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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

MARCUS JOHNSON, individually and as next friend of minor G.H.J.,	)	
Plaintiff,	)	
v.	)	**Case No. 18-CV-2079**
KANKAKEE SCHOOL DISTRICT 111, et al.,	)	
Defendants.	)	

ORDER

On November 30, 2018, Plaintiff, Marcus Johnson, represented by counsel, filed an Amended Complaint (#38) against Defendants alleging deprivation of due process under the Fourteenth Amendment pursuant to 42 U.S.C. § 1983, state law willful and wanton conduct, and state law negligence claims. Defendants filed a Motion for Summary Judgment (#71) on June 2, 2020, to which Plaintiff, now pro se, filed a Response (#73) on June 19, 2020. Defendants filed a Reply (#74) on June 26, 2020. For the following reasons, Defendants' Motion for Summary Judgment (#71) is GRANTED.

BACKGROUND

The background is taken from the Undisputed Material Facts in Defendants' Memorandum of Law. The court would note that Plaintiff's Response does not contain an "Additional Facts" section. Further, Plaintiff does attempt to rebut some of Defendants' facts, but does so in an argumentative manner without any citation to the record and without stating whether the fact is material or immaterial. This is all in violation of Central District of Illinois Local Rules 7.1(D)(2)(b)(2) and (3), which require

that disputed facts be deemed material or immaterial and that "[e]ach claim of disputed fact must be supported by evidentiary documentation referenced by specific page" and "[i]nclude as exhibits all cited documentary evidence not already submitted by the movant."

Plaintiff has been proceeding pro se since October 2019, and this court has, up to this point, treated Plaintiff with the leniency usually accorded to pro se parties in federal court. *Pearle Vision, Inc. v. Romm*, 541 F.3d 751, 758 (7th Cir. 2008). However, it is also well established that pro se litigants are not excused from compliance with procedural rules. *Pearle Vision*, 541 F.3d at 758. Even pro se parties must comply with local rules in the absence of good cause. *Garcia v. Illinois State Police*, 545 F.Supp.2d 823, 836 (C.D. Ill. 2015). The court finds instructive the reasoning of this court's predecessor:

> Further, pro se litigants are presumed to have full knowledge of applicable court rules and procedures. Therefore, although the plaintiff is proceeding pro se, he must follow the Federal Rules and procedural rules of the Central District of Illinois. See *Metro Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002). The defendants are correct [that] local rules serve an important function in the summary judgment process. "Such rules assist the court by organizing the evidence, identifying undisputed facts, and demonstrating precisely how each side proposed to prove a dispute[d] fact with admissible evidence." *Bordelon v. Chicago Sch. Reform Bd. Of Trustees*, 233 F.3d 524, 527 [7th Cir. 2000], citing *Markham v. White*, 172 F.3d 486, 490 (7th Cir. 1999). The Seventh Circuit has "consistently and repeatedly upheld a district court's discretion to require strict compliance with its local rules governing summary judgment." *Bordelon v. Chicago Sch. Reform Bd. of Trustees*, 233 F.3d 524, 527 (7th Cir. 2000) (upholding the district court's decision to strike response in its entirety rather than selectively due to failure to comply with local rules); *Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1316 (7th Cir. 1995); *Waldridge v. American Hoechst Corp*., 24 F.3d 918, 922 (7th Cir. 1994) (collecting cases).

Moralis v. Flageole, 2007 WL 2893652, at *3 (C.D. Ill. Sept. 28, 2007).

Plaintiff has failed to cite to any evidentiary documentation by specific page for his disputed facts, and is therefore not in compliance with local rules. District judges may strictly enforce local summary judgment rules, even against pro se litigants. *McCurry v. Kenco Logistics Services, LLC*, 942 F.3d 783, 787 (7th Cir. 2019); see also *Penny v. Lincoln's Challenge Academy*, 822 Fed.Appx. 497 (7th Cir. Aug. 27, 2020). A district court is not required to wade through improper denials and legal argument in search of a genuinely disputed fact, and a mere disagreement with the movant's asserted facts is inadequate if made without reference to specific supporting material. *Smith v. Lanz*, 321 F.3d 680, 683 (7th Cir. 2003). "In short, '[j]udges are not like pigs, hunting for truffles buried in briefs.'" *Smith*, 321 F.3d at 683, quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Defendants' entire Statement of Undisputed Material Facts will be deemed admitted.

Factual Background

Parties Involved

Plaintiff is approximately 37 years old and, at all relevant times, was a resident of Kankakee, Illinois. Chastity Williams was at all relevant times a resident of Fort Wayne, Indiana. GHJ is the daughter of Plaintiff and Williams, and was five years old and a kindergarten student at Taft Primary School ("Taft") in Kankakee, Illinois.

Terrence Lee was at all relevant times the principal at Taft. Lee was dropped as a Defendant in this case when Plaintiff filed his Amended Complaint. Lee's administrative assistant at Taft was Leslie Salgado. Greg Merrill was the acting principal

at Taft on December 14, 2017, because Lee left early due to a family emergency. Merrill died in 2019 and was dismissed as a defendant in this case when Plaintiff failed to make a timely motion under Federal Rule of Civil Procedure 25(a) to substitute parties in case of a death. Holly Keller was a substitute teacher in GHJ's kindergarten class at Taft on December 14, 2017. Jamie Matthews was a teacher at Taft working on December 14, 2017. Taft is a part of Kankakee School District 111, a municipal corporation under the laws of Illinois.

Family Background of Plaintiff, Chastity Williams, and Their Children

Plaintiff married Williams on October 9, 2008. In addition to GHJ, Plaintiff and Williams had a second child together, SJ, and both Plaintiff and Williams have children with other people. Plaintiff and Williams separated in 2011, living together only briefly and occasionally after that time. Plaintiff filed for divorce from Williams on December 20, 2017, and the divorce was finalized on May 22, 2018.

Shortly before Williams moved to Indiana in April 2017, she told Plaintiff that she was going to take GHJ and SJ to Indiana. Despite hearing this, Plaintiff did not seek an Order of Protection because he believed Williams' "threats were always empty." Plaintiff did not speak with Williams at any point between this call and December 14, 2017.

For the fall semester of 2017, GHJ's regular kindergarten teacher was Mrs. Brown. During that semester GHJ always rode the bus home from school and had a permanent

bus sticker attached to the back of her backpack at all times because she was a regular bus rider. During that semester, Plaintiff would allow Elisa Thomas, Chastity Williams' mother, to pick GHJ up from the bus stop after school.

In 2015, Williams reported Plaintiff to the Illinois Department of Children and Family Services ("DCFS") and obtained an Order of Protection against him after he beat SJ with an extension cord. Plaintiff later pleaded guilty to a felony battery for this act, was sentenced to 30 months' probation, and was required to register under the Violent Offenders Against Youth Act. He was on probation on December 14, 2017.

Williams was not subject to any DCFS or court child custody order restricting her access to GHJ or SJ on December 14, 2017. In November 2015, DW, a seven-month old infant who was the child of Williams and another man, died via suffocation while under the care of that other man. The police and DCFS investigated DW's death. Williams was never charged with any crime and DCFS never limited her contact with her other children.

Taft principal Terrence Lee has known Plaintiff, Williams, and their children for many years and was present on one occasion when Williams "exploded" and threatened to fight another parent over a schoolyard incident between her child and another child. At the registration day for GHJ's kindergarten class, Plaintiff told Lee about DW's death and that he believed Williams was not a safe person.

Holly Keller and Jamie Matthews' Lack of Knowledge Regarding Chastity Williams

Plaintiff has never seen or spoken with either Holly Keller or Jamie Matthews. On December 14, 2017, neither Keller nor Matthews had ever been told anything about the family history of Plaintiff, Williams, and their children, or that Williams had posed any danger to GHJ.

Events of December 14, 2017

At around 8 a.m. on December 14, 2017, Williams called Taft and told an administrative assistant that she would pick GHJ up after school. Lee was informed of that call, looked at the school records, saw that Williams was not on the list of people authorized to pick GHJ up, and directed the administrative assistant to tell Williams that she could not pick up GHJ from school. Around 11 a.m., Plaintiff went to Taft, and as he was entering, Lee was leaving for a family emergency. Plaintiff told Lee that he was going to get court documents to ensure that GHJ was protected. Lee said that Plaintiff should give the documents to Salgado, his administrative assistant.

Plaintiff then went inside to pick up GHJ and spoke face-to-face with Salgado. Plaintiff said he was going to the courthouse to get documents needed so GHJ would be protected and asked if that was everything he needed. Salgado responded yes and that she would enter any documents he brought back into the system.

Plaintiff, with GHJ in tow, then went to the Kankakee courthouse and had a judge sign an ex parte Order of Protection against Williams. Plaintiff never served that Order of Protection on Williams, whether on December 14, 2017, or at any other time.

Plaintiff brought GHJ back to Taft around 12:15 p.m., and gave a copy of the unserved Order of Protection to Salgado. Salgado took the paper and said she would enter it into Taft's system, and that she did not need anything else. Salgado asked if GHJ would ride the bus home that day, and Plaintiff told her yes.

Plaintiff called Taft around 2:30 p.m. and told Salgado that Williams was trying to "kidnap" the children and thus not to put GHJ on the bus, that he would come pick her up. Salgado then wrote a note to Holly Keller, the substitute teacher covering GHJ's kindergarten class that day, that GHJ was not to ride the bus home, but would be a "car rider" and be picked up by her father. Keller read the note.

When the school day ends at Taft, all students are designated as either "bus riders," or "car riders," who are picked up by a parent or guardian. The children form lines in the school gym for dismissal, with "bus riders" at one end and "car riders" at the other end. Children who are regular bus riders like GHJ have a permanent bus rider tag on their backpacks, while children who are typically picked up by their parent or guardian, but who are taking the bus home on a particular day, have a temporary bus tag. Many school personnel assist with the dismissal procedure, but given the number of lines and children, it can be a chaotic situation and it is possible for a child to switch lines without being noticed.

During the 2017-18 school year, Kankakee School District 111 contracted with First Student, Inc., to provide bus transportation for students.

When the school day ended on December 14, 2017, Keller told GHJ that her father had called and said that she would be a car rider that day, instead of a bus rider. GHJ responded that she thought she was riding the bus home, and Keller reiterated that no, Plaintiff had called the school and said he would pick GHJ up. Keller escorted GHJ to the car rider line. Keller then turned to the other children under her care, helping them with their coats, backpacks, and their proper line for dismissal, and did not see GHJ again on December 14, 2017.

Jamie Matthews, another teacher who was assisting in the children's departure, saw GHJ in a bus line engaging in horseplay with another child, and warned both children to be careful so that no one got hurt. Matthews saw nothing unusual about GHJ being in a bus rider line because Matthews knew that GHJ typically rode the bus home and had a regular bus rider tag on her backpack and because Matthews worked in a different classroom and had not seen Salgado's note or been told about Plaintiff's phone call. GHJ then got on the bus.

At about 4:30 p.m. Plaintiff called Salgado and said he was on his way to pick up GHJ. Salgado responded that she believed he had already picked up GHJ because the school was closing and GHJ was no longer there. Plaintiff responded that he had not picked GHJ up, demanded to know where his daughter was, cursed at Salgado, and hung up.

Salgado called acting principal Merrill, First Student, and the Kankakee Police Department ("KPD") in rapid succession, reporting that GHJ was missing and asking for help. Plaintiff contacted the KPD and was told by an officer that because the Order of Protection had not been served, it was a civil matter and police could not do anything. Salgado also spoke with an Officer Krause of the KPD. He told her that because Williams was GHJ's mother, and the Order of Protection had not been served, the school personnel had not done anything wrong. At some point before 5:30 p.m., Plaintiff received a call from Elisa Thomas, Williams' mother, and learned that Williams had picked GHJ up and was taking her to Indiana.

Plaintiff Reacquired Custody of GHJ, Who Is Unharmed

Plaintiff drove to Indiana on January 19, 2018, picked up GHJ, brought her back, and has retained custody of her ever since. Plaintiff did not communicate with Williams between December 14, 2017 and January 19, 2018. GHJ sustained no physical injuries from the incident, received no mental health treatment or counseling due to the incident, and was not hit and did not lack for food while with Williams. Plaintiff never served the Order of Protection and let it lapse on June 27, 2018, even though he still believes Williams to be an unfit parent.

Procedural Background

Count I of Plaintiff's Amended Complaint alleges § 1983 due process claims against Defendants Salgado, Matthews, and Keller, claiming that Defendants, by their affirmative acts, created or increased a danger faced by GHJ, and that they were

deliberately indifferent by not attending to the known risk of abduction and danger which was communicated to them. Plaintiff alleges Defendants' failure to protect GHJ was the proximate cause of her injuries.

Count II alleges that Defendants "engaged in willful and wanton conduct" when they allowed GHJ to get on the school bus and leave school property.

Count III alleges that Defendant Kankakee School District 111, as the employer of Salgado, Matthews, and Keller, is obligated to pay any judgment obtained against them pursuant to 745 Ill. Comp. Stat. 10/9-102.

Counts IV, V, and VI are alleged against Defendants who are no longer a part of this case and, thus, are irrelevant for purposes of this summary judgment motion.

ANALYSIS

Defendants argue that: (1) Plaintiff's child custody claim is not a state-created danger claim because (a) Supreme Court precedent shows Plaintiff's claim is baseless and (b) Plaintiff cannot satisfy any element of the state-created danger doctrine; (2) in the alternative, Defendants are entitled to qualified immunity; (3) the state-created danger doctrine should be abolished as inconsistent with Supreme Court precedent; and (4) Plaintiff's state law claims should fail along with his constitutional claim or in the alternative be dismissed for want of jurisdiction.

Plaintiff's Response does not address Defendants' arguments, and appears to argue an entirely different theory than the state-created danger doctrine. The court will discuss Plaintiff's Response below.

Summary Judgment Standard

Summary judgment is appropriate "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); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In ruling on a motion for summary judgment, a district court "has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). In making this determination, the court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Singer v. Raemisch*, 593 F.3d 529, 533 (7th Cir. 2010). However, a court's favor toward the nonmoving party does not extend to drawing inferences which are only supported by speculation or conjecture. See *Singer*, 593 F.3d at 533. In addition, this court "need not accept as true a plaintiff's *characterization* of the facts or a plaintiff's legal conclusion." *Nuzzi v. St. George Cmty. Consol. Sch. Dist. No. 258*, 688 F. Supp. 2d 815, 835 (C.D. Ill. 2010) (emphasis in original).

The party opposing summary judgment may not rely on the allegations contained in the pleadings. *Waldridge*, 24 F.3d at 920. "[I]nstead, the nonmovant must present definite, competent evidence in rebuttal." *Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 924 (7th Cir. 2004). Summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Koszola v. Bd. of Educ. of City of Chicago*, 385 F.3d 1104, 1111

(7th Cir. 2004), quoting *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). Specifically, to survive summary judgment, the nonmoving party "must make a sufficient showing of evidence for each essential element of its case on which it bears the burden at trial." *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 936 (7th Cir. 2007), citing *Celotex Corp.*, 477 U.S. at 322-23.

Section 1983 Due Process Claim

Plaintiff's § 1983 claim in Count I is pled as a deprivation of due process claim based on the state-created danger doctrine. Defendants' summary judgment motion addresses the claim on that ground as well. Plaintiff, in his Response, does not address any of the arguments raised by Defendants with regard to either the state-created danger doctrine, or, as will be discussed below, qualified immunity. Instead, Plaintiff recounts what he believes Defendants did wrong on December 14, 2017, and accuses Salgado of negligence in letting GHJ get on the bus (p. 3-4 of Response (#73)), and lays out the elements of common law negligence. Plaintiff also makes general arguments against the resolution of this case on summary judgment.

Plaintiff's Response is non-responsive to the arguments raised in Defendants' summary judgment motion.

> A non-movant's failure to respond to arguments addressed in a summary judgment motion results in a waiver. *Betco Corp., Ltd. v. Peacock*, 876 F.3d 306, 309 (7th Cir. 2017) (underdeveloped or conclusory arguments in response to motion for summary judgement constitutes waiver); *Walton v. U.S. Steel Corp.*, 497 F. App'x 651, 655 (7th Cir. 2012) (non-movant waived argument "by failing to raise it in response to summary judgment"); *Laborers' Int'l Union of N. Am. v. Caruso*, 197 F.3d 1195, 1197 (7th Cir. 1999)

> ("We have long refused to consider arguments that were not presented to the district court in response to summary judgment motions."). This is also true for pro se plaintiffs. Although courts liberally construe a pro se plaintiff's filings, *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), a complete failure to respond to an argument results in a waiver. See *Martin v. Jones*, 752 F. App'x 368, 369 (7th Cir. 2019), reh'g denied (Mar. 5, 2019) (when a pro se litigant does not provide an "articulable basis" for disturbing a summary judgment ruling, "we cannot fill the void by crafting arguments and performing the necessary legal research.") (citations omitted); see also *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) ("We too construe pro se filings liberally, but still we must be able to discern cogent arguments in any appellate brief, even one from a pro se litigant.") (citations omitted).

Candell v. Shiftgig Bullpen Temporary Employment Agency, 2019 WL 2173797, at *3 (N.D. Ill. May 20, 2019).

Still, Plaintiff's failure to respond does not mean Defendants are automatically entitled to summary judgment, and the court will make an independent determination based on the law and Defendants' admitted Undisputed Statement of Material Facts. See *D.S. v. East Porter County School Corp.*, 799 F.3d 793, 800 (7th Cir. 2015).

Plaintiff appears to want to argue some sort of common law negligence claim against Defendants. However, there is no cause of action under § 1983 for simple tort law duties-of-care. *Lanigan v. Village of Hazel Crest, Ill.*, 110 F.3d 467, 471 (7th Cir. 1997); *Estate of Her v. Hoeppner*, 939 F.3d 872, 877 (7th Cir. 2019) (mere negligence is categorically beneath the threshold of constitutional due process). Further, to the extent Plaintiff is now making some kind of interference with parental rights claim, his claims

were not pled that way, and a "plaintiff may not amend his complaint in his response brief." *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 448 (7th Cir. 2011).

Rather, under the facts of this case, Plaintiff's only possible avenue of recovery against Defendants under § 1983 is the state-created danger doctrine, which was pled in Plaintiff's Amended Complaint, and which the court addresses below.

State-Created Danger

Defendants argue that Plaintiff's child custody claim is not a state-created danger claim because U.S. Supreme Court precedent shows Plaintiff's claim is baseless and Plaintiff cannot satisfy any element of the state-created danger doctrine.

The U.S. Supreme Court has held that the Due Process Clause of the Fourteenth Amendment generally does not impose upon the state a duty to protect individuals from harm by private actors. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195-96 (1989). There are two recognized exceptions to the *DeShaney* rule: (1) when a public official "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced," the official may be liable for a due process violation if injury results; and (2) when the state has a "special relationship" with a person, that is, if the state has custody of a person, thus cutting off alternative avenues of aid. *Estate of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019). Allegations

concerning school officials and students are analyzed under the first exception to *DeShaney*, the state-created danger doctrine. See *King ex rel. King v. East St. Louis School Dist. 189*, 496 F.3d 812, 817-18 (7th Cir. 2007); *D.S.*, 799 F.3d at 798.

The state-created danger exception to the *DeShaney* rule is "quite narrow and reserved for 'egregious' conduct by state officials." *Estate of Her*, 939 F.3d at 876. A due process claim of this kind requires proof of three elements: (1) the government, by its affirmative acts, created or increased a danger to the plaintiff; (2) the government's failure to protect against the danger caused the plaintiff's injury; and (3) the conduct in question "shocks the conscience." *Estate of Her*, 939 F.3d at 876; *Johnson v. Rimmer*, 936 F.3d 695, 708 (7th Cir. 2019); *King*, 496 F.3d at 817-18.

It should be noted that a recent decision of the Seventh Circuit, *Weiland v. Loomis*, 938 F.3d 917 (7th Cir. 2019), has called into question whether *DeShaney* actually allows exceptions outside of the state custody context, and whether the three element state-created danger tests articulated in *Estate of Her*, *Johnson*, and *King* can employed by courts as a recognized exception to the holding of *DeShaney*. In *Weiland*, the court wrote that "[i]n recent years, the 'state-created danger' exception has been treated as if it were a rule of common law" and has been turned into a "'three-part test'[.]" *Weiland*, 938 F.3d at 920. The court went on to state:

> Every once in a while, a court should step back and ask whether local jurisprudence matches the instructions from higher authority. If taken literally, the approach that *Johnson* attributes to *King* would have justified liability in *DeShaney*. The Justices themselves saw the matter differently. They hinted that the Constitution might support liability when a state has a

> duty that "arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." 489 U.S. at 200, 109 S.Ct. 998. That is why the Constitution requires the state to supply prisoners with medical care and protect them from each other; having disabled resort to self-help (or to the market in private services), the state must provide a substitute. Several decisions in this circuit find liability outside of prisons when the state has disabled or undermined self-help or sources of private assistance. See, e.g., *Paine v. Cason*, 678 F.3d 500, 510–11 (7th Cir. 2012); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993). Those cases have a footing in *DeShaney* that the "three-part test" lacks.
>
> Other circuits have their own approaches. *Estate of Romain v. Grosse Pointe Farms*, 935 F.3d 485 (6th Cir. 2019), discusses the "three-part test" (with parts different from those of *Johnson* and *King*) that the Sixth Circuit uses to evaluate claims of state-created danger. Judge Murphy filed a concurring opinion, 935 F.3d at ––––– – ––––, questioning whether the Sixth Circuit's approach can be reconciled with *DeShaney* and suggesting that it be refocused on the question whether the state has impaired the plaintiff's powers of self-help or ability to obtain help from others. All three members of the panel joined this opinion, making it an alternate majority opinion.
>
> *Estate of Romain* did not need to decide whether the Sixth Circuit's approach should be revised, just as we do not need to decide whether *Johnson* and *King* are compatible with *Paine*, *Reed*, and *DeShaney*. These subjects should be presented for consideration in some future case, when the outcome may turn on the difference. For now, it is enough to say that even if Loomis is civilly and criminally liable as a matter of Illinois law, he is entitled to qualified immunity from a claim based on the federal Constitution, so the district court's decision is REVERSED.

Weiland, 938 F.3d at 921.

Despite questioning whether the three-part state-created danger test can be properly inferred from *DeShaney*, the *Weiland* court did not specifically overrule *Johnson* and *King*'s recognition of that exception and application of that test. *Weiland*, 938 F.3d at 921. Indeed, in a decision issued just one week after *Weiland*, the Seventh Circuit again

recognized the state-created danger exception and applied the three-part test articulated in both *King* and *Johnson* and so recently questioned in *Weiland.* See *Estate of Her*, 939 F.3d at 876. Therefore, this court is bound to recognize the state-created danger exception, and will analyze Plaintiff's claim according to the three-part test.

In analyzing a state-created danger claim, a court need not explore the first two components of the doctrine when the case can be resolved expeditiously on the third prong of the analysis, whether Defendants' actions "shock the conscience." *King*, 496 F.3d at 818.

The "shocks the conscience" prong is an attempt to quantify the rare "most egregious official conduct" required for substantive due process liability. *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015), quoting *Jackson v. Indian Prairie School Dist. 204*, 653 F.3d 647, 654-55 (7th Cir. 2011). Though the standard lacks precise measurement, only conduct falling "towards the more culpable end of the tort law spectrum of liability" is constitutionally conscience-shocking. *Flint*, 791 F.3d at 770. Governmental defendants must act with a mens rea akin to criminal recklessness for constitutional liability to attach. *Flint*, 791 F.3d at 770. Neither bad decision-making nor grossly negligent behavior meets the stringent test. *Flint*, 791 F.3d at 770.

Nothing in evidence concerning the actions of Defendants Salgado, Matthews, or Keller comes close to meeting that standard. Plaintiff had informed Salgado that he had obtained an Order of Protection against Chastity Williams (an Order that was never actually served on Williams), and that GHJ would, like usual, ride the bus home that

day. A few hours later he called back to say Williams was trying to "kidnap" the children and that the school should *not* put GHJ on the bus, that she would be a car rider and he would pick her up. In response, Salgado wrote a note to Keller that GHJ was not to ride the bus home, but would be a car rider and would be picked up by her father. Keller read the note, informed GHJ that she would be a car rider that day, not a bus rider, and escorted her to the car rider line. So far, so good.

The breakdown leading to GHJ getting on the bus comes next. After escorting GHJ to the bus rider line, Keller returned to her other duties supervising all the other children under her care, getting them in the proper line, and did not see or look for GHJ again that day. Matthews, who knew nothing about Salgado's note or Plaintiff's issues with Chastity Williams, did see GHJ in the bus line, but that was not unusual, because Matthews knew GHJ typically rode the bus and had a regular "bus rider" tag. GHJ then got on the bus.

Of the three Defendants, Matthews can bear no blame for what happened. She had no knowledge of Plaintiff's phone call about Williams, the Order of Protection, or Salgado's note. Indeed, to Matthews, GHJ was where she was supposed to be: in the bus riders' line.

Fault can perhaps be said to lie with Keller for not keeping a closer eye on GHJ, or informing her co-supervisor Matthews that GHJ was to be in the car rider line that day instead of the bus rider line, but Keller did not know about the phone call from Plaintiff or the history between Plaintiff and Williams or that Williams was any threat to GHJ.

Keller had many other children to supervise and manage that day. Maybe she could have been more attentive to what line GHJ was in, but she had already followed the instructions from Salgado's note and placed GHJ in the proper line.

Fault can also be said to lie with Salgado. Salgado had been informed of all the issues between Plaintiff and Williams, and Plaintiff had informed Salgado that Williams was a kidnap threat to GHJ. Perhaps Salgado could have gone further than she did, and informed all the teachers about the threat as articulated by Plaintiff, or seen to it herself that GHJ got into and stayed in the car rider line. Still, Salgado did tell Keller, GHJ's teacher that day, that GHJ was to get in the car rider line, not the bus rider line. Salgado did take action based on Plaintiff's communications to ensure GHJ was placed in the proper line. The actions were just not enough.

Salgado's and Keller's actions, or inactions, can be said to flawed, incomplete, or even possibly negligent, based on bad decision-making and a breakdown in communication. However, bad decision-making and negligence, even gross negligence, (which might be a stretch under these facts), does not meet the stringent "shocks the conscience" test. *Flint*, 791 F.3d at 770. There is nothing in evidence demonstrating that Salgado or Keller acted with the requisite "mens rea akin to criminal recklessness for constitutional liability to attach." See *Flint*, 791 F.3d at 770. While that negligence may have increased the risk of danger to GHJ, it was not the type of reckless, conscience-shocking conduct that might be actionable as a constitutional violation. See *Estate of Her*, 939 F.3d at 878.

Compare Defendants' actions in this case to the rare instances where the Seventh Circuit has found that a defendant's actions meet the "shock the conscience" standard, such as when police officers arrested a suspended but sober driver and allowed a clearly intoxicated passenger to take the wheel, who later ended up causing a fatal collision (*Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993)), or where police removed a mentally ill woman from an airport and released her at dusk in a notoriously violent and unfamiliar part of town, where she was raped and beaten (*Paine v. Cason*, 678 F.3d 500 (7th Cir. 2011)). Although Defendants' actions may well have been flawed, somewhat negligent, and slightly careless, they do not satisfy the standard for finding a constitutional violation. See *Jackson*, 653 F.3d at 656.

Qualified Immunity

Even if the court were to find that Plaintiff could demonstrate a constitutional violation for a state-created danger under § 1983, which he cannot, Plaintiff's claim would be barred by qualified immunity because the right at issue was not clearly established at the time of the incident.

To be "clearly established," a constitutional right "must have a sufficiently clear foundation in then-existing precedent." *Campbell v. Kallas*, 936 F.3d 536, 545 (7th Cir. 2019). The principle of fair notice pervades the doctrine, with qualified immunity applying unless the specific contours of the right "'were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Campbell*, 936 F.3d at 545, quoting *Plumloff v. Rickard*, 572 U.S. 765, 778–79 (2014).

Given this emphasis on notice, clearly established law cannot be framed at a high level of generality, and a rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that the rule was firmly established. *Campbell*, 936 F.3d at 545.

Existing case law must dictate the resolution of the parties' dispute, so while a case directly on point is not required, "'precedent must have placed the ... constitutional question beyond debate'[.]" *Campbell*, 936 F.3d at 545, quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017). In other words, "a right is clearly established only if 'every reasonable official would have understood that what he is doing violates that right.'" *Campbell*, 936 F.3d at 546, quoting *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015). "The Supreme Court's message is unmistakable: Frame the constitutional right in terms granular enough to provide fair notice because qualified immunity 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Campbell*, 936 F.3d at 546, quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

In *Weiland*, a recent qualified immunity case before the Seventh Circuit, a pretrial detainee attempted to commit suicide and was taken from the county jail to a local hospital for treatment. His guards were instructed to keep him shackled. One of those guards disobeyed that order when the detainee said he needed to use the bathroom. The detainee subsequently seized the guard's gun, escaped, and terrorized hospital staff and patients, holding nurses at gunpoint and assaulting two of them. Two of those injured sued under § 1983, alleging a state-created danger when the guard allowed the detainee

to escape. The defendants moved to dismiss under qualified immunity, which the district court denied, finding that the state-created danger exception was long established in the Seventh Circuit.

The Seventh Circuit reversed, finding that the court should have dismissed the claim because the defendants had qualified immunity. The district court in *Weiland* essentially found the right at issue to be "clearly established" because the "state-created danger" exception had been acknowledged in the Seventh Circuit since, at least, the *Reed* case in 1993. The Seventh Circuit rejected this reasoning, finding that the district court framed the right at issue using too high a level of generality. *Weiland*, 938 F.3d at 919.

Rather, the Seventh Circuit wrote, the right in question must be established with *specificity*. *Weiland*, 938 F.3d at 919. The court noted that a search for a case with identical facts is not required to establish specificity, and "would be a fool's errand[,]" because "[a] principle can be clearly established without matching a later case's facts." *Weiland*, 938 F.3d at 920. Rather, "[t]he search is for an appropriate level of generality, not the most particular conceivable level[,]" and "the level of generality is appropriate when it establishes the rule in a way that tells a public employee what the Constitution requires in the situation that employee faces." *Weiland*, 938 F.3d at 920. The court found that no rule required guards to prevent prisoner escapes, and that every appellate court to consider the possibility had rejected such a rule as incompatible with *DeShaney*. *Weiland*, 938 F.3d at 920.

Here, Plaintiff cannot show that the right he claims is clearly established. An appropriately defined right is clearly established if (1) there is a closely analogous—though not necessarily identical—case identifying that right, or (2) if the defendant's conduct was so egregious and unreasonable that no reasonable official could have thought he was acting lawfully. *Hardeman v. Curran*, 933 F.3d 816, 820 (7th Cir. 2019). Plaintiff cites to no cases with facts similar or even analogous to the instant case to support a claim that the right at issue was "clearly established" in 2017. Plaintiff did not respond to the qualified immunity argument at all. Further, for the reasons articulated above with regard to the "shocks the conscience" analysis, Defendants' conduct was not so egregious and unreasonable that no reasonable school employee could have thought they were acting lawfully.

Thus, even if the court were to find that Plaintiff had alleged the violation of a constitutional right, Plaintiff has not carried his burden of showing that such a right was clearly established, and thus qualified immunity applies to bar Plaintiff's § 1983 claim. See *Findlay v. Lendermon*, 722 F.3d 895, 897 (7th Cir. 2013).

State Law Claims and Supplemental Jurisdiction

Plaintiff's state law claim, for negligence based on willful and wanton conduct against Defendants, remains pending (along with Count III's indemnity claim under 745 Ill. Comp. Stat. 10/9-102). This case is in federal court due to Plaintiff's § 1983 claims. Plaintiff pleads jurisdiction under 28 U.S.C. § 1331, federal question jurisdiction. It is not here on diversity grounds, as Plaintiff is a citizen of Illinois and he has not alleged that

any Defendant is a citizen of another state. In order to keep the case in federal court, this court must exercise supplemental jurisdiction over the remaining state law claims.

"The supplemental jurisdiction statute provides that a district court 'may' decline to exercise jurisdiction over supplemental state-law claims for several enumerated reasons, including where 'the district court has dismissed all claims over which it has original jurisdiction.'" *In re Repository Technologies, Inc.*, 601 F.3d 710, 724 (7th Cir. 2010), quoting 28 U.S.C. § 1367(c)(3). This decision is committed to the sound discretion of the district court, and in cases such as this one where the district court disposes of the federal claims before trial, the Seventh Circuit will reverse the district court's decision to relinquish supplemental jurisdiction over state law claims "only in extraordinary circumstances." *Repository Technologies,* 601 F.3d at 724-25, quoting *Contreras v. Suncast Corp.*, 237 F.3d 756, 766 (7th Cir. 2001). Indeed, when all federal claims in a suit are dismissed before trial, there is a "presumption" that the court will relinquish supplemental jurisdiction over the supplemental state law claims. *RWJ Management Co., Inc. v. BP Products North America, Inc.*, 672 F.3d 476, 479 (7th Cir. 2012).

In cases where the district court has dismissed all claims over which it has original jurisdiction, the presumption that the court will relinquish supplemental jurisdiction may be rebutted if one of three circumstances is present: (1) the statute of limitations has run on the pendent claim, precluding the filing of a separate suit in state court; (2) substantial judicial resources have already been committed, so that sending the

case to another court will cause a substantial duplication of effort; or (3) when it is absolutely clear how the pendent claims can be decided. *RWJ Management*, 672 F.3d at 480.

First, there is no statute of limitations issue with regard to the common law wanton and willful negligence claim against Defendants. The Seventh Circuit itself has noted that § 1367(d) explicitly tolls the statute of limitations for 30 days after dismissal of a supplemental claim, to allow the plaintiff to refile the claim in state court without being time-barred. *Williams Electronic Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007).

Second, this case has not yet gone to trial, thus "substantial federal judicial resources" have not been expended on the resolution of the state law claim.

Finally, it is not absolutely clear how the pendent claims will be decided. Wanton and willful conduct is simply an aggravated form of negligence. *Baylay v. Etihad Airways P.J.S.C.*, 222 F.Supp.3d 698, 704 (N.D. Ill. 2016), citing *Jane Doe-3 v. McLean County Unit Dist. No. 5 Board of Directors*, 973 N.E.2d 880, 887 (Ill. 2012). The wanton and willful conduct claim is related to the § 1983 claims, but is based entirely on Illinois state law, and is subject to a different standard.

Much of this order has been spent detailing how § 1983 claims alleging state-created danger and deliberate indifference must demonstrate more than mere negligence, or even gross negligence. Simply because the court has found that Plaintiff cannot demonstrate a genuine issue of material fact based on a state-created danger involving deliberate indifference, does not mean that an Illinois court applying Illinois

law could not find that wanton and willful conduct has been sufficiently shown. The court's ruling on one issue does not determine the second. Therefore, the court will relinquish supplemental jurisdiction over the state law claims pursuant to § 1367(c)(3).

IT IS THEREFORE ORDERED:

(1) Defendants' Motion for Summary Judgment (#71) is GRANTED. Judgment is entered in favor of Defendants and against Plaintiff on Count I of Plaintiff's Amended Complaint. The court relinquishes supplemental jurisdiction on the remaining counts, which are dismissed without prejudice.

(2) The final pretrial date of March 29, 2021, and jury trial date of April 13, 2021, are hereby VACATED.

(3) This case is terminated.

ENTERED this 26th day of October, 2020.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE