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STATE OF MICHIGAN

IN THE SUPREME COURT

BETTINA WINKLER, by her next friends
HELGA DAHM WINKLER and
MARVIN WINKLER,

Plaintiff-Appellant,

v.

MARIST FATHERS OF DETROIT, INC.
d/b/a NOTRE DAME PREPARATORY HIGH
SCHOOL AND MARIST ACADEMY

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 323511

Oakland County Circuit Court
Lower Ct. No. 14-141112-CZ

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PLAINTIFF-APPELLANT BETTINA WINKLER'S
APPLICATION FOR LEAVE TO APPEAL

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Order Appealed From

Plaintiff-Appellant Bettina Winkler, by her next friends Helga Dahm Winkler and Marvin Winkler, appeals from the unpublished opinion of the Court of Appeals, COA No. 323511, reversing the trial court and granting summary disposition to Defendant-Appellee Marist Fathers of Detroit, Inc., entered on November, 12, 2015. (Exhibit A) Plaintiff-Appellant timely files this application pursuant to MCR. 7.302(C)(2) seeking reversal of the Court of Appeals' decision and remand to the trial court for discovery and trial in this matter.

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Questions Presented for Review

Has the Court of Appeals misinterpreted the ecclesiastical abstention doctrine to *prima facie* prohibit civil rights claims where no ecclesiastical doctrine or polity is at issue and such claims can be resolved through the application of the neutral principles of law embodied in Michigan's Persons With Disabilities Civil Rights Act?

Plaintiff-Appellant says: Yes.

Where Defendant-Appellee Marist's decision to deny Bettina Winkler admission to a private, Catholic High School because of her learning disability can be decided with reference to external statutory law without reliance on religious doctrine or ecclesiastical polity, is Defendant-Appellee entitled to immunity under the First Amendment?

Plaintiff-Appellant says: No.

RECEIVED by MSC 12/23/2015 2:11:42 PM

Table of Contents

Page

Table of Authorities v

Statement of Facts and Proceedings 1

I. Statement of Facts 1

A. Chronological Narrative 1

B. Substance of Proof 2

II. Disposition in the Trial Court 9

III. Disposition in the Court of Appeals 9

Standard of Review 10

Argument 10

I. The PWDCRA, by its unambiguous statutory language, applies to Defendant-Appellee Marist. 10

II. This Court has applied neutral principles of law to properly adjudicate disputes involving religious institutions. 13

III. The dispute herein can be decided by application of neutral principles. 14

A. The Court of Appeals gives too broad a scope to the ecclesiastical abstention doctrine. 14

B. *Dlaikan* is distinguishable and not controlling. 20

IV. There is a question of fact that Bettina Winkler was denied admission because of her disability 23

Conclusion 26

Certificate of Service 27

RECEIVED by MSC 12/23/2015 2:11:42 PM

TABLE OF AUTHORITIES

Cases

Berry v. Bruce, 317 Mich. 490 (1947) 13, 19

Borgman v. Bultema, 213 Mich. 684 (1921) 13, 14

Chmielewski v. Xermac, Inc., 457 Mich. 593 (1998) 12

Crancer v. Bd. of Regents, 156 Mich. App. 790 (1986) 12, 25

Dep't of Soc. Servs. v. Aetna Cas. & Sur. Co., 177 Mich. App. 440 (1989) 26

DiBenedetto v. W. Shore Hosp., 461 Mich. 394 (2000) 10

Dias v. Archdiocese of Cincinnati, No. NO: 1:11-CV-00251, 2012 U.S. Dist. LEXIS 43240 (S.D. Ohio Mar. 29, 2012) 19

Dlaikan v. Roodbeen, 206 Mich. App. 591 (1994) ..... passim

Fishers Adolescent Catholic Enrichment Soc'y v. Bridgewater, 990 N.E.2d 29 (Ind. Ct. App. 2013) 22

Gallon v. House of Good Shepherd, 158 Mich. 361 (1909) 22

Harrison v. Olde Fin. Corp., 225 Mich. App. 601 (1997) 24

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) 19

Jones v. Wolf, 443 U.S. 595 (1979) 19

Komarynski v. Popovich, 232 Mich. 88 (1925) 14

Littsey v. Bd. of Governors of Wayne State Univ., 108 Mich. App. 406 (1981) 24

Lytle v. Malady, 458 Mich. 153 (1998) 25

Maciejewski v. Breitenbeck, 162 Mich. App. 410 (1987) 14, 18

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 25

Md. & Va. Eldership of Churches of God v. Church of God, Inc., 396 U.S. 367 (1970) 13

Pilgrim's Rest Baptist Church v. Mayfield, No. 318797, No. 319571, 2015 Mich. App. LEXIS 881 (Mich. Ct. App. Apr. 23, 2015) 21, 22

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 486 Mich. 311 (2010) 10

Smith v. Calvary Christian Church, 462 Mich. 679 (2000) 13, 19

Straman v. Minder, No. 164099, 1996 Mich. App. LEXIS 1791 (Mich. Ct. App. Sept. 17, 1996) 21

Tolan v. Cotton, 134 S. Ct. 1861 (2014) 26

Travelers Ins. Co. v. Det. Edison Co., 465 Mich. 185 (2001) 10

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) 22

Wood v. Berean Baptist Church & Heidi Beagle, No. 196381, 1997 Mich. App. LEXIS 3438 (Mich. Ct. App. Sept. 26, 1997) 22

Yuhase v. Macomb County, 176 Mich. App. 9 (1989) 11

Statutes

Mich. Comp. Laws § 37.1102 ..... 20, 21
Mich. Comp. Laws § 37.1303 11
Mich. Comp. Laws § 37.1401 10
Mich. Comp. Laws § 37.2401 11
Mich. Comp. Laws § 37.2403 11
Mich. Comp. Laws § 37.2404 24

Other

Section 402 23
Section 504 8
Section 3 11
Section 504 (d) 24

RECEIVED by MSC 12/23/2015 2:11:42 PM

RECEIVED by MSC 12/23/2015 2:11:42 PM

Statement of Facts and Proceedings

I. Statement of Facts

Plaintiff-Appellant Bettina Winkler ("Bettina" or "Winkler") is a teenaged, learning-disabled student. She filed a lawsuit alleging that Defendant-Appellee ("Marist") refused her admission to its private, Catholic high school because of her learning disability. Because (1) there were no ecclesiastical justifications for Marist's actions, (2) they are within the jurisdiction of the Persons With Disabilities Civil Rights Act ("PWDCRA"), and (3) there are sufficient facts in dispute, the trial court correctly denied Marist's motion for summary disposition. (Exhibit B) The Court of Appeals, however, relying on *Dlaiken v Roodeen*, 206 Mich App 591 (1994), reversed the trial court and granted summary disposition for Defendant-Appellee. Plaintiff-Appellant Winkler requests that this Court reverse the Court of Appeals and remand this matter to the trial court for further proceedings.

A. Chronological Narrative

Bettina filed a complaint in Oakland County Circuit Court on June 2, 2014 alleging three counts: discrimination under the PWDCRA, tortious fraud and misrepresentation, and violation of the Consumer Protection Act. (Exhibit C) Rather than file an answer, Marist filed a motion for summary disposition. Winkler voluntarily dismissed the latter two counts and the motion proceeded on the disability discrimination claim only.

The trial court denied Marist's motion in an opinion and order dated August 15, 2014. In lieu of submitting to discovery or further litigation, Marist filed an application for leave to appeal. Leave was granted on December 18, 2014. In its opinion date November 12, 2015, the Court of Appeals reversed the trial court and dismissed Winkler's PWDCRA claim.

There were four other motions in the lower court that are not subject to this appeal.

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(1) Bettina filed a motion for preliminary injunction, seeking an order admitting her to Marist's high school. The lower court denied this motion in an opinion and order dated August 15.

(2) Marist filed a motion for protective order to broadly shield itself from discovery requests. Winkler opposed that and (3) filed a motion to compel discovery. The lower court did not address either of these motions.

Finally, Marist (4) filed a motion on September 3, 2014 for stay of proceedings. The court granted the motion, entering an order on September 18, 2014.

None of these four other motions are subject to the instant application for leave to appeal.

B. Substance of Proof

Bettina Winkler is an extraordinary young lady. Besides being a good daughter, big sister, and young Christian, she is gifted with blazing speed. Among her many track victories, Bettina won the national AAU Junior Olympics 50- and 200-yard dashes as a twelve-year-old, and the 60-meter dash victory in the fourteen-and-under age group at Olympic Park in Munich, Germany. With dual citizenship, Bettina has her sights set on making Germany's 2016 Olympics squad as a sprinter. She has the talent, motivation, and discipline to make these dreams a reality, as Marist's own web site attests, extolling Bettina's track success. [http://www.ndpma.org/drupal/node/3604; http://www.ndpma.org/drupal/webfm_send/6190; also see Appendix ("App") 2, Complaint, ¶¶ 10-12][1]

Bettina is also an intelligent student who performs reasonably well in the classroom, though she has struggled at times, especially in certain classes such as math and science. [App 2,

[1] Citations to the Appendix cite the record filed in the Court of Appeals. Plaintiff-Appellant has attached select documents from the record to this Application as lettered Exhibits, i.e., Exhibit A, etc.

RECEIVED by MSC 12/23/2015 2:11:42 PM

Complaint, ¶ 12] When she finished 6th grade, her parents enrolled her at Marist's Middle School, attracted by Defendant's academics, athletic program, and their promises of assured admission to Notre Dame Preparatory High School ("Notre Dame") after Bettina completed 7th and 8th grades at the middle school. [App 2, Complaint, ¶¶ 18-20]

In addition to these verbal representations, Marist's website and other written documents consistently confirm that once admitted to the middle school, promotion to the high school is virtually automatic, as long as one maintains "good grades and good behavior." [http://www.ndpma.org/drupal/ndmamiddle] The correspondence that Marist sends to 8th graders, regarding admission to the high school, provide the same assurances.

In September, 2013, Gregory Simon, the Dean of Admissions and Diversity, sent an email to all 8th grade parents concerning transition from the middle school to Notre Dame for the 2014-2015 school year. [App 5] He stated that the only conditions for promotion were (a) good behavioral standing, (b) "work at or above" a B average in core and elective courses; and (c) to take the High School Placement Test ("HSPT") which will be used to assess academic progress, aids in course placement, and eligibility for merit-based scholarships.

Later that fall, Marist administered the HSPT to all Marist middle school students wishing to continue to the high school. The "Admissions Checklist" for Notre Dame confirms that the HSPT is used only to determine a student's place in the curriculum – thus the name, High School *Placement* Test. The checklist states that the placement test is "helpful in determining scholarships and the proper placement of students in our curriculum. NDP uses your test score, teacher evaluations, and academic record to customize a college-preparatory schedule to fit your needs." [App 19, Plaintiff's MSD Response Exh 2] The checklist goes on to provide assurance

RECEIVED by MSC 12/23/2015 2:11:42 PM

that on "January 24, 2014" — "Open your letter of acceptance: Welcome to the Irish family! Your letter welcomes you to become part of the NDP Class of 2018." [*Id.*]

Bettina took the HSPT on November 23, 2013. At no time did Marist question her right to take the test or state that she was ineligible because of grades or any other reason. She relied on the consistent communications that her test score would only be used to determine placement in the high school curriculum, and not to deny admission.

In accordance with this policy, Admissions Dean Simon sent a follow-up communication to the Marist students. This letter was undated, but must have been in late November or early December, 2013, because it was sent after the test but before it was scored. The letter confirmed that nothing was required before acceptances went out on January 24, 2014 except to maintain good grades and behavior. [App 6]

Dean Simon sent a new letter to Marist students in December 2013 after the HSPT test results were made available. This letter provided assurance that: (a) "the test results fulfill your requirements for transition to the high school division;" (b) as long as you maintain good grades and good behavior you will receive an acceptance letter mailed January 24, 2014, with no further application necessary; (c) the test scores help us make decisions about your freshman schedule and to award academic scholarships; and (d) if you have low scores, "Please do not be discouraged ... your overall composite score is really an indication of how you fair (sic) among college-bound students at this point in your education" - adding that your "NDP education will put you in a position to do even better on tests like these!" [App 4]

Despite these assurances, Bettina was denied admission. Notre Dame High School Dean of Admissions Kathleen Offer sent an email to the Bettina's parents on January 17, 2014, notifying them that their daughter would not be admitted to the high school. She wrote:

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> As you know, the admissions office at Notre Dame Preparatory is given the responsibility of reviewing the status of all 8th grade students at our Middle Division. The process of this review is designed to select students who are best prepared to succeed in our challenging college-preparatory curriculum. Unfortunately, the decisions often include deferring students we do not believe are in position to succeed in our school's curriculum.
>
> While NDP is a great fit for many students, we know NDP's curriculum is quite demanding. After reviewing Bettina's academic transcript, teacher evaluation and test scores, as well as discussing the matter with Principal Fr. Joe Hindelang, we do not feel NDP can provide the curriculum necessary to assure Bettina's successful transition to NDP. Therefore, we are not able to grant her admission to NDP at this time.

[App 10]

On information and belief, Bettina Winkler is the only Marist student who was denied admission to the high school for the 2014-2015 entering freshman class. Her parents suspected discrimination on the basis of Bettina's learning disability.

Marist claims they were unaware that Bettina had a learning disability, because Beaumont Hospital's evaluation, formally diagnosing Bettina with "moderate dyslexia" and dyscalculia," was not conducted until March 20, 2014. [App 7] However, Marist was well aware that Bettina was diagnosed with other learning disabilities well before that, back when she was in 7th grade. Exhibits 8, 9, and 10 to Plaintiff's Response to MSD [App 19] show that in early 2013, Bettina's mother notified all of her 7th grade teachers via email that Bettina was diagnosed with ADD [Attention Deficit Disorder] and was prescribed Adderall for the condition. The email exchanges between Bettina's mother and her teachers focused on providing extra learning supports for Bettina, including reading tests, further evaluations and tutoring. [*Id.*]

Despite her learning disabilities, in 8th grade Bettina performed better than a "C" or 2.0 average. She earned a 2.33 GPA in Semester 1 [App 8], with Semester 2 averages ranging from 66 to 92 %. [App 19, Plaintiff's MSD Response, Exh 6]

RECEIVED by MSC 12/23/2015 2:11:42 PM

When Bettina was denied admission to the high school, her parents had Bettina undergo a "Comprehensive Evaluation" by Beaumont Hospital, which in a report dated March 20, 2014 updated Bettina's previous ADD diagnosis. Beaumont concluded Bettina had "moderate dyslexia" and "dyscalculia," a learning disability in math, Attention Deficit/Hyperactivity Disorder (ADHD), and adjustment disorder with anxiety. Their report recommended certain accommodations, psychological counseling and tutoring. [*Id*.]

The Winklers presented this report to Marist to seek reconsideration of their decision. They told Marist they would obtain tutors and other supports for Bettina as necessary to help ensure her success in high school. [App 2, Complaint, ¶ 28] Marist stood by their decision to deny admission to Bettina – and in doing so, consistently cited Bettina's learning disability as a justification.

Mrs. Winkler spoke by phone with the high school principal, Fr. Joseph Hindelang. He told her, "Bettina doesn't fit our school profile. With a learning disability, she should attend Eaton Academy where they take [students with] autism and [other] learning disabilities." Fr. Hindelang also shared that one of Notre Dame own teacher's child, who also had dyslexia, was previously denied admission, explaining, "We told our own teacher that her child wouldn't fit in, and they understood." [App 2, Complaint, ¶ 32]

Fr. Hindelang followed up by email, writing to Mrs. Winkler on April 4, 2014:

> As I explained over the phone we will not be accepting Bettina into 9th grade. The high school placement test, her report cards and comments from current teachers indicate that we would not have courses in which she could achieve success. The information that you have recently received about her dyslexia may give Bettina and you indications of how she can learn best. Hopefully that information will be helpful in choosing another high school. While we wish her every success, we will not be accepting Bettina into 9th grade.

[App 2, Complaint, ¶ 31; App 13]

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Superintendent Brian Dougherty also emailed Mrs. Winkler, on April 16. He acknowledged:

> With the recent diagnosis of dyslexia it is easy to understand the score she received on the High School Placement test. . . . Bettina has struggled during the two years that she has attended NDP (sic). As a result of the undiagnosed presence of dyslexia, Bettina has many gaps in her learning stretching across her grade levels. This was clearly evidenced in the score she received on the High School Placement Test. Now that the diagnosis has been made, I assume you have made arrangements for Bettina to work with the specialists necessary to learn how to deal with dyslexia . . . .

[App 19, Plaintiff's MSD Response, Exh 6]

Superintendent Dougherty went on to suggest that Bettina repeat 8th grade at the middle school, with no guarantee that she would be accepted to the high school. His email concluded, "I would encourage you to discuss this issue with the professionals working with Bettina to address her dyslexia. I would ask that you call the school and discuss this with them as well. There are steps that can be taken now to help Bettina be successful in the future and I believe this is one that should be discussed and explored." [*Id*.]

At around this same timeframe, Gregory Simon, the Dean of Admissions, told Mr. Winkler on the phone that Bettina would be better off in the public schools, saying "they take anybody." He also suggested Our Lady of the Lakes, another private Catholic school. [App 2, Complaint, ¶ 34]

In addition to directly communicating to the Winklers that they denied admission to Bettina on the basis of her disability, Marist is fairly frank that their official policy does not protect students with disabilities. In their various statements of non-discrimination, they conspicuously do *not* prohibit discrimination on the basis of disability. Their mission statement reads in part:

> Notre Dame Preparatory School and Marist Academy believes it is important for students to understand the great gift and great responsibility we have as citizens of the United States. We believe that we are increasingly part of a global society. It

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> is important to grow in knowledge of and concern for all people and all of God's creation. Because of these beliefs, opportunities are offered to help the student understand the responsibility of leadership in a democratic society, to exercise the rights and liberties guaranteed by the Constitution, to respect the dignity of all individuals **regardless of race, creed, sex, national or ethnic origin**. Notre Dame Preparatory School and Marist Academy honors the right of parents to educate their children in the schools of their choice.

[http://www.ndpma.org/drupal/mission, emphasis added; App 2, Complaint, ¶ 35, emphasis added]

Additionally, Notre Dame's "diversity statement" omits reference to disability discrimination, stating: "Notre Dame challenges our community members to battle discrimination against any person or group, including, but not limited to discrimination on the basis of **age, creed, gender, race, national or ethnic origin, socio-economic status, or religion**" [http://www.ndpma.org/drupal/mission, Id., ¶ 36, emphasis added].[2]

Even without formal discovery, Winkler has provided ample evidence that she was denied admission because of her learning disability. Because she can also show Marist is not exempt from the Persons With Disabilities Civil Rights Act ("PWDCRA"), the trial court correctly found a triable issue of disability discrimination.

---

[2] Because the Americans with Disabilities Act specifically exempts private religious schools, and Section 504 of the Rehabilitation Plan only applies to entities that receive federal funds, private denominational schools that do not receive federal funding sometimes often assume they are not bound by any laws prohibiting disability discrimination. This is consistent with the statements set forth above made by various administrators that Defendant does not accept students with learning disabilities.

Additionally, as noted in Plaintiff's trial court brief opposing summary disposition, "Plaintiffs also expect to offer the testimony of another parent who was told by Jill Mistretta, the middle school principal, that Notre Dame 'does not take students with learning disabilities.' Undersigned counsel's legal assistant confirmed this conversation directly with the parent, but has been unable to obtain an affidavit. Once discovery is to resume, it is expected that her deposition would be taken.

RECEIVED by MSC 12/23/2015 2:11:42 PM

II. Disposition in the Trial Court

In an opinion dated August 15, 2014, the trial court denied Defendant-Appellee's motion for summary disposition. (Exhibit B) The trial court correctly held that the PWDCRA applies to Defendant-Appellee. And further found *Dlaiken v Roodeen*, 206 Mich App 591 (1994) distinguishable from the present case, insofar as Winkler asserted that she had been denied admission on the basis of her disability, "an allegation different than a challenge based upon the refusal to provide services found to involve ecclesiastical policy as was found in *Dlaikan*". (Exhibit B, p. 4) The trial court further stated:

> Defendant [Marist] cites no canon law or religious doctrine governing its admission conditions; indeed, its reasons appear to be otherwise secular ones involving Plaintiff's grades, high school placement test results and teacher evaluations. No rituals, liturgy of worship or tenets of faith appear to have been involved in its decision. Moreover, Defendant cites nothing rooted in Catholic or other religious precepts, beliefs or doctrine that governed or dictated its refusal.

(Exhibit B, p. 3) Accordingly, the trial court correctly denied Defendant Marist's motion for summary judgment. Thereafter, application for leave to appeal was granted in the Court of Appeals.

III. Disposition in the Court of Appeals

In its opinion dated November 12, 2015, the Court of Appeals reversed the trial court, holding that it was bound by *Dlaiken v Roodeen*, 206 Mich App 591 (1994). (Exhibit A) The Court of Appeals interpreted *Dlaikan* to require an absolute bar on any claim involving admissions to private, religious schools regardless of whether such a claim implicates rights or legal questions wholly separate from ecclesiastical concerns or polity. Indeed, the Court of Appeals' holding in this matter forecloses even inquiry into whether such disputes necessarily require application of ecclesiastical law or whether they may be resolved by application of

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neutral principles. Accordingly, the Court of Appeals' holding is inconsistent with Michigan jurisprudence interpreting and applying the ecclesiastical abstention doctrine.

Marist's decision to deny Bettina admission to Notre Dame high school can easily be decided by solely applying civil law, without reference to questions of religious doctrine or ecclesiastical polity. As such, the trial court has jurisdiction under the PWDCRA, which applies under its plain terms, and the case should be affirmed and remanded for trial on the triable issues of disability discrimination.

Standard of Review

The question of Defendant-Appellee Marist's religious exemption is a jurisdictional one for this court to determine *de novo*, whether under the standards of MCR 2.116 (C)(4) or (C)(8). *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp,* 486 Mich 311 (2010).; *Travelers Ins Co v Detroit Edison Co,* 465 Mich 185 (2001).

Argument

I. The PWDCRA, by its unambiguous statutory language, applies to Defendant-Appellee Marist.

The Persons With Disabilities Civil Rights Act through its plain language applies to private schools:

> As used in this article, "educational institution" means a public or private institution or a separate school or department of a public or private institution, includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system, school district, or university, and a business, nursing, professional, secretarial, technical, or vocational school, and includes an agent of an educational institution.

MCL § 37.1401. It is this Court's clear directive that statutory language "be enforced as written". *DiBenedetto v West Shore Hosp,* 461 Mich 394, 402 (2000). Judicial gloss is unnecessary where statutory language is clear and unambiguous, as it is here: religious schools are not exempted

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from the PWDCRA. The single exception listed under § 37.1303 applies to a "private club" or other establishment not open to the public. If the legislature had intended to exempt religious schools, it could have – but it did not. The terms of the PWDCRA do not limit its application to only some, or certain types, of private educational institutions. Statutory interpretation does not permit reading language into the statute that would limit (or expand) its meaning.

Another way to show that the legislature intended the PWDCRA to apply to religious schools is to compare its coverage to that of the Elliott-Larsen Civil Rights Act ("ELCRA"). The PWDCRA and the ELCRA are similar statutes. *See, e.g. Yuhase v Macomb County,* 176 Mich App 9, (1989). They were promulgated at the same time and effective the same date (March 31, 1977). Their provisions often mirror each other.

Specifically, their respective definitions of "educational institution" are practically identical. Compare the ELCRA's definition (below) to that of the PWDCRA (above):

> As used in this article, "educational institution" means a public or private institution, or a separate school or department thereof, and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, local school system, university, or a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.

MCL § 37.2401. We know that ELCRA is specifically intended to apply to religious schools, because section 3 provides religious schools a narrow exemption to give preference to applicants of the same religion. MCL § 37.2403. If ELCRA defines "educational institution" the same way as PWDCRA, and by section 3's explicit terms applies to religious schools, then it is easy to see that the legislature must have also intended PWDCRA to apply to religious schools. Otherwise, it makes no sense that the legislature intended for every all of Michigan's anti-discrimination statutes to apply to religious institutions, except on the basis of disability.

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While there are no reported cases under the PWDCRA concerning its applicability to denominational schools, this Court may benefit from the analysis of the Muskegon Circuit Court, finding in the attached opinion that the Act applied to the Greater Muskegon Catholic Schools.[3] Similarly, *Crancer v Board of Regents*, 156 Mich App 790 (1986), *app den*, 428 Mich 892 (1987), analyzes application of the PWDCRA to institutions of higher education and holds that the deference generally given to a school's admissions policy is limited by its obligation to not discriminate. That is, despite the deference generally accorded admission decisions, that deference can be set aside where there is "proof that [the institution's] standards serve little purpose other than to deny an education to handicapped persons." *Id*. at 796-97.

In summary, by the plain text of the statute, with reference to the companion civil statutes in ELCRA, the Persons With Disabilities Civil Rights Act does apply to private, denominational institutions. Such application furthers the broad purpose of the Act to remediate discriminatory practices in places of public accommodation, including private educational institutions of all types. *See Chmielewski v Xermac, Inc*, 457 Mich 593, 601 (1998) (holding that the PWDCRA "is to be liberally construed by the courts" to remediate discriminatory practices).

The weight of authority compels the conclusion that Defendant-Appellee Marist is subject to the PWDCRA and is prohibited from discriminating on the basis of disability in its admissions policies. The remaining question is whether the ecclesiastical abstention doctrine can be properly applied to shield such discriminatory policies from judicial review. It cannot.

[3] *Wenk v Greater Muskegon Catholic Schools*, 00-40320-CA (Muskegon Circuit Court, 3/8/01) (Exhibit D)

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II. This Court has applied neutral principles of law to properly adjudicate disputes involving religious institutions.

The purpose of the ecclesiastical abstention doctrine is to prevent secular courts from deciding matters of church polity or religious doctrine. Paradigmatic cases are the hiring, firing, and assignment of clergy within a church and admission and expulsion of church members, which are undisputedly matters of ecclesiastical concern. *See Borgman v Bultema*, 213 Mich 684, 703 (1921) ("the action of the church authorities in the deposition of pastors and the expulsion of members is final"). This Court has also discussed the ecclesiastical abstention doctrine in reference to tort claims. *See Smith v Calvary Christian Church*, 462 Mich 679, 684 (2000), recognizing that "civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity", but affirming dismissal of plaintiff's intentional tort claims on other grounds. *See also Berry* v *Bruce*, 317 Mich 490 (1947) (reversing grant of injunctive relief as it was an "improper judicial interference with the internal management of the church in ecclesiastical matters").

But the abstention doctrine does <u>not</u> preclude judicial consideration of all claims brought against, or involving, religious institutions. Rather, Michigan courts inquire into whether the dispute presented impermissibly requires the court to decide religious doctrinal or church governance matters. *Smith*, *id.*; *Berry*, *id*. That is, Michigan Courts, like the United States Supreme Court,[4] have long applied the neutral principles of law doctrine when faced with disputes involving churches as parties. In *Borgman*, this Court recognized that questions that do not

[4] *See e.g., Maryland & Virginia Eldership of Churches of God v Church of God at Sharpsburg, Inc*, 396 US 367, 370; 90 S Ct 499, 501; 24 L Ed 2d 582 (1970), holding that a property dispute between two church factions was properly judicially resolved "only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious policy."

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implicate religious doctrine or church governance, for example enforcement of contractual or property rights, may properly be judicially determined. This Court held, in part, "[w]here…a church controversy involves rights growing out of a contract recognized by the civil law, or the right to the possession of property, civil tribunals cannot avoid adjudicating these rights under the law of the land". *Borgman, supra* at 703. Similarly, in *Komarynski v Popovich*, 232 Mich 88, 99 (1925), this Court held that "[i]n matters of church polity purely ecclesiastical civil courts do not interfere, but when property rights are involved they are to be tested in the civil courts by the civil laws." The Court then held that a faction of the church was entitled to injunctive relief against the forcible occupation of church property by another church faction, which the Court found was a civil matter not an ecclesiastical one.

The precedent of this Court does not preclude judicial determination of disputes involving religious institutions. Rather, it draws the line at those disputes which necessarily require judicial determination of matters of religious faith or church governance. Civil matters, as opposed to clearly ecclesiastical matters, are justiciable controversies. This precedent was ignored by the Court of Appeals in this matter in its singular reliance on *Dlaikan v Roodbeen*, 206 Mich App 591 (1994).

III. The dispute herein can be decided by application of neutral principles.

A. The Court of Appeals gives too broad a scope to the ecclesiastical abstention doctrine.

As the neutral principles doctrine has been developed and applied by Michigan courts, ultimately the test comes down to whether a court must "stray into questions of religious doctrine or ecclesiastical polity." *Maciejewski v Breitenbeck*, 162 Mich App 410, 414 (1987). The Court of Appeals never addressed this central question. It does little more than assert that the decisions of religious organizations in running their schools, i.e., places of public accommodation pursuant

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to the PWDCRA, must be unreviewable, stating that Winkler's "arguments would require the courts to delve into the decision-making process of defendant, a religious institution. … [T]he factual basis for the denial is not an appropriate consideration by civil courts." (Exhibit A p. 4) The Court reached this decision relying wholly on a prior Court of Appeals decision *Dlaikan v Roodbeen*, 206 Mich App 591 (1994) which improperly extends the religious abstention doctrine and ignores the neutral principles of law doctrine applied by Michigan Courts to resolve such questions.

In *Dlaikan*, *id*. at 592, plaintiffs brought a breach of contract and tort claims against the administrators of a Catholic school for not admitting their children into the parish school. *Dlaikan*'s extremely short majority opinion (2-1, over a strong dissent) provided scant detail about the facts leading to the claim. It simply held that:

> When the claim involves the provision of the very services . . . for which the organization enjoys First Amendment protection, then any claimed contract for such services *likely* involves its ecclesiastical policies, outside the purview of civil law.

Id. at 593 (emphasis added). The Court made no mention, much less any findings, regarding any claimed religious doctrine or matter of church governance that was implicated by plaintiffs' claims. It was enough, the court held, that plaintiffs were seeking admission to a school run by the Church. *Id*. at 593. Yet, there is no principled explanation of why this is so and no consideration of precedent discussing and applying the neutral principles doctrine. The *Dlaikan* majority does make reference to the lack of an

> express written contract manifesting application of civil law alone. Under their theory of implied contract, an inquiry into the parties' relationship again necessarily entails an excursion into ecclesiastical polity. The same is true for the claims of intentional misrepresentation and professional negligence. Furthermore, we are aware of no precedent in this state for a claim of clergy malpractice where the only allegations relate to the performance of ecclesiastical functions such as the operation of a church school.

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Dlaikan, id. at 594. But, again, there is no explanation or analysis of how the facts of the case require the court to rule on matters of religious doctrine rather than, as the dissent recognizes, "educational and pedagogical matters common to all elementary schools, secular and parochial". *Dlaikan* at p. 600. These common pedagogical matters in dispute were "teachers' lesson plans, allegations of improperly calculated grades, violation of the hair-length provision of the student dress code, and plaintiffs' complaints about the 'people skills' of defendant Seeley." *Dlaikan, id.* at 595. The dissent also points out that neither the complaint nor the answer cite canon law or Catholic doctrine, despite the claim of "clergy malpractice." *Id.*

The Court of Appeals interprets and applies the abstention doctrine too broadly. As the dissent in *Dlaikan* explained, "a court must determine precisely what it is being called upon to decide." *Id*. at 598-99. That is, there must be some dispute of ecclesiastical doctrine or church governance, which a Court is being asked to decide as part of the claims before it. It is only when a Court is required to decide such an issue in order to resolve a dispute that it infringes the First Amendment protections afforded religious organizations. In this case, requiring Marist to identify the religious doctrine allegedly threatened by Winkler's PWDCRA claim is not itself an infringement of its First Amendment rights. It is providing the courts the necessary information to evaluate application of the abstention doctrine – or not. Otherwise, the abstention doctrine becomes a complete shield for religious institutions to hide their wrongful conduct. Religious institutions engage in secular activities well beyond buying property or fixing roofs. *Cf. Dlaikan*, 206 Mich App at 593-94 ("when an ecclesiastical organization enters into a contract to buy or sell property, to fix the church roof, or to interact in some other way with the secular world, its activity is governed by civil law alone"). One of the secular activities Marist has chosen to engage in is running a school to which it admits students <u>regardless of their religious faith</u>. Unlike admission

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to Marist's church, or faith, or governing body, there is no faith or ecclesiastical requirement for admission to the high school. And Marist has never once cited any ecclesiastical justification for its decision, whether in policies, correspondence, or verbal explanations. Nor does Marist require that student admitted to its high school be of the Catholic faith, or even Christian. Moreover, Marist suggested that Winkler apply to a different Catholic high school, Our Lady of the Lakes, for admission, further evidencing that excluding her from Marist's high school had nothing to do with religious beliefs or governance of the Church. Rather than consider this relevant evidence, the Court of Appeals merely applied an improper blanket ban to all claims which involve "analyzing the decision-making process of a religious institution regarding admission" to a school provided as a public accommodation to students of any faith. **(Exhibit A p. 4)** This is not a proper application of the ecclesiastical abstention or neutral principles of law doctrine.

The distinction here is that Defendant-Appellee Marist's decision was based on academic policy, not ecclesiastical policy. Marist never cited - and cannot cite - any religious or ecclesiastical justification for denying high school admission to Bettina. They have only made conclusory statements. In fact-intensive inquiries like application of the ecclesiastical abstention doctrine, Defendant-Appellee's inability to cite religious justification is fatal. In reality, the decision was made for educational reasons, with a triable issue as to discrimination. Because the issue can be determined purely by reference to the PWDCRA and applicable case law, Marist is not entitled to First Amendment protection.

First, Marist's webpage regarding admission standards cite the HSPT, "... grades, teacher evaluations, interview performance, and overall attitude towards school." [App 3] Dean Simon, in his three letters to 8th graders concerning prospective admission, in its otherwise detailed instructions makes no religious reference other than his final letter, which signs off "May God

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bless you and your family this Christmas and New Year." [App 5, 6, and 4] The admissions checklist, sent in the same time frame, talks about visiting the Fall Open House and the "Freshman Icebreaker," shadowing, selecting classes, registering, and sounds like any high school orientation checklist, public or private. [App 19, Plaintiff's MSD Response, Exh 2][5]

Second, Marist's written communications to the Winklers focused only on Bettina's ability to handle the academic curriculum at Notre Dame. These included the official denial letter, which cited "Bettina's academic transcript, teacher evaluation and test scores" in concluding that "we do not feel NDP can provide the curriculum necessary to assure Bettina's successful transition to NDP" [App 10], Fr. Hindelang' s email explaining that "The high school placement test, her report cards and comments from current teachers indicate that we would not have courses in which she could achieve success" [App 13], and Superintendent Dougherty's email that "Bettina has many gaps in her learning stretching across her grade levels." [App 19, Plaintiff's MSD Response, Exh 6]

Finally, the verbal explanations provided to the Winklers are consistent with the written ones, additionally citing Bettina's learning disability and Marist's refusal to accommodate her. [App 2, Complaint, ¶¶ 31, 34]

As neither religious doctrine nor church governance is implicated, ecclesiastical abstention is not applicable. As *Maciejewski*, *supra* at 414, explained, "[j]urisdiction is limited to property rights which can be resolved by application of civil law. Whenever the court must stray into questions of religious doctrine or ecclesiastical polity the court loses jurisdiction." In *Maciejewski*, the court was faced with a dispute among parishioners over the bishop's ability to

[5] There is reference to "faith-based activities" and a "liturgy" held after the student is already admitted to the high school.

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employ their parish priest. The court found it easy to conclude that dispute involved religious doctrine or ecclesiastical polity.[6]

The Unites States Supreme Court has defined religious doctrine as "the ritual and liturgy of worship or the tenets of faith." *Jones v Wolf*, 443 US 595, 602; 99 SCt 3020; 61 LEd2d 775 (1979). *See also Dlaikan*, *supra* at p. 597 (Taylor, J., in dissent). And "[p]olity refers to organization and form of government of the church." *Maciejewski*, *id.* at 414; *Dlaikan*, *id*. And this Court has analyzed whether asserted claims require adjudication of "the correctness of an interpretation of canonical text", *Smith*, 462 Mich at 684, or "the internal management of the church in ecclesiastical matters", *Berry*, 317 Mich at 502. There is simply no justification proffered by Defendant-Appellee Marist – or the Court of Appeals – that implicates these concerns. Admission of Bettina Winkler to the high school does not require testing or ruling upon Marist's tenets of faith, nor does it require the courts to adjudicate the organization or government of the Catholic Church. Nothing in the record indicates that students have to be a member of a particular faith, parish, denomination, or be a catholic, a protestant or even a Christian to be admitted to the high school. Nor need the court determine the appropriate government of the school, the church, or any religious institution. Adjudication of this dispute merely requires the court to determine – by application of secular, statutory law – whether Winkler was denied admission to a public accommodation because of her learning disability.

The Court of Appeals reaches too far: the exception swallows the whole. *Dlaikan*, 206 Mich App at 595 ("[B]y its unwarranted and unwise expansion of the ecclesiastical exception

[6] The U.S. Supreme Court held as much in *Hosanna-Tabor v EEOC*, 132 S Ct 694 (2012), a narrowly crafted opinion only barring ministers from bringing employment discrimination suits due to the ministerial exception of the First Amendment. In contrast, non-minister employees may bring discrimination claims; *see e.g.*, *Dias v Archdiocese of Cincinnati*, 2012 U.S. Dist LEXIS 43240 (US DC, SD Ohio, 2012), and cases cited therein.

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provided by the Free Exercise Clause, the majority has created a jurisprudential black hole in which the exception swallows the rule of law"). The Court of Appeals did not appropriately consider or apply Michigan courts' long-standing application of the neutral principles of law doctrine. Pursuant to that doctrine, Plaintiff-Appellant Winkler's claim of disability discrimination under the PWDCRA should be allowed to proceed.

B. *Dlaikan* is distinguishable and not controlling.

Notwithstanding, it is possible to see why the *Dlaikan* Court did not want to get involved in that dispute. Without reference to statutory law or even a written contract, it would have predictably devolved into the proverbial type of contest that courts disfavor. In contrast, Bettina Winkler's claim is squarely based in a statutory anti-discrimination law that effectuate a strong public policy: "The opportunity to obtain ... full and equal utilization of ... educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right." MCL 37.1102. This would come into the apparent exception carved out by the *Dlaikan* court concerning "alleg[ations] ... manifesting application of civil law alone," citing "obvious contrasts" such as contracts with the secular world or even "a dispute over title to property between factions of [a religious] organization [which] may be determined without reference to doctrine or ecclesiastical polity." *Id.* at 593-4, citing *Bennison v Sharp*, 121 Mich App 705 (1982).

Bennison's analysis is persuasive. It involved a dispute about the incorporation of a church. A bishop and church wardens sought to enjoin seceding church members from conveying church property to the new church organization. The Court of Appeals upheld the decision of the trial court, citing the "neutral principles of law" theory. Citing numerous U.S. Supreme Court precedents, in a thorough survey of cases, the Court of Appeals concluded that it could intervene "so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of

worship or the tenets of faith." *Id.* at 713. The "neutral principles of law" theory was further described as instances where reference could be made to the "language of the deeds, the terms of the local church charters, state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." *Id.* at 717.

Notably, while *Bennison* was a property dispute, it does illuminate that where a case can be resolved by references to neutral sources such as "state statutes" "'obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.'" *Id.* at 718.

Accordingly, a sex discrimination claim was not barred by the First Amendment in *Straman v Minder*, 1996 Mich App LEXIS 1791 (Mich Ct App, Sept. 17, 1996), distinguishing *Dlaikan*. This is the essence of the distinction: Bettina Winkler's case can be fully resolved with reference to Michigan's disability discrimination statute, with no need to delve into ecclesiastical matters.

Further analysis was provided by a very recent decision of the Court of Appeals in *Pilgrim's Rest Baptist Church v Mayfield*¸ 2015 Mich App LEXIS 881 (April 23, 2015). While nonbinding, the opinion is useful in showing how the court dealt with each separate claim, in this dispute among the "pro-pastor" and "anti-pastor" factions of a church. The court began its analysis by citing the general rule set forth in *Maciejewski*, *Id.*, regarding abstention in "questions of religious doctrine or ecclesiastical polity." *Id.* at 4. The court further explained, "Under the ecclesiastical abstention doctrine, apparently derived from both First Amendment religion clauses, 'civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity.'" *Id.* at 5. In applying these rules,

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the Court of Appeals determined that the trial court could exercise jurisdiction over claims involving church property, utilizing "the ordinary principles which govern voluntary associations," as long as analysis of those claims did not "lead[] the court to 'stray into questions of religious doctrine or ecclesiastical polity.'" *Id.* at 8, citing *Watson v Jones*, 80 US 679, 725 (1871). Using the same analysis, the court permitted tort claims of conversion of $14,623.46 worth of donations to go forward, reasoning that "The trial court could easily resolve this question because it is a matter of determining to which donee the donor of the money intended to make the donation. This determination sounds entirely in property law and does not delve into questions of religious doctrine or ecclesiastical polity, and therefore, the claim is justiciable." *Id.* at 9.

Similarly, tort claims of assault and battery and false imprisonment were permitted to go forward in *Wood v Berean Baptist Church & Heidi Beagle*, 1997 Mich App LEXIS 3438, 4-5 (Mich Ct App Sept. 26, 1997). The court reasoned:

> Although it has long been held that judicial interference in the purely ecclesiastical affairs of religious organizations is improper, the unreviewable discretion of religious authorities does not apply to all of their decisions regarding all activities; rather, they are only insulated only from such interference with regard to their decisions which directly involve religious doctrine. *Dlaikan v Roodbeen*, 206 Mich App 591, 597; 522 NW2d 719 (1994). Indeed, the fact that a religious organization may be sued for non-religious activities was long ago established when the Michigan Supreme Court, in *Gallon v House of Good Shepherd*, 158 Mich 361; 122 NW 631 (1909), proceeded on a theory of false imprisonment against a religious home for wayward girls, ruling that the jury below was warranted in finding that the plaintiff was restrained against her will.

Outside of Michigan, research has uncovered very few claims of disability discrimination claims filed by students or prospective students against religious schools. An Indiana case, *FACES, Inc. v Bridgewater*, 990 NE 2d 29 (Ct App Ind 2013), *rev'd on other grounds*, permitted a student's civil-rights based claim to go forward, where she claimed she was retaliated against for requesting a disability accommodation.

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Because Bettina Winkler's claim may be resolved with reference to the external statutory scheme in the PWDCRA, and there is no articulated reason why this would necessarily require delving into ecclesiastical matters or internal church polity, other than some hypotheticals advanced by Marist in their brief before the Court of Appeals at pp. 15-16.[7] There is no reason to exercise the broad immunity that was granted in the *Dlaikan* case. Resolution of Plaintiff-Appellant's PWDCRA claim can be resolved without excessive entanglement in ecclesiastical issues, as contemplated by the neutral principles of law doctrine as articulated and applied by Michigan and federal courts, *supra*. Plaintiff-Appellant invokes a statutorily defined civil right and the trial court is asked only to interpret and apply the PWDCRA without reference to religious doctrine. The trial court can determine the merits of this case without deciding issues of religious belief or adherence to faith.

IV. There is a question of fact that Bettina Winkler was denied admission because of her disability

The PWDCRA states at Section 402 that an educational institution shall not:

> (a) Discriminate in any manner in the full utilization of or benefit from the institution, or the services provided and rendered by the institution to an individual because of a disability that is unrelated to the individual's ability to utilize and benefit from the institution or its services, or because of the use by an individual of adaptive devices or aids.
>
> (b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, and privileges of the institution, because of a disability that is unrelated to the individual's ability to utilize and benefit from the institution, or because of the use by an individual of adaptive devices or aids.

[7] Put another way, it might be very difficult for Marist to argue that its religious mission permits discrimination against disabled persons, thus their reliance on hypotheticals.

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MCL § 37.2404; also see *Littsey v Board of Governors of Wayne State University*, 108 Mich App 406 (1981), *app denied*, 413 Mich 882 (1982). A discrimination claim may be made in two ways, by direct evidence, or circumstantial, indirect evidence. Bettina has presented sufficient proofs under both tests.

"'Direct evidence' [is] evidence that, if believed, "'requires the conclusion that unlawful discrimination was at least a motivating factor.'" *Harrison v Olde Fin Corp*., 225 Mich App 601 (1997). Marist's explanations for denying Bettina admission to the high school have consistently relied upon her learning disability, specifically her dyslexia, as a justification. These include:

* Fr. Hindelang's statements that Bettina didn't "fit the school profile," wouldn't "fit in," that "we told our own teacher" that we couldn't take her child with dyslexia;

* Admissions Dean Simon's suggestion that Bettina enroll in the public schools, because "they take anybody;"

* Emails from Fr. Hindelang and Superintendent Dougherty citing Bettina's dyslexia as a justification for the decision to deny her admission;

* The publication of various promotional media that pointedly omits disability discrimination from Defendant's anti-discrimination statements.[8]

Marists' brief below omits any reference to this evidence. Instead, Marist's entire defense under MCR 2.116 (C) (10) is based on the fact that Beaumont's formal diagnosis was not presented until after they denied admission to Bettina. However, as noted above, there is abundant evidence, even in this undeveloped record, that Marist was on notice as early as 2012 that Bettina was diagnosed with ADD and was otherwise learning disabled. [App 19, Plaintiff's Response to

[8] This may raise a claim under the PWDCRA at section 504 (d), that an educational institution may not "Print or publish or cause to be printed or published a catalog or other notice or advertisement indicating a preference, limitation, specification, or discrimination based on the disability of an applicant that is unrelated to the applicant's ability to utilize and benefit from the institution or its services, or the use of adaptive devices or aids by an applicant for admission to the educational institution."

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MSD, Exhs 8, 9, and 10] It is also difficult to reconcile their defense with the specific reasons cited by Marist's decision makers for Bettina's non-admission.

Bettina may also make her case by way of circumstantial evidence of disparate treatment. These types of cases are analyzed under the familiar burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792 (1973). Under the PWDCRA, a person seeking to make a prima facie showing of a violation of the by an educational institution must show: (1) that he or she is a [disabled] person within the meaning of the act; (2) that he or she is qualified for the educational opportunity sought in spite of the [disability]; and (3) that, in spite of those qualifications, he or she is not being afforded an equal opportunity to secure the educational opportunity as other applicants. *Crancer, supra*.

In short, the question in a disparate treatment is whether there is evidence that she was treated differently as others similarly situated. *See e.g.*, *Lytle v Malady*, 458 Mich 153 (1998). Here, Bettina meets the same admission criteria for the high school that other, non-disabled students present, but she was refused admission because of her learning disability. Plaintiff believes, and the evidence is expected to show, that non-disabled students are routinely admitted to the high school despite their grades and HSPT score, and that Bettina was the only Marist 8th grader denied admission for the 2014-2015 school year.

The evidence is expected to show that the alleged 3.0 GPA requirement is only selectively enforced. For example, Marist allows student-athletes, allowing those with multiple "F's" to continue competing as long as they take an extra study hall. [See policies and argument, App 19, Plaintiff's Response to MSD, pp. 9-11] Additionally, Marist's claim that their students must maintain a certain grade point average is belied by an emailed announcement sent to 8th graders in October, 2013, which talks about monitoring student grades and sets forth a "plan of action"

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for students whose academic averages below 65%. In contrast, Bettina's lowest grade for the second semester in 8th grade was still above that 65% threshold – a 66% in Algebra. [App 19, Plaintiff's Response to MSD, Exh 6]

Winkler has amassed this circumstantial evidence of disparate treatment even without formal discovery, and it is fair to assume that further discovery will uncover additional evidence to sustain her claims. She cites this court to the general rule that summary disposition should not be granted until discovery is complete. *Dep't of Social Services v Aetna Casualty & Surety Co.*, 177 Mich App 440, 446 (1989). Given the strict standard of review for "(C) (10)" type cases recently emphasized by the U.S. Supreme Court *Tolan v Cotton*, 134 S Ct 1861 (2014), summary disposition is not warranted.

Conclusion

Bettina Winkler's disability discrimination claim against a private, denominational school is recognized by statute, and backed by sufficient evidence to go forth. It is not barred by the First Amendment because it may be resolved by reference to Michigan statute, and will not require review of internal ecclesiastical questions or church polity. The Court of Appeals has impermissible extended the ecclesiastical abstention doctrine to cases which cannot be said to involve questions of religious faith or Church governance. Accordingly, Plaintiff-Appellant requests reversal of the Court of Appeals and remand to the trial court for further proceedings.

Respectfully submitted,
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December 23, 2015