APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 19-2058

Chad Richardson, Individually, and as Parents and Next Friends of L; Tonya Richardson, Individually, and as Parents and Next Friends of L

Plaintiffs - Appellants

v.

Omaha School District; Jacob Sherwood, Superintendent; Amanda Green, Principal; Dawn Dillon, Teacher

Defendants - Appellees

Council of Parent Attorneys and Advocates, Inc.

Amicus on Behalf of Appellant(s)

Appeal from United States District Court for the Western District of Arkansas – Harrison

Submitted: March 11, 2020
Filed: April 27, 2020

Before GRUENDER, ARNOLD, and SHEPHERD, Circuit Judges.

GRUENDER, Circuit Judge

Chad and Tonya Richardson (collectively, "the Richardsons") appeal the district court's[1] grant of Omaha School District's motion to dismiss in part and motion for summary judgment. We affirm.

I.

The Richardsons filed an administrative complaint against the school district with the Arkansas Department of Education under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. The Richardsons claimed that their child, "L," was denied his right to a free appropriate public education ("FAPE"). *See* 20 U.S.C. § 1401(9). Specifically, they alleged that the school district (1) failed to conduct necessary evaluations of L; (2) failed to develop and implement an individualized education plan ("IEP") for L; (3) failed to ensure that L was not bullied by peers and teachers; and (4) failed to educate L in the least restrictive environment possible. On April 14, 2017, the hearing officer found in favor of the Richardsons on their first two allegations but found in favor of the school district on the Richardsons' third and fourth allegations.

The Richardsons subsequently filed a complaint in the United States District Court for the Western District of Arkansas. In Count One, they sought an award of attorneys' fees as the prevailing party of the administrative-level IDEA hearing on their first two allegations. *See* 20 U.S.C. § 1415(i)(3)(B)–(C). The

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[1] The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

school district filed a motion to dismiss Count One, and the district court granted the motion.[2]

Counts Two and Three of the complaint alleged discrimination against L in violation of section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § § 12131–12165. The school district filed a motion for summary judgment as to those counts, and the district court granted the motion. The Richardsons appeal.

II.

A.

The Richardsons first argue that the district court erred in granting the school district's motion to dismiss Count One because the district court determined the claim for attorneys' fees was time barred. We review *de novo* the district court's dismissal of the Richardsons' claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Minter v. Bartruff*, 939 F.3d 925, 926 (8th Cir. 2019). To survive a motion to dismiss under Rule 12(b)(6), a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A court may dismiss a claim under Rule 12(b)(6) as barred by the statute of limitations if the complaint itself establishes that the claim is time- barred." *Humphrey v. Eureka Gardens Pub. Facility Bd.*, 891 F.3d 1079, 1081 (8th

[2] In their motion, the school district also moved to dismiss Counts Four through Nine of the complaint, which the district court granted. The Richardsons do not appeal that ruling.

Cir. 2018). We also review *de novo* "the district court's decision to borrow a particular state statute of limitations." *Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850, 854 (8th Cir. 2000).

The IDEA includes a default ninety-day statute of limitations for merits actions after the administrative decision if the relevant state has no explicit time limitation, 20 U.S.C. § 1415(i)(2)(B), but it does not include a statute of limitations for a prevailing party to file a cause of action for attorneys' fees, *see* § 1415(i)(3). The parties dispute what statute of limitations applies. "When a federal law has no statute of limitations, courts may borrow the most closely analogous state statute of limitations, unless doing so would frustrate the policy embodied in the federal law." *Birmingham*, 220 F.3d at 854. "We have not previously determined what state statute is most analogous in this situation . . . ." *Brittany O. v. Bentonville Sch. Dist.*, 683 F. App'x 556, 557–58 (8th Cir. 2017) (per curiam) (declining to reach the issue).

The district court borrowed the ninety-day statute of limitations for merits actions of the administrative decision from Arkansas Code section 6-41-216(g), a provision of the Children with Disabilities Act, *see* Ark. Code § 6-41-201, Arkansas's statutory framework for IDEA compliance. *See* Ark. Code § 6-41-202. If the ninety-day statute of limitations applies, the Richardsons do not contest that the district court properly dismissed their claims.

The Richardsons argue instead that we should borrow a different statute of limitations. They first

point to the four-year statute of limitations in 28 U.S.C. § 1658(a). That statute provides a default four-year statute of limitations for "civil action[s] arising under an Act of Congress" passed after § 1658 was enacted in December 1990. The Richardsons concede that they did not raise this argument before the district court.

Even if the Richardsons did not waive this argument, *but see Cromeans v. Morgan Keegan & Co.*, 859 F.3d 558, 568 n.5 (8th Cir. 2017), it nevertheless fails. As the Richardsons concede, the IDEA provided for a prevailing parent's right to attorneys' fees in 1986, years before § 1658 was enacted. *See* Handicapped Children's Protection Act of 1986 § 2, Pub. L. No. 99-372, 100 Stat. 796. Thus, § 1658's default four-year statute of limitations does not apply.

The Richardsons argue that this reading leads to absurd results because the IDEA did not provide a prevailing school district with a cause of action for attorneys' fees until 2004. In other words, school districts would benefit from the four-year default when seeking an award for attorneys' fees, but parents would not benefit from the same default. Be that as it may, the text of § 1658 is clear. *See D.G. ex rel. LaNisha T. v. New Caney Indep. Sch. Dist.*, 806 F.3d 310, 319 (5th Cir. 2015) ("If the cause of action for attorneys' fees was created after December 1, 1990, the answer would be four years. . . . But . . . the cause of action for attorney's fees under the IDEA was first created in 1986." (internal quotation marks and brackets omitted)).

Next, the Richardsons argue we should borrow Arkansas's three-year statute of limitations for personal injury actions. *See* Ark. Code § 16-56-105. This argument is not without support. Both the Ninth and Eleventh Circuits have borrowed similar, years-long statutes of limitations for a prevailing party's attorneys' fees claim under the IDEA. *See Meridian Joint Sch. Dist. No. 2. v. D.A.*, 792 F.3d 1054, 1064 (9th Cir. 2015); *Zipperer ex rel. Zipperer v. Sch. Bd. of Seminole Cty.*, 111 F.3d 847, 852 & n.9 (11th Cir. 1997).

The Seventh Circuit explained the difficulty in identifying an analogous statute of limitations: "an action for attorneys' fees presents a unique problem in that it may arguably be characterized as either an independent cause of action . . . or as ancillary to the judicial review of the administrative decision." *Powers v. Ind. Dep't of Educ., Div. of Special Educ.*, 61 F.3d 552, 555 (7th Cir. 1995). The Eleventh Circuit noted this difficulty and reasoned that the IDEA "provides two distinguishable causes of action": one for the appeal of a substantive administrative decision and "an independent claim for attorneys' fees." *Zipperer*, 111 F.3d at 851. It rejected the argument that a claim for attorneys' fees "is analogous to the appeal of an administrative hearing" and applied a four-year statute of limitations provided for "actions founded on statutory liability." *Id.* at 850–51. It reasoned that a longer period would "encourage the involvement of parents, as represented by attorneys, in securing appropriate public educations for their children." *Id.*

at 852. It also reasoned that "the resolution of claims for attorneys' fees is less urgent." *Id*. at 851.

Following the Eleventh Circuit's reasoning, the Ninth Circuit concluded that "a request for attorneys' fees under the IDEA is more analogous to an independent claim than an ancillary proceeding." *Meridian Joint Sch. Dist. No. 2*, 792 F.3d at 1063–64. It based its conclusion on the fact that the hearing officer may not award the attorneys' fees. *Id*. at 1064. It noted also that "the adoption of the state law limitations period for judicial review of administrative agency decisions" might mean that the party who prevailed at the administrative hearing would have to determine whether to file an action for attorneys' fees before the party that lost at the administrative hearing decided whether to seek judicial review of the merits of the decision. *Id*. It therefore looked to a three-year statute of limitations for statutory liability actions and a two-year statute of limitations for personal injury actions, declining to decide which applied because it determined that both statutes of limitations were met. *Id*. at 1064 n.9.

By contrast, the Seventh Circuit determined that an action for attorneys' fees is a claim ancillary to the underlying dispute. *Powers*, 61 F.3d at 556. It relied on one of its previous decisions, which noted that "[i]n awarding attorneys' fees, the district court must review not only proceedings in its own court but also proceedings in a state administrative environment, and that a return to such a quagmire months after adjudication of the merits would result in a needless expenditure of judicial energy." *Id*. (alteration in

original and internal quotation marks omitted). It thus looked for a statute of limitations with "some relevance to the administration of the IDEA itself" and ultimately applied the state's thirty-day limitations period for seeking judicial review of administrative decisions in special education matters. *Id.* at 556–58.

The Sixth Circuit agreed with the Seventh Circuit, reasoning that because the only reason a prevailing parent would have "entree to the court is the failure to recover fees incurred in the administrative proceeding, the statutory authorization for the court to award attorney fees . . . must, in this situation, be an authorization for the court to award attorney fees in the administrative proceeding itself." *King ex rel. King v. Floyd Cty. Bd. of Educ.*, 228 F.3d 622, 625–26 (6th Cir. 2000). The Sixth Circuit explained further, "[i]t is difficult for us to conceive of a legislature intentionally authorizing the filing of a fee application up to five years after termination of the proceeding to which the application relates." *Id.* at 626. It applied the state's thirty-day statute of limitations period for an appeal from an administrative order. *Id.* at 624, 627.

We are persuaded by the reasoning in the Sixth and Seventh Circuit decisions. As the D.C. Circuit reasoned when addressing a different question, "a prevailing party's fee request [is] part of the same 'action' as the underlying educational dispute." *Kaseman v. District of Columbia*, 444 F.3d 637, 641 (D.C. Cir. 2006). It explained that "[a] fee request is . . . not a direct appeal of a decision made by the agency at the administrative hearing, as it does not

call into question the child's evaluation or placement." *Id*. at 642. It continued, "[y]et the parent's entitlement to fees arises out of the same controversy and depends entirely on the administrative hearing for its existence." *Id*. In other words, the fee proceeding is ancillary and inherently related to the underlying dispute.

Following this logic, we agree with the district court's decision to borrow the ninety-day statute of limitations for merits actions from Arkansas Code section 6-41-216(g), Arkansas's statutory framework for IDEA compliance, because the claim for attorneys' fees is ancillary to judicial review of the administrative decision. *See C.M. ex rel. J.M. v. Bd. of Educ. of Henderson Cty.*, 241 F.3d 374, 380 (4th Cir. 2001) ("Logic virtually compels the conclusion that a state special education statute, specifically enacted to comply with the IDEA . . . constitutes the state statute most analogous to the IDEA."). Doing so does not frustrate the policy embedded in the federal law, *see Birmingham*, 220 F.3d at 854, particularly in our circuit, where we have held that the statute of limitations period for a prevailing party seeking attorneys' fees does not begin to run "until the 90-day period [expires] for an aggrieved party to challenge the IDEA administrative decision by filing a complaint in court." *Brittany O.*, 683 F. App'x at 558. This means that the Ninth Circuit's concern that the prevailing party would have to determine whether to file an action for attorneys' fees before knowing whether the losing party would seek judicial review of the

administrative decision is likely not an issue in our circuit.

Further, as the Sixth and Seventh Circuits reasoned, when attorneys' fees are at issue, parents of the aggrieved student have already hired a lawyer, so the shorter period does "not run the risk of hurting vulnerable unrepresented parents." *King*, 228 F.3d at 627; *Powers*, 61 F.3d at 558. The parents, school district, and attorneys have an interest "in the expeditious resolution" of the attorneys' fees issue. *Dell v. Bd. of Educ., Twp. High Sch. Dist. 113*, 32 F.3d 1053, 1063 (7th Cir. 1994). "Moreover, by the end of the administrative proceedings and any subsequent judicial review, the parties ought to have a good idea of the extent and quality of representation, and long-term deferral of the issue simply serves no salutary purpose." *Id.* at 1063–64.

The district court thus did not err in applying the ninety-day statute of limitations, and Count One was properly dismissed because the Richardsons' district court complaint was filed after the ninety-day limit.[3]

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[3] The Richardsons argue that our decision in *Birmingham* supports their position. 220 F.3d at 850. In that case, we applied Arkansas's three-year personal injury statute of limitations to a merits action after an adverse decision in an IDEA hearing. *Id.* at 856. We reasoned that a three-year statute of limitations is consistent with IDEA policies but that a thirty-day period was not. *Id.* at 855–56. Since that time, Congress amended the IDEA to provide a default ninety-day period for merits actions of an adverse decision, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, undercutting our reasoning that a shorter period is inconsistent

B.

Second, the Richardsons argue the district court erred in granting the school district's motion for summary judgment. We review a grant of summary judgment "*de novo*, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011). Courts must grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Counts Two and Three of the Richardsons' complaint are raised under section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the ADA, 42 U.S.C. § 12131–12165. "Where alleged ADA and § 504 violations are based on educational services for disabled children, the plaintiff must prove that school officials acted in bad faith or with gross misjudgment." *Birmingham*, 220 F.3d at 856.

"In order to establish bad faith or gross misjudgment, a plaintiff must show that the defendant's conduct departed substantially from accepted professional judgment, practice or standards so as to demonstrate that the persons responsible actually did not base the decision on such a judgment." *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013) (internal quotation

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with the IDEA. And *Birmingham* did not consider the appropriate statute of limitations for a claim for attorneys' fees, nor did it consider Arkansas's Children with Disabilities Act.

marks and brackets omitted). Bad faith or gross misjudgment requires more than "mere non-compliance with the applicable federal statutes." *Id.* The non-compliance "must deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate that the defendant acted with wrongful intent." *Id.*

In its motion for summary judgment, the school district argued that there is no genuine issue of material fact about whether it acted in bad faith or with gross misjudgment with respect to the Richardsons' claim that L was the victim of peer and teacher bullying. The Richardsons argued before the district court that the school district failed to meet its initial burden of proof for summary judgment under Rule 56. They contended in part that Counts Two and Three were also based on the school district's failure to reevaluate L comprehensively and to provide an IEP in addition to their claims that L was subject to peer and teacher bullying. They pointed out that the school district's motion only addressed the bullying arguments, not the other bases they claim to have alleged in Counts Two and Three.

The district court found that the school district had met its initial burden, and we agree. The moving party "bears the initial responsibility of informing the district court of the basis for its motion[] and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477

U.S. 317, 323 (1986) (internal quotation marks omitted). But Rule 56 contains no express or implied requirement "that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id*.

In its statement of undisputed facts in support of its summary judgment motion, the school district stated that the factual allegations underlying Counts Two and Three "are indistinct from the factual allegations regarding bullying that [the Richardsons] pursued at the Hearing." It explained that the hearing officer ultimately rejected the arguments and concluded that the school district complied with the IDEA with respect to the allegations of peer and teacher bullying. It explained further that the Richardsons had "disclosed in discovery no evidence to establish what are accepted professional practices or standards applicable to educators' investigations of or responses to alleged bullying," nor did they provide evidence that the school district substantially departed from such standards. In its brief in support of its motion for summary judgment, the school district argued that it would be "legally untenable" to conclude that the school district acted in bad faith or with gross misjudgment when a hearing officer concluded that they acted in a manner that fully complied with the IDEA.

The Richardsons emphasize on appeal, as they did before the district court, that the school district's motion said nothing about their claims regarding the failure to reevaluate L and to provide an IEP, meaning the school district did not meet its burden under Rule

56. They highlight the fact that the district court considered these claims in its analysis of Counts Two and Three.

But the district court *assumed*, "despite what the Complaint may focus on," that those claims were included as part of Counts Two and Three. Reviewing *de novo*, we are not obligated to adopt such an assumption, and we refuse to do so. The complaint does not support the Richardsons' position that Counts Two and Three are based on an alleged failure to reevaluate L or an alleged failure to provide an IEP. The only hint of these theories is passing statements that were not pleaded as the factual basis for the legal claim and are insufficient to meet our pleading standards. *See Adams v. Am. Family Mut. Ins.*, 813 F.3d 1151, 1154 (8th Cir. 2016) ("A theory of liability that is not alleged or even suggested in the complaint would not put a defendant on fair notice and should be dismissed."); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] district court considering a defendant's motion for summary judgment does not err by disregarding a theory of liability asserted in the plaintiff's response that was not pleaded as required by the applicable pleading standard." *Hoffman v. L & M Arts*, 838 F.3d 568, 576 (5th Cir. 2016); *see also Katsev v. Coleman*, 530 F.2d 176, 179–80 (8th Cir. 1976) (explaining that the district court was not required to consider a new legal theory raised at the summary judgment stage that was not included in the complaint and that the claim could not be asserted on appeal). We thus conclude that these alternative theories of liability under section 504 and the ADA

were not adequately pleaded, so the district court need not have addressed them, and we do not do so now.

The Richardsons nevertheless argue that even if the school district met its burden, there is a genuine dispute of material fact with respect to whether the school district acted in bad faith or with gross misjudgment such that the district court should not have granted the motion for summary judgment. But their brief on appeal cites little, if any, evidence about bullying, instead focusing on their failure to reevaluate and to provide an IEP claims. "We cannot tell whether the district court erred in a ruling if [the plaintiff] does not direct us to a place in the record where we can find it, and so we consider only those contentions that include appropriate citations." *Singer v. Harris*, 897 F.3d 970, 980 (8th Cir. 2018) (alteration in original).

Although they make nearly no argument on appeal that there is a genuine dispute of material fact about whether L was denied FAPE due to bullying, a review of the record confirms the district court's decision. The statement of facts in opposition to the motion for summary judgment that the Richardsons submitted to the district court includes no facts about bullying. It does not even include the words bully or bullying.

Further, the Richardsons do not contest that all the facts about their bullying claims were presented at the administrative hearing. At that hearing, the hearing officer considered evidence about four incidents of alleged bullying. The first incident involved an allegation that a peer was bullying L. When the school

district administrators learned of the event, they called the Richardsons to retrieve L and informed the Richardsons that a teacher had disciplined the child at fault. The second incident involved L reporting that he felt bullied when another student told him to put his name on a class paper. The school administration informed the relevant teacher of the incident. The third incident involved an allegation that L's keyboarding teacher told L to stop moving in his seat when he was experiencing tics. The teacher admitted to L's father that she had told L to stop moving and that she did not know he experienced tics because of Autism Spectrum Disorder. The fourth incident involved allegations that L was bullied in a class where the teacher was nonresponsive to his requests for help, instead telling him to sit in a bean bag chair. The school district administration investigated the situation. The hearing officer concluded that only one incident *might* constitute bullying and that the school district did not deny L FAPE based on the alleged bullying incidents.

We agree with the district court that, when viewed in the light most favorable to the Richardsons, none of the evidence of bullying creates a genuine dispute of material fact about whether the school district acted in bad faith or with gross misjudgment, as required by both section 504 and the ADA. *See B.M. ex rel. Miller*, 732 F.3d at 887 (explaining that § 504 and the ADA do not create general tort liability for educational malpractice and that statutory noncompliance must "deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate

that the defendant acted with wrongful intent"). The district court therefore properly granted summary judgment on Counts Two and Three.

III.

For the foregoing reasons, we affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

CHAD AND TONYA RICHARDSON, Individually, and as Parents and Next Friends of L.,	)	**3:17-CV-03111**
Plaintiffs,	)	
v.	)	
OMAHA SCHOOL DISTRICT,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Now pending before the Court are Defendant Omaha School District's ("the District") Motion for Summary Judgment (Doc. 36), Statement of Facts (Doc. 37), and Brief in Support (Doc. 38); Plaintiffs Chad and Tonya Richardson's Response in Opposition (Doc. 41) and Statement of Facts (Doc. 42); and the District's Reply (Doc. 47). For the reasons explained below, the Motion is **GRANTED.**

I. BACKGROUND

The Richardsons, individually and on behalf of their child, L., filed a due process complaint on November 29, 2016, before the Arkansas Department of Education, concerning claims brought under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*. The Richardsons alleged in their due process complaint that L., while attending school in the District, was denied the right to a free, appropriate public education ("FAPE"). The parties participated in a due process hearing before a hearing officer appointed by the Arkansas Department of Education, and the hearing officer issued his final decision on April 14, 2017.

On July 13, 2017, the Richardsons appealed the hearing officer's decision to this Court in Case No. 3:17-CV-3053. The hearing officer had found in their favor on some of their claims, but in favor of the District on other claims. In particular, the hearing officer concluded that the "District denied [L] FAPE between November 29, 2014 and November 29, 2016 by failing to comprehensively reevaluate [L], as well as failing to provide IEPs ["Individualized Education Program"] reasonably calculated to enable [L] to make progress appropriate in light of his specific circumstances." (Doc. 1-2 at 51). The District was ordered to evaluate L. within the next 30 days "for [the] purpose of obtaining a comprehensive understanding of [L's] academic, social and behavioral deficits" and then "reconvene [L's] IPE team to develop and update [L's] IEP based on the information received from the updated evaluations (regardless of whether [L] is able

to return to school or whether he needs homebound services)." *Id.* at 51–52.

The Richardsons lost before the hearing officer on their claims that peer-bullying and teacher-bullying of L. denied him FAPE under the IDEA. *See id.* at 43. Of the four incidents of bullying raised during the hearing, the hearing officer determined that only one of the incidents actually qualified as bullying. He concluded that, "[r]egardless, all incidents were promptly and thoroughly investigated." *Id.* at 47. The hearing officer then made a finding that the incidents described as "bullying"—and the District's response to those incidents—did not violate the IDEA and "d[id] not constitute a violation of FAPE." *Id.* at 48.

This Court ultimately dismissed Case No. 3:17-CV-3053 without prejudice because the Richardsons never served the Complaint. *See* Doc. 7, Case No. 3:17-CV-3053. Then, on December 4, 2017, the Richardsons filed the instant lawsuit and served it. Eventually, the District and the other defendants who had been named in the Complaint filed a motion for partial dismissal of some of the Richardsons' claims. The Court granted the motion in a Memorandum Opinion and Order issued on March 22, 2018 (Doc. 23).

Count I of the Complaint was dismissed with prejudice, due to the running of the statute of limitations.[1] Counts IV–IX were dismissed without

[1] Count I was a request by the Richardsons for attorney's fees for prevailing at the administrative level on the issue of L. being denied FAPE due to the District's failure to comprehensively evaluate him and provide reasonable IEPs. The Court dismissed

prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. This left for later resolution Counts II and III—which are now the subject of the District's Motion for Summary Judgment.

Count II asserts that the District discriminated against L. in violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 701, *et seq*. ("§ 504"). The Richardsons contend that the District was aware that L. was being bullied by other children and by at least one of his teachers due to his disabilities, but was deliberately indifferent to the bullying and took no steps to protect L. Count III is similar to Count II in that it alleges that the District discriminated against L. in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131–12165. The Richardsons maintain that L. did not receive the same services, programs, and activities that children in the District without disabilities received, due to the fact that L. was subjected to a hostile and bullying environment at school.

Section 504 and the ADA contain exceedingly similar prohibitions on disability discrimination. Section 504 states that "[n]o otherwise qualified individual with a disability in the United States ...

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the request for fees as time-barred, noting that "the parties here are in agreement that a party aggrieved by a hearing officer's findings has a maximum of 90 days to appeal to the district court, or else the findings are deemed final." (Doc. 23 at 7). Since the Court concluded that the Richardsons brought their claim for attorney's fees 144 days after the hearing officer's decision became final, the claim was filed too late and was dismissed with prejudice on that basis. *See id*. at 11.

shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," 29 U.S.C. § 794. The ADA's corresponding language states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity," 42 U.S.C. § 12132.

On summary judgment, the District argues that the Richardsons have produced no evidence from which a jury could reasonably conclude that the District and its staff are liable for violations of the Rehabilitation Act or the ADA by deviating from accepted professional practices or standards in their response to allegations of bullying. The District further contends that there is no evidence to suggest the District acted in bad faith with respect to complaints of bullying or that it engaged in intentional wrongdoing in handling the bullying claims. In making these arguments, the District relies primarily on the administrative hearing officer's decision, which considered and rejected the Richardsons' claims that L. was denied FAPE due to bullying and/or the District's lack of an appropriate response to bullying.

On summary judgment, the Richardsons focus not on bullying, but on the hearing officer's conclusion that the District failed to conduct proper educational assessments and provide IEPs that were suited to L's needs. The Richardsons' briefing makes clear that

they believe Counts II and III do not have much, if anything, to do with bullying. In fact, no facts or legal argument about bullying are contained in their brief and statement of undisputed facts.[2]

Though the Richardsons agree that the District has referred in its opening brief to the facts surrounding the bullying allegations that were developed in the administrative hearing, they think that mere references to the hearing officer's opinion are not enough to meet the District's initial burden under Rule 56. Instead, they argue that the District was obligated on summary judgment to cite to specific "actions taken by the school and its employees, as well as an explanation for the alleged reasonableness of those actions," (Doc. 41 at 5), in order to trigger a fulsome response. To summarize, then, the Richardsons maintain they are not obligated to provide any facts to support their claims on Counts II and III, but if they are wrong and a response is required, the only facts that truly matter are those that show the District's failure to evaluate L. for services and provide him with an appropriate IEP.

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[2] Also attached to their brief are complete transcripts of the depositions of Tonya and Chad Richardson. However, the Richardsons' brief and statement of facts in support of their response to summary judgment fail to cite the Court to any portion of either deposition that refers to bullying. Indeed, the brief cites to *no portion of either parent's testimony at all.* See Doc. 41 at 10 (making only the following oblique reference to the Richardsons' depositions: "*see generally* Ex. B (Deposition of Tonya Richardson); Ex. C (Deposition of Chad Richardson)").

The Court will take up the parties' arguments on summary judgment below.

II. LEGAL STANDARD

A. Summary Judgment

The legal standard for summary judgment is well established. Under Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Court must review the facts in the light most favorable to the opposing party and give that party the benefit of any inferences that can be drawn from those facts. *Canada v. Union Elec.* Co., 135 F.3d 1211, 1212–13 (8th Cir. 1997). The moving party bears the burden of proving the absence of a genuine dispute of material fact and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus.* Co. *v. Zenith Radio Corp.,* 475 U.S. 574, 586–87 (1986); *Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem*. Co., 165 F.3d 602 (8th Cir. 1999).

The movant's initial burden on summary judgment is "far from stringent, for it is sufficient if the movant points out that the record does not contain a genuine issue of material fact and identifies that part of the record which bears out his assertion." *Handeen v. Lemaire,* 112 F.3d 1339, 1346 (8th Cir. 1997) (internal quotation marks and alterations omitted). But "[e]ven when the non-movant bears the burden of proof at trial, simply filing a summary judgment motion does not immediately compel the party opposing the motion to

come forward with evidence demonstrating material issues of fact as to every element of its case." *Id.* (internal quotation marks omitted).

B. Elements of § 504 and ADA Claims

"To prevail on a claim under § 504, a plaintiff must demonstrate that: (1) he is a qualified individual with a disability; (2) he was denied the benefits of a program or activity of a public entity which receives federal funds; and (3) he was discriminated against based on his disability." *Gorman v. Bartch,* 152 F.3d 907, 911 (8th Cir. 1998) (footnote omitted) (citing 29 U.S.C. § 794(a)). Section 504 requires that "'a person's disability serve as the *sole* impetus for a defendant's adverse action against the plaintiff,'" *Wojewski v. Rapid City Reg'l Hosp., Inc.,* 450 F.3d 338, 344 (8th Cir. 2006) (emphasis in original). "Although the ADA has no federal funding requirement, it is otherwise similar in substance to the Rehabilitation Act, and cases interpreting either are applicable and interchangeable." *Wojewski,* 450 F.3d at 344 (internal quotation marks omitted); *see also Hoekstra by & through Hoekstra v. lndep. Sch. Dist. No. 283,* 103 F.3d 624, 626 (8th Cir. 1996) ("[E]nforcement remedies, procedures and rights under Title II of the ADA are the same as under § 504[.]").

When both § 504 and ADA claims are asserted against a defendant based on a failure to provide educational services for a disabled child, "the plaintiff must prove that school officials acted in bad faith or with gross misjudgment." *Birmingham v. Omaha Sch. Dist.,* 220 F.3d 850, 856 (8th Cir. 2000). In order to

establish bad faith or gross misjudgment, a plaintiff must show that the defendant's conduct "depart[ed] substantially from 'accepted professional judgment, practice or standards [so] as to demonstrate that the person[s] responsible actually did not base the decision on such a judgment.'" *B.M. ex rel. Miller v.* S. *Callaway R-11 Sch. Dist.,* 732 F.3d 882, 887 (8th Cir. 2013) (internal citations omitted; alterations in original). As the Eighth Circuit has explained:

> Because the ADA and § 504 do not create general tort liability for educational malpractice, bad faith or gross misjudgment requires something more than mere non-compliance with the applicable federal statutes. The defendant's statutory non-compliance must deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate that the defendant acted with wrongful intent.

Id. (internal citations omitted and cleaned up).

Further, to recover compensatory damages under § 504 or the ADA, a plaintiff must establish discriminatory intent. *Meagley v. City of Little Rock,* 639 F.3d 384, 389 (8th Cir. 2011) (holding discriminatory intent may be inferred by deliberate indifference to the fact a given action will result in violation of federally protected rights). And even though neither § 504 nor the ADA contains an exhaustion requirement, if a plaintiff brings a claim under either statute seeking relief that is available

under the IDEA, the plaintiff must first exhaust the administrative remedies available under the IDEA before filing suit in court. *B.M. ex rel. Miller*, 732 F.3d at 886 n.3.

III. DISCUSSION

A. The District's Initial Burden of Proof Under Rule 56

A threshold issue to address is the Richardsons' argument that the District failed to meet its initial burden of proof under Rule 56, such that the Richardsons were not even obligated to respond to the motion with their own interpretation of the facts and their own legal arguments to justify denying the request for summary judgment. *See* Doc. 41 at 5–6.

The only claims left in the case, Counts II and III, do appear to turn on the Richardsons' assertion that L. was bullied by other students and perhaps some teachers, and that the bullying and the District's lack of appropriate response constituted disability discrimination in violation of § 504 and the ADA. However, the Richardsons maintain on summary judgment that there is more to their § 504 and ADA discrimination claims than just the bullying allegations. At the same time, the Richardsons do not dispute the District's statement that all facts about bullying and the District's response to bullying were raised during the administrative hearing, and no new facts about bullying have been revealed since then. The Richardsons do not discuss the alleged bullying incidents in their brief, and they do not attempt to add new facts about bullying to the summary judgment

record, other than the facts that are recited in the hearing officer's opinion. The hearing officer made specific findings about bullying in his opinion, concluding that those allegations did not amount to a violation of the IDEA or a deprivation of FAPE. Presumably, the Richardsons disagree with that conclusion, but they offer no facts and no legal argument to counter it.

The District begins its brief in support of summary judgment by observing that the facts about bullying that exist in the administrative record are the *only facts* about bullying that support Counts II and III. The District then goes on to explain why those same facts are insufficient to establish a violation of § 504 or the ADA as a matter of law. All of that is enough to meet the District's initial burden on summary judgment. In citing to the facts on bullying that exist in the administrative record, the District has made an adequate "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B).

B. The Nature of the Discrimination Claims in Counts II and III

Another threshold issue is whether the disability discrimination alleged in Counts II and III of the Complaint refers only to bullying, or refers to bullying and something else. The Richardsons criticize the District's "laser-focus on bullying" and contend that the District has ignored their other proof supporting

Counts II and III, namely, the District's "innumerable failures in providing an education to L. as required by law." (Doc. 41 at 8). It appears the Richardsons have assumed-without explanation-that these educational failures amount to violations of § 504 and the ADA. But the Complaint at Counts II and III certainly makes claims about bullying. Paragraph 62, describing Count II, states: "The frequency and extent *of the disability-based abuse L. suffered at the hands of his peers and teachers* denied L. full participation and benefits of his education." (Doc. 1 at 15 (emphasis added)). Paragraph 64, also describing Count II, identifies the source of the disability discrimination alleged as peer-to-peer and teacher-to-student bullying: "L. was being discriminated against based on his disability, *by his peers and teachers;* yet the school district was deliberately indifferent to the discrimination." *Id.* at 16 (emphasis added). Moreover, although Count II mentions the fact that L. "required language and other related services to address his disabilities," the Complaint does not claim that L. suffered disability-based discrimination as a result of the District's failure to provide those services; instead, the Complaint explains that the reason why "L. failed to benefit educationally and his skills actually regressed" was *"because of the abuse, torment and harassment by his peers* which increased as he progressed through school." *Id.* at 14 (emphasis added).

Turning to Count III, which charges disability discrimination under the ADA, Paragraph 74 of the Complaint states: "The District has failed their responsibilities under Title II to provide services,

programs, and activities in a full and equal manner to L. and *free from abuse, oppression, discrimination, and exclusion as a result of his disabilities."* *Id.* at 18. Then, Paragraph 75 states: 'The Third-Party Defendant District has further failed their responsibilities under Title II to provide services, programs, and activities in a full and equal manner to children with disabilities and specifically L., as described herein *by subjecting L to an oppressive, inappropriate, hostile, and abusive educational environment* solely based on his disability." *Id.* (emphasis added).

The Richardsons contend that (despite what the Complaint may focus on) the District's failure to comprehensively evaluate L. for services and provide him with IEPs reasonably calculated to enable him to make educational progress was what actually violated § 504 and the ADA. Therefore, in ruling on the District's motion for summary judgment, the Court will assume that the bullying claims and the "failure to educate" claims explained in the hearing officer's opinion form twin bases for the substantive law violations asserted in Counts II and III.

With all of that said, what the Court will *not* consider is the Richardsons' contention that the instant claims against the District arise out of the District's "failure to develop or otherwise implement an appropriate IEP as directed by the hearing officer" *after the hearing officer's decision was published.* (Doc. 41 at 8). According to the Richardsons, these new failures on the part of the District include not implementing appropriate IEPs *after the hearing*

officer directed the District to do so, see id. at 8–9, and not providing L. with homebound services, appropriate homework, benchmark testing, or subject-by- subject grade level assessments *after the time period considered by the hearing officer in the context of the administrative hearing, see id.* at 9–10.

Even though neither § 504 nor the ADA contains an exhaustion requirement, the law is clear that "a party must exhaust the administrative remedies available under the IDEA before bringing a claim under a different statute seeking relief that is also available under the IDEA." *B.M. ex rel. Miller,* 732 F.3d at 886 (citing *J.B. ex rel. Bailey v. Avilla R- XIII Sch. Dist.,* 721 F.3d 588, 592 (8th Cir. 2013)); see also 20 U.S.C. 1415(1) ("Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.").

The Richardsons' post-hearing claims about violations of § 504 and the ADA must be exhausted in a separate administrative hearing before the Arkansas Department of Education before those claims may be brought to federal court. The Richardsons advised the Court in another document filed of record (Doc. 52, Plaintiffs' Reply in Support of

Motion for Leave to Amend Complaint) that they had already submitted a second due process complaint (Doc. 48-1) to the Arkansas Department of Education, listing all the District's alleged failures to comply with the hearing officer's order after the decision was issued.[3] The Richardsons explained that they believed they were required to file this second due process complaint "to preserve their rights." (Doc. 52 at 3). The Court agrees.

According to the Supreme Court's decision in *Fry v. Napoleon Community Schools,* 137 S. Ct. 743, 755 (2017), when "the gravamen of a complaint seeks redress for a school's failure to provide a FAPE," even if the claims are brought under a statute other than the IDEA (such as § 504 of the Rehabilitation Act or the ADA), the claims must first be exhausted in an administrative hearing before being brought to court, as per Section 1415(I) of the IDEA. The *Fry* Court pointed out that "a plaintiff's initial pursuit of the IDEA's administrative remedies can serve as evidence that the gravamen of her later suit is the denial of a FAPE, even though that does not appear on the face of her complaint." *Id.* at 758. So, it follows that a plaintiff

> cannot escape § 1415(I) merely by bringing her suit under a statute other than the IDEA-as when, for example, the

[3] In fact, all the facts listed in the Richardson's response to summary judgment that cover the time period after the hearing officer's decision appear, verbatim, in the second due process complaint. *See* Doc. 48-1 at 6–7.

> plaintiffs in *Smith* [4] claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act. Rather, that plaintiff must first submit her case to an IDEA hearing officer, experienced in addressing exactly the issues she raises. But if, in a suit brought under a different statute, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required.

Id. at 754.

In the case at bar, the new, post-hearing claims asserted by the Richardsons are not distinctly§ 504 or ADA claims, but instead bear a close resemblance to their IDEA claims brought in the first administrative hearing, in that both their first and second due process complaints raise issues about the adequacy of L.'s IEPs and the District's evaluation process for the provision of special education services. Moreover, the second due process complaint flows logically from the first one, as the second complaint alleges the District failed to do all the things the hearing officer ordered it to do after the first complaint was resolved.

To discern whether "the gravamen" of the Richardsons' new claim—though maintained under statutes other than the IDEA—require that they be brought before an IDEA hearing officer before being

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[4] *Smith v. Robinson*, 468 U.S. 992 (1984).

filed in court, the following passage from *Fry* is instructive:

> One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

Id. at 756 (emphasis in original).

Under the instant facts, the hypothetical questions above must be answered in the negative. That further convinces the Court that the Richardsons' post-hearing claims must first be exhausted before the Arkansas Department of Education before being heard by this Court. For all these reasons, the Court finds that Counts II and III of the Complaint are premised on facts concerning: (1) the alleged bullying of L. and the District's response to such bullying and (2) the District's alleged failure to comprehensively evaluate L. and provide reasonable IEPs during the time period that was considered by the administrative hearing officer with respect to the first due process complaint.

1. Bullying

In the District's summary judgment brief, it cites to the hearing officer's summary of the incidents of bullying claimed by the Richardsons, as well as the District's response or lack of response to the bullying. The District then argues that these facts are insufficient to establish any genuine, material question of liability for violations of § 504 or the ADA. As the Court observed previously, citing to the hearing officer's record of the facts was sufficient to meet the District's initial burden on Rule 56. The burden then shifted to the Richardsons to "discard the shielding cloak of formal allegations and meet proof with proof" as to the bullying claims. *Conseco Life Ins.* Co. *v. Williams,* 620 F.3d 902, 909 (8th Cir. 2010) (quotation and citation omitted).

Before examining the Richardsons' proof, the Court turns to the District's argument about the preclusive

effect the Court ought to give to the hearing officer's findings about bullying. The District argues that since the hearing officer found that the bullying allegations did not amount to a violation of the IDEA and a denial of FAPE, the Court should give those findings preclusive effect with respect to the claims in Counts II and III, since the hearing officer's decision was not successfully appealed by the Richardsons and is now to be considered "final." Though the District's argument is an interesting one, there is no need for the Court to take it up here. The Richardsons' response to summary judgment—or lack thereof—provides enough basis for the Court to find that they failed to meet their burden under Rule 56 to establish the existence of any genuine, material dispute of fact regarding bullying that would demonstrate that "school officials acted in bad faith or with gross misjudgment." *Birmingham,* 220 F.3d at 856.

In particular, the Richardsons' statement of facts (Doc. 42) contains no facts about bullying or facts that purport to show that L. suffered a hostile and abusive environment at school. Tonya Richardson's affidavit (Doc. 42-1) states nothing about bullying. Her affidavit is confined to facts showing how the District allegedly failed in its educational obligations to L. after the hearing officer issued his opinion. *Id.* Mrs. Richardson's ninety-three-page deposition (Doc. 42-2) and Mr. Chad Richardson's fifty-one-page deposition (Doc. 42-3) are attached to the brief in opposition to summary judgment, but the brief itself does not refer the Court to any portion of either deposition. As the Seventh Circuit observed, "[j]udges are not like pigs,

hunting for truffles buried in briefs," *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991) (per curiam), and they "need not excavate masses of papers in search of revealing tidbits—not only because the rules of procedure place the burden on the litigants, but also because their time is scarce," *Northwestern Nat'l Ins.* Co. *v. Baltes,* 15 F.3d 660, 662–63 (7th Cir. 1994).

Another item attached to the brief is an expert report by Dr. Howard M. Knoff (Doc. 42-4), which is also the subject of a *Daubert* motion filed by the District (Doc. 49). Without deciding the admissibility of Dr. Knoff's opinions or ruling on the *Daubert* motion, the Court notes that the report is sixty-three pages long, and, again, *no portion of it* is discussed in the Richardsons' brief. In fact, the only reference to the report appears in the last sentence of the brief, just before the "Conclusion" section, as follows: *"See generally* Ex. D (Expert Report), at 48–57 (describing the specific and pervasive failures of the District in this case, as well as the proper practices and standards)." (Doc. 41 at 10). Any facts about bullying cited in Dr. Knoff's report are lifted, verbatim, from the hearing officer's opinion. As Dr. Knoff was not an eyewitness to any of the bullying incidents and is not qualified to offer legal opinions, the report itself cannot serve as a proxy for the Richardson's lack of response on summary judgment.

Left only with the facts about bullying as recounted by the hearing officer, the Court finds that those facts, when taken in the light most favorable to the Richardsons, do not establish a violation of § 504 or the ADA as a matter of law. As previously stated, to

prove § 504 and ADA claims based on educational services for a disabled child, there must be evidence that "school officials acted in bad faith or with gross misjudgment." *Birmingham v. Omaha Sch. Dist.,* 220 F.3d 850, 856 (8th Cir. 2000). In order to avoid summary judgment, the Richardsons must raise a genuine, material question of fact that shows that the District's conduct in response to allegations of bullying "depart[ed] substantially from 'accepted professional judgment, practice or standards [so] as to demonstrate that the person[s] responsible actually did not base the decision on such a judgment.'" *B.M. ex rel. Miller v.* S. *Callaway R-11 Sch. Dist.,* 732 F.3d 882, 887 (8th Cir. 2013) (internal citations omitted; alterations in original).

The record reveals there were four incidents of alleged bullying. (Doc. 1-2 at 44–45). They are summarized by the hearing officer in his opinion as follows:

(1) "[L.] was bullied by another peer. The incident upset [L.], and Hicks [L.'s science teacher] called Parents to request that they pick up [L.] from school. When Parents arrived to pick up [L.], Hicks told Parent (father) that another Student had picked on [L.] and that another teacher, Robinson, had disciplined the child at fault. Hicks assured Parent (father) that steps would be taken to ensure that there were no other similar incidents."

(2) "[D]uring the first week of October, 2016, [L.] told Hicks that he felt bullied by another

Student. When asked details about the incident, [L.] told Hicks that another peer had told [L.] that he needed to put his name on a class paper. Hicks took action and informed the appropriate teacher of the incident."

(3) "Parents assert that [L.] was bullied in keyboarding class by his keyboarding teacher, Perry. There was testimony that [L.] was experiencing tics in class and Perry instructed [L.] to stop moving in his seat. Parent (father) testified that he went to the school on October 3, 2016 to address this issue with Perry. In discussing the issue with Parent (father), Perry admitted that she had told [L.] to stop moving in his seat. She explained that she did not know that [L.] had a diagnosis of Autism Spectrum Disorder."

(4) "Parents alleged that [L.] was being picked on in Dillon's class and that Dillon was non-responsive to [L.'s] requests for assistance. Parents also alleged that Dillon required [L.] to sit on a bean bag chair in her classroom when [L.] continued to tell Dillon that he was being bullied."

Id. at 45.

The Court, having reviewed all the facts surrounding these incidents, as set forth in detail by the hearing officer, finds that none of these incidents demonstrates bad faith or gross misjudgment by District staff or administrators. None of the incidents, even assuming they happened exactly as the hearing

officer recounted, create a jury question as to a possible violation of § 504 or the ADA. The Richardsons elected on summary judgment to rest only on the facts on bullying as recounted by the hearing officer, and those facts simply do not form a basis for liability as to either Count II or Count III.

2. Failure to Comprehensively Evaluate L and Provide Reasonable IEPs

The Richardsons also argue that the District violated § 504 and the ADA when it failed to provide L. with adequate IEPs, educational services, evaluations, and programming suited to his capabilities and in line with his disabilities. The Court views the facts surrounding these claims as temporally limited. *See* Section III.B., *supra.* The Court will therefore consider whether the failure to provide adequate IEPs, educational services, evaluation, and programming during the time period *prior to* the hearing officer's issuance of his opinion could potentially constitute a violation of § 504 or the ADA as a matter of law.

The Court assumes for purposes of summary judgment that the District violated the IDEA and failed to provide L. with FAPE, just as the hearing officer found in his opinion. The legal question is whether there are any facts in the summary judgment record to show that the District did "something more" than merely fail to comply with the IDEA. For liability to attach under both § 504 and the ADA, "[t]he defendant's statutory non-compliance must deviate so substantially from accepted professional judgment,

practice, or standards as to demonstrate that the defendant acted with wrongful intent." *B.M. ex rel. Miller*, 732 F.3d at 887.

The Richardsons contend that the facts that prove the District's "failure to educate, specifically a failure to conduct necessary evaluations and to develop and implement an appropriate IEP," (Doc. 41 at 5), are sufficient to create a jury question as to whether the District violated § 504 and the ADA. The Court disagrees. The Richardsons have pointed to no facts in the summary judgment record that, even when taken in the light most favorable to them, would indicate that any District staff member or administrator acted in bad faith or with wrongful intent to violate the IDEA in failing to comprehensively evaluate L. and provide IEPs reasonably calculated to enable him to make academic progress. The facts at most indicate the District's statutory non-compliance with the IDEA, which is not the same as intentional discrimination. Ordinary negligence on the part of educators is insufficient as a matter of law to establish a genuine, material dispute of fact as to a § 504 or ADA violation. *Birmingham,* 220 F.3d at 856 (defining the legal standard as bad faith or gross misjudgment).

IV. CONCLUSION

For all the reasons explained herein, **IT IS ORDERED** that Defendant Omaha School District's Motion for Summary Judgment (Doc. 36) is **GRANTED,** and the case is **DISMISSED WITH**

PREJUDICE. Judgment shall enter concurrently with this Order.

IT IS FURTHER ORDERED that all other pending motions are **MOOT.**

IT IS SO ORDERED on this 30th day of April, 2019.

/s/Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

CHAD AND TONYA RICHARDSON, Individually and As Parents and Next Friends of L. — **PLAINTIFFS**

V. **CASE NO. 3:17-CV-03111**

OMAHA SCHOOL DISTRICT; JACOB SHERWOOD, Superintendent; AMANDA GREEN, Principal; and DAWN DILLON, Teacher — **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

Currently before the Court are a Motion for Partial Dismissal (Doc. 5) and Brief in Support (Doc. 6) filed by Defendants Omaha School District, Jacob Sherwood, Amanda Green, and Dawn Dillon; a Response in Opposition (Doc. 12) and Brief in Support (Doc. 13) filed by Plaintiffs Chad and Tonya Richardson; and Defendants' Reply (Doc. 18). On February 12, 2018, the Court held a hearing on the Motion, and the parties had the opportunity to present oral argument. For the reasons given below, the Motion for Partial Dismissal (Doc. 5) is **GRANTED**.

I. BACKGROUND

This lawsuit arises from an administrative appeal of claims made before the Arkansas Department of Education ("ADE") by a disabled student, "L" ("Student"), who attended school in the Omaha School District ("the District"). Plaintiffs filed a due process complaint before the ADE on November 19, 2016, alleging that the District had failed to provide Student with a free, appropriate public education, in violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*. The parties participated in a hearing before a hearing officer appointed by the ADE, and the hearing officer issued her Final Decision and Order on the due process complaint on April 14, 2017. *See* Doc. 1-2.

On July 13, 2017, Plaintiffs filed a lawsuit in this Court, seeking judicial review of the hearing officer's decision. Plaintiffs asserted a single claim in that lawsuit, and hereafter, the Court will refer to this earlier-filed case as "*Richardson I*." *See* Case No. 3:17-CV-3053. In *Richardson I*, Plaintiffs' counsel argued that although Student and his parents had prevailed on some issues before the hearing officer, they had lost on other issues. Therefore, for purposes of the administrative appeal, Plaintiffs wished the Court to consider them the "aggrieved party," as that term is defined in the IDEA. *See* 20 U.S.C. § 1415(i)(2)(A) ("Any party aggrieved by the [hearing officer's] findings and decision . . . [has] the right to bring a civil action with respect to the complaint.").

Plaintiffs argued in *Richardson I* that the hearing officer found that the District had committed certain wrongdoing with respect to Student's educational plan, and the hearing officer made the following findings in Plaintiffs' favor: (1) the District failed to conduct a comprehensive evaluation of Student, (2) the District provided Student with inappropriate Individual Education Plans ("IEPs") for three consecutive years while Student was enrolled in school, (3) Student regressed in the last two years he was in school, (4) Student's IEPs were not reasonably calculated to enable him to make appropriate progress, and (5) Student's IEPs lacked provisions for social skills training and social skills goals.

Despite these favorable findings, Plaintiffs disagreed with certain other findings the hearing officer made, which were *not* in their favor, including that: (1) the District had educated Student in the least restrictive learning environment, and (2) the District provided an appropriate education to Student while the administrative appeal was pending. The Court also believes it likely that Plaintiffs disagreed with some of the hearing officer's key factual findings in *Richardson I*, namely, that Student's teacher, Dawn Dillon, did *not* bully Student or allow bullying in her class, and that Superintendent Jacob Sherwood and Principal Amanda Green conducted thorough investigations into Student's bullying allegations.

Richardson I was ultimately dismissed because Plaintiffs never served the District with the complaint. The Court dismissed the case without prejudice on November 8, 2017. The Court noted in its dismissal

order that it appeared that Plaintiffs might be barred from refiling their IDEA claim due to the running of the statute of limitations, as Plaintiffs' counsel had filed *Richardson I* on the last day of the 90-day deadline to appeal the hearing officer's decision. *See* Doc. 7, Case No. 3:17-CV-3053.

Nonetheless, on December 4, 2017—nearly a month after *Richardson I* was dismissed—Plaintiffs filed the instant case, which the Court will call "*Richardson II*." *Richardson II* is different than *Richardson I*, at least in terms of the causes of action asserted and the defendants sued. Whereas *Richardson I* characterized Plaintiffs as the "aggrieved party" and requested district court review of the hearing officer's substantive findings, *Richardson II* does not request such review (as it is time-barred) and instead asserts in Count I that Plaintiffs were the "prevailing party" at the administrative level and are now entitled to attorney fees. *Richardson II* names not only the District as a Defendant, but also Jacob Sherwood, who is the District's Superintendent and the CEO of the District's Board of Education, Amanda Green, who is Principal of Omaha Elementary School, where Student attended, and Dawn Dillon, who was Student's fifth and sixth grade science teacher. In addition, the Complaint now before the Court in *Richardson II* provides more details about Student and his educational experiences than *Richardson I*, as well as eight new causes of action.

In particular, Count II of the *Richardson II* Complaint alleges that the District discriminated against Student in violation of the Rehabilitation Act,

29 U.S.C. § 701, *et seq*. Plaintiffs believe the District had knowledge that other children were bullying Student because of his disabilities, but the District took no steps to protect him. Plaintiffs therefore accuse the District of being deliberately indifferent to the bullying.

Count III is similar to Count II in that it alleges that the District discriminated against Student in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131–12165, in that Student did not receive the same services, programs, and activities that children without disabilities received, due to the fact that Student was subjected to a hostile and bullying environment at school, and the District failed to stop it.

Count IV is a 42 U.S.C. § 1983 claim based on "state-created danger," and is asserted against the District and Defendants Sherwood, Green, and Dillon, in their individual and official capacities. The "state-created danger" described here is the bullying.

Count V is another Section 1983 claim for "supervisory liability for participation in and encouragement of unconstitutional misconduct by subordinates"—another Due Process claim. *See* Doc. 1 at 21. This claim is asserted against Sherwood, who has supervisory authority over all District employees, and against Green, who has supervisory authority over Dillon. Plaintiffs' legal theory in Count V is that Sherwood and Green knew, or should have known, that their subordinates were "unconstitutionally placing L in a place of harm where he would be

subjected to ongoing, and targeted bullying and the resulting foreseeable deprivations of L's Constitutional rights to a public education, to bodily integrity, to be secure and to be left alone free from bullying and harassment, and to substantive due process under the Fourteenth Amendment to the Constitution of the United States." *Id.* at 22. Count V also cites the District's failure to investigate an incident that took place at school on October 6, 2016, when Student had a major seizure in Dillon's science class and never came back to school after that. Plaintiffs complain that the District failed to enforce its no-bullying policies, was deliberately indifferent to bullying, refused to implement effective bullying-prevention strategies, and tacitly authorized bullying in the schools through inaction.

Count VI is another Section 1983 claim, lodged only against the District, for denial of Due Process due to the District's alleged failure to train and supervise its teachers to prevent and stop bullying.

Count VII is similar to Count VI, in that Count VII is also a Section 1983 claim lodged against the District for having a policy, custom, or practice of failing to respond to or prevent bullying in its schools. The Count claims there is a persistent pattern of inappropriate responses to bullying by the District, but offers no specific examples of such bullying other than Student's.

Count VIII is for punitive damages against all Defendants, as Plaintiffs maintain that all Defendants committed willful, wanton, and malicious acts against

Student; and Count IX is the state law tort of intentional infliction of emotional distress, again asserted against all Defendants.

Defendants jointly filed a Motion for Partial Dismissal (Doc. 5), seeking to dismiss all Counts but II and III. In addition, or perhaps in the alternative, Defendants argue that the individual Defendants are entitled to qualified immunity. The Motion is now ripe for consideration.

II. LEGAL STANDARD

To survive a motion to dismiss, a pleading must provide "a short and plain statement of the claim that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of this requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Court must accept as true all factual allegations set forth in the Complaint by the plaintiff, drawing all reasonable inferences in the plaintiff's favor. *See Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

However, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic

recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* In other words, "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

III. DISCUSSION

A. Count I: Attorney Fees for Prevailing at the Administrative Level

Defendants argue that Count I, in which Plaintiffs request attorney fees for prevailing at the administrative level, should be dismissed as time-barred. The Eighth Circuit has yet to announce a particular deadline by which a prevailing party must file a request for attorney fees related to work incurred at the administrative level on an IDEA claim. Certainly, the parties here are in agreement that a party aggrieved by a hearing officer's findings has a maximum of 90 days to appeal to the district court, or else the findings are deemed final. But how long should the prevailing party have *after the findings are deemed final* to request attorney fees from the district court?[1] Plaintiffs argue they should have three years to request such fees, while Defendants argue they should have 90 days. In the absence of Eighth Circuit

[1] Under the IDEA, a party is considered to have "prevailed" "if it succeeded on any significant issue which achieved some of the benefit it sought." *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1377 (8th Cir. 1996).

guidance, this Court must arrive at a reasonable decision on its own.

In the case at bar, the hearing officer's final decision was entered on April 14, 2017. The aggrieved party then had 90 days to appeal the decision—or until July 13, 2017. *See Brittany O v. Bentonville Sch. Dist.*, 683 F. App'x 556, 557 (8th Cir. 2017) (per curiam) (finding that in Arkansas, "any party aggrieved . . . shall have 90 days from the date of the hearing officer's decision to bring a civil action in a court of competent jurisdiction pursuant to the IDEA"). Plaintiffs never successfully appealed the hearing officer's final decision. They filed *Richardson I*, but they never served it, and it was dismissed by the Court. Therefore, in the absence of any ongoing appeal, the hearing officer's decision became final as of July 13. Defendants contend that if Plaintiffs had determined that they did, in fact, prevail at the administrative level, they were required to request attorney fees of the district court no later than 90 days after the hearing officer's decision became final, or by October 11, 2017. Instead, Plaintiffs filed their fee request in the instant case on December 4, 2017.

Although Defendants concede that the IDEA doesn't expressly state when a prevailing party must make its request for fees, they believe the Eighth Circuit in *Brittany O v. Bentonville School District* tacitly agreed—or at least did not explicitly disagree with the district court's opinion in that case—that the same 90-day statute of limitations that applies to filing IDEA appeals should also apply to filing requests for attorney fees. In *Brittany O.*, the Eighth Circuit

specifically stated that it "need not decide" the appropriate statute of limitations applicable to a request for attorney fees pursuant to the IDEA. 683 Fed. App'x at 558. At the same time, the Eighth Circuit did not explicitly overrule the reasoning of the Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas, who analyzed the issue at an earlier stage of the litigation and came to the conclusion that a 90-day limitations period for filing attorney fee claims was reasonable. *See Brittany O. v. Bentonville Sch. Dist.*, 2015 WL 284971, at *6–7 (E.D. Ark. Jan. 22, 2015).

Judge Holmes drew insight from opinions authored by the Sixth and Seventh Circuits and found that "a claim for attorneys' fees arising out of a due process hearing under the IDEA is ancillary to the administrative action and therefore should be governed by the state statute of limitations that governs appeals from administrative decisions." *Id.* at *6 (citing *King v. Floyd Cnty. Bd. of Educ.*, 228 F.3d 622, 625–26 (6th Cir. 2000); *Powers v. Ind. Dep't of Educ.*, 61 F.3d 552, 556–59 (7th Cir. 1995)). Judge Holmes reasoned that adopting plaintiff Brittany O.'s suggested three-year statute of limitations to file an attorney fee claim—which Plaintiffs also suggest in the case at bar—

> would create a risk of piecemeal litigation inasmuch as, on that argument, as to the issues on which the party to a due process hearing is aggrieved, an action must be brought within ninety days of the hearing officer's decision, whereas a claim for attorneys' fees arising out of the same hearing could

> be commenced as much as three years after the decision.

Id. at *7.

He then quoted a district court of Massachusetts case, *B.D. ex rel. Doucette v. Georgetown Public School District*, 2012 WL 4482152, at *9 (D. Mass. Sept. 27, 2012), for the following logical proposition:

> "There is no good reason why the statute of limitations for an action to recover fees that depend upon an agency's decision, should be longer than an appeal of the merits of the decision itself."

Brittany O., 2015 WL 284971, at *7 (quoting *Doucette*, 2012 WL 4482152, at *9). Accordingly, Judge Holmes determined that a 90-day statute of limitations was "ample time for the parents to prepare a claim for attorneys' fees and present it to the district court," particularly given the fact that 90 days "is specific to claims under the IDEA" and "will avoid piecemeal litigation and ensure that all claims related to the due process hearing would be brought in a single action." *Id.* at *7.

This Court agrees with Judge Holmes' reasoning as to the appropriate limitations period for a prevailing party to file a claim for fees, subsequent to an IDEA administrative hearing. Simply put, it defies logic that the time to file a claim for fees would be longer than the time to file a substantive appeal of the hearing officer's decision. A claim for fees is merely ancillary to the administrative action itself, and it follows that, if anything, a prevailing party should be required to file his claims for fees *in less time* than he

did the underlying appeal—but certainly not more. As the Court of Appeals has already approved a 90-day limitation period for filing an underlying appeal, this Court finds that a 90-day limitation period for filing a claim for fees is eminently fair and reasonable, and also promotes judicial efficiency and encourages the swift administration of justice and the preservation of evidence. This is because attorney fee claims cannot be evaluated in a vacuum, but instead must be tested for reasonableness in the context of the work performed by the attorney at the administrative level below. The time to file a claim for fees for prevailing at the administrative level should correlate closely to the time to file an appeal of the hearing officer's final decision, so there are no significant gaps in time between the district court's consideration of the merits decision and the fee decision.

Since Plaintiffs' claim for attorney fees in the case at bar was brought 144 days after the hearing officer's decision became final, it was brought too late. Count I is time-barred and will be dismissed with prejudice.

B. Count IV: State-Created Danger

Count IV is a 42 U.S.C. § 1983 claim based on "state-created danger," against the District and Defendants Sherwood, Green, and Dillon, in their individual and official capacities. To prevail on a state-created danger claim under Section 1983, a plaintiff must demonstrate: (1) that he is a member of a limited, precisely-definable group; (2) that the defendants' conduct put him at significant risk of serious, immediate, and proximate harm; (3) that the risk of

harm was obvious or known to the defendants; (4) that the defendants acted recklessly in conscious disregard of the risk; and (5) that the defendants did so in a way that shocks the conscience. *See Avalos v. City of Glenwood*, 382 F.3d 792, 798–90 (8th Cir. 2004) (internal citations omitted).

Here, assuming for the sake of argument that Student qualifies under the first part of the *Avalos* test as "a member of a limited, precisely definable group," the Complaint fails to allege any facts that would show that any Defendant acted affirmatively and recklessly to put Student at serious risk of harm, in a manner that would shock the conscience.

Defendants cite to an analogous school-bullying case out of the Third Circuit called *Morrow v. Balaski*, 719 F.3d 160, 164 (3d Cir. 2013). In that case, parents of two bullied children sued the school under Section 1983 on a state-created danger theory, and the case was dismissed because the court found that *the school* did not create the danger to the students. *The bully* did. *See id.* at 176 (finding that child bullies did not act under authority delegated by the school or exercise coercive power with significant encouragement from the school; and even if the school's response to the bullying "may well have been . . . inadequate," no constitutional remedy existed). The Third Circuit further held that a school's "passive inaction" in the face of bullying, either by not enforcing a no-bullying policy or in failing to effectively stop individual bullying, was not the same as the school committing an affirmative act to create a danger to a student. *See id.* at 179.

Even if the Court were to assume the allegations in the Complaint are true, they fail to establish facts sufficient to show that the District or any of its employees acted in a manner that was reckless, rather than negligent, and that the actions shocked the conscience. Plaintiffs maintain that Defendants knew or should have known that "a culture of bullying existed within the School District and specifically at Omaha Elementary School." (Doc. 1, p. 19). They also charge Defendants with knowing that Student was "the victim of daily abuse, harassment, and torment by his classmates for years," *id.* at 20, and that teachers discouraged Student from reporting the abuse by calling him a "tattletale" and "refusing to take corrective action once the bullying was reported," *id.* Importantly, the specific incidents of bullying described in the Complaint are limited to classmates calling Student names or generally "ridicul[ing] him and mak[ing] fun of him," *id.* at 6, and a single teacher—or perhaps more than one teacher, as the Complaint is unclear on this point—either calling Student a tattletale for reporting the bullying, *id* at 7–8, or "forcing L to sit in a beanbag chair in the middle of the classroom," *id.* at 8. Aside from being far from conscience-shocking, such incidents of "bullying" by teachers and administrators are described in a vague and conclusory manner, unsupported by actual facts.

During the Motion hearing, the Court informed counsel for Plaintiffs that it did not appear from the face of the Complaint that Plaintiffs had asserted any "conscience-shocking" facts that would constitute affirmative acts by the District or its employees. The

Court then gave Plaintiffs' counsel—or her clients, who were present at the hearing—an opportunity to state in open court any other facts they knew of that would be conscience-shocking, aside from forcing Student to sit on a beanbag chair or calling him a tattletale. In the end, Counsel and the parties were unable to provide any other facts. Count IV is therefore dismissed for failure to state a claim.

C. Count V: Supervisory Liability

Count V is a Section 1983 Due Process claim that charges Sherwood and Green with supervisory liability for participation in and encouragement of unconstitutional misconduct by subordinates. Plaintiffs believe that Sherwood and Green knew, or should have known, that their subordinates were "unconstitutionally placing L in a place of harm where he would be subjected to ongoing, and targeted bullying and the resulting foreseeable deprivations of L's Constitutional rights to a public education, to bodily integrity, to be secure and to be left alone free from bullying and harassment, and to substantive due process under the Fourteenth Amendment to the Constitution of the United States." (Doc. 1 at 22).

"Supervisory school officials. . . can be liable under § 1983 only if they are deliberately indifferent to acts committed by a teacher that violate a student's constitutional rights." *Doe v. Flaherty*, 623 F.3d 577, 584 (8th Cir. 2010). To establish a claim based upon a supervisor's deliberate indifference, a plaintiff must show that the supervisor defendant: (1) had notice of a pattern of unconstitutional acts of a subordinate; (2)

showed deliberate indifference to those acts; (3) and failed to take sufficient remedial action; (4) which proximately caused injury to the plaintiff. *Id.* (citing *Doe v. Gooden*, 214 F.3d 952, 955 (8th Cir. 2000) (holding that deliberate indifference is a stringent standard of fault that cannot be predicated upon mere negligence).

In *Gebser v. Lago Vista Independent School District,* the Supreme Court held that in order for a school official tasked with reviewing complaints to be liable under Title IX, that "official must have actual knowledge of discrimination and fail adequately to respond." *Gebser*, 524 U.S. 274, 290–91 (1998).

The Complaint is devoid of facts that would indicate that Sherwood, Green, or any teacher who was subordinate to them actually bullied Student. There are also no facts that would indicate that Sherwood and/or Green knew of such "bullying" by teachers and were deliberately indifferent to it. None of the acts alleged in the Complaint to have been committed by teachers can be construed as ones that violated Student's constitutional rights: the facts simply do not rise to that level of detail or severity. Count V is dismissed for failure to state a claim.

D. Count VI: Failure to Train and Supervise

Count VI is another Section 1983 claim, lodged only against the District, for denial of Due Process due to the District's alleged failure to train and supervise its teachers to prevent and stop bullying. "To establish a substantive due process violation, a plaintiff must plausibly allege 'both that the official's conduct was

conscience-shocking and that the official violated one or more fundamental rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Schmidt v. Des Moines Pub. Sch.*, 655 F.3d 811, 816 (8th Cir. 2011). Defendants argue here that the facts in the Complaint to support Count VI fail to establish that the District's behavior was conscience-shocking. For the reasons stated previously, the Court agrees.

Furthermore, the elements of a failure-to-train claim under Section 1983 require proof that: (1) the training practices were inadequate, (2) the school was deliberately indifferent to the rights of students, such that the failure to train reflected a deliberate choice, and (3) the failure to train caused the plaintiff's injuries. *B.A.B. v. Bd. of Educ. of City of St. Louis, Mo.*, 698 F.3d 1037, 1040 (8th Cir. 2012).

Along with the lack of conscience-shocking facts in the Complaint that would implicate Defendants, Plaintiffs have also failed to sufficiently allege facts that would indicate that school officials were deliberately indifferent to bullying within the schools, or that the District *deliberately chose* to train its teachers to ignore bullying. For these reasons, the claim in Count VI is dismissed without prejudice.

E. Count VII: Policy, Custom, or Practice

Count VII is a Section 1983 claim against the District for having a policy, custom, or practice of failing to respond to or prevent bullying in its schools. "To establish the existence of a policy, custom or

failure to receive, investigate, or act on complaints of violations of constitutional rights, a plaintiff must prove:

> (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
>
> (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
>
> (3) that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation.

Jane Doe A By & Through Jane Doe B v. Special Sch. Dist. of St. Louis Cnty., 901 F.2d 642, 646 (8th Cir. 1990).

Plaintiffs fail to reference in their Complaint a persistent pattern of inappropriate responses to bullying. Instead, they cite only to Student's example. It is difficult to argue that one student's example of bullying, if true, would amount to a policy, custom, or practice of the District of failing to respond to student bullying. Plaintiffs simply assume, without providing any facts to support their assumption, that there is a District-wide policy or practice of ignoring bullying. In general, "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be

attributed to a municipal policymaker." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985). Here, Plaintiffs are unable to state facts that would plausibly show the existence of a persistent pattern of abuse or tacit authorization of alleged abuse. Count VII is dismissed for failure to state a claim.

F. Count VIII: Punitive Damages

Plaintiffs maintain that all Defendants committed willful, wanton, and malicious acts against Student. Exactly what those willful, wanton, and malicious acts are is a mystery, despite the length of the 34-page Complaint. Plaintiffs' claim that Defendants intentionally or deliberately failed to take action in response to bullying is not supported by any facts in the Complaint and fails to meet the pleading standards of Rule 12(b)(6), and the guidance in *Iqbal* and *Twombly*. Count VIII is dismissed without prejudice.

G. Count IX: Intentional Infliction of Emotional Distress (Outrage)

Count IX is the state law tort of intentional infliction of emotional distress. In Arkansas, this tort is called "outrage." Defendants argue that no allegations in the Complaint rise to the level of the tort of outrage. Further, they contend that this tort claim would be barred by sovereign immunity.

The tort contains the following four elements: (1) the defendant intended to inflict emotional distress or should have known that emotional distress was the likely result of its conduct; (2) the defendant's conduct was extreme and outrageous, beyond all possible

bounds of decency, and utterly intolerable in a civilized community; (3) the defendant's conduct caused the plaintiff emotional distress; and (4) the plaintiff's emotional distress was so severe that no reasonable person could be expected to endure it. *Crockett v. Essex*, 341 Ark. 558, 563–64 (2000).

In the case at bar, there do not appear to be any facts that would demonstrate intentional, extreme, or outrageous conduct on the part of any of the Defendants. Further, Arkansas courts have interpreted very narrowly what would qualify as "outrageous" conduct that would state a valid claim. Putting aside the sovereign immunity question, the Court rejects Plaintiffs' argument that the facts here state a claim for outrage under Arkansas law. Count IX is dismissed without prejudice.

IV. CONCLUSION

IT IS ORDERED that Defendants' Motion for Partial Dismissal (Doc. 5) is **GRANTED**. Count I is **DISMISSED WITH PREJUDICE**, due to the running of the statute of limitations, and Counts IV, V, VI, VII, VIII, and IX are **DISMISSED WITHOUT PREJUDICE**, pursuant to Rule 12(b)(6), for failure to state a claim. Only Counts II and III remain for resolution, and both of those Counts are brought explicitly against Defendant Omaha School District and no other Defendant. Accordingly, separate Defendants Jacob Sherwood, Amanda Green, and Dawn Dillon are **DISMISSED** as parties to the action, and the Clerk of Court is directed to terminate them from the case.

IT IS SO ORDERED on this 22nd day of March, 2018.

/s/ Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX D

STATUTES OF LIMITATIONS FOR ALL FIFTY STATES PLUS THE DISTRICT OF COLUMBIA AND PUERTO RICO FOR EACH APPROACH IN THE CIRCUIT SPLIT

This Appendix lists statutes of limitations for the administrative review approach (adopted by the Sixth, Seventh, and Eighth Circuits) and the independent lawsuit approach (adopted by the Ninth and Eleventh Circuits) for all fifty states plus the District of Columbia and Puerto Rico. For the independent lawsuit approach, the Appendix provides the shortest limitations period that the courts following the Ninth or Eleventh Circuits' approach could borrow given the availability in many states of multiple statutes of limitations for independent causes of action.

Alabama: 30 days versus 2 years.

Administrative review approach: 30 days, Ala. Admin. Code r. 290-8-9-.08.

Independent lawsuit approach: 2 years, Ala. Code § 6-2-38.

Alaska: 30 days versus 2 years.

Administrative review approach: 30 days, Alaska Stat. Ann. § 14.30.193(f) (incorporating *id.* § 44.62.560).

Independent lawsuit approach: 2 years, Alaska Stat. Ann. § 09.10.070.

Arizona: 35 days versus 1 year.

Administrative review approach: 35 days, Ariz. Admin. Code R7-2-405.

Independent lawsuit approach: 1 year, Ariz. Rev. Stat. Ann. § 12-541.

Arkansas: 90 days versus 3 years.

Administrative review approach: 90 days, Ark. Code Ann. § 6-41-216(g).

Independent lawsuit approach: 3 years, Ark. Code Ann. § 16-56-105.

California: 90 days versus 2 years.

Administrative review approach: 90 days, Cal. Educ. Code § 56505(k).

Independent lawsuit approach: 2 years, Cal. Civ. Proc. Code § 335.1.

Colorado: 90 days versus 2 years.

Administrative review approach: 90 days, 1 Colo. Code Regs. 301-8:2220-R-6.02 (incorporating 34 C.F.R. § 300.516).

Independent lawsuit approach: 2 years, Colo. Rev. Stat. Ann. § 13-80-102.

Connecticut: 45 days versus 2 years.

Administrative review approach: 45 days, Conn. Gen. Stat. Ann. § 10-76h(d)(4) (incorporating *id.* § 4-183(c)).

Independent lawsuit approach: 2 years, Conn. Gen. Stat. Ann. § 52-584.

Delaware: 90 days versus 2 years.

Administrative review approach: 90 days, Del. Code Ann. tit. 14, § 3142(a).

Independent lawsuit approach: 2 years, Del. Code Ann. tit. 10, § 8119.

District of Columbia: 90 days versus 3 years.

Administrative review approach: 90 days, D.C. Mun. Regs. Subt. 5-E, § 3031 (incorporating 20 U.S.C. § 1415(i)(2)(B)).

Independent lawsuit approach: 3 years, D.C. Code Ann. § 12-301(8).

Florida: 30 days versus 4 years.

Administrative review approach: 30 days, Fla. Stat. Ann. § 1003.57(1)(c) (incorporating *id.* § 120.68(2)(a)).

Independent lawsuit approach: 4 years, Fla. Stat. Ann. § 95.11(3).

Georgia: 90 days versus 2 years.

Administrative review approach: 90 days, Ga. Comp. R. & Regs. 160-4-7-.12.

Independent lawsuit approach: 2 years, Ga. Code Ann. § 9-3-33.

Hawaii: 30 days versus 2 years.

Administrative review approach: 30 days, Haw. Code R. § 8-60-70(b).

Independent lawsuit approach: 2 years, Haw. Rev. Stat. Ann. § 657-11; *id.* § 657-7.

Idaho: 42 days versus 3 years.

Administrative review approach: 42 days, Idaho Admin. Code r. 08.02.03.109.

Independent lawsuit approach: 3 years, Idaho Code Ann. § 5-218.

Illinois: 120 days versus 2 years.

Administrative review approach: 120 days, 105 Ill. Comp. Stat. Ann. 5/14-8.02a(i).

Independent lawsuit approach: 2 years, 735 Ill. Comp. Stat. Ann. 5/13-202.

Indiana: 30 days versus 2 years.

Administrative review approach: 30 days, 511 Ind. Admin. Code 7-45-9(a).

Independent lawsuit approach: 2 years, Ind. Code Ann. § 34-11-2-4(a).

Iowa: 90 days versus 2 years.

Administrative review approach: 90 days, Iowa Admin. Code r. 281-41.516(2).

Independent lawsuit approach: 2 years, Iowa Code Ann. § 614.1.

Kansas: 30 days versus 2 years.

Administrative review approach: 30 days, Kan. Stat. Ann. § 72-3418(d).

Independent lawsuit approach: 2 years, Kan. Stat. Ann. § 60-513(a)(4).

Kentucky: 90 days versus 1 year.

Administrative review approach: 90 days, 707 Ky. Admin. Regs. 1:340 (not providing limitations period, so defaulting to 90 days under 20 U.S.C. § 1415(i)(2)(B)).

Independent lawsuit approach: 1 year, Ky. Rev. Stat. Ann. § 413.140.

Louisiana: 90 days versus 1 year.

Administrative review approach: 90 days, La. Admin. Code tit. 28, Pt. XLIII, § 516.

Independent lawsuit approach: 1 year, La. Civ. Code Ann. art. 3492.

Maine: 90 days versus 6 years.

Administrative review approach: 90 days, 05-071 Code Me. R. Ch. 101, § XV (incorporating 34 C.F.R. § 300.516).

Independent lawsuit approach: 6 years, Me. Rev. Stat. Ann. tit. 14, § 752.

Maryland: 120 days versus 3 years.

Administrative review approach: 120 days, Md. Code Ann., Educ. § 8-413(j).

Independent lawsuit approach: 3 years, Md. Code Ann., Cts. & Jud. Proc. § 5-101.

Massachusetts: 90 days versus 3 years.

Administrative review approach: 603 Code Mass. Regs. 28.08(6) (not providing limitations period, so defaulting to 90 days under 20 U.S.C. § 1415(i)(2)(B)).

Independent lawsuit approach: 3 years, Mass. Gen. Laws ch. 260, §§ 2A, 5B.

Michigan: 90 days versus 3 years.

Administrative review approach: 90 days, Mich. Admin. Code r. 340.1724f(4).

Independent lawsuit approach: 3 years, Mich. Comp. Laws Ann. § 600.5805.

Minnesota: 60 days (state court) or 90 days (federal court) versus 2 years.

Administrative review approach: 60 days (state court) or 90 days (federal court), Minn. Stat. Ann. § 125A.091.

Independent lawsuit approach: 2 years, Minn. Stat. Ann. § 541.07.

Mississippi: 90 days versus 3 years.

Administrative review approach: 90 days, Miss. Code Ann. § 37-23-143(3).

Independent lawsuit approach: 3 years, Miss. Code Ann. § 15-1-49.

Missouri: 45 days versus 5 years.

Administrative review approach: 45 days (state court) or 90 days (federal court default), Mo. Ann. Stat. § 162.962.

Independent lawsuit approach: 5 years, Mo. Ann. Stat. § 516.120.

Montana: 90 days versus 3 years.

Administrative review approach: 90 days, Mont. Admin. R. 10.16.3523 (incorporating 34 C.F.R. § 300.516).

Independent lawsuit approach: 3 years, Mont. Code Ann. § 27-2-202(3).

Nebraska: 90 days versus 3 years.

Administrative review approach: 90 days, 92 Neb. Admin. Code ch. 55, § 009 (subsection 009.08).

Independent lawsuit approach: 3 years, Neb. Rev. Stat. Ann. § 25-219.

Nevada: 90 days versus 2 years.

Administrative review approach: 90 days, Nev. Admin. Code 388.315.

Independent lawsuit approach: 2 years, Nev. Rev. Stat. Ann. § 11.190(4).

New Hampshire: 120 days versus 3 years.

Administrative review approach: 120 days, N.H. Rev. Stat. Ann. § 186-C:16-b.

Independent lawsuit approach: 3 years, N.H. Rev. Stat. Ann. § 508:4.

New Jersey: 90 days versus 2 years.

Administrative review approach: 90 days, N.J. Admin. Code § 6A:14-2.7.

Independent lawsuit approach: 2 years, N.J. Stat. Ann. § 2A:14-2.

New Mexico: 30 days versus 3 years.

Administrative review approach: 30 days, N.M. Admin. Code 6.31.2.

Independent lawsuit approach: 3 years, N.M. Stat. Ann. § 37-1-8.

New York: four months versus 3 years.

Administrative review approach: four months, N.Y. Educ. Law § 4404(3).

Independent lawsuit approach: 3 years, N.Y. C.P.L.R. § 214.

North Carolina: 30 days versus 3 years.

Administrative review approach: 30 days, N.C. Gen. Stat. Ann. § 115C-109.9(d).

Independent lawsuit approach: 3 years, N.C. Gen. Stat. Ann. § 1-52.

North Dakota: 90 days versus 6 years.

Administrative review approach: 90 days, N.D. Admin. Code § 67-23-05-01 (incorporating 20 U.S.C. §§ 1400–19).

Independent lawsuit approach: 6 years, N.D. Cent. Code Ann. § 28-01-16.

Ohio: 45 days (state court) or 90 days (federal court) versus 2 years.

Administrative review approach: 45 days (state court) or 90 days (federal court), Ohio Rev. Code Ann. § 3323.05(H).

Independent lawsuit approach: 2 years, Ohio Rev. Code Ann. § 2305.10.

Oklahoma: 90 days versus 2 years.

Administrative review approach: 90 days, Okla. Admin. Code § 210:15-13-1 ("incorporat[ing] by reference all applicable federal and state laws, regulations, and policies").

Independent lawsuit approach: 2 years, Okla. Stat. Ann. tit. 12, § 95.

Oregon: 90 days versus 2 years.

Administrative review approach: 90 days, Or. Rev. Stat. Ann. § 343.175(4).

Independent lawsuit approach: 2 years, Or. Rev. Stat. Ann. § 12.110.

Pennsylvania: 90 days versus 2 years.

Administrative review approach: 90 days, 22 Pa. Code § 14.102 (incorporating 34 C.F.R. § 300.516).

Independent lawsuit approach: 2 years, 42 Pa. Cons. Stat. Ann. § 5524.

Puerto Rico: 30 days versus 3 years.

Administrative review approach: 30 days, P.R.S. Admin. Código de Regulaciones § 4493(IX)(c).

Independent lawsuit approach: 3 years, P.R. Laws Ann. tit. 31, § 5297.

Rhode Island: 30 days versus 3 years.

Administrative review approach: 30 days, 200 R.I. Code R. § 20-30-6.8.

Independent lawsuit approach: 3 years, R.I. Gen. Laws § 9-1-36.

South Carolina: 30 days versus 3 years.

Administrative review approach: 30 days, S.C. Code Ann. Regs. 43-243.

Independent lawsuit approach: 3 years, S.C. Code Ann. § 15-3-530.

South Dakota: 90 days versus 3 years.

Administrative review approach: 90 days, S.D. Admin. R. 24:05:30:11.

Independent lawsuit approach: 3 years, S.D. Codified Laws § 15-2-14.

Tennessee: 60 days versus 1 year.

Administrative review approach: 60 days, Tenn. Comp. R. & Regs. 0520-01-09-.19 (incorporating Tenn. Code Ann. § 4-5-322(b)).

Independent lawsuit approach: 1 year, Tenn. Code Ann. § 28-3-104.

Texas: 90 days versus 2 years.

Administrative review approach: 90 days, 19 Tex. Admin. Code § 89.1185(n) (incorporating 34 C.F.R. § 300.516).

Independent lawsuit approach: 2 years, Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a).

Utah: 30 days versus 3 years.

Administrative review approach: 30 days, Utah Code Ann. § 53E-7-208(4).

Independent lawsuit approach: 3 years, Utah Code Ann. § 78B-2-305.

Vermont: 90 days versus 3 years.

Administrative review approach: 90 days, Vt. Stat. Ann. tit. 16, § 2957(d).

Independent lawsuit approach: 3 years, Vt. Stat. Ann. tit. 12, § 512.

Virginia: 90 days (federal court) or 180 days (state court) versus 2 years.

Administrative review approach: 90 days (federal court) or 180 days (state court), 8 Va. Admin. Code 20-81-210.

Independent lawsuit approach: 2 years, Va. Code Ann. §§ 8.01-243, 8.01-248.

Washington: 90 days versus 2 years.

Administrative review approach: 90 days, Wash. Admin. Code 392-172A-05115.

Independent lawsuit approach: 2 years, Wash Rev. Code Ann. § 4.16.130.

West Virginia: 90 days versus 2 years.

Administrative review approach: 90 days, W. Va. Code R. § 126-16 attach. ch. 11, sec. 4(N), at 115, *available at* https://wvde.us/wp-content/uploads/2018/01/Policy2419_2017.pdf.

Independent lawsuit approach: 2 years, W. Va. Code Ann. § 55-2-12.

Wisconsin: 45 days versus 3 years.

Administrative review approach: 45 days, Wis. Stat. Ann. § 115.80(7).

Independent lawsuit approach: 3 years, Wis. Stat. Ann. §§ 893.54, 893.93.

Wyoming: 90 days versus 2 years.

Administrative review approach: 90 days, Wy. Admin. Code 206.0002.7 § 7 (incorporating 34 C.F.R. § 300.516).

Independent lawsuit approach: 2 years, Wyo. Stat. Ann. § 1-3-115.