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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

NO. 95-3634

JAMIE STUART NABOZNY,  
Plaintiff-Appellant

v.

MARY PODLESNY, individually, and in her capacity as Principal at  
Ashland Middle School; WILLIAM DAVIS, individually, and in his  
capacity as Principal of Ashland High School; THOMAS BLAUERT,  
individually, and in his capacity as Assistant Principal of Ashland  
High School; STEVEN KELLY, individually, and in his capacity as  
Administrator of the Ashland Public School District, and the ASHLAND  
PUBLIC SCHOOL DISTRICT,  
Defendants-Appellees

Appeal from the United States District Court for the  
Western District of Wisconsin  
No. 95-C-0086-S  
John C. Shabaz  
Presiding Judge

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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## ARGUMENT

In both his summary judgment papers below and in his opening brief ("Op. Br. I'), plaintiff Jamie Nabozny provided detailed factual and legal support for his equal protection and due process claims against the Ashland Public School District and its officials based on their discriminatory and deliberately indifferent responses to the four years of abuse Jamie suffered in their schools. In their response ("Def. Br."), defendants primarily pretend that this appeal of the district court's grant of summary judgment will turn on how the Court views the record in this case. Feigning surprise at Jamie's Statement of Facts -- although Jamie largely cited to the same materials cited by defendants below -- defendants declare they "are unwilling" to respond to the full record set forth by appellate counsel. Def. Br. at 11. They instead bank on the Court limiting the record by applying district court local rules that the court below did not apply - See Section I-B.

Defendants miscalculate. Even were those rules applied now at defendants' urging, it would make no difference. The record assembled by trial counsel did not support summary judgment on any ground, in large part due to admissions in defendants' own proposed factual findings. See Sections II and III. Further, where the district court ~~sua sponte~~ went beyond the parameters of defendants' summary judgment papers, as it did on three of Jamie's four claims, Jamie is entitled to present all facts relevant to the new grounds for judgment relied upon by the district judge. See Section I-A. Finally, there is no legal basis to dismiss Jamie's claims or grant qualified immunity.

I. THE COURT MAY CONSIDER ALL EVIDENCE ALLOWED UNDER RULE 56.

Jamie's opening brief marshalled the evidence properly considered under Fed.R.Civ.P. 56(c) in support of his claims, Op. Br. at 4-21, and all of that evidence may be considered by the Court. Defendants present no basis to narrow the record which may be considered under Rule 56.

**A. Where The District Court Entered Judgment On Grounds Not Proposed By Defendants, Jamie Is Entitled to Cite the Full Record To Demonstrate The Court's Error.**

Jamie may invoke the full record in support of each of his equal protection claims and his "enhancement of risk" due process claim because the district court did not enter judgment on the factual grounds raised by defendants. Brown v. United States, 976 F.2d 1104, 1109-10 (7th Cir. 1992) ("If the district court is inclined to venture outside the moving party's grounds for summary judgment and statement of undisputed facts, the court must be careful to ensure that the record reveals no issue of material fact.").

The movant must identify the grounds upon which summary judgment is sought; the non-movant's response need only be tailored to those grounds. Celotex Core. v. Catrett, 477 U.S. 317, 323 (1986) (party seeking summary judgment has burden to inform court of basis for motion); ~~Malhotra v. Cotter & Co.~~, 885 F.2d 1305, 1310 (7th Cir. 1989) ("When a party moves for summary judgment on ground A, his opponent is not required to respond to ground B -- a ground the movant might have presented but did not").

Here, defendants pressed for entry of summary judgment on both of Jamie's equal protection claims on **only one** factual

basis.<sup>1</sup> Defendants asserted that. "there is no allegation that any of the individual defendants participated in, directed or authorized any of the harassment." R. 24 at 6. In his response, Jamie demonstrated the irrelevance of this argumeilt as a matter of law. R. 28 at 12-17. In reply, defendants did not claim that plaintiff had failed to address any other ground for judgment. R. 32 at 8-9.

The district court did not enter judgment on the factual basis urged by defendants with respect to Jamie's gender discrimination claim. Instead, the district court on its own found that II [tlhere is absolutely nothing in the record to indicate that plaintiff was treated differently by the defendants because of his gender." R. 39 (Order) at 9. As the district court considered this issue ~~sua sponte~~, without notice to Jamie, it was required to consider the full record and Jamie may rely on that full record here to demonstrate the court's error. Brown, 976 F.2d at 1109-10 (non-movant cannot be limited to materials cited under local rule if judgment is granted on a basis not urged by moving party).

The district court also did not rely upon the factual ground raised by defendants -- or cite any other reason -- for disposing of Jamie's sexual orientation claim. Jamie is thus entitled to demonstrate that there is no basis in the full record for entering summary judgment against him on that claim. Id.

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<sup>1</sup>Defendants also argued as a matter of law that the individual defendants should receive qualified immunity because Jamie's rights were not clearly established. R. 24 at 5-7, 31. Jamie fully addressed the qualified immunity issue as to all of his claims in his opening brief. Op. Br. at 25-36; 46-8.

Likewise, defendants offered no basis in their summary judgment memorandum (R. 24) to dispose of Jamie's due process claim that they enhanced the risk of harm to him from abuse.' Because the district court on its own found that "[t]here is nothing in the record . . . to indicate that the defendants created or exacerbated this danger by either their actions or inactions," R. 39 (Order) at 7, Jamie is entitled to respond with the full record in this Court. Brown, 976 F.2d at 1109-10.

In this context, *defendants'* claim of surprise and a lack of opportunity to respond, Def. Br. at 11, must be rejected. It was Jamie who was surprised here, by the district court.

**B. There Is No Basis to Apply A District Court Local Rule Not Applied By That Court.**

Jamie's right to rely for his four claims upon all materials allowed under Fed.R.Civ.P. 56(c) also should not be narrowed by local rules of the district court when there is no indication that those rules were applied in entering judgment. Compare Wienco, Inc. v. Katahn Assocs., Inc., 965 F.2d 565, 566 (7th Cir. 1992) (local rules cited below as ground for judgment under Circuit Rule 50) ~~with McGann v. Northeast Illinois Regional Commuter R-R.~~, 8 F.3d 1174, 1178 n.3 (7th Cir. 1993) ("not appropriate" for Court, under district court rule, to reject submission when that court did not).

In Tatalovich v. City of Superior, 904 F.2d 1135, 1138 (7th Cir. 1990), cited by defendants, the district court expressly

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<sup>2</sup>In reply (R. 32 at 3), defendants claimed they did not raise this claim because plaintiff had not adequately alleged it in his Amended Complaint, but Jamie did so. See Section III-A, infra, at 10-12, R. 13 at pars. 10-30, 39-41.

applied its local rule and "refused to consider" certain record evidence not properly presented. The Court upheld the district judge's exercise of discretion. Here, however, the lower court did not invoke its rules. For example, as defendants concede, Def. Br. at 9-10, the district court expressly considered Jamie's affidavit, which was not referenced in his proposed findings of fact. Had the district court applied its rules or ~~Tatalovich~~, it would not have done so. There is no reason for this Court to limit the record available under Fed.R.Civ.P. 56 when the lower court did not do so. McGann, 8 F.3d at 1178 n-3.

**II. SUMMARY JUDGMENT ON JAMIE'S EQUAL PROTECTION CLAIMS SHOULD BE REVERSED EVEN ON THE MORE LIMITED RECORD ADVOCATED BY DEFENDANTS.**

**A. Jamie Did Not Waive His Sexual Orientation Claim; Defendants' Admissions Establish Genuine Issues of Material Fact on This Claim.**

Defendants contend that the district court properly ignored and then entered judgment on Jamie's sexual orientation claim because Jamie "failed to mention sexual orientation" in his summary judgment response and the claim was therefore "not before the district judge." Def. Br. at 12. Defendants are wrong as a matter of fact and law. Defendants also err in contending that the summary judgment submissions below did not establish a genuine issue of material fact on this claim. Def. Br. at 12.

Jamie's Amended Complaint alleged an equal protection claim based upon sexual orientation discrimination, as defendants' summary judgment memorandum recognized:

Plaintiff alleges the school district had a policy regarding sexual harassment in place and enforced that policy for non-homosexual students, but not for the plaintiff, who is homosexual. (Amended Complaint at pars. 33, 34.) Plaintiff alleges that the defendants . . . den[ie]d comparable action

and investigation for plaintiff's claims versus those of non-homosexual students. (Amended Complaint at par. 35).

R. 24 at 5. In his consolidated response to defendants' unitary discussion of both the sexual orientation and gender claims, Jamie used the terms "sexual harassment," "discrimination," and "assaults" throughout. R. 28 at 12-17. Defendants apparently argue, disingenuously, that these terms must have referred only to gender-based claims, but Jamie made no such limitation. Jamie also expressly referred to "sexual orientation" in his response when he quoted the applicable Wisconsin law, R. 28 at 15 ("That no person may be . . . discriminated against in any public school because of the person's sex . . . or sexual orientation."), which he specifically alleged defendants failed to enforce on his behalf. *Id.* at 14. See also *id.* at 7 (citing anti-gay statements by defendants).

Moreover, even had Jamie filed no response, the court still would have been required to consider his claim. Glass v. Dachel, 2 F.3d 733, 739 (7th Cir. 1993) (even if no response is filed to summary judgment motion there is no waiver, only admission of no material issue of fact); Fed.R.Civ.P. 56(e) (even when "adverse party does not [I respond" summary judgment may be entered only "if appropriate") ; Circuit Rule 50 (district court shall give reasons when granting summary judgment).

Further, defendants' own findings of fact ("FOF") and plaintiffs' responses below established genuine issues for trial on Jamie's sexual orientation claim. Defendants assert that Jamie could not rely on the allegations of his Amended Complaint to *dispute* their factual assertions. Def. Br. at 12. But it was

defendants who frequently relied upon those allegations to support their proposed findings. R. 26 at 1-9. See Stewart v. McGinnis, 5 F.3d 1031, 1034 (7th Cir.,1993), cert. denied 114 S.Ct. 1075 (1994) (under similar local rule, moving party must support facts with specific references to the record). This approach required Jamie only to agree, which he did. R. 29 at 1-5. In so doing, Jamie complied with the district court's rules and Fed.R.Civ.P. 56.

For example, defendants conceded that plaintiff is gay, FOF par. 2, that he was verbally harassed and physically assaulted in the Ashland schools, FOF par. 12, citing Am. Compl. pars. 11, 12, 18 and 19 (detailing anti-gay abuse), and that these incidents were reported to defendants. FOF pars. 13, 19, 24, citing Am. Compl. par. 13 (setting forth anti-gay responses by defendant) | second par. 13 (describing defendants' failure to rectify or investigate assaults and harassment), par. 18 (detailing defendants' failure to investigate or punish), par. 20 and par. 21 (describing blaming of Jamie by defendant). Defendants also conceded that defendants promised to act on Jamie's behalf, FOF par. 22, that the School District was bound by policies of non-discrimination based on sexual orientation, FOF pars. 30, 31, and had a record of enforcing non-discrimination policies for other students. FOF par. 32, citing Am. Compl. par. 33 (policies enforced by defendants for non-gay students, pregnant students and female students who were sexually harassed and assaulted by teachers and other students).

Further, Jamie's affidavit provided additional details of the relentless harassment he faced, R. 30, pars. 2-4, 7-13, the

anti-gay animus of defendants, R. 30, pars. 5, 6, 9, 10, 12, 14, 15, and their failure to provide him adequate protection. R. 30, pars. 5, 8-12, 14, 15. The district court itself found that Jamie "was verbally harassed and beaten by other students because of his sexual orientation." R. 39 (Order) at 7.

Significantly, no findings of fact assert a lack of discriminatory intent, an issue rarely appropriate for summary judgment in any event. Esser v. Phillips, 669 F.2d 497, 502 (7th Cir. 1982), cert. denied, 464 U.S. 918 (1983). Nor do defendants ever deny that they failed to provide adequate protection to Jamie because of his sexual orientation. Given the record, Op. Br. at 4-21, FOF pars. 13, 23, 32, defendants could not properly have contended that these were not genuine issues for trial. Goka v. Bobbitt, 862 F.2d 646, 650 (7th Cir. 1988).

In sum, defendants failed to demonstrate the absence of a disputed issue of material fact entitling them to summary judgment on Jamie's sexual orientation claim.

**B . Defendants' Admissions Establish Genuine Issues of Material Fact on Jamie's Gender Discrimination Claim.**

Defendants' discussion of Jamie's gender claim wrongly relies upon a due process rather than equal protection analysis, citing only one case in which no equal protection claim was raised, Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988), cert. denied 489 U.S. 1065 (1989). Def. Br. at 13-16.

Defendants' efforts to show that some school officials occasionally took minor steps to assist Jamie do not address the key question of whether gender-based discriminatory intent was at

work in' defendants' failure to protect Jamie effectively for four years.<sup>3</sup> See Op. Br. at 31-6.

When the district court reached beyond defendants' asserted grounds for summary judgment and determined that there was no evidence that Jamie was treated differently because of his gender, R. 39 (Order) at 9, it failed to examine the record as a whole. See, e.g., Op. Br. at 19-21, 31-35. Even were the record limited to the parties' summary judgment submissions, however, a genuine issue of material fact was established. See FOF pars. 11, 12, 13, 18, 19, 32 and citations to Amended Complaint therein. See also R. 30 at pars. 4, 5, 8, 12, 14, 17, 18 and 19.

Defendants concede that Jamie has identified instances in which, unlike the handling of his complaints, claims of harassment by female students resulted in prompt discipline. Def. Br. at 15. Defendants seek to explain the discrepant approach to these claims by unsupported speculation that "discipline [might] have been easier" in those cases because of possible student or teacher witnesses. *Id.* But such speculation only confirms the presence of a genuine issue for trial. In a summary judgment context, all inferences are resolved in favor of the non-movant and judgment cannot be entered if the evidence is susceptible to conflicting interpretations. *Esser*, 669 F.2d at 502.

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<sup>3</sup>Al~~, the district court did not find "that there was no genuine issue of material fact that defendants were deliberately indifferent to plaintiff's harassment complaints" as defendants assert. Def. Br. at 14.

III. S-Y J-UDGMEim 1s INAPPROPRIATE ON JMIE'S DUE PROCESS CLAIMS BASED ON DEFENDANTS' OWN ADMISSIONS.

A. Defendants' Admissions Leave Genuine Issues of Fact in Dispute on The Enhancement of Jamie's Risk of Harm.

As Jamie demonstrated below and in his opening brief, there are genuine issues of material fact as to whether defendants enhanced his risk of harm from abuse. Defendants' own admissions are sufficient to establish these fact issues and defeat summary judgment. Defendants are really arguing that different inferences should be drawn from the admitted facts, Def. Br. at 37, which merely confirms that summary judgment should not have been granted. *Esser*, 669 F.2d at 502.

Defendants do not point to any specific facts not properly before the district court. Instead, defendants attempt to illustrate their argument from the following facts advanced by plaintiff concerning the school's actions: "[p]lacing plaintiff in different classes, in a separate part of the bus, in special education and forcing him to use a different bathroom." Def. Br. at 25. Defendants admitted these facts, FOF pars. 23, 50, 51, and the district court adopted them. R. 39 (Order) at 4-5.

Defendants made these admissions to advance an inference that segregating Jamie helped him, see, ~~e.g.~~, FOF pars. 23, 50, 51, but the same facts support the inference that defendants enhanced the risk of harm to Jamie by sending the message to his assailants that Jamie was the problem, not them. Op. Br. at 39-40. By their responses to abuse, school officials "send messages to students about what sorts of attitudes, behavior, and conduct are acceptable." Brief of Amici Curiae The National Association of School Psychologists, et al. at 11-12; Op. Br. at 40 n. 12.

Summary judgment is not appropriate when conflicting factual interpretations may arise from the evidence, or if reasonable people might differ as to its significance. Esser, 669 F.2d at 502.

Other factual elements of Jamie's enhancement of risk claim also are admitted. For example, defendants admit the element of harm in their own proposed findings: "During his time in the School District's schools, the plaintiff was verbally harassed and physically abused by some of his classmates." FOF par. 12. See R. 39 (Order) at 3, 7. Defendants' proposed findings also rely for evidentiary support on plaintiff's Amended Complaint, which provides greater detail on the issue of harm. FOF pars. 12, 13, 15, 18, 19, 20, 21, 27 (citing Am. Compl. pars. 11, 12, 15, 16, 18, 19).

The district court also relied upon Jamie's affidavit. R. 39 (Order) at 3. The affidavit provides further evidentiary support to document the abuse of Jamie, the repeated notice provided defendants and their responses. It describes instances in which Jamie's classmates wrestled him to the floor and acted out a sexual assault on him, R. 30, par. 4, pushed him to the floor, beat him and urinated on him, id. at par. 12, and trapped him in a hallway and kicked him in the stomach repeatedly. Id. at par. 13. See R. 39 (Order) at 3. It further describes defendants' indifferent responses, their routine blaming of Jamie and their failure to investigate or impose punishment upon being notified of each of these incidents. Id. at pars. 5, 6, 12, 14. It also describes more generally that he was subjected to continual name-calling, hitting, kicking and spitting, id. at

pars. 3, 10, 11, that he had objects thrown at him, *id.* at par. 10, that the violence was continual and escalating, *id.* at par. 11, 12, and that he was severely impacted by these events and attempted suicide. *Id.* at pars. 7, 11, 15.

Defendants also directly admit they received extensive notice of harm. FOF pars. 13, 15 (reports to Podlesny and "six or seven" meetings), 19, 20, 22 (reports to Davis, phone calls and meetings), 25, 26 (reports to Blauert and meetings "throughout ninth, tenth and eleventh grades"). Again, defendants' proposed findings extensively rely upon plaintiff's Amended Complaint on the issue of notice and defendants' responses. FOF pars. 13, 15, 18, 19, 20, 21, citing Am. Compl. par. 13 (reports of incidents and numerous subsequent meetings with no punishment or investigation), par. 15 (assailants merely told "not to do it anymore," no investigation), par. 18 (report of urination incident, no investigation or punishment) and par. 20 (continual notifications).

Defendants can argue at trial that in fact they were helping Jamie by having meetings and expressing concern. In opposition, Jamie has demonstrated that the meetings and expressions of concern were lip service and made matters worse, as established by the very unabated persistence of the abuse for over four years. Op. Br. at 38-40. Clearly the parties have thus identified genuine issues of material fact to be resolved at trial.

There also was no legal basis for summary judgment. Contrary to defendants' arguments, Def. Br. at 27, the Third Circuit's jurisprudence on the "enhancement of risk" theory

provides further support for Jamie's claim. D.R. by L.R. v. Middle Bucks, 972 F.2d 1364 (3rd Cir. 1992), cert. denied 506 U.S. 1079 (1993) ("Middle Bucks I"). In Middle Bucks, the court acknowledged possible liability in circumstances where there is a sufficient "intermingling of state conduct with private violence." Id. at 1375.. Because the court found that the school only received notice of misconduct on one occasion, it held that the school's nonfeasance did "not rise to the level of a constitutional violation." Id. at 1376. Here, defendants admit repeated notifications of misconduct over four years as well as their segregation of Jamie during that period, which establishes a clear intermingling of state conduct with private violence.

Defendants' argument that no "special relationship" existed for the purpose of liability, Def. Br. at 20-22, is irrelevant. Plaintiff expressly disavowed any argument based upon the government's "involuntary custody" of individuals (such as prisoners). Op. Br. at 41 n. 13.

Instead, plaintiff argued that compulsory attendance at public schools retains some relevance to whether a school has been deliberately indifferent in failing to protect a child from abuse despite extensive notice of the abuse. Op. Br. at 41. This Court's precedent on involuntary custody is not so boundless that compulsory attendance at schools can never have a factual bearing on federal substantive due process rights.

Defendants' remaining rhetorical points concerning the enhancement of risk theory ignore legal standards. Whether or not defendants "hated [Jamie] because he is gay," Def. Br. at 25, or wanted him to be harmed is irrelevant. Op. Br. at 37;

Stonekins v. Bradford Area School Dist., 882 F.2d 720, 725 (3rd Cir. 1989), cert. denied, 493 U.S. 1044 (1990). Defendants also suggest that parents and churches are to blame. Def. Br. at 26. Jamie does not seek to hold the school liable for his classmates' values. However, no school should escape liability for enhancing the risk of harm to schoolchildren who suffer from being repeatedly beaten, spit upon, and abused for over four years.<sup>4</sup>

**B. Defendants' Admissions Leave Genuine Issues of Fact in Dispute As To Their Encouragement of Harm to Jamie.**

As the district court recognized, plaintiff "is claiming that the defendants had a policy, practice or custom which facilitated the sexual harassment and abuse he received at the hands of other students." R. 39 (Order) at 8. Jamie demonstrated in his opening brief that schools are just as liable for encouraging students to cause harm as they are for encouraging teachers to cause harm. Op. Br. at 43-46.

Jamie largely anticipated and answered defendants' legal arguments about vicarious liability. However, plaintiff notes that the applicable standard for deliberate indifference does not require hate or intent, Def. Br. at 25, 29-30; but instead requires notice of potential harm that is "so obvious" that failure to address the harm could properly be characterized as "deliberate indifference." City of Canton v. Harris, 489 U.S. 378, 390 n. 10 (1989); see also Salazar v. City of Chicago, 940

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<sup>4</sup>Contrary to defendants' allegations, Def. Br. at 24 and n. 2, plaintiff has not violated Circuit Rule 53(b) (2) -- which applies only to Seventh Circuit opinions -- by citing two unreported (but published) district court opinions. Plaintiff provided these opinions in his appendix in compliance with Circuit Rule 28(e) regarding citation of unreported opinions.

F.2d 233, 238 (7th Cir. 1991) (if no intent to harm, must show failure to act in the face of "significant risk" of harm).


Defendants are wrong in asserting that the summary judgment submissions before the district court do not establish a genuine issue for trial on the issue on deliberate indifference. Def. Br. at 30. Defendants admit that the district court did not so hold. Id. As reviewed in the prior section, defendants' own findings and Jamie's affidavit provide a sufficient basis for Jamie's claim that defendants were deliberately indifferent and encouraged a climate of harm to flourish. See Section III-A at 10-12, supra. Defendants do not identify any undisputed facts to the contrary. Def. Br. at 30.

#### CONCLUSION

For all of the reasons stated above and in his opening brief, Jamie respectfully asks for reversal and remand for trial on all claims.

DATED: February 5, 1996

Respectfully submitted,

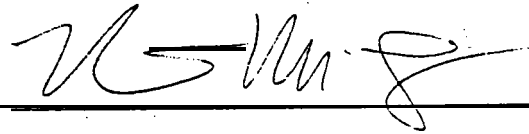
  
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CERTIFICATE OF SERVICE

I, Patricia M. Logue, lead counsel for plaintiff-appellant Jamie Stuart Nabozny, hereby certify that I caused two copies of the foregoing Appellant's Reply Brief to be served on counsel for defendants Timothy J. Yanacheck, Stilp, Cotton & Wells, P.O. Box 1072, Madison, WI 53701-1072, by first-class mail, postage prepaid, before the hour of 5:00 p.m. on Monday, February 5, 1996.

A handwritten signature in black ink, appearing to read 'P. M. Logue', is written over a horizontal line.

Patricia M. Logue