety of the consent judgment as a proper disposition of this action, therefore, pursuant to that consent judgment,

It is ORDERED:

1. The current application of the special education tuition provision of Wisconsin's public school open enrollment statute, Wis. Stat. § 118.51(17), discriminates against students with disabilities in violation of the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794, to the extent that it allows open enrollment tuition for a student with a disability to exceed the open enrollment tuition for a non-disabled student plus any actual additional special education costs a non-resident district would incur in educating the student with a disability.

2. Within 30 days of the entry this order, DPI shall notify all public school districts in Wisconsin that federal law precludes the charging of open enrollment tuition for a student with a disability that exceeds the open enrollment tuition for a non-disabled student

plus any actual additional special education costs the non-resident district would incur in educating the student with a disability.

3. The current application of the undue financial burden provision of Wisconsin's public school open enrollment statute, Wis. Stat. § 118.51(12)(b), discriminates against students with disabilities in violation of the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794, to the extent that it allows a resident school district to deny an open enrollment request by a student with a disability on the basis of the financial burden created by tuition charges that do not reflect the actual additional special education costs the non-resident district would incur in educating that student.

4. Within 30 days of the entry of this order, DPI shall notify all public school districts in Wisconsin that federal law precludes the denial of an open enrollment request by a student with a disability under Wis. Stat. § 118.51(12)(b) unless the undue financial burden determination is based only on tuition charges that reflect the actual additional special education costs the non-resident district would incur in educating the student with a disability.

5. The current application of the appeal provision of Wisconsin's public school open enrollment statute, Wis. Stat. § 118.51(9), discriminates against students with disabilities in violation of the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794, to the extent that it allows DPI to uphold the denial of an open enrollment request by a student with a disability under Wis. Stat. § 118.51(12)(b) without any determination that the undue financial burden forming the basis of the denial is created only by tuition charges that reflect the actual additional special education costs the non-resident district would incur in educating the student with a disability.

6. In all appeals pursuant to Wis. Stat. § 118.51(9), DPI shall not uphold the denial of an open enrollment request by a student with a disability under Wis. Stat. § 118.51(12)(b) unless the undue financial burden determination was based only on tuition charges that reflect the actual additional special education costs the non-resident district would incur in educating the student with a disability.

7. Within 30 days of the entry of this order, DPI shall reverse its August 26, 2003, decision upholding the denial of John Doe's open enrollment request. If the Hartland-Lakeside District intends to assert an undue financial burden at any time during John Doe's attendance in the Swallow District, the Does can elect to pay Swallow the additional cost so that he can continue to attend Swallow through the end of the 2005-2006 school year.

8. Plaintiffs are declared to be the prevailing parties in this action on Counts One, Two and Five of their Amended Complaint and on the portion of Count Six seeking permanent injunctive relief. DPI shall pay the reasonable attorney fees and costs of the plaintiffs in Case No. 03-CV-892. The remaining issues relating to the award of reasonable attorney fees and costs are: (1) the liability of any defendant for any portion of the fees and costs incurred by the plaintiffs in *Doe, et al. v. DPI, et al.*, Waukesha County Circuit Court, Case No. 03-CV-2217; (2) the liability of any defendant for any portion of the fees and costs incurred by plaintiffs in *In the matter of [John Doe] v. Hartland Lakeside J3 School District*, Case No. LEA-03-032; and (3) the reasonableness of specific allocations claimed in Case No. 03-CV-892. Plaintiffs shall file their request for costs and attorney fees relating to these issues within 45 days from the entry of this order.

9. Counts Three and Four of the Amended Complaint and the portion of Count Six seeking preliminary injunctive relief are dismissed without prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

Dated at Milwaukee, Wisconsin this 2nd day of December, 2004.

SO ORDERED:

s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
Chief Judge