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Fighting Anti-Gay Abuse in Schools: The Opening Appellate Brief of Plaintiff Jamie Nabozny in *Nabozny V. Podlesny*

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FIGHTING ANTI-GAY ABUSE IN SCHOOLS: THE OPENING APPELLATE BRIEF OF PLAINTIFF JAMIE NABOZNY IN *NABOZNY V. PODLESNY*†

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INTRODUCTION

In Nabozny v. Podlesny, *92 F.3d 446 (7th Cir. 1996), a case of first impression, the Seventh Circuit Court of Appeals recognized the constitutional right of a gay male public school student to equal protection from anti-gay harassment and assaults. The court held that Jamie Nabozny had stated equal protection claims against his school district and three school principals for gender and sexual orientation discrimination based on allegations that, because he is gay and a boy, defendants had failed to afford him the same kinds of protection given to other harassed students. At trial on remand a jury found the three school principals liable for intentional discrimination.*

Nabozny was represented on appeal and at trial on remand by Lambda Legal Defense and Education Fund. Patricia M. Logue, Managing Attorney of Lambda's Midwest Regional Office and an adjunct professor of law at Northwestern University, co-authored the Seventh Circuit brief and argued the appeal. David S. Buckel, Staff Attorney at Lambda's Headquarters in New York with a focus on youth and school issues, co-authored the Seventh Circuit brief. Nabozny was represented at trial by Logue, Buckel, and cooperating attorneys from the Chicago office of Skadden, Arps, Slate, Meagher & Flom.

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† In publishing this brief, the *Michigan Journal of Gender & Law* has made no editorial changes other than correcting spelling errors and changing citation form to conform with the *Bluebook* 16th edition.

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JURISDICTIONAL STATEMENT

The district court had original jurisdiction under (1) 28 U.S.C. § 1331 (1993) based on the existence of federal questions under 42 U.S.C. § 1983 (1994) and the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution; and, (2) 28 U.S.C. § 1343(a)(3) (1993) based on the deprivation of rights of equal protection and due process under color of state law, statute, ordinance, regulation, custom or usage.

This Court has jurisdiction under 28 U.S.C. § 1291 (1993). This is an appeal of a final Order, entered October 5, 1995, granting summary judgment to all defendants (or collectively, "school defendants") on all causes of action.[1] No post-judgment motions were filed. The notice of appeal was filed November 6, 1995.[2]

STATEMENT OF THE CASE

This is a case about a school's failure to take meaningful steps to end relentless physical assaults and verbal and sexual harassment of a gay student which brought about grave emotional and physical harm including hospitalizations and several suicide attempts. Plaintiff, Jamie Nabozny, attended the middle school and high school of defendant Ashland Public School District in Ashland, Wisconsin from 1987 to 1993. Defendant Mary Podlesny was principal of Ashland Middle School. Defendants William Davis and Thomas Blauert were principal and assistant principal, respectively, of Ashland High School.[3]

Jamie filed his four-count Complaint on February 6, 1995[4] and defendants filed an Answer on February 24, 1995.[5] An Amended Complaint was filed on April 21, 1995.[6] Jamie claimed that by their actions and inaction in response to the abuse he suffered defendants violated his rights of due process (Count I) and equal protection

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1. *See* Nabozny v. Podlesny, No. 95-C-086-S (W.D. Wis. Oct. 5, 1995) (Order granting defendants' motion for summary judgment).
2. *See* R. Doc. 43. The designation "R. Doc. ___" refers to the docket number entry for the document in the record on appeal. *See* App. at A-13.
3. *See Nabozny*, No. 95-C-086-S at 3.
4. *See* R. Doc. 1.
5. *See* R. Doc. 2.
6. *See* R. Doc. 13.

(Count II). Jamie additionally alleged that defendants had a policy, custom or habit of providing unequal and inadequate care and protection to plaintiff (Count III) and that defendants were negligent (Count IV).[7]

On August 15, 1995, defendants moved for summary judgment.[8] On October 5, 1995, after depositions, affidavits, briefs and proposed findings of fact were filed, the district court granted summary judgment to all defendants on all counts.[9] Plaintiff filed a notice of appeal on November 6, 1995.[10] Plaintiff did not appeal that part of the Order dismissing defendant Steven Kelly. Plaintiff also does not pursue here the dismissal of his state law claims.

Issues Presented for Review

1. Whether defendants' denial of protection to Jamie from violence and harassment because he is a gay boy states an equal protection claim, whether there are genuine issues of material fact as to that claim and whether the right underlying the claim was clearly established for purposes of qualified immunity?
2. Whether there are genuine issues of material fact on Jamie's first due process claim that the school defendants enhanced his risk of harm from abuse?
3. Whether the school defendants' encouragement of students to harm Jamie states a second due process claim and whether the right underlying the claim was clearly established for purposes of qualified immunity?

Relevant Statutes and Constitutional Provisions

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

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7. *See* R. Doc. 13.
8. *See* R. Doc. 23.
9. *See Nabozny*, No. 95-C-086-S at 5–10.
10. *See* R. Doc. 43.

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[11]

Plaintiff Nabozny seeks enforcement of these federal constitutional rights through 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[12]

Wisconsin Statutes section 118.13 ("Pupil discrimination prohibited") provides in relevant part:

> (1) No person may be denied . . . participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.
>
> (2)(a) Each school board shall develop written policies and procedures to implement this section and submit them to the state superintendent as a part of its 1986 annual report under s. 120.18. The policies and procedures shall provide for receiving and investigating complaints by residents of the school district regarding possible violations of this section, for making determinations as to whether this section has been violated and for ensuring compliance with this section.[13]

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11. U.S. CONST. amend. XIV, § 1.
12. 42 U.S.C. § 1983 (1994).
13. WIS. STAT. § 118.13 (1)–(2)(a) (1995).

STATEMENT OF FACTS[14]

Jamie Nabozny was born October 14, 1975 in Ashland, Wisconsin[15] to Carol and Robert Nabozny. As a young student, Jamie did well in elementary school. He was a good student who got along with everyone and never got in any kind of trouble.[16]

School life changed for Jamie when he went to Ashland Middle School for seventh and eighth grades in 1988-90 and to Ashland High School for ninth, tenth and eleventh grades in 1990–92. Both of these schools are part of defendant Ashland Public School District.[17] This Statement of Facts will review Jamie's experiences of anti-gay harassment and assault in each of those school years, his and his parents' attempts to have the abuse stopped and the defendants' responses to their requests. It will then review the School District's discipline, harassment and non-discrimination policies and practices and their implementation for other students.

Seventh Grade (1988–89)

In the fall of 1988, at age 12, Jamie entered seventh grade at Ashland Middle School.[18] It was also around this time that Jamie realized he was gay.[19] His fellow students by then perceived him as gay.[20] Jamie began to experience verbal anti-gay harassment at school from

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14. Because this appeal is from a grant of summary judgment to defendants, the facts (including the exact chronology of events) are presented in the light most favorable to plaintiff Nabozny and are based upon the pleadings, affidavits, depositions, interrogatory answers and admissions on file with the district court. FED. R. CIV. P. 56(c). These include the depositions of Jamie Nabozny ("JN Dep."), Carol Nabozny ("CN Dep."), Robert Nabozny ("RN Dep."), Thomas Blauert ("Blauert Dep.") and Mary Podlesny ("Podlesny Dep."). The exhibits for all depositions ("Dep. Ex. ___") are appended to the Podlesny deposition transcript. Citations are also made to the affidavits of Jamie Nabozny ("JN Aff.") and Jeanne Thompson ("Thompson Aff.") and to pleadings including the Amended Complaint ("Am. Compl."), Defendants' Response to the Plaintiff's First Set of Interrogatories ("Def.'s Interrog. Resp. No. ___") and Defendants' Answer ("Answer").
15. *See* JN Dep. at 7.
16. *See* RN Dep. at 22; CN Dep. at 10.
17. *See Nabozny*, No. 95-C-086-S at 2.
18. *See* JN Dep. at 7; *Nabozny*, No. 95-C-086-S at 3.
19. *See* JN Aff. ¶ 2.
20. *See* JN Dep. at 70.

his fellow students, including epithets such as "faggot."[21] He also was physically assaulted, again because of his sexuality; he was hit, kicked and spat upon in school hallways, bathrooms, locker rooms and other facilities.[22] The verbal, sexual and physical harassment of Jamie was ongoing.

Early that year, Jamie spoke to a school guidance counselor, Ms. Peterson, about the name-calling and harassment.[23] In response to her question, Jamie confirmed that he was gay.[24] Peterson convened a meeting of three harassing students and notified their parents of the problem. She ordered the students to stop the harassment and imposed detention upon two of the students, which had the desired effect, at least for a time.[25]

However, the harassment later resumed and Jamie spoke to Mr. Nowakowski, the guidance counselor who succeeded Ms. Peterson.[26] Jamie also told Nowakowski he was gay.[27] Mr. Nowakowski informed the principal, defendant Podlesny, of the harassment. He told Jamie that the principal would have to deal with discipline matters.[28] Podlesny was in charge of student discipline at Ashland Middle School.[29]

Sometime before Christmas, Jamie met with Nowakowski and principal Podlesny to discuss the continuing harassment.[30] At this meeting, Jamie informed Podlesny he was gay.[31] She said she would take care of the problem of harassment by other students.[32] However, she did nothing as a result of that meeting.[33]

The abuse continued, with Jamie going to guidance counselor Nowakowski about once a month to "tell him what harassment was going on by who[m] and he would relay the message to Mrs. Podlesny."[34] School officials talked to two of the abusive students, Jason Welty and Roy Grande, at some point about the harassment,

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21. JN Aff. ¶ 2.
22. *See e.g.*, JN Aff. ¶ 3.
23. *See* JN Dep. at 38.
24. *See* JN Dep. at 38.
25. *See* JN Dep. at 38–40.
26. *See* JN Dep. at 42.
27. *See* JN Dep. at 65.
28. *See* JN Dep. at 42, 67.
29. *See* Podlesny Dep. at 22, 26.
30. *See* JN Dep. at 43.
31. *See* JN Dep. at 66.
32. *See* JN Dep. at 43, 67.
33. *See* JN Dep. at 43, 67.
34. JN Dep. at 68.

but afterwards the students informed Jamie that if he said anything again the abuse would get worse.[35] The abuse continued, and Jamie continued to report the harassment to Mr. Nowakowski.[36]

At one point, Jamie was verbally harassed and pinched in a science classroom when the teacher left for a few minutes.[37] When Jamie tried to resist, the harassing student, Jason Welty, grabbed him and pushed him to the floor. Welty and another student, Roy Grande, held him down for several minutes, taunted him and acted out a mock rape on him, while twenty other students watched and laughed.[38] The two boys told Jamie that he should like what they were doing to him, making references to an actual sexual assault Jamie had endured from a male adult, Nick Rising, who had been a church youth group counselor.[39] Rising had pled guilty to assaulting Jamie and gone to jail.[40] Grande was a friend of Rising's.[41]

When Jamie broke free from his assailants, he went directly to the principal's office and told defendant Podlesny what had happened.[42] She responded by saying that if Jamie was "going to be so openly gay, that [he] had to expect this kind of stuff to happen."[43] She also said that "boys will be boys," a comment she repeated on other occasions.[44] Jamie went right home but only told his mother that he was "sick."[45] He was crying and very humiliated.[46]

The morning after the assault, the school would not let Jamie go to class until he spoke to a counselor, not because of the assault but because he had left school without telling anyone he was leaving.[47] He spoke to Nowakowski and informed him of the assault, and Nowakowski, who was upset, spoke to Podlesny.[48] However, no discipline was imposed on Jamie's harassers.[49]

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35. *See* JN Dep. at 68–69.
36. *See* JN Dep. at 68–69.
37. *See* JN Dep. at 72.
38. *See* JN Aff. ¶ 4; JN Dep. at 72–73.
39. *See* JN Aff. ¶ 4; JN Dep. at 55, 72.
40. *See* JN Dep. at 65.
41. *See* JN Dep. at 65.
42. *See* JN Dep. at 73.
43. JN Dep. at 74, 149.
44. JN Dep. at 73–74, 149.
45. JN Dep. at 75.
46. *See* JN Dep. at 75.
47. *See* JN Dep. at 76.
48. *See* JN Dep. at 76.
49. *See* JN Aff. ¶ 5.

The abuse continued, verbally and physically, on a daily basis.[50] On a few of the worst days, Jamie had to call his parents to come pick him up at school.[51] On these occasions, his father recalled Jamie being "petrified" but only later was he able to tell his parents about the abuse which caused his terror.[52]

Eighth Grade (1989–90)

The next school year, in the eighth grade, the daily verbal and physical abuse resumed and closely mirrored that of the prior year; name-calling of a sexual nature, hitting and spitting were commonplace.[53] Jamie had by then spoken to his parents about what was going on at school and they were very upset.[54]

Early in the year several boys, including Roy Grande's brother Larry and a boy named John, pushed Jamie's books out of his hands, hit him and pushed him around in a bathroom.[55] Jamie informed his parents of the assault that day and they requested a meeting with principal Podlesny and the three boys and one of their parents.[56] The boys denied that anything had happened.[57]

At this meeting, Jamie, Robert and Carol Nabozny all recall principal Podlesny saying to them (possibly with the perpetrators of the harassment still in the room) that if Jamie "was going to be openly gay that [he] had to expect that kind of stuff."[58] No disciplinary action was taken against Jamie's harassers and the abuse continued unabated after the meeting.[59]

All told, Jamie's parents set up meetings with school principal Podlesny six or seven times in the course of the seventh and eighth

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50. *See* JN Dep. at 78.
51. *See* RN Dep. at 28.
52. RN Dep. at 28–29.
53. *See* JN Aff. ¶ 8.
54. *See* JN Dep. at 78.
55. *See* JN Dep. at 79–80.
56. *See* JN Dep. at 80; RN Dep. at 34–35.
57. *See* JN Dep. at 81.
58. JN Dep. at 81; *see also* RN Dep. at 34–35 and errata; CN Dep. at 25.
    Jamie's mother also testified: "He was a very shy kid. He wasn't the type that would walk down the aisle and say, 'Hi, I'm Jamie, I'm gay.' That just wasn't him. He was very shy and very respectful and just a good kid, so I don't know where she was coming from with him being openly gay." CN Dep. at 29.
59. *See* JN Dep. at 82–83.

grades and also met with Mr. Nowakowski who passed on information to her.[60] Jamie's father recalls that the meetings were to address name-calling (including "faggot, queer, fudge-packer"),[61] punching, kids knocking Jamie's books out of his hands and the fact that his son was being "tortured."[62] The offending students were identified for Podlesny.[63] Jamie's father described the typical reason for the meetings and the results of the meetings:

> [Jamie would] come home and just really be feeling bad. He'd go right to his room and lay on the bed and cry. He couldn't come out for supper or anything. And we talked to him, and then as soon as we'd get ahold of the school and talk to her, we'd set up an appointment and we'd go in. . . . And we went and then talked to her about it, and she said she would take care of it, but nothing was—none of the kids ever did get anything out of it. It was like once we walked out the door, we were forgotten, you know.[64]

Near the end of the eighth grade, when he was 13, Jamie was hospitalized at Miller-Dwan Medical Center in Duluth, Minnesota, for an extended period after an attempted suicide because of depression, fear and anxiety related to the harassment at school which he sought to escape.[65] Prior to that hospitalization he had been out of school one and a half weeks "on the advice of the district attorney because of harassment and teasing [he was] receiving from [his] peers at school."[66]

Jamie finished the eighth grade in Catholic school. There was no Catholic high school, only a religious school unacceptable to the Naboznys.[67] Jamie therefore entered Ashland High School as a ninth grader.

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60. *See* RN Dep. at 41–42.
61. RN Dep. at 39.
62. RN Dep. at 37.
63. *See* RN Dep. at 41, 43.
64. RN Dep. at 39.
65. *See* JN Dep. at 28–31, 137. Although plaintiff agreed at his deposition with records indicating that this hospitalization occurred in the ninth grade, the date and year appear to correspond with the end of eighth grade. *See* JN Dep. at 137.
66. JN Dep. at 137–38.
67. *See* CN Dep. at 45.

Ninth Grade (1990–91)

The continual harassment and name-calling of Jamie by the Grande brothers and others resumed in ninth grade.[68] Early on that year, Roy Grande and Stephan Huntley assaulted Jamie while he was in the boys' bathroom using a urinal.[69] Huntley kneed Jamie in the back of the knee and he fell "kind of into the urinal."[70] Grande, who was standing next to Jamie using the urinal, then turned and urinated on Jamie, causing a big, continuous splash on the left side of his shirt and pants.[71]

When the assault was over, Jamie went directly to the office of principal William Davis and spoke with defendant Davis' secretary.[72] Defendant Blauert, assistant principal, recalled seeing Jamie go into Mr. Davis' office.[73] Jamie was very upset and told the secretary what had happened and that someone had urinated on him on purpose (possibly identifying Roy Grande specifically).[74] She then called Mr. Davis, who only said that Jamie should go home to change his clothes.[75] Jamie then called his parents and asked his father to pick him up from school, but told his father he did not want to talk about what had happened.[76]

Several weeks later, Jamie did tell his father about the incident:

> It was right before things were getting kind of bad in school. It was right before I ended up in the hospital and I had tried to kill myself, and we were all sitting around at the hospital talking about why I was so depressed and that's when I told my dad then.[77]

Jamie's parents then requested another meeting with the school and met with principal Davis, assistant principal Blauert, Jamie and possibly a guidance counselor, Mr. Reeder.[78] They discussed the on-

68. *See* JN Dep. at 82–83, 87, 89, 90.
69. *See* JN Dep. at 83.
70. JN Dep. at 83.
71. *See* JN Dep. at 83–84.
72. *See* JN Dep. at 84.
73. *See* Blauert Dep. at 58.
74. *See* JN Dep. at 85, 86.
75. *See* JN Dep. at 85–86.
76. *See* JN Dep. at 86–87.
77. JN Dep. at 87–88.
78. *See* JN Dep. at 89–90.

going harassment, including the "urination incident, the name calling, the harassment in [his] classes, the harassment in gym."[79] At that meeting, it was clear that Mr. Davis already knew of the urination incident.[80] However, no one had investigated and no action was ever taken against Grande or Huntley.[81]

Instead, the school responded by sending Jamie to Mr. Reeder's office for the purpose of switching his classes around to avoid classes with the harassing students.[82] This was ineffective because most of the assaults took place in the common areas and bathrooms which Jamie continued to share with the abusive students, and many of the abusive students were still in Jamie's classes.[83] The harassment continued relentlessly.[84]

Later, the school put Jamie into a "special education" class, where he spent all day in one classroom.[85] Rather than make him safer, this put Jamie in the same room with the "troublemakers" all day.[86] For example, Stephan Huntley and Roy Grande were special education students.[87]

After the assault by Huntley and Grande and other incidents, Jamie feared using the school's bathrooms and stopped doing so for an extended period to avoid further assaults.[88] Some time later, Jamie asked the home economics teacher, Nina Anderson, for permission to use the bathroom in her classroom.[89] After he recounted what had happened and his fears, she granted his request.[90] Jamie spent the rest of his time at the high school using this separate bathroom rather than those used by other students.[91]

On another occasion in a ninth grade math classroom, students verbally harassed Jamie, pushed his things off his desk and laughed at him.[92] The teacher got upset at Jamie, called him a "fag" and told him

79. JN Dep. at 90.
80. *See* JN Dep. at 90.
81. *See* JN Aff. ¶ 12.
82. *See* JN Dep. at 91.
83. *See, e.g.*, JN Dep. at 92.
84. *See* JN Aff. ¶ 9.
85. *See* RN Dep. at 55.
86. RN Dep. at 55.
87. *See* JN Dep. at 97; Blauert Dep. at 43.
88. *See* JN Aff. ¶ 12; JN Dep. at 93.
89. *See* JN Dep. at 93.
90. *See* JN Dep. at 93.
91. *See* JN Dep. at 124.
92. *See* JN Dep. at 125.

to get out of the class and get reassigned to another class.[93] The students laughed at the teacher's remarks.[94] Jamie left the class and went to see Mr. Reeder about being reassigned.[95]

Three or four times during the ninth grade, Jamie's parents met with school officials, including the principal, Mr. Davis, and the assistant principal, Mr. Blauert.[96] According to Jamie's father, "[e]very time we left any of the meetings we felt something was going to be resolved, and it never went any farther."[97] Carol Nabozny also spoke to Blauert several times and to Davis by phone several times about the "[n]ame-calling, tripping, knocking [of] books out of [Jamie's] hands" and other harassment.[98] She identified specific offenders to Davis.[99] In those conversations, Davis said that he would take care of the harassment problem.[100]

In the middle of ninth grade, Jamie again attempted suicide.[101] He was admitted to Ashland Memorial Medical Center in Ashland and diagnosed with depression because of the harassment at school.[102] Because of the continual and escalating abuse, Jamie's parents then sent Jamie to live with relatives and attend another school in another town for several months.[103] However, after a falling out in which his uncle told Jamie that he did not approve of his being gay, Jamie ran away to Minneapolis.[104]

Jamie's parents went to Minneapolis and located him.[105] Jamie did not want to come back to Ashland because of the verbal abuse and beatings at school and his fears about returning there.[106] His parents only persuaded Jamie to come home by promising that some arrangement would be worked out so that he would not have to go back

93. JN Dep. at 125.
94. *See* JN Dep. at 125.
95. *See* JN Dep. at 126.
96. *See* RN Dep. at 49.
97. RN Dep. at 54.
98. CN Dep. at 33, 38–39.
99. *See* CN Dep. at 40.
100. *See* CN Dep. at 39.
101. *See* CN Dep. at 31.
102. *See* JN Dep. at 29–30.
103. *See* JN Aff. ¶ 11; CN Dep. at 35.
104. *See* CN Dep. at 35–36; JN Dep. at 51.
105. *See* RN Dep. at 60–61.
106. *See* RN Dep. at 61.

to Ashland High School.[107] "He wanted to come home, but only if he didn't have to go to Ashland High School."[108]

Jamie's parents could not afford home schooling.[109] At some point, Jamie's parents tried to arrange for him to live with another family in Ashland that was already conducting home schooling for their children, but the arrangement failed after a short time.[110] Eventually, government officials from the Department of Social Services told Robert Nabozny that he was required to return Jamie to Ashland High School.[111] After returning there in ninth grade, Jamie endured never-ending verbal and physical assaults of a sexual nature.[112]

Tenth and Eleventh Grades (1991–92)

In tenth grade, the assaults against Jamie became more violent and physically abusive, including being grabbed in the crotch and bitten in the rear end.[113] Jamie's family had moved to his grandparents' home between ninth and tenth grades which was farther from the school and required him to ride the school bus 2–3 miles.[114]

Jamie was regularly abused on the school bus, both verbally and physically.[115] He was assigned to sit in the back of the bus, and two brothers who sat near him regularly called him anti-gay epithets such as "fag," "queer" and other names.[116] The verbal harassment was daily and loud enough for the driver to hear and the throwing of items at Jamie, such as nuts and bolts, occurred "almost all the time."[117]

Jamie eventually informed his parents about the abuse in the back of the bus—to explain his refusal to ride it anymore—and they spoke to the school.[118] The response was to move Jamie to an assigned seat at the front of the bus "out of place . . . with grade schoolers."[119] The

107. *See* CN Dep. at 67–68; RN Dep. at 61.
108. CN Dep. at 67.
109. *See* CN Dep. at 69.
110. *See* RN Dep. at 63.
111. *See* RN Dep. at 64.
112. *See* JN Aff. ¶ 11.
113. *See* JN Aff. ¶ 12.
114. *See* JN Dep. at 110; CN Dep. at 55.
115. *See* CN Dep. at 57; JN Dep. at 110, 115; JN Aff. ¶ 10.
116. JN Dep. at 111.
117. JN Dep. at 113–15.
118. *See* CN Dep. at 58; JN Dep. at 118.
119. JN Dep. at 119–20.

harassment continued in the form of the older children telling the younger children not to sit next to Jamie, that he would molest them and that he was perverted.[120] These things were said loud enough for the bus driver to hear but she did nothing.[121] Jamie also daily reported the harassment in the front of the bus to his guidance counselor, Lynn Hanson.[122] Finally, Jamie stopped riding the bus and started to walk two to three miles each way to school or get there by other means.[123]

Jamie spoke frequently with Hanson about the harassment at the school and on the bus.[124] She spoke to school administrators in an effort to have the problems addressed but was frustrated because "nobody was willing to do anything."[125] According to Jamie's father, Hanson "did her damnedest, but once it got above her, that's as far as it went."[126]

Jamie was very suicidal in tenth grade and made his most serious attempt at suicide early that year.[127] He felt like "I was going to kill myself, or I wanted to leave the school, one or the other."[128] After his attempt to kill himself, he was admitted to Memorial Medical Center in Ashland.[129] He subsequently returned to school.

During tenth grade, Jamie was also the victim of another brutal assault by Stephan Huntley in a school hallway.[130] During the time Jamie was walking to school he tried to get to school in the morning "earlier than everybody else so that I would get into the building and into the library before people got there."[131] One day when Jamie arrived early to get into the library:

> . . . the library lights weren't on yet, so I sat in the back hallway waiting for the librarian to get there, and Stephan Huntley and some other boys came down the hallway. There was about eight or nine of them. And Stephan—he called me a name and kicked my books out from my lap, and he told

120. *See* JN Dep. at 120.
121. *See* JN Dep. at 120.
122. *See* JN Dep. at 121. Although conversations with guidance counselors are generally confidential, the counselor is supposed to report allegations such as sexual harassment which are not kept confidential. *See* Blauert Dep. at 49–50.
123. *See* CN Dep. at 58, 61; JN Aff. ¶ 10.
124. *See, e.g.*, JN Dep. at 122.
125. JN Dep. at 121–22. *See also* RN Dep. at 57.
126. RN Dep. at 57.
127. *See* JN Dep. at 30–31.
128. JN Dep. at 30.
129. *See* JN Dep. at 30–31.
130. *See* JN Dep. at 95–96.
131. JN Dep. at 95.

> me—he said he wanted to fight, and I said that I wasn't going to fight him. And he said, "If you're not going to fight me, then I'll just kick the shit out of you." And I got up and I started to pick up my books, and he kicked me in the stomach. And then he continued to kick me in the stomach, and then they left when the lights turned on in the library . . . .[132]

The kicking lasted five to ten minutes,[133] while the other boys were standing around watching and laughing.[134] After the assault ended, Jamie went to the library and started to feel sick, so he went to the principal's office and called home.[135]

Jamie had stomach pain for three days and stayed out of school.[136] He did not tell his parents about the assault at that time.[137] When Jamie returned to school, he told his counselor, Ms. Hanson, exactly what had happened.[138] Hanson referred Jamie to the school's police liaison, Dan Crawford, who maintained an office at the school.[139] Jamie spoke to Crawford and told him he wanted to press charges, but Crawford dissuaded him by promising that he would speak to the abusive students and that it would stop.[140] Some minor punishment was imposed on some students but at least three of the principal abusers, including Huntley, Roy Grande and Ryan Goulan, continued the abuse.[141] Suspensions were not imposed.[142]

Jamie had continuous cramps and stomach pains until two to three weeks later when he collapsed from abdominal pain in class and an ambulance picked him up at school and he was hospitalized.[143] Jamie required abdominal surgery.[144] He had internal bleeding and bruising.[145] Jamie told his parents in his hospital room that he had been kicked repeatedly in the stomach at school and that "[o]ne had cowboy boots

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132. JN Dep. at 95–96.
133. *See* JN Dep. at 98.
134. *See* JN Dep. at 96.
135. *See* JN Dep. at 99.
136. *See* JN Dep. at 101.
137. *See* JN Dep. at 102.
138. *See* JN Dep. at 102.
139. *See* JN Dep. at 102–03.
140. *See* JN Dep. at 103–05.
141. *See* JN Dep. at 103–05.
142. *See* JN Dep. at 106.
143. *See* JN Dep. at 33, 107–08; RN Dep. at 68.
144. *See* RN Dep. at 68; JN Dep. at 107–08.
145. *See* RN Dep. at 32.

on."[146] As of his 1995 deposition, Jamie was continuing to have frequent stomachaches and had recently been rehospitalized for internal bleeding and throwing up blood.[147]

During Jamie's tenth and eleventh grade years, he spoke on at least three or four occasions with the assistant principal, Mr. Blauert, regarding the harassment.[148] Jamie initially went to Blauert because the police liaison, Dan Crawford, told him he had to speak to Blauert as well as him about what was going on.[149] He continued to go to Blauert because "[i]f I had a complaint and went to the office, I was told to go to Mr. Blauert. He was in charge of disciplining."[150]

Jamie recalled that Blauert "didn't respond very well to the things I would tell him. He laughed at me. He was another person who told me that if I wasn't—that I was kind of deserving what I was getting because of the fact that I was gay."[151] At his deposition, Jamie further testified:

> Q. What exactly did [Blauert] say when you got the message that Mr. Blauert felt you were deserving of what you were getting?
>
> A. I was telling him about being called names and the harassment and stuff, and he just looked at me, and he laughed and he said—he goes, "Well, if you're going to be gay, this kind of stuff is going to happen to you."[152]

Jamie asked Blauert to stop the harassment and Blauert said he would deal with it.[153] Blauert's typical response was that Jamie was initiating the trouble or provoking the perpetrators.[154] Jamie also experienced delay in waiting to discuss with Mr. Davis an assault he had just suffered, when a female student who came to the office after him was taken in to see Mr. Davis first.[155]

Jamie's parents also "made quite a few phone calls to the school with complaints that . . . he would come home and had bruises and be

146. CN Dep. at 70.
147. *See* JN Dep. at 34–36.
148. *See* JN Dep. at 146.
149. *See* JN Dep. at 145, 147.
150. JN Dep. at 147; *see also* Def.'s Interrog. Resp. No. 4; Blauert Dep. at 21, 36, 42.
151. JN Dep. at 144.
152. JN Dep. at 145.
153. *See* JN Dep. at 146.
154. *See* JN Aff. ¶ 14.
155. *See* JN Aff. ¶ 18.

beat up."[156] Many of these calls were to Lynn Hanson who said she would take their concerns through channels.[157] Jamie's mother also recalled speaking to Mr. Blauert several times regarding the name-calling and harassment.[158] Principal Davis referred the Naboznys to Blauert.[159] Blauert assured the Naboznys "he would take care of it. He would do something about it."[160]

According to Jamie's mother, Lynn Hanson had "asked for help and asked for help for this kid, and nothing was being done to stop the other kids from doing what they were doing to him."[161] At a meeting attended by Carol Nabozny, Hanson "said that she had tried to help a gay student at Ashland High and that she went as far as the superintendent and even higher and th[at] nobody would help."[162]

Finally, in December of his eleventh grade year, Jamie could no longer tolerate the stress and fear of going to school and decided to drop out and leave Ashland.[163] The Naboznys met with Hanson and she told Jamie it would be best for him to find alternative schooling options which might include leaving Ashland.[164] According to his father:

> He just flat refused to go back to school. And we told him that we could understand why, but he should still stick it out and finish it. And we talked to Lynn Hanson about it, and she told us that she was at the top of her ladder and couldn't go any farther. The district wouldn't do anything about it, and we should just let him go.[165]

Jamie moved to Minnesota and sought the help of a therapist.[166]

After leaving Ashland, Jamie was diagnosed with Post Traumatic Stress Disorder (PTSD) because of the harassment he suffered at the Ashland schools.[167] He pursued his education in the Minneapolis area, but riding a bus and being in classrooms became too difficult because of PTSD and, in 1994, Jamie obtained his GED rather than a high school

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156. RN Dep. at 64.
157. *See* RN Dep. at 67–68.
158. *See* CN Dep. at 52.
159. *See* JN Aff. ¶ 14.
160. CN Dep. at 52.
161. CN Dep. at 66.
162. CN Dep. at 64; *see also* RN Dep. at 57.
163. *See* JN Aff. ¶ 15; CN Dep. at 51.
164. *See* JN Aff. ¶ 15.
165. RN Dep. at 72–73.
166. *See* JN Aff. ¶ 16.
167. *See* JN Dep. at 8.

diploma.[168] Jamie's therapy for depression and PTSD are ongoing.[169] In the summer of 1994, the depression worsened and Jamie again became somewhat suicidal. He was admitted to the University of Minnesota Hospital on August 31, 1994 and remained an in-patient for a month.[170]

School Harassment Polices and Incidents Involving Other Students

Since July 27, 1987, the School District has had in effect a Non-Discrimination Policy implementing state law forbidding, *inter alia*, sexual orientation and sex discrimination in curricular, extra-curricular, pupil services, recreational or other school programs.[171] During the years that Jamie was a student, the School District required that all students be protected from sexual harassment, including student-on-student harassment and harassment directed at gay and lesbian students.[172] The sexual harassment and school non-discrimination policies were included in the student handbook which is distributed and discussed at the beginning of the year.[173] Students were to be held accountable for complying with policies in the handbook.[174]

According to school policies, all school rules of behavior remained in effect on the bus, enforceable by the driver.[175] The privilege of riding on the bus was to be withdrawn for unacceptable behavior, including using profane language or other discourteous behavior.[176] The school was supposed to "make[ ] every effort to avoid injury and accident to pupils" on the bus.[177]

School disciplinary penalties could include, at least, "detention, in-school suspension, out-of-school suspension [or] expulsion."[178] Referrals

168. *See* JN Dep. at 19–23.
169. *See* JN Aff. ¶ 16.
170. *See* JN Dep. at 25–27.
171. *See* Thompson Aff. ¶ 5, Ex. A; WIS. STAT. § 118.13 (1995).
172. *See* Thompson Aff. ¶ 5, Ex. A; Blauert Dep. at 27; Def.'s Interrog. Resp. No. 5; Answer ¶¶ 34, 36.
173. *See* Blauert Dep. at 37–38; Dep. Ex. 1.
174. *See* Blauert Dep. at 40.
175. *See* Dep. Ex. 1 at 181. At school, for example, use of the word "fag" was supposed to bring "disciplining from a warning to detention, suspension, parents, to whatever I thought was necessary because then that's unacceptable language and it will not be put up with and not tolerated." Blauert Dep. at 52–53.
176. *See* Dep. Ex. 1 at 181.
177. Dep. Ex. 1 at 181.
178. Blauert Dep. at 26 and errata.

to the police liaison for possible criminal charges could follow discipline for sexual harassment.[179] Defendant Mary Podlesny was in charge of student discipline at Ashland Middle School.[180] When she received a complaint of sexual harassment, for example, Podlesny would investigate, find out what was happening and try to resolve the problem.[181] Defendant Thomas Blauert was in charge of student discipline at Ashland High School, including investigating complaints of sexual harassment, and communicating behavioral expectations to the student body.[182]

Defendants admitted that they took immediate action through discipline when they learned that female students were discriminated against on the basis of their gender.[183] Jamie has personal knowledge of classroom incidents in which boys were reprimanded and subsequently disciplined for physically assaulting girls.[184] For example, a student who hit his girlfriend was immediately expelled.[185] Jamie also has personal knowledge of incidents in which boys who made sexually harassing comments to girls were reprimanded and disciplined.[186] When pregnant girls were called names such as "slut," "whore" or "fat," defendants imposed immediate detentions and suspensions.[187] Jamie was never informed by school officials of a sexual harassment or anti-discrimination policy.[188]

SUMMARY OF ARGUMENT

Jamie Nabozny raises quintessential Section 1983 claims against the school defendants and there are genuine issues of material fact requiring trial on those claims. In *Monroe v. Pape*,[189] the Supreme Court noted that it was "the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind"[190] the

179. *See* Blauert Dep. at 43.
180. *See* Def.'s Interrog. Resp. No. 4; Podlesny Dep. at 22, 26.
181. *See* Podlesny Dep. at 50.
182. *See* Def.'s Interrog. Resp. No. 4; Blauert Dep. at 21, 36, 42–43.
183. *See* Answer ¶ 34.
184. *See* JN Aff. ¶ 17.
185. *See* Am. Compl. ¶ 33.
186. *See* JN Aff. ¶ 17.
187. *See* Am. Compl. ¶ 33.
188. *See* Am. Compl. ¶ 19.
189. Monroe v. Pape, 365 U.S. 167 (1961).
190. *Monroe*, 365 U.S. at 174–75.

passage of Section 1983. The particular concern then, as now, was state governmental indifference to harassment and violence.

While the defendants and the State of Wisconsin have laws and policies to address the assaults and harassment endured by Jamie in the Ashland schools, they also had a custom, policy or practice of not enforcing those remedies for this student. Their failure to expel Jamie's attackers or otherwise stop the abuse of him is explained by discriminatory anti-gay and gender-based animus and by deliberate indifference. Section 1983 provides Jamie a remedy for the great harm caused by this deprivation of his equal protection and due process rights.

After the standard of review applicable to the district court's grant of summary judgment is set forth in Section I of the Argument, Section II advances an equal protection claim based on the school defendants' failure to impose meaningful discipline on Jamie's abusers or to take other steps to stop the relentless anti-gay harassment and violence he endured from identified students. While the school acted immediately and decisively in defense of girls assaulted by boyfriends and others, it usually did nothing in response to vicious assaults on Jamie, literally telling him he had to learn to expect them as a gay boy. Any steps that were taken—such as verbal reprimands for violent physical assaults—were obviously inadequate to stop the harassment. In short, Jamie seeks a very literal form of equal protection of the laws.

Part A of Section II details the constitutional basis for Jamie's equal protection claim and its application to all vulnerable minorities. It also traces a long series of cases recognizing the right Jamie asserts, demonstrating that qualified immunity is unwarranted for the individual defendants because the right is clearly established. Part B of Section II reviews the significant record evidence of discriminatory intent, establishing that there are genuine issues of material fact which remain and warrant reversal and trial.

Section III advances two due process claims under this Circuit's law, both based upon school officials' deliberate indifference to Jamie's liberty interest in personal security. Part A of Section III asserts that the school defendants' actions and inaction "enhanced the risk of harm" to Jamie. Their four-year failure to discipline the abusive students, combined with the message sent to those students by the school's segregation of Jamie, rendered him more vulnerable to abuse. The district court recognized the legal basis for such a claim but wrongly entered judgment for defendants for lack of evidence.

The evidence of record, viewed most favorably to Jamie, demonstrates genuine issues for trial.

Part B of Section III asserts a second due process claim in that these policies and practices of the school defendants unconstitutionally "encouraged a climate" in which Jamie would be harmed. The Court is asked to reject the district court's holding that a school can only be responsible for fomenting such a climate if teachers, not students, are the ones encouraged to behave abusively. This reasoning is a remnant of vicarious liability theory that has no application in Section 1983 cases. Jamie further asserts that the due process right of students to be free from abuse was clearly established at the time these defendants caused harm to him and therefore they should not escape liability under qualified immunity principles.

ARGUMENT

I. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT ON THE MERITS AND ON THE BASIS OF QUALIFIED IMMUNITY IS SUBJECT TO DE NOVO REVIEW; THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT REQUIRES REVERSAL.

The district court's grant of summary judgment to defendants is subject to *de novo* review by this Court.[191] Summary judgment is appropriate only when, based on the pleadings, depositions, interrogatory answers, affidavits and admissions on file, there is an absence of a genuine issue of any material fact.[192] The evidence must be viewed in the light most favorable to plaintiff Jamie Nabozny, the nonmovant, and must be assessed in light of the evidentiary burdens imposed by the substantive law.[193] Because he bears the burden of proof at trial, plaintiff must offer specific evidence providing a factual basis for relief.[194]

This case turns on the actions and inaction of the school defendants in response to the abuse and harassment suffered by Jamie at the hands of fellow students over many years. The claims under 42 U.S.C. § 1983 (1994) assert violations of equal protection and substantive due

191. *See* Roger v. Yellow Freight Sys., Inc., 21 F.3d 146, 148 (7th Cir. 1994).
192. *See Roger*, 21 F.3d at 148; FED. R. CIV. P. 56(c).
193. *See Roger*, 21 F.3d at 148.
194. *See Roger*, 21 F.3d at 148.

process rights. Summary judgment was improperly granted because defendants have admitted that their actions were taken under color of law,[195] and Jamie presented facts demonstrating that defendants deprived him of rights, privileges or immunities guaranteed by the federal Constitution.[196] As to his equal protection claim, Jamie also presented ample evidence supporting a finding of discriminatory intent.[197]

Defendants Podlesny, Blauert and Davis asserted that even if Jamie's claims survive against the School District, they are entitled to qualified immunity from individual liability. Thus, to avoid dismissal of these defendants, Jamie additionally showed that the rights he seeks to vindicate were "clearly established statutory . . . rights of which a reasonable person would have known" as of "the time [the] action occurred."[198] The district court's rulings that he did not do so were based on interpretations of law and should be reviewed *de novo*.[199]

II. JAMIE'S CLAIM THAT HE WAS DENIED PROTECTION FROM HARM BECAUSE HE IS A GAY BOY STATED A VALID EQUAL PROTECTION CLAIM BASED ON CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS AND JAMIE DEMONSTRATED GENUINE ISSUES FOR TRIAL ON THAT CLAIM.

A. Jamie Had An Equal Protection Right Not to be Denied Protection From Harm Because of His Sexual Orientation or Gender; Reasonable Officials Would Have Known That Failing to Protect Him Was Unconstitutional.

1. Jamie stated a valid equal protection claim.

It has long been established that a state may not deny some citizens protection from harm that it affords to others or selectively enforce protective statutes based on membership in a minority group without

195. *See* Answer ¶ 9.
196. *See* Webb v. City of Chester, 813 F.2d 824, 828 (7th Cir. 1986).
197. *See Webb*, 813 F.2d at 828.
198. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
199. *See* Triad Associates, Inc. v. Robinson, 10 F.3d 492, 495 (7th Cir. 1993).

running afoul of the Equal Protection Clause.[200] Contrary to the district court's holding,[201] Jamie's allegations that, because he is a gay boy, his requests for protection from violence and harassment were effectively ignored, state a valid equal protection claim under Section 1983.[202]

In *DeShaney*,[203] the Court affirmed this Court's refusal, under substantive due process principles, to hold the Winnebago County Department of Social Services liable for failing to remove a child from his abusive father's custody. But the Court specifically noted that there had been no allegation that the State's failure to protect Joshua DeShaney was attributable to animus against him because of his membership in a group and expressly recognized that "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[204]

The Court in *DeShaney* cited the 1886 case of Yick Wo v. Hopkins[205] as the progenitor of this principle. In *Yick Wo*, which concerned selective enforcement of laws only against Chinese laundry owners, the Court held that:

> [t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[206]

In this case, the school defendants failed to protect Jamie from brutal assaults and continual harassment because of their own discriminatory animus.[207] The State's failure to provide minorities

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200. *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 197 n.3 (1989); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

201. *See Nabozny*, No. 95-C-086-S at 9.

202. The district court's equal protection holding reached only Jamie's gender claim. For unexplained reasons, the district court did not acknowledge or rule upon Jamie's sexual orientation claim. *See Nabozny*, No. 95-C-086-S at 9. This claim was well pled, *see* Am. Compl. ¶¶ 31–37, and specifically addressed by defendants in their summary judgment memorandum. *See* R. Doc. 24 at 5–7.

203. *See Deshaney*, 489 U.S. at 202.

204. *DeShaney*, 489 U.S. at 196 n.3.

205. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

206. Yick Wo, 118 U.S. at 373–74; *see also* Oyler v. Boles, 368 U.S. 448, 456 (1962) (selective enforcement of state laws is unconstitutional where based on "arbitrary classification").

207. *See infra* Section II.B.

protection from violence and harassment is the very type of discrimination sought to be addressed by Section 1983.[208] In *Monroe*, the Court traced the history of Section 1983's enactment as part of the 1871 Civil Rights Act. Extensive legislative history documented a strong Congressional intent to provide recourse when a state unconstitutionally fails to protect some classes of citizens from violence and harassment, then by the Ku Klux Klan, while seeking out and punishing those who attack other classes of citizens.[209] As Representative Burchard of Illinois explained:

> But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws.[210]

Or, as Representative Beatty of Ohio put it:

> [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.[211]

This Court has frequently reiterated the continuing vitality of these principles. In *Jackson*, the Court considered the sufficiency of equal protection claims alleging that government actors had failed to assist or had negligently botched a rescue of travelers in a burning car. In finding that no claim was stated because there was no allegation that help was withheld because the victims "belong[ed] to a group to

208. *See* Monroe v. Pape, 365 U.S. 167, 174–83 (1961). The additional holding in *Monroe* that local governments are immune from suit under Section 1983 was overturned in Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658, 663 (1978).

209. *See Monroe*, 365 U.S. at 174–83.

210. *Monroe*, 365 U.S. at 176–77.

211. *Monroe*, 365 U.S. at 175.

which [defendants] were hostile,"[212] Judge Posner noted: "If the defendants had withheld protection from the plaintiffs' decedents because they were blacks or members of some other vulnerable minority—if the defendants were discriminating in a vicious or irrational fashion—there would be an equal protection issue."[213]

Many other cases also have held that selective enforcement or the failure to enforce a law because of purposeful discrimination between persons or classes is an actionable equal protection violation.[214]

While the level of scrutiny accorded government discrimination might vary with the target of its animus,[215] no contention has been made that any rational, let alone substantial, justification supports providing Jamie less protection from criminal assaults or harassment because he is a gay boy. Wisconsin not only outlaws battery,[216] but the Supreme Court in *Wisconsin v. Mitchell*[217] also has upheld its law enhancing the penalties for battery motivated by bias, including bias against the victim's sexual orientation or gender, real or perceived.[218] Wisconsin also forbids gender and sexual orientation discrimination in educational services,[219] and the School District purports to protect

212. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

213. *Jackson*, 715 F.2d at 1203; *see also* Jackson v. Byrne, 738 F.2d 1443, 1447 (7th Cir. 1984) ("The case would be a different one if the selection of firehouses to close during the pendency of the strike had been done on a discriminatory basis"); Hawk v. Perillo, 642 F. Supp. 380, 384 (N.D. Ill. 1985) (failure of police to investigate and pursue assailants because victim of beating was black stated equal protection claim); Lowers v. City of Streator, 627 F. Supp. 244, 246 (N.D. Ill. 1985) (allegation that police failed to arrest rapist and continue investigation because victim was a woman stated equal protection claim).

214. *See, e.g.*, Muckway v. Craft, 789 F.2d 517, 522–23 (7th Cir. 1986) (county's failure to enforce zoning ordinance actionable if intentional or purposeful discrimination between classes present); Olshock v. Village of Skokie, 541 F.2d 1254, 1258–60 (7th Cir. 1976) (selective discipline of police officers improperly based on whether represented by an attorney); United States v. Falk, 479 F.2d 616, 618–21 (7th Cir. 1973) (selective enforcement of draft laws improperly based on political views).

215. *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (sexual orientation classifications subject to at least rational basis scrutiny); Bohen v. City of East Chicago, 799 F.2d 1180, 1185 (7th Cir. 1986) (gender classifications subject to heightened scrutiny).

216. *See* WIS. STAT. § 940.19 (1996).

217. Wisconsin v. Mitchell, 508 U.S. 476 (1993).

218. *See* WIS. STAT. § 939.645(1) (1996).

219. *See* WIS. STAT. § 118.13 (1997).

all students, regardless of gender or sexual orientation, from sexual harassment by other students.[220]

Jamie plainly stated a constitutional claim for relief and therefore the district court erred in granting summary judgment on this basis.[221]

2. Defendants are not entitled to qualified immunity.

Likewise, defendants Podlesny, Blauert and Davis should not have received qualified immunity from the district court.[222] Since the nineteenth century and certainly at all times relevant to this lawsuit (from fall 1988 to December 1992, when Jamie was in seventh through eleventh grades), it has been clearly established that state actors may not properly withhold protection from violence and harassment or fail to enforce laws because of discriminatory animus toward "blacks or members of some other vulnerable minority."[223]

Contrary to the reasoning of the district court,[224] there is no requirement that Jamie point to a factually identical case to meet the "clearly established right" standard.[225] It is enough that reasonable school officials would have known as of 1988 that it was unconstitutional to deny Jamie protection from harm because of his gender or sexual orientation.[226] The varied cases and legislative history cited above leave no doubt that the equal protection right Jamie seeks to vindicate was clearly established at all relevant times.

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220. *See* Thompson Aff. ¶ 5, Ex. A; Blauert Dep. at 27; Def.'s Interrog. Resp. No. 5; Answer, ¶¶ 34, 36.

221. *See Nabozny*, No. 95-C-086-S at 9.

222. *See Nabozny*, No. 95-C-086-S at 9. The School District is not eligible for qualified immunity. *See* Owen v. City of Independence, 445 U.S. 622, 650 (1980). The district court's reference to granting qualified immunity to "defendants," *Nabozny*, No. 95-C-086-S, at 9, is imprecise or inaccurate as only individual officials can seek qualified immunity. *See Owen*, 445 U.S. at 653.

223. *Jackson*, 715 F.2d at 1203.

224. *See Nabozny*, No. 95-C-086-S at 9.

225. *See* Triad Assoc., Inc. v. Robinson, 10 F.3d 492, 498–99 (7th Cir. 1993); McDonald v. Haskins, 966 F.2d 292, 293 (7th Cir. 1992).

226. *See Triad Assoc.*, 10 F.3d at 498–99.

B. Genuine Issues of Material Fact Preclude Summary Judgment on Jamie's Equal Protection Claim; Jamie Provided Significant Evidence of Discriminatory Intent.

The facts reviewed above demonstrate at least a genuine issue for trial as to whether defendants failed to provide Jamie with meaningful protection from verbal, physical and sexual harassment. It is also admitted that these protections were provided to others,[227] and promised by law regardless of gender or sexual orientation.[228] The power to impose meaningful discipline was also plainly within the defendants' authority.[229]

The commonly missing "genuine issue" in section 1983 equal protection claims—discriminatory intent—is also well documented in the record here, especially when viewed most favorably to plaintiff Nabozny.[230] Jamie provided direct evidence of discriminatory animus by defendants and abundant evidence of a pattern and practice of failing adequately to address his need for protection from the harm being inflicted upon him for being a gay boy. The record shows that defendants took seriously complaints of harassment and assault of girls but, even in the face of quite brutal assaults, never seriously acted to protect Jamie from harm. In the face of these damning facts, it was error to ignore Jamie's claim based on sexual orientation animus and to grant summary judgment on his gender bias claim for lack of evidence.[231]

There is ample direct evidence of anti-gay discriminatory intent in the record. Defendant Podlesny, principal of Ashland Middle School and in charge of discipline there,[232] told Nabozny to his face in seventh grade that if he was "going to be so openly gay, that [he] had to expect this kind of stuff to happen."[233] This comment was in response to Nabozny immediately reporting that he had been pinned down on a classroom floor for several minutes while students on top

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227. *See, e.g.*, Answer ¶ 34.
228. *See, e.g.*, WIS. STAT. § 939.645(1) (1996); Answer ¶¶ 34, 36.
229. *See, e.g.*, Blauert Dep. at 26 and errata.
230. *See* Roger v. Yellow Freight Sys., Inc., 21 F.3d at 146, 149 (7th Cir. 1994).
231. *See Nabozny*, No. 95-C-086-S at 9.
232. *See* Podlesny Dep. at 22, 26.
233. JN Dep. at 74, 149.

of him pretended to rape him and twenty others watched.[234] No discipline was imposed on Jamie's harassers even after a guidance counselor spoke to Podlesny about the incident.[235]

A later incident in the eighth grade similarly revealed the anti-gay discriminatory animus of the school defendants. Jamie informed his parents of an assault in which several boys hit him, pushed him around in a bathroom and knocked his books out of his hands.[236] His parents requested a meeting with Podlesny, the offenders and their parents. As she had a year earlier, despite unrelenting abuse in the intervening time, Podlesny responded that if Jamie "was going to be openly gay that [he] had to expect that kind of stuff."[237] This remark was made to Jamie and his parents, possibly with the perpetrators and one of their parents still present.[238] Again, no disciplinary action was taken.

Similarly, defendant Blauert, who was in charge of pupil discipline at Ashland High,[239] laughed at Jamie's reports of harassment and name-calling and accused him of provoking them. He directly stated to Jamie that "if you're going to be gay, this kind of stuff is going to happen to you."[240] Blauert also told Jamie he was "deserving [of] what I was getting because of the fact that I was gay."[241]

The record also shows that guidance counselor Lynn Hanson was frustrated in her attempts to help Jamie—eventually agreeing with him that he should drop out—because he was gay. For example, she stated publicly that "she had tried to help a gay student at Ashland High and that she went as far as the superintendent and even higher and th[at] nobody would help."[242]

These various admissions and statements demonstrate that anti-gay discriminatory animus—the belief that Jamie should be denied meaningful protection because he is gay—was behind the school defendants' failure to protect him. At the very least, Jamie has raised a

234. *See* JN Dep. at 72–73.
235. *See* JN Aff. ¶ 5.
236. *See* JN Dep. at 79–80.
237. JN Dep. at 81; *see also* CN Dep. at 25; RN Dep. at 34–35 and errata.
238. *See* JN Dep. at 81; CN Dep. at 25; RN Dep. at 34–35 and errata.
239. *See* Def.'s Interrog. Resp. No. 4; Blauert Dep. at 21, 36, 42.
240. JN Dep. at 145.
241. JN Dep. at 144.
242. CN Dep. at 64; *see also* RN Dep. at 57.

genuine issue of material fact that entitles him to trial on his equal protection claim.[243]

Contrary to the district court's conclusion,[244] there is also significant evidence from which a jury could conclude that gender bias motivated defendants' treatment of Jamie. Jamie had personal knowledge of incidents in which a male student who hit his girlfriend was immediately expelled[245] and boys were reprimanded and disciplined for physically assaulting girls.[246] Likewise, boys who made sexually harassing comments to girls would be reprimanded and disciplined.[247] When pregnant girls were called names such as "slut," "whore" or "fat," defendants imposed immediate detentions and suspensions.[248]

All defendants admitted that they "took or at least tried to take immediate action through discipline if and when it was brought to their attention that female students were discriminated against on the basis of their gender."[249] They steadfastly maintained that their usual practice was to investigate claims of sexual harassment immediately, take them seriously and seek to resolve them.[250]

But as she did on other occasions, Podlesny dismissed even the very serious incident of mock rape and sexual harassment of Jamie with the comment that "boys will be boys"—suggesting that a boy student could not expect protection from such harms inflicted by other boys.[251] Davis and Blauert took no action against Roy Grande and Stephan Huntley for assaulting and urinating on Jamie in a restroom although he went right to their office and his parents later met with them.[252] No suspensions, let alone expulsions or criminal charges, were leveled against Stephan Huntley for kicking Jamie in the stomach so brutally that he ultimately required abdominal surgery.[253]

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243. *See Roger*, 21 F.3d at 149; Webb v. City of Chester, 813 F.2d 824, 829 (7th Cir. 1987) (holding that plaintiff presented evidence of discriminatory intent in Section 1983 claim and trial judge appropriately ruled that credibility issues were for the jury); Van Houdnos v. Evans, 807 F.2d 648, 653 (7th Cir. 1986) (holding that plaintiff presented enough evidence to send issue of discriminatory intent to jury).
244. *See Nabozny*, No. 95-C-086-S at 9.
245. *See* Am. Compl. ¶ 33.
246. *See* JN Aff. ¶ 17.
247. *See* JN Aff. ¶ 17.
248. *See* Am. Compl. ¶ 33.
249. Answer ¶ 34.
250. *See, e.g.*, Podlesny Dep. at 50; Blauert Dep. at 42–43.
251. JN Dep. at 73–74, 149.
252. *See* JN Aff. ¶ 12.
253. *See* JN Dep. at 95–96, 106.

Based on defendants' stated policies, it is simply inconceivable that a serious investigation and strong punishment would not follow if a girl of Jamie's age were pinned down and subjected to a mock sexual assault in a classroom, or urinated on or beaten to the point of missing several days of school and requiring hospitalization. The fact that defendants departed from their stated practices when Jamie brought such incidents to their attention raises a genuine issue of discriminatory intent.[254]

The Supreme Court also has emphasized that the inquiry into discriminatory intent "is practical. What . . . any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from . . . 'the give and take of the situation.' "[255]

Here, countless meetings were held during Jamie's school years at which the anti-gay verbal harassment, continuing sexual harassment and daily physical abuse were made known to the defendants and officials who reported to them.[256] While defendants continually promised to take care of the problem,[257] they never seriously addressed it.[258]

In sum, the record contains abundant direct and circumstantial evidence from which a reasonable jury could conclude that defendants intended that Jamie should not receive protection from harm and simply had to endure relentless abuse because he is a gay boy. Summary judgment was therefore error.[259]

III. THE DISTRICT COURT ERRED IN FINDING INSUFFICIENT EVIDENCE THAT SCHOOL OFFICIALS ENHANCED THE RISK OF HARM TO JAMIE AND IN HOLDING THAT SCHOOLS CAN ESCAPE LIABILITY FOR ENCOURAGING STUDENTS TO HARM OTHER STUDENTS; THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO EACH OF THESE DUE PROCESS CLAIMS.

A public school and its officials may be liable under Section 1983 and the Due Process Clause if they take actions that enhance the risk

254. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.").

255. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.24 (1979) (citation omitted).

256. *See, e.g.*, RN Dep. at 37, 39, 41–42, 49, 64, 67–68; JN Dep. at 89–90, 146.

257. *See, e.g.*, JN Dep. at 38, 43, 68, 146; RN Dep. at 39, 54; CN Dep. at 52.

258. *See, e.g.*, JN Dep. at 67–68, 82–83, 121–22; JN Aff. ¶ 5; RN Dep. at 39, 54, 57, 72–73; CN Dep. at 66.

259. *See Roger*, 21 F.3d at 149.

of harm to a student. In addition, they may be liable if, by custom, policy or practice, they encourage a climate to flourish in which a student suffers harm. Under both these theories of liability, the cognizable harm is a deprivation of the liberty interest in personal security.

> Although it would be impossible to catalogue and to describe precisely each "liberty" interest protected by the Due Process Clause, it can hardly be doubted that chief among them is the right to some degree of bodily integrity. As the Supreme Court recently stated: "Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for unjustified intrusions on personal security."[260]

These protections extend to "arbitrary intrusions on personal security includ[ing] both physical and emotional well-being."[261]

An element of liability under both of these theories is deliberate indifference on the part of the school officials.[262] This does not mean that Jamie must show that defendants wanted him to be harmed, but instead that officials made "a deliberate choice to follow a course of action" which reflected deliberate indifference to his rights.[263]

A. There are Genuine Issues for Trial on Jamie's Due Process Claim That School Officials Enhanced the Risk of Harm to Him.

As the district court recognized, a school and its officials may be liable under Section 1983 if they enhance the risk of harm to a student.[264] The State need not create the danger but can be liable if it "renders citizens more vulnerable to danger."[265] Specifically, the school

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260. White v. Rochford, 592 F.2d 381, 383 (7th Cir. 1979) (footnote and citation omitted) (reversing dismissal of case where parent sued because police officer arrested driver of a car on a highway and left children behind in the car).

261. *White*, 592 F.2d at 385.

262. *See* Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3rd Cir. 1989) (citing City of Canton v. Harris, 489 U.S. 378, 390 (1989)).

263. *Stoneking*, 882 F.2d at 725 (citations omitted).

264. *See Nabozny*, No. 95-C-086-S at 6–7; *see also* Reed v. Gardner, 986 F.2d 1122, 1126–27 (7th Cir. 1993).

265. *Reed*, 986 F.2d at 1125 (citing DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 201 (1989)); *see also* Stauffer v. Orangeville Sch. Dist., No. 89-C-20258, 1990 WL 303595, at *3 (N.D. Ill. July 31, 1990) ("By allowing Stauffer to go to the restroom unsupervised with another student who had a prior history of

defendants' actions or failure to take action in response to years of abuse against Jamie enhanced the risk of harm to him and is actionable under Section 1983. As this Circuit has observed:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.[266]

Here, reviewing the evidence most favorably to Jamie,[267] there can be no doubt that school officials enhanced the risk of harm to Jamie, or rendered him "more vulnerable to danger."[268] For over four years Jamie and his parents consistently reported to the school the relentless abuse he suffered, including the more assaultive incidents of simulated rape, severe beatings, and being urinated and spat on. School officials repeatedly told Jamie and his parents that they would take care of the problem.[269] Time and again, this promise was made, reassurance was given—and yet Jamie's abusers were allowed to resume their assaults on him. On his own, Jamie made several attempts to escape the terror of the school, through suicide attempts and by running away, but he was required to return to school.[270]

School officials simply did not remove, prosecute or meaningfully discipline the abusive students, despite promises to stop the harassment. Only the school, not Jamie or his parents, had disciplinary authority over the harassers. Discipline that could have been imposed included, at least, "detention, in-school suspension, out-of-school suspension [or] expulsion"—in other words, deterrence or removal of the perpetrators.[271] In at least one incident of a boy hitting a girl, the school expelled the boy.[272] But none of Jamie's attackers was ever expelled. In Jamie's case, school officials openly informed Jamie and his

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sexually abusing others and who had threatened Plaintiff, it is possible that the teacher took the affirmative act of placing Stauffer in a hazardous situation.").

266. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

267. *See* Roger v. Yellow Freight Sys., Inc., 21 F.3d 146, 148–49 (7th Cir. 1994).

268. *Reed*, 986 F.2d at 1125 (citation omitted).

269. *See, e.g.*, RN Dep. at 39, 43; CN Dep. at 52.

270. *See* RN Dep. at 64.

271. Blauert Dep. at 26 and errata.

272. *See* Am. Compl. ¶ 33.

parents of their belief that he should expect to endure abuse because he is a gay boy, which apparently explains their deliberate indifference.[273]

The failure to deter Jamie's attackers from assaulting him, through appropriate discipline, is particularly egregious given that the school officials knew the identities of the principal abusers. Roy Grande began abusing Jamie in the seventh grade, persisted in the abuse and participated in the most assaultive incidents during Jamie's nearly five-year ordeal, including the simulated rape in front of a class,[274] and the urination assault in the student bathroom.[275] Stephan Huntley assisted Roy Grande in the urination assault by kneeing Jamie to the floor,[276] and it was Huntley who kicked Jamie so brutally as to require abdominal surgery and rehospitalization for internal bleeding and throwing up blood.[277]

Indeed, the school took more steps to degrade and isolate Jamie than it did to punish his attackers. Far from expelling the lead perpetrators, for example, the school placed Jamie in the special education class,[278] when both Roy Grande and Stephan Huntley were special education students.[279] This act was part of a pattern that highlighted the school's message to students that abuse of a boy because he is gay would be accommodated at his expense, not the perpetrators' expense. The pattern included placing Jamie in different classes, placing him in a separate part of the bus, placing him in the special education class and forcing him to use a separate bathroom. Such affirmative acts by the school emphasized the message that Jamie was unworthy of respect and worthy of further abuse.

Unlike other cases considered by this Court, the harm attributed to the State here is not from an isolated incident.[280] Defendants' long pattern of assuming the role of disciplinarian, yet returning Jamie to his abusers without effectively disciplining them, enhanced the risk of further harm. The abusive students received the clear message that their verbal and physical assaults of Jamie would be tolerated, a fact

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273. *See* Section II.B., *supra.*
274. *See* JN Aff. ¶ 4; JN Dep. at 72–73.
275. *See* JN Dep. at 83–84.
276. *See* JN Dep. at 83–84.
277. *See* JN Dep. at 34–36, 95–96, 107–08; RN Dep. at 68.
278. *See* RN Dep. at 55.
279. *See* JN Dep. at 97; Blauert Dep. at 43.
280. *See, e.g., Bowers,* 686 F.2d 616; Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983).

which would encourage them to continue and escalate the abuse, particularly given their age and immaturity.[281] The very existence of the school's array of progressive disciplinary measures recognizes that schoolchildren who are not given clear lines for their unacceptable conduct will predictably persist and escalate its gravity. Yet defendants did not use their full disciplinary powers. As a result, the abuse continued unabated until it finally drove Jamie from the school, from his family, and from his entitlement to an education and a childhood like everyone else's.

This case is also distinctive in that the harm occurred within the government's domain. For example, it is not a case where government is faulted for actions by an ex-patient off government property,[282] or for failing to pull bodies from a burning car on a highway.[283] Here, the school is faulted for harm to a student compelled to be present on school property, and only the school is in the position to address the harm through discipline. In this respect, schools are a unique environment.[284] Indeed, in assuming the parents' role under the heading of *in loco parentis*, schools have sought and won the right to inflict corporal punishment for disciplinary reasons, which underscores the schools' power and duty to address harms to schoolchildren.[285]

In addition, Jamie and his parents made repeated attempts to take actions that were within their control. Jamie's parents made every reasonable effort to seek a halt to the abuse of their son at school by repeated calls and meetings.[286] They attempted alternate schooling.[287] Jamie himself, following years of reported abuse, attempted to escape

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281. "When adults tolerate abusive language, the next step is often physical violence. Lesbian and gay students are pushed, punched, and even severely beaten." Joyce Hunter & Robert Schaecher, *Gay and Lesbian Adolescents*, *in* 2 ENCYCLOPEDIA OF SOCIAL WORK 1055, 1058 (Richard L. Edwards et al. eds., 19th ed. 1995).

282. *See Bowers*, 686 F.2d at 616.

283. *See Jackson*, 715 F.2d at 1200.

284. *See* Stauffer v. Orangeville Sch. Dist., No. 89-C-20258, 1990 WL 304250 at *6 (N.D. Ill. May 17, 1990) ("Although the State has no general duty to protect students from the torts of third parties, this duty could conceivably be imposed under the facts of this specific case.").

Jamie does not argue on appeal that such circumstances constitute "involuntary custody" over him, giving rise to a predicate duty to protect him from random or isolated harms that may or may not be anticipated. *See* J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990). The lack of involuntary custody cannot, however, wholly "privatize" the school grounds.

285. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

286. *See, e.g.*, RN Dep. at 37, 39, 41–42, 49, 64, 67–68.

287. *See, e.g.*, RN Dep. at 36.

the terror by running away.[288] He requested as a condition for returning to his family and his hometown that he not be forced to return to the abusive school environment.[289] His parents agreed and attempted home schooling but it did not work out.[290] The nearby Catholic school did not go past the eighth grade.[291] State authorities then directed Jamie's parents to return him to Ashland High School where he had to face the terror anew.[292] The terror included not only further abuse but ineffective and demeaning segregation.[293]

This Court has observed that the Framers of the Fourteenth Amendment could not have been thinking of due process protections for an isolated fire, or auto accident, or a one-time careless policeman,[294] but clearly they did have in mind deliberate indifference by state actors to violence over a sustained period of time. This Court has further observed that the Due Process Clause is concerned more with "negative" liberties, such as government honoring "the right to be let alone," than with "positive liberties," such as government providing assistance at the site of an auto accident.[295] By continuing to return Jamie's abusers to school with him instead of using common disciplinary measures, including expulsion, and by segregating him in a degrading and dangerous fashion, including placement in the special education class, school officials plainly violated Jamie's "right to be let alone."[296] The school officials here may not be the snakes in the snakepit, but they are as much active tortfeasors as if they had thrown this child "into a snake pit."[297]

Jamie has raised a genuine issue of material fact that defendants enhanced the risk of harm to him.[298] Therefore, the district court erred in granting summary judgment on this claim.

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288. *See* CN Dep. at 36.
289. *See* JN Dep. at 61.
290. *See* CN Dep. at 67–68; RN Dep. at 61–64.
291. *See* RN Dep. at 44.
292. *See* CN Dep. at 67–68; RN Dep. at 61–64.
293. *See* RN Dep. at 55; JN Dep. at 93; Blauert Dep. at 43.
294. *See Jackson*, 715 F.2d at 1205.
295. *Jackson*, 715 F.2d at 1203.
296. *Jackson*, 715 F.2d at 1203.
297. *Bowers*, 686 F.2d at 618.
298. *See Roger*, 21 F.3d at 148; *Reed*, 986 F.2d at 1123.

B. Defendants Can Be Held Liable For Encouraging a Climate to Flourish in Which Students Freely Abused Jamie; They Are Not Entitled to Qualified Immunity And Genuine Issues of Material Fact Require Reversal.

A school and its officials also may be liable under Section 1983 if they encourage a climate to flourish in which innocent children, including students, are victimized by others.[299] "This is an independent basis for liability . . . which is unrelated to the issue decided in *DeShaney*. Liability of municipal policymakers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a 'special relationship' between the municipal officials and the individuals harmed."[300]

If a school's deliberately indifferent practices foster a recurrence of abuse, the school can be liable for that harm. It is the State's action in fostering a climate of abuse that allows liability under the Due Process Clause and Section 1983.

The district court recognized this principle but limited its application to circumstances in which schools or their officials encourage teachers to harm students.[301] The district court held that schools or their officials can escape liability, despite their deliberate indifference and its effect on other tortfeasors, if those tortfeasors are students harming other students.[302] The district court provided no reasoning for allowing liability only when schools encourage teachers to abuse students and courts have split on this issue.[303]

Ironically, the limitation assumed by the district court appears to resurrect the principle of *respondeat superior* liability, which the Supreme Court has held inapplicable to constitutional torts.[304] Under *respondeat superior* liability theory, a school would be vicariously liable

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299. *See* J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 273 (7th Cir. 1990) (citing Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3rd Cir. 1989)).

300. *Stoneking*, 882 F.2d at 725. *See also* Doe v. Paukstat, 863 F. Supp. 884, 888 (E.D. Wis. 1994) ("*Paukstat*"); Doe v. Board of Educ. of Hononegah Community High Sch. Dist. 207, 833 F. Supp. 1366, 1377–1378 (N.D. Ill. 1993) ("*Hononegah*").

301. *See Nabozny*, No. 95-C-086-S at 6.

302. *See Nabozny*, No. 95-C-086-S at 6.

303. *Compare* Doe v. Evanston Township Consol. Sch. Dist. 202, No. 93-C-1011, 1994 WL 55652 at *2 n.1 (N.D. Ill. Feb. 23, 1994) ("*Evanston Township*"), *with* Elliot v. New Miami Bd. of Educ., 799 F. Supp. 818 (S.D. Ohio 1992).

304. *See* Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658, 663 (1978).

for the conduct of teachers (and other employees) but not for the conduct of students. However, in recognizing municipal liability under Section 1983, the Supreme Court expressly rejected *respondeat superior* as a basis for liability.

The reasoning of *Monell* explains why the district court erred here. The *Monell* Court, in rejecting the imposition of liability based solely on the employer/employee relationship, concluded that liability of a municipal employer for constitutional torts arises not from the employment of a tortfeasor, but from the fact that the municipality "causes" a tortfeasor to harm another.[305] The relevant factor for liability is causation, not the employment relationship between the municipal entity and the tortfeasor.[306] A municipality may cause either its employees or a private actor to harm a person. Accordingly, the municipality's liability for its own actions should not turn on whether its joint tortfeasor is an employee or not. The district court's holding is grounded upon theories of vicarious liability and cannot stand.[307]

The authority for the district court's holding[308] consists of a Third Circuit opinion and a district court opinion which follows it, neither of which offer reasons to warrant contradicting *Monell* and applying the principle of *respondeat superior*.[309] Specifically, the court relied upon the Third Circuit's observation that Section 1983 liability may not lie where "private actors committed the underlying violative acts."[310] But, as shown above, this view cannot be reconciled with *Monell*, which established that municipal liability turns on causation (where the municipality is a joint tortfeasor), not upon vicarious liability (where the municipality is not a joint tortfeasor). It is therefore irrelevant whether state actors or private actors committed the underlying violative act, as long as the municipality provided part of the cause for the act.[311]

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305. *See Monell*, 436 U.S. at 692.

306. The very language of Section 1983—"shall subject, *or cause to be subjected*, any person"—suggests that the employer/employee relationship is not relevant. *Monell*, 436 U.S. at 691 (emphasis added). The Court held this language "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Monell*, 436 U.S. at 692.

307. *See Evanston Township*, 1994 WL 55652 at *2 n.1.

308. *See Nabozny*, No. 95-C-086-S at 7–8.

309. *See* D.R. by L.R. v. Middle Bucks, 972 F.2d 1364 (3rd Cir. 1992) ("*Middle Bucks*"); *Elliot*, 799 F. Supp. at 823.

310. *Middle Bucks*, 972 F.2d at 1376.

311. In *Middle Bucks*, the facts suggest that notice to the school of the harm was limited to one report of one incident, which provides comparatively uncertain ground on which

Based upon the review of the facts in the above section concerning the enhancement of the risk of harm, genuine issues of material fact exist concerning whether or not there was a practice by appellees that fostered a climate in which Jamie was harmed.[312] The district court's grant of summary judgment on the merits should therefore be reversed.

The district court also erred in ruling that even if liability existed for school officials encouraging students to harm Jamie, the right to be free from physical abuse by private actors "was not clearly established at the time defendants conduct occurred, and defendants would be entitled to qualified immunity."[313] This plainly is not true as a matter of law with respect to the School District.[314] The court also erred in granting qualified immunity to the individual defendants because the right Jamie asserts was clearly established.

It is not seriously contended that Jamie did not have a constitutional right to attend school without suffering physical abuse as well as sexual and verbal harassment. The Supreme Court, in considering the closely analogous right implicated by corporal punishment in schools, held that "among the historic liberties . . . protected [by the Due Process Clause] was a right to be free from . . . unjustified intrusions on personal security."[315] Encouraging physical abuse of a student "is an intrusion of the schoolchild's bodily integrity not substantively different for constitutional purposes from corporal punishment by teachers."[316] Therefore, Jamie's constitutional right to be free of certain emotional and physical abuse was clearly established by 1977, the date of the *Ingraham* decision. Indeed, since physical abuse of a student "could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*."[317]

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to argue that the school in fact "caused" the students to harm other students. *See Middle Bucks*, 971 F.2d at 1366, 1376.

312. *See Stoneking*, 882 F.2d at 725 ("[A]ppellants' argument that there was no policy, custom or practice is a merits issue, which we cannot resolve on this interlocutory appeal.").

313. *Nabozny*, No. 95-C-086-S at 9 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

314. *See Owen*, 445 U.S. at 650.

315. Ingraham v. Wright, 430 U.S. at 673 (1977).

316. *Stoneking*, 882 F.2d at 727.

317. *Stoneking*, 882 F.2d at 727 (citing Rochin v. California, 342 U.S. 165, 172 (1952) ("substantive due process violation occurs where conduct 'shocks the conscience'")).

Here the emotional and physical abuse encouraged by the school officials through their perpetual failure to remove Jamie's harassers or impose any meaningful disciplinary measures, and through the segregation of Jamie (eventually into the special education class with his principal assailants), clearly rises to the level of unconstitutional harm. Reasonable persons would have known that such conduct is unconstitutional and not entitled to qualified immunity.[318]

The district court put too much emphasis upon whether defendants should have known they could be liable to Jamie for their role in fomenting the conduct of Jamie's classmates. In *Triad Associates*,[319] the Court made clear that the issue is "the legality of the conduct of the public official, not the obviousness of his liability to the ultimate plaintiff."[320] "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."[321] There should indeed be hesitation in the mind of any public school official considering the encouragement of plainly illegal student harassment and physical assaults.

Likewise, there should be no concern for offending the underlying purpose of qualified immunity, which is to prevent fear of unjustified lawsuits from hampering school officials who act responsibly in the discharge of their duties,[322] because it is difficult to envision responsible school officials encouraging over four years of abuse in the manner described. Therefore, the lower court erred in raising the shield of qualified immunity on defendants' behalf.

CONCLUSION

For all the reasons stated above, plaintiff-appellant Jamie Nabozny respectfully asks the Court to reverse the district court's grant of summary judgment on his equal protection and due process claims and to remand to the district court for further discovery and trial.

DATED: December 18, 1995

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318. *See* Triad Assoc., Inc. v. Robinson, 10 F.3d 492, 496 (7th Cir. 1993) (no requirement of factually identical case).

319. *Triad Assoc.*, 10 F.3d at 498–500.

320. *Triad Assoc.*, 10 F.3d at 499.

321. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1981).

322. *Harlow*, 457 U.S. at 814.