IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IN THE MATTER OF D.P. (a minor),
By and Through his Parents,
RICHARD PIERCE and
MARGARET PIERCE,

Plaintiffs,

v.

SCHOOL DISTRICT OF POYNETTE,
BARBARA WOLFE, JIM CARELLI and
NORMA LIMMEX,

Defendants.

OPINION AND ORDER

03-C-310-C

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This is a civil action brought pursuant to § 1983, § 504 of the Rehabilitation Act and state common law. Plaintiffs, D.P. and his parents Richard Pierce and Margaret Pierce, contend that defendants School District of Poynette, Barbara Wolfe, Jim Carelli and Norma Limmex failed to provide D.P. with a free appropriate public education by ignoring his special needs and that they allowed mistreatment of D.P. to occur in violation of his rights under state law and the Fifth and Fourteenth Amendments to the U.S. Constitution. Jurisdiction is present under 28 U.S.C. § § 1331 and 1367.

Presently before the court is defendants' motion for summary judgment. Plaintiffs ask this court to decide whether D.P. qualifies for special education services or accommodations and whether defendants denied D.P. a free appropriate public education under the Individuals with Disabilities Education Act (IDEA) or § 504 of the Rehabilitation Act. Because the administrative law judge did not decide these questions, plaintiffs have not exhausted their administrative remedies under the IDEA. I will grant defendants' motion for summary judgment on these issues. I do not find that the administrative law judge erred when she dismissed plaintiffs' IDEA claim for failure to cooperate with defendant school district. Therefore, I will grant defendants' motion for summary judgment on plaintiffs' claim that as parents, they can refuse to allow the defendant school district to evaluate D.P. if they believe it will harm his mental health. I will grant defendants' motion for summary judgment as to plaintiffs' § 504 discrimination claim because plaintiffs have failed to show that D.P. is an individual with a disability under § 504 of the Rehabilitation Act or that he is an "otherwise qualified individual" for the gifted and talented program in defendant school district. Because plaintiffs have failed to adduce any evidence showing discriminatory intent or deliberate indifference on the part of any of the defendants toward D.P., I will grant defendants' motion for summary judgment on plaintiffs' equal protection claim. I will grant defendants' motion for summary judgment as to plaintiffs' substantive due process claim because no reasonable jury could find that defendants created a dangerous

environment for D.P. Finally, plaintiffs have failed to show that defendants breached a duty of playground supervision or that defendants' actions caused D.P. injury. Therefore, I will exercise supplemental jurisdiction and grant defendants' motion for summary judgment as to plaintiffs' state law claims of negligence. I will deny plaintiffs' motion to amend their complaint as unnecessary.

As an initial matter, I must address the severe problems plaintiffs' proposed findings of fact presented. First, I did not consider the opinion of Jocelyn Miller, D.P.'s therapist, that subjecting D.P. to testing by the district would harm D.P.'s mental health. Her opinion is merely conclusory and establishes no basis for her judgment. Second, plaintiffs have submitted proposed findings of fact that rely on evidence from affidavits that were sworn to after an earlier deposition of the same party and which contradict the deposition testimony. For example, I ignored the incident regarding defendant Limmex and the Tennessee horse report by D.P. because in his deposition D.P. states that Limmex provided no comments on the report and then in his later affidavit he states that she expressed disbelief about the contents of his report. Plts.' Resp. to Dfts.' PFOF, dkt. #49, ¶ 110. Parties cannot defend a summary judgment motion by "creating 'sham' issues of fact with affidavits that contradict their prior testimony." Bank of Illinois v. Allied Signal Safety Restraint Systems, 75 F.3d 1162, 1168 (7th Cir. 1996). This does not mean that subsequent affidavits may not be considered if they are offered to clarify ambiguous or confusing testimony or are based on

newly discovered evidence. Id. at 1171-72. The rule prohibiting the creation of false disputes of fact must be applied with caution; it is the jury's role to resolve questions of credibility. Id. at 1169. In this instance, however, plaintiff's affidavit supplies new material to which plaintiff D.P. never referred in his deposition and it contradicts portions of his deposition testimony.

As another example, I ignored plaintiffs' objections to Amy Cole's analysis of D.P.'s academic abilities because plaintiffs did not follow this court's Procedure to be Followed on Motions for Summary Judgment. In fact, for each proposed finding of fact, plaintiffs ignored this court's procedures by failing to cite admissible evidence, Procedure II(E), failing to cite page numbers to admissible evidence, Procedure I(B), or failing to properly propose their own findings of fact by separating each fact in a numbered paragraph, Procedure I(B). See, e.g., Johnson v. Cambridge Industries, 325 F.3d 892 (7th Cir. 2003) ("district courts . . . are not required to scour every inch of the record for evidence"). To the extent that plaintiffs' submissions did not comply with this court's procedures, I have not considered them. Ziliak v. Astra Zeneca L.P., 324 F.3d 518 (7th Cir. 2003) (when parties fail to comply with district court's summary judgment procedures, proper response is to disregard nonconforming submissions). It is no consequence, however, as I would have reached the same decision had plaintiffs' proposed facts complied with this court's procedures.

I note that this is not plaintiffs' counsel's first appearance in this court. If she intends

to practice here in the future, she should make herself familiar with the court's procedures and follow them assiduously.

From the parties' proposed findings of fact and the record, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

A. The Parties

D.P. is currently a thirteen-year-old student, residing with his parents Margaret Pierce and Richard Pierce. D.P. resides in the defendant School District of Poynette.

On or about March 25, 1997, when D.P. was six and one half years old and in kindergarten, D.P.'s family physician, Susan Isensee, referred D.P. to Peter A. Williamson at the Dean Medical Center's Neuropsychology Unit for possible attention deficit disorder. Williamson conducted a neuropsychological evaluation of D.P. and diagnosed him as exhibiting a significant attention deficit disorder. Williamson described D.P. as a very bright boy with average to above average IQ scores and normal academic skills who has difficulty sustaining consistent vigilant attention, problems with listening skills and problems with executive/cognitive control. Williamson referred D.P. to Jocelyn Miller, a Dean Medical Clinic therapist, who managed D.P.'s attention deficit hyperactivity disorder and monitored his medications beginning in 1999.

Richard L. Listiak is a clinical psychologist for Gunderson Lutheran Medical Center in La Crosse, Wisconsin, who conducted a psychological evaluation on D.P. at the request of his parents. Michael Ishii is a psychiatrist for Dean Clinic who evaluated D.P. on February 8, 2002, at the request of Miller and Margaret Pierce, when D.P. was in fifth grade.

Defendant Barbara Wolfe is the District Administrator for defendant School District of Poynette. Defendant Jim Carelli is the principal of the Poynette Elementary School. Defendant Norma Limmex was plaintiff D.P.'s fifth grade teacher in defendant school district during the 2001-2002 school year. Neither Wolfe nor Carelli had any authority to make school district policy. At the time covered by this complaint, Limmex had just begun her sixth year of teaching and was certified to teach elementary education, grades one through nine. In addition, Limmex had experience teaching children with disabilities and had attended approximately fifteen individualized education program meetings for students assigned to her classroom. Amy Cole is a school psychologist for defendant school district and a member of D.P.'s individualized education program team. Rick Zabriskie was the school social worker for defendant school district at all times relevant to this action and worked with D.P. when he was in second, third, fourth and fifth grade. Jeanne Mutchler is District Coordinator of the Gifted and Talented Program.

B. Special Education Needs

In the fall of 1997, D.P. began attending first grade in the defendant school district. Teachers in the defendant school district made accommodations for D.P. For example, D.P's fourth grade teacher allowed him to print or give oral answers for part of his written cursive assignments, submit late homework assignments if he did not complete them for the day that they were assigned and take more time than other students to complete tests. Defendant school district monitored D.P.'s educational performance in first through fourth grades by administering the standardized achievement tests given to all students in the district. D.P. exhibited average to above average performance in all tested areas.

During the 2001-2002 academic year, D.P. was in fifth grade at the Poynette Elementary School. Limmex was his fifth grade teacher. At the beginning of the school year, Margaret Pierce told Limmex that D.P. had attention deficit hyperactivity disorder and was taking medication for his condition.

On October 1, 2001, Richard Pierce began working in Pittsburgh, Pennsylvania. His move came shortly after the September 11, 2001 terrorist attacks, which had upset D.P. D.P. was concerned about his father having to fly back and forth from Pittsburgh, which was near the place where one of the planes went down on September 11, 2001. Around the same time, Margaret Pierce sent Limmex a note, stating:

> If [D.P.] has some trouble with concentrating for the next few weeks, just send the work not completed home with him and we'll do as much as we can every night.

> Dick started working in Pittsburgh yesterday and it has hit [D.P.] pretty hard. ([And] which he knows is no excuse for poor behavior, but he may need a little time for adjusting to the "single mom" phenomenon around here.)

D.P.'s mother frequently communicated with Limmex about D.P. and made suggestions to her regarding the management of D.P. in her classroom. Plaintiffs asked Limmex to give D.P. some flexibility in classroom assignments. Plaintiffs wanted accommodations for D.P. similar to those provided him in the fourth grade, such as not completing his homework assignments on a daily basis but submitting the work at the end of the week. In addition, plaintiffs asked that D.P. be allowed to print rather than write in cursive and to chew gum during class. Limmex allowed D.P. to type his vocabulary terms and definitions instead of writing them out like the rest of the class, in order to accommodate plaintiffs' complaints about D.P.'s difficulty in completing homework. Limmex permitted D.P. to chew gum in class to help him pay attention, even though she did not generally allow chewing gum in school in the fifth grade. In October 2001, D.P.'s mother asked Limmex to move D.P.'s desk to the back of the room, where D.P. would be less distracted. Limmex complied with the request. On December 16, 2001, plaintiffs wrote Limmex a note explaining that D.P. had not completed a draft of a report assigned by Limmex because the time plaintiffs spent on the report took away from "Dad and [D.P.]" events. Limmex responded with a note apologizing to plaintiffs that the classroom activity

took time away from other family activities for that weekend and asked plaintiffs to contact her if they had any questions.

About three weeks into the school year Limmex noticed that D.P. was having difficulty paying attention to her during class instruction. However, Limmex never viewed D.P. as a behavior problem in her classroom. Limmex was concerned that D.P. was not finishing his assigned homework as he needed to do to prevent him from developing skill deficits in the different curriculum areas.

D.P.'s academic performance during the first quarter of the 2001-2002 school year was in the average to above average range, represented by two As, four Bs, one C and one D (which was raised to a B the second quarter). D.P. received four As, three Bs and one D for his second quarter grades in school. During the second semester of his fifth grade year, D.P. had the following grades: two As, five Bs and once C for third quarter; two As, five Bs and one C for fourth quarter. D.P. has never been identified as a student with disabilities eligible for special education and related services.

D.P.'s mother attributed his problems with homework completion to his attention deficit hyperactivity disorder, dyslexia and the fact that his father was not home during the week. Plaintiffs told Zabriskie, the school social worker, that D.P. said he was not doing his homework because "he wanted to be 'super dumb [D.P.],' if not that, then 'dumb [D.P.]' so that the other kids would not pick on him." Zabriskie asked Limmex to complete a learning

and behavior problem checklist in order to identify D.P.'s problem areas and make specific classroom modifications that would help him succeed. This procedure is done through the regular education program to assist children experiencing problems in school who are not eligible for services as a student with disabilities.

On December 21, 2001, D.P. and his mother met with Miller, D.P.'s therapist. During the conference, Miller noted plaintiffs' concerns about the defendant school district's inflexibility and inadequate response to D.P.'s needs and about D.P.'s peer problems at school and the change in his father's schedule. Around this same time, plaintiffs asked Zabriskie whether D.P. could do special activities in math or science because he was a "bright" kid and faster than most other children. Richard Pierce told Zabriskie that it can be "difficult getting 'the powers that be' to help a 'bright' kid, but restricting (hurting) a 'bright' kid to favor a 'slow' kid is not, as you well know, a proper response." In addition, plaintiffs asked Limmex to provide D.P. with additional school work in math and science to provide him with more stimulation because he was bored.

Zabriskie told plaintiffs that D.P. was probably not eligible for special education services. Richard Pierce asked Zabriskie to talk with the special education people to find out what they could do to help the situation. Zabriskie emailed Richard Pierce, stating that he had "contacted Jeanne Mutchler, our education Excellence coordinator, who says [D.P.] is enrolled in the August Derleth writing program this January . . . [and that] [s]he is also

working with Mrs. Limmex to see what other curriculum changes could help [D.P.'s] creative side."

Around January 4, 2002, Zabriskie arranged a meeting with Limmex, Principal Carelli, Mutchler, District Coordinator for the Gifted and Talented Program] and Margaret Pierce. Mutchler and Carelli told plaintiffs that because D.P.'s test scores were in the average range, he did not qualify for special services. Margaret Pierce acknowledged that D.P.'s grades were in the range of 88 to low 90's but expressed concern at the meeting that D.P. was bored and losing interest in school and having a terrible time there. The group considered various interventions for D.P. such as condensing the time he spent in the academic units so he could advance more quickly through some of the instruction. Pierce wanted Limmex to provide D.P. with additional math work. Pierce believed that Limmex and Mutchler based their conclusions regarding D.P.'s eligibility for the gifted and talented program on their belief that he "does not deserve additional work." Limmex thought that D.P. needed to complete his homework assignments for his regular class work before adding responsibilities from the gifted and talented program. Margaret Pierce acknowledged that D.P. was not completing his assignments in class. Nevertheless, Limmex decided to see whether D.P. could test out of some of the science units, the area in which she believed he was most interested. This would allow D.P. to substitute the gifted and talented programming time for his academic class work. However, D.P. was unable to test out of his

current classroom science unit, making him ineligible for additional work through the gifted and talented program.

The January group discussion led to encouraging D.P. to participate in the school "Math 24" contest and the August Derleth writing contest. His written short story was published in a fifth/sixth grade anthology. D.P. did not advance to the regional "Math 24" contest.

On January 29, 2002, Richard Pierce emailed Zabriskie, expressing displeasure that D.P. did not progress in the math competition. He also complained about Limmex's homework requirements. He acknowledged that defendant school district was providing D.P. with a separate room for study and that D.P. did not have to go out to recess, which he described as "working well." That same day Zabriskie responded to Richard Pierce, explaining:

> [D.P.] can print if he needs to ([D.P.] may not know this), but it is fine with the teacher and was confirmed yesterday; whenever he can be pushed to write cursively he should though (I've seen his work and it is perfectly good). The flexibility with homework will always be there – please confirm with teacher, not [D.P.].
>
> Ms. L[immex] is quite supportive of [D.P.] within the limitations of the classroom setting, but [D.P.] doesn't seem to accept/acknowledge the support given and he seems to need more than a teacher can supply.
>
> I met with [D.P.] and a classmate who [D.P.] cited as one of those who gives him the most trouble: the other child didn't seem to be aware that he was bothering [D.P.] (at least intentionally). The classmate also said that he

> wishes [D.P.] would work on his assignments in class instead of 'rolling on the floor' and 'making noise' or 'drawing with crayons' which makes it difficult for the classmate (who sits close to him) to focus on completing his assignments. I don't think that [D.P.] realizes how he affects others.
>
> My extra efforts to support [D.P.] may help in the long run and I hope that Jocelyn Miller can add to that. None of this is going to show instant results. We all need to be patient and supportive of [D.P.] and his unique perspective on life and [his] sometimes challenging behaviors. Please feel free to show this to Jocelyn Miller so that she can get a feel for what we are doing and make suggestions as to other appropriate interventions.

In February 2002, plaintiffs attended a parent-teacher conference and informed Limmex about D.P.'s suicide attempts. (D.P. had threatened to stab himself with a kitchen knife during an altercation with his mother and he had attempted to hang himself with rope in the barn.) After the parent-teacher conference, plaintiffs "marched" right into Principal Carelli's office for further discussion. Richard Pierce told Carelli that D.P. was bored and that the school was not doing enough for him. He also complained that other kids were picking on D.P. on the playground and using him for a hurdle.

At a February 20, 2002 therapy session with Miller, Margaret Pierce reported that D.P. was still unhappy with school and that they had decided to move him to a different school next year. Miller reported that a change in D.P.'s medication was "working very well for him. Mom is seeing a big improvement in his mood. [D.P.] himself verbalized that he is feeling much more 'up.'" Miller noted that "Mom reports home behavior is good. [D.P.]

did complete all of the chores that were assigned as a consequence for his aggressive behavior against his mom" and D.P. reported that he had made friends at school who stayed with him when he stays in from outdoor recess.

On February 18, 2002, Margaret Pierce completed an application under the Wisconsin Department of Instruction full-time public school open enrollment program, asking that D.P. be allowed to attend the Lodi School District during the 2002-2003 school year. On February 28, 2002, Wolfe informed the Lodi School District's District Administrator, Michael Shimshak, that D.P. had no special education records or referrals.

On March 5, 2003, D.P.'s parents asked Listiak, a clinical psychologist for Gunderson Lutheran Medical Center, to conduct a psychological evaluation to provide information to the school district to help determine D.P.'s eligibility for special education services. Also, Stephen Porter evaluated D.P. at Gunderson Lutheran Medical Center in March 2003 but did not conduct intellectual testing and administered only portions of an achievement test. Margaret Pierce wrote a letter to Porter, objecting to Listiak's report, stating that D.P. "does not have an Appositional Defiant Disorder diagnosis."

On March 28, 2002, Miller reported that:

> [D.P.] has maintained his gains in regard to anger management. He is very helpful at home with chores, according to mom. Parents recently got the word that his current school district is going to release him and allow him to transfer to a different public school at another area if he is accepted there. They have not heard from Lodi regarding [D.P.'s] application to transfer there. If he

> doesn't get accepted to Lodi then they will have him go to Walbridge Academy on the west side of Madison. [D.P.] is looking forward to being in horse shows this summer with his family. He continues to socialize with one little boy, Billy, and this friendship is working out well. [D.P.] had no issues to raise to day and wanted to play chinese checkers.

On April 11, 2002, Ishii, a psychiatrist for Dean Clinic, reported that:

> Mom is extremely impressed with [D.P.'s] academic performance. His behavior is going well at school. He is not going out at recess because of his need for structure. The structure and his behavior at home is going much better with less oppositionality and anger management. He is not having side effects to his medications. Overall mom is impressed with the Risperdal helping out with anger management and controlling his behavior . . . changes were significant for bright affect and mood with appropriate range. Thoughts were linear and goal directed without psychosis. No suicidality was evident.

On March 7, 2002, Zabriskie completed a special education referral on D.P., despite informing plaintiffs that D.P. did not have a deficit in his educational performance. Defendant school district convened an individualized education program team for D.P. to review evaluation information to determine D.P.'s eligibility as a student with a disability for special education and related services. In early April 2002, Cole, school psychologist and member of D.P.'s individualized educational program team, sent plaintiffs a Notice of Receipt of Referral and Start of Initial Evaluation.

For D.P.'s evaluation, Cole read and reviewed the Gunderson Lutheran Medical Center evaluation reports, Miller's January 30, 2002 report, D.P.'s standardized achievement test results from second, third and fourth grades, D.P.'s report cards from second through

fifth grade and his 2000 Wisconsin reading comprehension test. D.P.'s parents did not provide the defendant school district with a complete copy of Listiak's report. In addition, Cole was not given a copy of Ishii's evaulation of D.P. dated February 8, 2002.

After reviewing D.P.'s second through fifth grade report cards, which showed that he had passed all of his courses, and D.P.'s results on his I.Q. and fourth grade Wisconsin achievement tests, Cole determined that D.P. was performing at an average level of academic proficiency in all academic subject areas and therefore did not qualify for special education and related services as a student with learning disabilities. Cole concluded in a March 27, 2003 report interpreting D.P.'s standardized test results that D.P. scored in the specific academic areas as follows:

> **Reading** - D.P. scored a national percentile of 77, scoring higher than 77 out of 100 students his grade level on a national scale. His grade equivalent in this area was 7.7. His proficiency level was proficient.
>
> **Language** - D.P. scored a national percentile of 73, scoring higher than 73 out of 100 students at his grade level. His grade equivalent was 7.6 in this area and his proficiency level was proficient.
>
> **Mathematics** - D.P. scored a national percentile of 61, scoring higher than 61 out of 100 students at his grade level. His grade equivalent was 5.2. His proficiency level was proficient.
>
> **Science** - D.P. scored a national percentile of 76, scoring higher than 76 out of 100 students at his grade level. His grade equivalent was 6.8 and his proficiency level was advanced in this area.
>
> **Social Studies** - D.P. scored a national percentile of 77, scoring higher than

> 77 out of 100 students at his grade level. His grade equivalent was 6.8 and his proficiency level was advanced in this area.
>
> D.P. scored above average in all academic areas.
>
> In summary, it appears that D.P. is an intelligent boy who could do well in school seeing his above average abilities in all academic areas throughout his school years.

To confirm Cole's determination, Cole and the other individualized educational program team members concluded that they required additional information about D.P. through formal testing, observations and interviews with D.P., his classroom teachers and his parents. However, plaintiffs refused to provide their consent for the defendant school district personnel to conduct additional testing, interviews and observations related to D.P.'s current educational performance, although doing so would allow the district to determine D.P.'s eligibility for special education and related services.

Members assigned to D.P.'s individualized education program evaluation team determined in the spring of the 2001-02 school year and in April 2003 that, from the information available to them, D.P. was not a student with a disability.

As a result of D.P.'s referral for special education evaluation, Wolfe informed the Lodi District Administrator that a special education evaluation for D.P. was pending, pursuant to Wis. Stat. § 118.51(5)(a)(6). On April 1, 2002, the District Administrator of the Lodi School District denied plaintiffs' request to transfer D.P. to Lodi under the open enrollment

program. At the April 25, 2002, therapy session with Miller, Margaret Pierce reported that D.P. had shown a downturn in his behavior since hearing about the denial of the open enrollment application.

In September 2002, D.P. started attending Walbridge Academy, a private school. D.P. was in sixth grade and continued to make As, Bs, and Cs in his school work and continued to perform in the average range on standardized achievement tests.

C. Harassment

Zabriskie and D.P.'s mother talked on a regular basis about D.P. Around October or November 2001, plaintiffs asked Zabriskie whether he would start seeing D.P. because D.P. was having increasing trouble with recess and they were concerned about his entire school experience. In November 2001, Zabriskie began to work individually with D.P. on a weekly basis to talk about school experiences. In all the time that Zabriskie spent with D.P., D.P. never told him that he was afraid to come to school. D.P. did have some friends at school, in particular, [J] and [B]. D.P. would play with [B] on the weekends at their homes.

In November 2001, in response to concerns expressed by plaintiffs, Zabriskie started observing D.P. on the playground interacting with his peers. Zabriskie casually observed the social interactions of the students daily when walking across the playground. Plaintiff Margaret Pierce believed that the playground during recess was not properly supervised. She

had driven by the school at least seven times and believed that D.P. was not supervised at all times. Because the playground is L-shaped, it is possible that plaintiff Margaret Pierce failed to observe the adult supervisor standing in a different location on the playground. Principal Carelli assigns personnel to playground supervision. He has hired a teacher assistant for lunch recess supervision and assigned each of the four fifth grade teachers on a rotating schedule to the afternoon recess period, consistent with their collective bargaining agreement and teaching assignments. A substitute assistant supervises the playground on days when the assigned teacher assistant is absent.

D.P. experienced several incidents where other students would tease him or physically hurt him. In one incident in November 2001, a playground supervisor saw D.P. jump on top of a soccer ball and curl up in a fetal position, clutching the ball underneath; D.P. hung tightly onto the ball and refused to respond to the other students' requests that he return the ball so that they could continue playing. When D.P. refused, the playground supervisor saw some of the students jump over D.P. The supervisor yelled at the students and told them to stop jumping over D.P. The supervisor tried to get D.P.'s attention by touching him and asking him whether he was all right, but D.P. would not respond, keeping his head down and not saying anything. D.P.'s mother first heard about this incident at a February 7, 2002 meeting with Miller.

During the winter of the 2001-2002 school year, other students hit D.P. with soccer

balls. D.P. was an avid soccer player and would get upset with other children on the playground if they did not know the soccer rules. D.P. usually egged other children on, not the other way around. One time D.P. went inside the soccer net on the playground, pulled his coat over his head and got into a fetal-type position because "he got really bored." The children playing soccer kicked the ball into the net, at times hitting D.P. D.P. stayed inside the net and encouraged the other kids to kick the ball at him, yelling "Kick it, kick it." One child walked around the net and started kicking at D.P. to get him out of the net because D.P. was interfering with the ongoing soccer game. Zabriskie and another playground supervisor responded to the soccer incident, asking D.P. whether he was all right, telling D.P. that sitting inside a soccer net is "not a very good place to sit and think and wonder" and that such conduct was not going to make friends. D.P. told Zabriskie that it was not a problem and that he did not have any complaints except that he wanted to know why Zabriskie had interrupted his play. D.P. thought that everyone was against him no matter what he did. D.P. did not sit in the soccer net again.

Another incident of teasing occurred when D.P. wore a kilt during the school's "Olympics," an outdoor athletic activity event in which each class represented a different country and competed in different sport events. D.P.'s class voted to be Scotland. Other students teased D.P. for wearing the kilt, but Limmex backed D.P. up and explained that it was an authentic costume representing the traditional dress for Scotland. Carelli met with

D.P. and the boys teasing him and told the boys not to call D.P. a "queer" again.

On two other occasions other students knocked D.P. down in physical education class. On another occasion a girl started kicking the table at which D.P. and his mother were eating lunch at school.

Another time D.P. was sitting at a lunch table adjacent to a table with a group of boys. D.P. reported that the boys were saying that he was gay, and D.P. asked some of the boys to marry him, saying "I want to marry you."

In a December 11, 2001 email, plaintiffs asked Zabriskie whether there was "anyway for [D.P.] to do other things than with the 'football kids?' Can he get his own space, like work/play on the computer in the computer lab, or something similar so that the other kids don't have an excuse to beat up on him." Zabriskie explained to plaintiffs how the playground was supervised and encouraged plaintiffs to inform him if D.P. was continuing to cite instances that made him feel uncomfortable on the playground.

On December 14, 2001, plaintiff Richard Pierce emailed Zabriskie, informing him that D.P. had said there were no adult (teacher) supervisors visible for the second recess the day before. Later that day, Zabriskie responded to the email, explaining that "[f]or late recess, a fifth grade teacher or two usually goes out with the kids. Randy Spencer was out during the recess in question. He was playing basketball with some of the students, so [D.P.] may not have noticed him."

Carelli talked to D.P. shortly after his conversation with Richard Pierce after the parent-teacher conference in February 2002 and asked him whether he was still having trouble with the other kids. D.P. responded "yes" and named one student. D.P. complained that some students were calling him gay and teased him during recess.

At Miller's suggestion, plaintiffs asked that D.P. be given the option to stay inside during recess so he could have some control over the recess. Defendant school district agreed to that arrangement.

Defendant school district has implemented student nondiscrimination polices and procedures for the purpose of preventing prohibited discrimination, including harassment, on the basis of disability and other protected classifications. Defendant school district disseminated these policies and procedures to its employees and students for the 2001-2002 school year. Plaintiffs never contacted Wolfe regarding any concerns related to discrimination against D.P. during the 2001-2002 school year.

D. Court and Administrative Proceedings

On November, 20, 2002, plaintiffs submitted a request for a due process hearing, requesting tuition reimbursement for their unilateral placement of D.P. in a private school from defendant school district. On July 28, 2003, the administrative law judge for the Wisconsin Division of Hearings and Appeals dismissed plaintiffs' due process hearing

request because plaintiffs refused to allow defendant school district to evaluate D.P. to determine his eligibility for services under the Individuals with Disabilities Education Act and Wis. Stat. Ch. 115. Plaintiffs filed an appeal of the administrative law judge's decision on September 3, 2003, in the Circuit Court for Columbia County. On November 6, 2003, plaintiffs stipulated with defendant school district to dismiss the action with prejudice. The state court entered judgment on the stipulation on December 2, 2003.

Plaintiffs filed a complaint against defendants in the Circuit Court for Columbia County on April 28, 2003, alleging claims of negligent supervision, failure to maintain a safe environment, discrimination and violations of equal protection under 28 U.S.C. § 1983. On June 13, 2003, defendants removed the action to this court. On August 27, 2003, plaintiffs amended their complaint to add a fifth claim of violations of § 504 of the Rehabilitation Act of 1973.

OPINION

Plaintiffs' arguments in opposition to defendants' motion for summary judgment are cryptic, undeveloped and unorganized. However, after piecing together the different parts of plaintiffs' brief, I can discern the following arguments: 1) D.P. is eligible for special education services and accommodations under the Individuals with Disabilities Education Act and § 504 of the Rehabilitation Act of 1973; 2) defendants denied D.P. a free

appropriate public education under the Individuals with Disabilities Education Act and § 504 of the Rehabilitation Act of 1973 when they refused to acknowledge and act upon D.P.'s peers' harassing behavior; 3) the administrative law judge incorrectly dismissed plaintiffs' request for a due process hearing when she held that D.P. must undergo testing by the defendant school district; 4) defendants School District of Poynette, Wolfe, Carelli and Limmex intentionally discriminated against D.P. because of his disability in violation of § 504 of the Rehabilitation Act and the equal protection clause of the Fourteenth Amendment ; 5) defendants allowed D.P.'s peers to harass and assault him in violation of his substantive due process rights under the Fourteenth Amendment. (Plaintiffs bring a separate § 1983 claim as well. Section 1983 is not a claim by itself but a statutory vehicle in which to bring a claim for a constitutional violation. Thus, I have incorporated plaintiffs' § 1983 arguments into their equal protection and substantive due process claims.) Plaintiffs also raise state law claims of negligence and "failure to maintain a safe environment."

A. Special Education Needs

The Individuals with Disabilities Education Act (formerly the "Education of the Handicapped Act") insures a free appropriate public education for all children with disabilities. 20 U.S.C. § 1412(a)(1)(A). "Under IDEA, a [free appropriate public education] is an educational program 'specifically designed to meet the unique needs of the handicapped

child, supported by such services as are necessary to permit the child to benefit from the instruction.'" Board of Education of La Grange School District v. Illinois State Board of Education, 184 F.3d 912, 915 (7th Cir. 1999) (quoting Board of Education of Murphysboro v. Illinois Board of Education, 41 F.3d 1162 (7th Cir. 1994). The act attempts to achieve this goal by conditioning federal funding on state compliance with a variety of substantive and procedural obligations. 20 U. S.C. § 1412 (establishing eligibility requirements for states to qualify for assistance under the Individuals with Disabilities Education Act).

The act requires identification and evaluation of children with disabilities that need special services as a result of their disabilities. Once a child has been identified as disabled under the act, the state must assemble a team to evaluate the child and develop an individualized education program tailored to the unique needs of the child, 20 U.S.C. §§ 1401(11) and 1414(d), which sets forth the child's educational level, performance and goals and is the governing document for all educational decisions concerning the child. Board of Education, No. 218, Cook County v. Illinois State Board of Education, 103 F.3d 545, 546 (7th Cir. 1996).

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

program or activity receiving Federal financial assistance. . . ." Section 504 is broader than the IDEA in "the range of federally-funded activities it reaches, but narrower in the kind of actions it regulates." Timms v. Metropolitan School District, 722 F.2d 1310, 1317-18 (7th Cir. 1983) (discussing the predecessor to the IDEA, the Education for All Handicapped Children Act). "Because section 504 forbids exclusion from programs rather than prescribing the programs' content it reaches grosser kinds of misconduct than the [IDEA]." Id.; see also Monticello School District No. 25 v. George L., 102 F.3d 895, 902-03 (7th Cir. 1996); School District of Wisconsin Dells v. Z.S., 184 F. Supp. 2d 860, 883- 84 (W.D. Wis. 2001); Wenger v. Canastota Central School District, 979 F. Supp. 147, 152 (N.D.N.Y. 1997) ("[S]omething more than a mere violation of the IDEA is necessary in order to show a violation of Section 504 in the context of educating children with disabilities, i.e., a plaintiff must demonstrate that a school district acted with bad faith or gross misjudgment."); Brantley v. Independent School District No. 625, 936 F. Supp. 649, 657 (D. Minn. 1996) ("§ 504 provide[s] relief from intentional discrimination whereas the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination."). Similar to IDEA, however, the regulations promulgated under § 504 of the Rehabilitation Act require primary and secondary schools receiving federal funds to provide handicapped children a free and appropriate public education. Timms, 722 F.2d at 1317. "Section 504 and the [IDEA] therefore have considerable overlap." Id.

Although plaintiffs' complaint does not allege a claim under the Individuals with Disabilities Education Act (IDEA) and plaintiffs stipulated to dismiss their IDEA claim with prejudice in state court, plaintiffs seem to argue such a claim in their brief. Regardless of plaintiffs' intent, defendants argue that plaintiffs have failed to exhaust their administrative remedies under the statute. Therefore, plaintiffs are barred from bringing their claims that D.P. is eligible for special education services and accommodations and that defendants denied D.P. a free appropriate public education under IDEA or § 504 of the Rehabilitation Act.

Defendants' argument is correct. The Individuals with Disabilities Education Act states the following:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(l). 20 U.S.C. § 1415(f) provides parents with the opportunity for an impartial due process hearing and 20 U.S.C. § 1415(g) provides aggrieved parties to appeal a decision from an impartial due process hearing if a local educational agency conducted that hearing.

The Court of Appeals for the Seventh Circuit has held that "any pupil who wants 'relief that is available under' the IDEA must use the IDEA's administrative system, *even if he invokes a different statute*." Charlie F. v. Board of Education of Skokie School District, 98 F.3d 989, 991 (7th Cir. 1996) (emphasis added). It is of no consequence that plaintiffs asked only for tuition reimbursement when they filed a request for an impartial due process hearing, a typical remedy under IDEA, see Florence County School District Four v. Carter, 510 U.S. 7, 12 (1993), or seek remedies in the action before this court that may not be available under IDEA, such as compensatory damages. Id. (damages are not relief available under IDEA). (Plaintiffs have asked for tuition reimbursement in the present action as well.) "The nature of the claim and the governing law determine the relief no matter what the plaintiff demands. If this principle is equally applicable for purposes of § 1415([l]), the theory behind the grievance may activate the IDEA's process, even if the plaintiff wants a form of relief that the IDEA does not supply." Id. at 992 ("Several district courts have used this principle to hold that the pleadings in court do not end the analysis under § 1415([l]), and we think these decisions right.").

Plaintiffs ask this court to decide whether, under IDEA or § 504 of the Rehabilitation Act , D.P. qualifies for special education services or accommodations and whether defendants denied D.P. a free appropriate public education when they failed to stop the harassing behavior toward him. (Although it is unclear from plaintiffs' brief as to the special

accommodations that plaintiffs seek, one argument might be that defendants denied D.P. entry into the gifted and talented program.) The administrative law judge did not decide these questions, even though they come under the auspices of IDEA. Putting these questions before educational professionals and hearing officers who evaluate IDEA claims will help determine what educational shortfalls D.P. had faced, if any. Id. ("[U]nder the IDEA, educational professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls."). Therefore, plaintiffs must give IDEA's administrative process a chance to resolve these questions before bringing an action in this court. Because they have not done so, I will grant defendants' motion as to plaintiffs' § 504 claim as it relates to D.P.'s educational needs.

Because the administrative law judge rendered a decision on the question whether parents can refuse to allow defendant school district to evaluate D.P., plaintiffs exhausted their administrative remedies under IDEA as to this question. (Defendants argue that plaintiffs should be collaterally estopped from bringing this claim because they stipulated to dismiss this claim with prejudice. Because defendants did not raise this argument until their reply brief, it has been waived. United States v. Turner, 203 F.3d 1010, 1019 (7th Cir. 2000) (arguments raised for first time in reply brief are waived); James v. Sheahan, 137 F.3d 1003, 1008 (7th Cir. 1998) (same).) Thus, I may review the administrative law judge's decision.

The standard of review of administrative agency decisions under the IDEA is provided by 20 U.S.C. § 1415(i)(2)(B):

In any action [challenging an administrative decision], the court-

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

As this provision indicates, the IDEA "authorizes the district court to receive and consider new evidence, that is, evidence that was not before the administrative law judge, and to reverse his decision if it is contrary to the 'preponderance of the evidence.'" School District of Wisconsin Dells v. Z.S. ex rel. Littlegeorge, 295 F.3d 671, 675 (7th Cir. 2002). Therefore,

> a reviewing court that has before it evidence not considered at the administrative level will naturally defer less to the administrative decision, as it has an information advantage over the administrator that it lacks when judicial review is limited to the record that was before him. Judicial review is more searching the greater the amount (weighted by significance) of the evidence that the court has but the agency did not have.

Id. The level of deference to the administrative decision is thus a "sliding scale" based on the amount and significance of new evidence received by the district court. Id. Even where the district court receives some evidence that was not before the administrative law judge,

if the new evidence is minimally significant, the district judge must be "strongly convinced that the [administrative law judge's] order is erroneous" and must give "considerable deference to the reviewing officer." Id. This makes particular sense in Wisconsin, where administrative law judges who hear IDEA cases are specialists, id. at 676 (citing Wis. Admin. Code § PI 11. 12(2)), in contrast to courts, which "lack special expertise in the area of educational policy" and therefore should "give 'due weight' to the results of the administrative decision." Todd v. Duneland School Corp., 299 F.3d 899, 904 (7th Cir. 2002). As the party challenging the outcome of the state administrative hearing, plaintiff bears the burden of proof. See Murphysboro, 41 F.3d at 1167.

Plaintiffs contend that the administrative law judge erred in her decision, but they cannot support their contention. The administrative law judge found that IDEA regulations require a school district "to perform a variety of tests in order to accurately reflect the child's specific areas of educational need." Rohrer Aff., dkt. #41, exh. 3, p. 000004; 34 C.F.R. § 300.532(b). She concluded that because plaintiffs refused and continue to refuse to allow the district to evaluate D.P., plaintiffs had no right to tuition reimbursement under IDEA. Rohrer Aff., dkt. #41, exh. 3, p. 000004

It is undisputed that plaintiffs did not provide their consent to allow the defendant school district personnel to conduct additional testing, interviews and observations related to D.P.'s current educational performance. Rather, plaintiffs relied on independent

evaluations from Gunderson Lutheran Medical Center and expected defendants to rely on those assessments as well. Although the IDEA regulations provide parents with the right to independent educational evaluations at public expense or such evaluations at private expense, 34 C.F.R. § 300.502(b) & (c), the regulations do not say that these evaluations may replace the school district's obligation to conduct its own evaluation. See e.g., Board of Education of Murphysboro v. Illinois Board of Education, 41 F.3d 1162, 1169 (7th Cir. 1994) (parents had right to independent educational evaluation performed at public expense if they disagreed with school district evaluation); 34 C.F.R. § 300.502(c) (school district must consider independent evaluations at private expense so long as evaluation meets agency criteria). "[A] school district cannot be forced to rely solely on an independent evaluation conducted at the parents' behest." Patricia P. v. Board of Education of Oak Park, 203 F.3d 462, 468 (7th Cir. 2000) (citing Johnson v. Duneland School Corporation, 92 F.3d 554, 558 (7th Cir. 1996)).

Alternatively, plaintiffs contend that they should be excused from the exhaustion requirement because it would be futile to proceed through the administrative process. Plts.' Br., dkt. #48, at 12; Honig v. Doe, 484 U.S. 305, 327 (1988) (parents may bypass administrative process where exhaustion would be futile or inadequate). Plaintiffs state that they were "prohibited from having a hearing on the matters under IDEA because the District refused to allow other individuals to evaluate D.P." Plts.' Br., dkt. # 48, at 12. Nothing in

the record supports this assertion. The undisputed evidence shows that several independent practitioners assessed D.P.'s needs and that members of the independent evaluation program team considered those evaluations that were available to them.

Plaintiffs fare no better when they argue that an evaluation by the district would be detrimental to D.P.'s mental health and would compromise his test scores. In the administrative proceeding, plaintiffs failed to provide a legal basis for their proposition that their refusal to cooperate with the district was reasonable. Rohrer Aff., dkt. #41, exh. 3, p. 000004. In the present action, plaintiffs cite Holland v. District of Columbia, 71 F.3d 417 (D.C. Cir. 1995), and state that therapist Miller concluded that testing by the defendant school district would be detrimental to D.P.'s mental health. In Holland, 71 F.3d at 419-20, the plaintiffs refused to consent to a school district psychological evaluation of their daughter; plaintiffs had an independent psychiatrist conduct an evaluation. The court did not decide under what circumstances a school district might not be permitted to conduct its own evaluation. Id. at 424. Rather, the court concluded that the plaintiffs were statutorily entitled to know what procedures were involved in the evaluation that the school district wished to conduct. Id. at 425. Thus, the holding in Holland does not support plaintiffs' proposition that they could withhold consent to any school district evaluation of D.P.

Furthermore, plaintiffs do not strengthen their case by attributing to Miller their belief that an evaluation by the school district would cause harm to D.P.'s mental health.

In her affidavit, Miller merely states general conclusions that in her "professional opinion," an evaluation by defendant school district would be a detriment to D.P. Miller Aff., dkt. #50, ¶¶6-9. "For an expert report to create a genuine issue of fact, it must provide not merely the conclusions, but the basis for the conclusions." Vollmert v. Wisconsin Dept. of Transportation, 197 F.3d 293, 298 (7th Cir. 1999) (expert who supplies nothing but bottom line supplies nothing of value to judicial process; his "naked opinion" does not preclude summary judgment). Miller's affidavit provides no "seeds of justification" for her opinion that testing by defendant school district would harm D.P. Id. (citing Weigel v. Target Stores, 122 F.3d 461, 469 (7th Cir. 1997) (psychologist's years of experience and treatment of plaintiff not enough to support expert's opinion that plaintiff could not return to her position after medical leave of absence; psychologist did not discuss depression in general or plaintiff's past responsiveness to treatment). (Notably, it is undisputed that at the time the school district convened the independent evaluation program team, Miller reported that D.P. was making gains in his anger management, making friends at school and generally feeling more "up.") I cannot find that the administrative law judge erred when she dismissed plaintiffs' IDEA claim for failure to cooperate with defendant school district.

B. Discrimination

Plaintiffs argue that defendants discriminated against D.P. on the basis of his

disability in violation of § 504 of the Rehabilitation Act and the equal protection clause of the Fourteenth Amendment. (Plaintiffs' complaint raises a general "discrimination" claim that I have rolled into the two legal theories listed above.)

1. Section 504 of the Rehabilitation Act

To prevail on a claim for discrimination under § 504, plaintiffs must prove that: 1) D.P. is disabled as defined by the Act; 2) he is otherwise qualified for the program sought; 3) he has been excluded from the program solely because of his disability; and 4) the program exists as part of a program or activity receiving federal financial assistance. Knapp v. Northwestern University, 101 F.3d 473, 478 (7th Cir. 1996). The Act defines "individual with a disability as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such an impairment." 29 U.S.C.A. § 705(20)(B). The Act's regulations define "major life activities" as basic functions of life "such as caring for one's self, performing manual tasks, walking, seeing hearing, speaking, breathing, learning, and working." Knapp, 101 F.3d at 479.

Again, although they fail to make the argument directly, I understand plaintiffs to argue that defendants discriminated against D.P. on the basis of his attention deficit hyperactivity disorder by excluding him from the gifted and talented program offered at

defendant school district. Plaintiffs have failed to put material facts into dispute that D.P. was "otherwise qualified" for the gifted and talented program or that his attention deficit hyperactivity disorder qualified him as an individual with a disability.

An "otherwise qualified" person is one who is able to meet all of a program's requirements *in spite of* his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (emphasis added). Thus, § 504 does not require an academic program to adjust its criteria for admission to accommodate a particular disabling condition. Id. Because D.P.'s test scores were in the average range, defendants concluded that he was not eligible for the gifted and talented program. Furthermore, Limmex believed that D.P. needed to complete his homework assignments for his regular class work before receiving additional responsibilities from the gifted and talented program. However, defendants did arrange for him to participate in the "Math 24" contest and the August Derleth writing contest. In addition, Limmex provided an opportunity for D.P. to test out of his current science units. Contrary to his parents' beliefs about his math abilities, D.P. did not advance to the regional "Math 24" contest and could not test out of his science units.

A reasonable jury could not infer that D.P. was an individual with a disability under the Act. His attention deficit hyperactivity disorder did not substantially limit a major life activity and none of the defendants believed that his disorder imposed such limitations. Although plaintiffs fail to specify the "major life activity" at issue, I assume that the plaintiffs

intended to specify "learning" as the "major life activity" affected by D.P.'s condition. It is undisputed that D.P. has never been identified as a student with disabilities eligible for special education and related services. In addition, D.P.'s academic performance during the 2001-2002 school year was in the average to above average range, consistently earning As, Bs, and an occasional C and D. These grades show no evidence that D.P.'s attention deficit hyperactivity disorder substantially limited his ability to learn. See Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 155 (1st Cir. 1998) (student's lack of academic difficulties enough to show that attention deficit hyperactivity disorder did not substantially impair his basic learning abilities). Furthermore, plaintiffs have failed to adduce any evidence showing that defendants believed D.P.'s disorder imposed substantial limitations on his learning ability. In fact, it is undisputed that members assigned to D.P.'s individualized education program evaluation team determined in the spring of the 2001-02 school year and in April 2003 that, from the information available to them, D.P. was not a student with a disability. Because plaintiffs have failed to show that D.P. is an individual with a disability under § 504 of the Rehabilitation Act or that he is an "otherwise qualified individual" for the gifted and talented program in defendant school district, I will grant defendants' motion for summary judgment as to plaintiffs' § 504 discrimination claim. (Defendants point out that plaintiffs have failed to show that defendant school district's gifted and talented program exists as part of a program or activity that receives federal financial assistance. Plaintiffs ask the court for

an opportunity to amend their pleadings to make such a showing. It is unnecessary to do so. Plaintiffs' § 504 discrimination claim fails on other grounds.)

2. Equal protection

I understand plaintiffs to argue that defendants discriminated against D.P. when they allowed bullying and harassment of D.P. to occur on the playground and when Limmex failed to respond to his needs in the classroom. Plaintiffs contend that these actions violated the equal protection clause of the Fourteenth Amendment (via 42 U.S.C. § 1983). Nabozny v. Podlesny, 92 F.3d 446, 453 (7th Cir. 1996) (when state actor violates equal protection clause, aggrieved parties can seek relief pursuant to 42 U.S.C. § 1983). "[T]he Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority, absent at least a rational basis for the discrimination." Id., at 457. Plaintiffs have not specified what class, if any, D.P. belongs to. However, "an individual may state a 'class of one' equal protection claim if she has 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" Martin v. Shawano-Gresham School District, 295 F.3d 701, 712 (7th Cir. 2002); see also Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982) (to show equal protection violation and establish liability under § 1983, plaintiff must demonstrate intentional or purposeful discrimination); Nabozny, 92 F.3d at 453-54 (to

establish liability under § 1983, plaintiff must show that defendant acted with nefarious discriminatory purpose or deliberate indifference and discriminated against him based on his membership in definable class). A showing of negligence is insufficient. Nabozny, 92 F.3d at 454.

Plaintiffs have set forth no facts from which a jury could conclude that defendants singled out D.P. for particularly adverse treatment in comparison to other children within the school district. Plaintiffs have not adduced any evidence of similarly situated children who were treated differently by defendants. Moreover, it is undisputed that defendants responded to many of the incidents of harassment about which plaintiffs complain. For example, the playground supervisor yelled at the students and told them to stop jumping over D.P. after D.P. had grabbed the soccer ball and held it in a fetal position. In the other soccer ball incident in which D.P. sat inside the net, Zabriskie and another playground supervisor responded to the soccer incident, asking D.P. whether he was all right, telling D.P. that sitting inside a soccer net is "not a very good place to sit and think and wonder" and that such conduct was not going to make friends. In addition, one may not characterize this incident as harassment, as D.P. told Zabriskie that the incident was not a problem and that he did not have any complaints except that he wanted to know why Zabriskie had interrupted his play. In the "kilt incident," Limmex backed up D.P. and explained that it was an authentic costume representing the traditional dress for Scotland. Carelli met with

D.P. and the boys teasing him and told the boys not to call D.P. a queer again.

It is undisputed that after plaintiffs requested that D.P. be given the option to stay inside during recess so he could have some control over the recess, defendant school district agreed to that arrangement. Plaintiffs never contacted Wolfe, the district administrator, regarding any concerns related to discrimination against D.P. during the 2001-2002 school year. A jury would be hard pressed to find that defendants acted with intentional discrimination or deliberate indifference toward D.P. on the playground.

In addition, plaintiffs seem to argue that Limmex discriminated against D.P. by forcing him to write and by criticizing and finding fault with him. Plts.' Br., dkt. #48, at 23. To the extent that plaintiffs argue that Limmex treated D.P. differently from other students, plaintiffs fail to state an equal protection claim because defendants have shown a rational basis for the disparate treatment: Limmex tried to accommodate D.P.'s needs, mostly at the request of plaintiffs. It is undisputed that Limmex allowed D.P. to type his vocabulary terms and definitions rather than write them out like the rest of the class, in order to accommodate plaintiffs' complaints about D.P.'s difficulty in completing homework. Also at plaintiffs' request, she allowed him to chew gum in class to help him pay attention and moved his desk to the back of the room where he would be less distracted. In response to one of plaintiffs' notes about homework, Limmex apologized to plaintiffs for allowing classroom activity to take time away from other family activities for a weekend and asked plaintiffs to contact her

if they had any questions.

As to plaintiffs' argument that Limmex was more critical of D.P. than other students, plaintiffs have failed to adduce any evidence showing that Limmex treated similarly situated students differently. It is undisputed that Limmex supported D.P. and explained to other children that wearing a kilt was an authentic costume representing the traditional dress for Scotland; such action contradicts the allegation that Limmex was critical of D.P. and found fault with him. The only disputed instance of criticism by Limmex is whether Limmex criticized and belittled D.P. regarding a report he prepared on Tennessee and horses. Dfts.' PFOF, dkt. #34, ¶¶ 106-114. Even if she did, however, plaintiffs have failed to show that she responded differently to the reports of other similarly situated students.

In summary, plaintiffs have failed to adduce any evidence showing discriminatory intent or deliberate indifference on the part of any of the defendants toward D.P. I will grant defendants' motion for summary judgment on plaintiffs' equal protection claim.

C. Harassment

Plaintiffs contend that defendants allowed D.P.'s peers to harass and assault him in violation of his substantive due process rights under the Fourteenth Amendment. The specific due process right at issue for plaintiffs is D.P.'s right to be free from invasion of personal security. Plts.' Br., dkt. # 48, at 28. Plaintiffs argue that D.P. did not feel safe at

school because defendants failed to respond to the known risks of harassment by his peers and failed to supervise playground activity. Plts.' Br., dkt. #48, at 28. As a result of defendants' negligent supervision and reckless indifference to the assaults, D.P. attempted to commit suicide. Id.

In support of their substantive due process claim, plaintiffs cite Stoneking v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1989). The facts in Stoneking are easily distinguishable from the present case. In Stoneking, 882 F.2d at 722, a high school student sued school district personnel for injuries arising out of alleged sexual abuse and harassment by a school district employee. The Court of Appeals for the Third Circuit reasoned that because the plaintiff's injuries resulted from the actions of a state employee, the school district personnel could be held liable under § 1983. Id. at 724-25 (facts distinct from DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), in which plaintiff's injuries resulted from the hands of private actor.)

D.P. experienced harassment by other students, not district employees. "The Supreme Court in DeShaney held that even though the defendants suspected ongoing abuse, they had not deprived [the plaintiff] of his right to due process because the Due Process Clause's 'purpose was to protect the people from the State, not to ensure that the State protected them from each other.'" Martin, 295 F.3d at 708 (citing DeShaney, 489 U.S. at 195-96) (nothing in language of due process clause requires state to protect life, liberty and

property of its citizens against invasion by private actors). In two limited circumstances a state has affirmative duties of care and protection with respect to particular individuals. Id. One is when the state has custody of a person and the other is when the state creates the danger. Id. Schools do not have a "special custodial relationship" with students for purposes of the DeShaney exception. Id. at 708 n.6. Thus, to succeed on their due process claim, a reasonable jury would have to conclude that the school district created the danger. The state-created danger exception to DeShaney requires a showing that the state actors created an environment that is dangerous, that they knew was dangerous and that they used their authority to create an opportunity that would not otherwise have existed for the third party's acts to occur. Id. at 711.

As noted earlier, there is undisputed evidence that defendants responded to the incidents of harassment by D.P.'s peers. Plaintiffs admit that a playground supervisor could have been present when they believed one was not. In light of the evidence, it is beyond my comprehension why plaintiffs would claim that defendants "stood by and did nothing" with respect to the incidents of harassment. Plts.' Br., dkt. #48, at 20. Moreover, it appears that at least some of the incidents of harassment were created by D.P. himself, not defendants. It is undisputed that D.P. jumped on top of a soccer ball and refused to respond to the other students' requests that he give them the ball so that they could continue playing and that it was only after that point that the students started jumping over him. It is undisputed also

that D.P. usually egged other children on, not the other way around. With respect to the soccer net incident, plaintiffs admit that D.P. went inside the net and encouraged the other kids to kick the ball at him, yelling, "Kick it, kick it." No reasonable jury could find that defendants created a dangerous environment for D.P. I will grant defendants' motion for summary judgment as to plaintiffs' substantive due process claim.

C. State Law Claims

Because I will grant defendants' motion for summary judgment as to all of plaintiffs' federal law claims and because the parties are not diverse, it is not necessary to consider plaintiffs' state law claims of negligence and "failure to maintain a safe environment." 28 U.S.C. § 1367(c)(3). Defendants ask this court to exercise supplemental jurisdiction and decide plaintiffs' state law claims on the merits. The Court of Appeals for the Seventh Circuit has held that district courts may dispose of state law claims on the merits when there is complete overlap between the state law and federal law claims. Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1178 (7th Cir. 1987) (having decided whether plaintiffs were commissioned employees under federal statute, judge had automatically decided their status under state statute as well and therefore no purpose would have been served by relinquishing jurisdiction to state courts).

I will construe plaintiffs' state law claims as one negligence claim because the claims

arise from the same allegations of fact. Plts.' Amended Compl., dkt. #6. Plaintiffs argue that defendants were negligent by failing to insure the safety and security of D.P. on school grounds, even though defendants were put on notice of D.P.'s vulnerability. As a result of their negligence, D.P. suffered injuries at the hands of other students.

The elements of a negligence claim are: "(1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." Antwaun A. v. Heritage Mutual Insurance Co., 228 Wis. 2d 44, 55, 596 N.W.2d 456, 461 (1999). "The test for negligence is whether the conduct foreseeably creates an unreasonable risk to others." Morgan v. Pennsylvania General Insurance Co., 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979). However, a plaintiff cannot recover under a negligence theory unless he can prove that the defendant's negligence was a cause of his injuries. Cause is established by showing that the defendant's negligence was a substantial factor in producing the injury. Clark v. Leisure Vehicles, Inc., 96 Wis. 2d 607, 617, 292 N.W.2d 630, 635 (1980).

I have found that defendants responded to many of the incidents of harassment about which plaintiffs complain and that plaintiffs admit that the playground could have been supervised even in those instances where they allege it was not. I have concluded also that D.P. subjected himself to harassment on several occasions. Even if I assume that defendants had a duty of care on the playground (defendants argue that playground supervision is a

discretionary act and therefore they are immune from liability under Wis. Stat. § 893.80(4)), a reasonable jury could not conclude that defendants breached that duty or that defendants' actions caused D.P.'s injuries. I will not waste another court's time by remanding plaintiffs' state law claims. Defendants' motion for summary judgment on the plaintiffs' negligence claims will be granted.

ORDER

IT IS ORDERED that

1. The motion for summary judgment by defendants School District of Poynette, Barbara Wolfe, Jim Carelli and Norma Limmex against plaintiffs, D.P. by his parents Richard Pierce and Margaret Pierce is GRANTED as to all claims;

2. Plaintiffs' request to amend their pleadings is DENIED as unnecessary;

3. The clerk of court is directed to enter judgment in favor of the defendants and close this case.

Entered this 16th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge