

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CYNTHIA KROPP, *et al.*, as next friends)
and on behalf of S.K,)
)
Plaintiffs,)
)
v.)
)
MAINE SCHOOL ADMINISTRATIVE)
UNION # 44, *et al.*,)
)
Defendants.)

Civil No. 06-81-P-S

RECOMMENDED DECISION

SK's parents have brought this lawsuit on her behalf against Maine School Administrative Union # 44, its superintendent, and the principal of the Wales Central School. In a fourteen-count complaint SK and her parents claim various violations of the Americans with Disabilities Act, the Rehabilitation Act, and the Maine Human Rights Act, as well as a tort claim for intentional infliction of emotional distress and a Section 1983 claim grounded in federal statutes, all arising from the defendants' alleged failure to reasonably accommodate SK, who suffers from allergic reactions and asthma allegedly aggravated by environmental factors at the Wales Central School. The defendants have moved for summary judgment on all counts. I recommend the court grant the defendants' motion with respect to the plaintiffs' claims for compensatory damages, based on the absence of a genuine issue concerning intentional discrimination and further grant the motion as to the claim for prospective injunctive relief, based on the federal standard regarding substantial limitation of a major life activity. I also recommend the Court grant

the motion with respect to the plaintiffs' emotional distress claim and Section 1983 claim. I recommend that the Court grant the motion with respect to all claims asserted against School Administrative Union #44. Finally, I recommend the court dismiss without prejudice plaintiff's Maine Human Rights Act claim for prospective injunctive relief brought against Malinski and La-Joie Cameron in their official capacities.

Statement of Facts

Maine School Administrative Union # 44 (Union 44) consists of the school departments of the Town of Wales, Sabattus and Litchfield and the Oak Hill Community School District. (Defs.' Statement of Material Facts (DSMF) ¶ 1, Docket No. 33.) The functions of Union 44 include employing a superintendent, providing the superintendent with office space, supplies and assistants, and apportioning the costs among the member school departments. (Id. ¶ 2) The Wales School Department is a municipal school administrative unit that operates the Wales Central School in Wales, Maine. (Id. ¶ 3) During certain time periods relevant to this action, Christine LaJoie-Cameron was the principal of the Wales Central School and an employee of the Wales School Department. In particular, she was Principal for three years until she left on August 15, 2006, to work in Litchfield. (Id. ¶ 4) Paul Malinski was superintendent of Union 44 during all times relevant hereto until June 30, 2006, when he retired. (Id. ¶ 5.)

The plaintiffs, Theron and Cynthia Kropp, live in Wales, Maine with their daughter, SK (Id. ¶ 7) They moved there from Poland, Maine, during SK's second grade year. At the time, SK had been withdrawn from the Poland school system for some months after her parents request that another student be transferred out of SK's class was denied. (Id. ¶ 8.) SK started her second grade year as an average student with some

catching up to do. (Id. ¶ 9, Pls.' Opposing Statement of Material Facts (PSMF) ¶ 9, Docket No. 52, Elec. Attach. 2.) During her third grade year, SK developed academic problems that the Kropps attributed to her teacher's conduct and they decided to remove her from school (the Wales Central School) for the remainder of the 2002-2003 school year. (DSMF ¶¶ 10-12.)

SK returned to the Wales Central School during her fourth grade year and during that year she began to develop significant asthma and allergy symptoms at home, at school and at swimming practices and events, requiring much more frequent use of her inhaler. (Id. ¶ 33; PSAMF ¶ 23.) SK has participated in competitive swimming on a year-round basis at the local Y since she was seven years old. (DSMF ¶¶ 30-31.) SK's asthma was so significant during this time that it was preventing her from attending swimming practices.¹ (PSAMF ¶ 24.) She also began requiring more frequent use of a nebulizer as opposed to an inhaler, made more frequent complaints of chest pain, and became much more tired to the point that her parents had difficulty waking her in the morning for school. (Id. ¶ 25.) Mrs. Kropp informed the school that SK was having significant health problems while at home and indicated that she intended to commence the process of seeking "Section 504" eligibility for SK. (DSMF ¶ 14, PSMF ¶ 14.) At this time, the Kropps did not provide the Wales School Department with any medical

¹ SK's swim coaches and the local Y have tried to accommodate SK's asthma and allergies. (Pls.' Statement of Additional Material Facts (PSAMF) ¶ 70, Docket No. 52, Elec. Attach. 2.) The Y facility where SK does most of her swimming has added notices for patrons to stop wearing perfumes and colognes into the pool area to reduce the chances that SK will suffer from a reaction. (Id. ¶ 72.) Despite such precautions, SK's asthma continues to bother her when she swims. (Id. ¶ 74.) SK has experienced significant difficulties and asthma attacks in certain pool environments, which her parents now avoid. (Id. ¶ 77.) Her asthma also bothers her when she goes to places like the mall. (Id. ¶ 75.) SK does not participate in any other sports due to her illness, but all of her specialists have indicated that swimming is a great way to keep her lungs strong enough for every day function. (Id. ¶ 76.) SK's asthma is allergen induced, not exercise induced. (Id. ¶ 78.) Swimming is well-recognized in the medical community as being a beneficial activity for asthmatics. (Id. ¶ 94.)

evidence at all about SK, but the Wales School Department chose to pay for a full assessment of the air quality of its building, which was completed during the summer between SK's fourth and fifth grade school years. (DSMF ¶ 15.) Otherwise, SK's fourth grade school year (2003-2004) was relatively quiet in relation to interactions between school administrators and the Kropps.

Union 44 employs a Director of Special Education who oversees special education and related services, including Section 504 accommodations and compliance within all of the schools inside Union 44. The Director of Special Education also serves as the Union 44 ADA/504 Compliance Coordinator. (PSAMF ¶ 2.) The Director/Coordinator has direct authority over the procedural aspects of a request for Section 504 accommodations and the responsibility to ensure that the law is upheld by the schools when addressing those requests.² (Id. ¶¶ 4, 7.) The relevant grievance procedure for persons with disabilities states that if a parent or other concerned person has questions about the process or legal avenues available for persons with disabilities, he or she should address those questions to the Director/Coordinator. (Id. ¶ 5.) Neither the Wales Central School nor the Wales School Department had its own special education director or compliance coordinator, but they share the services of the Union's employee with the other school departments in Union 44 and pay a proportionate share for his services. (Id. ¶ 6.) Union 44's Special Education Director/Compliance Coordinator at all times relevant to this dispute was Mr. Will Burrow. In addition to this involvement with the 504 process, Union 44 has produced and furnishes to schools within the Union a

² Apropos the Kropps' request for accommodations Superintendent Paul Malinski specifically directed Mr. Burrow to "make sure that in fact the procedure was appropriate, that the information needed to make those determinations was complete so that a determination could be made in a legitimate fashion." (PSAMF ¶ 7.) Burrow ensured Malinski that the law was upheld in the 504 process involving SK. (Id. ¶ 8.)

Section 504 handbook containing policies and procedures for, among other things, matters related to disability accommodation. (Id. ¶ 2.)

Linda Glass, M.D., has been SK's pediatrician since SK's birth. (Id. ¶ 22.) In the Spring of 2004, during SK's fourth grade year, Dr. Glass referred SK to Dr. David Hurst for allergy testing. (DSMF ¶ 17.) When Dr. Hurst tested SK, she had only a moderate amount of allergy and all skin reactions occurred at the maximum testing strength before SK showed any reaction. (Id. ¶ 18.) Dr. Hurst stopped testing SK on May 7, 2004, and continued testing her on May 19, 2004, because he concluded that something about the procedure itself made SK uncomfortable and he did not feel that he should continue the May 7 testing. (PSMF ¶ 18.) When it was indicated that the Kropps were considering building an allergen-free home, Dr. Hurst thought it was a "brilliant idea" that he "certainly approved" of, though it had not been his recommendation that they do so.³ (Id. ¶ 19.)

The Wales Central School received its air quality assessment in August of 2004, which indicated that "the Wales Central School has no concerns with respect to indoor air quality at this time." (DSMF ¶ 16.)⁴ The assessment indicated, however, there were dust problems in some locations and that "a routine inspection and cleaning program is a good way to promote more healthy indoor air." (PSMF ¶ 16.)

Dr. Glass wrote a letter dated August 30, 2004, regarding the Kropps' intent to build their new home. The letter was written by Dr. Glass and intended for submission to

³ The defendants inform us that Dr. Hurst does not believe SK has life threatening asthma. (DSMF ¶ 20.)

⁴ The plaintiff seeks to exclude this statement as the record citation is inadmissible hearsay because it consists only of Exhibit 8 of the LaJoie-Cameron Deposition which is the report of an Air Quality Assessment done by someone who has not been designated as an expert. I agree with plaintiff that the report is not admissible to prove the air quality of the Wales School. However, to the extent the report is offered to explain what steps the school officials took and why they took those steps, I have allowed the statement to stand.

the Kropps' insurer in the hopes that the insurer would contribute to the cost of the home, but a copy of the letter was provided to the school in the Fall of 2004, prior to the first Section 504 team meeting at the beginning of SK's fifth grade year. (DSMF ¶ 21.) At some point in 2004 or 2005 the Kropps constructed an allergen-free home to alleviate SK's asthma and allergy conditions. (PSAMF ¶ 60.) The house is climate controlled, has three air filters, including HEPA filtration and ultraviolet light to kill mold spores and bacteria. (Id. ¶ 61.) All of the furniture and cabinetry in the house was specially constructed and treated with a special sealant to prevent any wood oils from leaking. (Id. ¶ 62.) The wood sealant as well as the paint used throughout the house contain no phenol, a chemical compound discussed below. (Id. ¶¶ 62-63.) The house contains no drapery and contains special dust-resistant shades on all of the windows. (Id. ¶ 63.) The house contains no pictures, minimal shelving and no carpeting to control dust and mold. It also has a central vacuum system to remove dust particles from the air. (Id. ¶ 64.) The Kropps vacuum the house daily and wipe down open surfaces regularly with the "Seventh Generation" brand of all purpose cleaner. (Id. ¶ 65.) No animals, outside shoes, house plants or perfumes are allowed in the house. (Id. ¶ 66.) The Kropps change all bedding weekly, wash it with Seventh Generation laundry soap and use no dryer sheets or fabric softener. (Id. ¶ 67.) The Kropps clean the bathroom, including counters and showers with Seventh Generation bathroom cleaner, wash the dishes with Seventh Generation dish soap and dishwasher liquid, mop the floors weekly with "Orange Plus" and wash the windows every month with vinegar and water. (Id. ¶ 68.) The Kropps select all personal hygiene items to contain no phenols or irritating scents. (Id. ¶ 69.)

Sometime in the summer or fall of 2004 the Kropps asked that a team be formed under Section 504 of the Rehabilitation Act of 1973 to determine whether SK was eligible for Section 504 services. (DSMF ¶ 23.) SK's 504 Team met first on October 28, 2004, and it issued a determination that same day. In addition to Mrs. Kropp, the school nurse, a school social worker, a grade five teacher and Wales Central School Principal Lajoie-Cameron and Director/Coordinator Will Burrow were present. Superintendent Malinski was not. (Malinski Aff. Ex. 1, Docket No. 33, Elec. Attach. 3.)

During the meeting, Mrs. Kropp asserted that the school environment was not healthy for SK and requested that the School pay for SK to be home tutored. (DSMF ¶ 24.) The records of the school nurse, Wendy Bourgoïn, reflect that SK visited her office complaining of breathing problems four times that school year prior to the meeting. (Id. ¶ 25.) According to Bourgoïn, she never saw SK exhibiting what she would consider to be "objective" symptoms at the school and her participation and performance remained steady. Exhibit 1 attached to the Bourgoïn deposition speaks for itself regarding the frequency and seriousness of SK's visits to the school nurse.⁵ (Id. ¶ 29.) The reported observations of SK's teachers were that there did not appear to be any significant change or decline in SK's testing or performance, which remained excellent. The Kropps did not supply the school with medical records at that time, but did supply them with signed releases. (Id. ¶ 27, PSMF ¶ 27.) In addition, Dr. Glass sent faxes to the school on October 27, the day before the team meeting, that described "severe environmental

⁵ The parties disagree about the meaning of those records and frankly I am unable to ascertain the dates of SK's visits in order to determine if there is a dispute of material fact about the number of visits in November 2004. Plaintiff says her peak flows fell in the yellow range rather than green range as defendants contend. I cannot find a reference to yellow range peaks in Nurse Bourgoïn's note, and the record citation given by plaintiffs to the Lajoie-Cameron deposition, Exhibit 20 appears to be a report by Dr. Glass regarding peak flows taken at home after SK spent the day at school.

allergies" and asserted a need for tutoring services. (PSAMF ¶ 26.) At the October 28 meeting the 504 Team determined that SK was ineligible for services on that date. Other itemized "determinations" included the following:

Principal is willing to make any accommodations to allow SK to come to school. Modifications will be made to allow SK some flexibility in schoolwork and after-school tutoring will start on 11/03/04.

(DSMF ¶ 28; Malinski Aff. Ex. 1, Docket No. 33, Elec. Attach. 3.) In effect, the Team invited the Kropps to submit additional information to support a "new determination and new modification as needed." (Malinski Aff. Ex. 1.) The Team specifically requested additional information regarding the nature of SK's medical condition including:

*Current medication program, *Diagnosis, *The severity of the illness, and *Long term outcome.

(Id.; PSAMF ¶ 27.)

On November 2, 2004, Dr. Glass sent the school a letter stating that SK's diagnoses were are follows: moderate to severe asthma, severe environmental allergies, severe seasonal allergies, gastroesophageal reflux, and probable food allergies. (DSMF ¶ 34.) The accommodations Dr. Glass recommended at that time were:

[SK] needs to be able to pace herself when she doesn't feel well, and get extra help when feeling poorly makes her confused. [SK] is a bright young lady, and she shouldn't be further frustrated by the seriousness of her illness. There will be parts of the school building (e.g. a lower level room without good ventilation, following a damp or rainy day) or times when the weather (e.g. high pollen count and windy) is such that [SK] does not feel well. At these times her needs must be accommodated.

(Id. ¶ 35.) Within a very short time following the meeting, additional records and letters arrived⁶ from Dr. Cairns, Dr. Hurst, and Dr. Glass, as well as spirometry test results from Central Maine Medical Center. (PSAMF ¶ 29.)

Meanwhile, the Wales School Department asked the school physician, Carol Mansfield, to review the documentation the Kropps had provided to date. Dr. Mansfield did so and issued her conclusions in a letter dated January 27, 2005, that was reviewed during a 504 Team meeting in February. (DSMF ¶ 41.) Dr. Mansfield concluded that SK has significant allergies and asthma and that her asthma "may" be affecting performance at school. (DSMF ¶ 42; PSMF ¶ 42; Malinski Aff. Ex. 4.) She expressed concern that SK was "using albuterol to an excess" even though her spirometry was in the "green zone." She expressed "concerns that she has a coexisting anxiety disorder, which may have been precipitated by her asthma and 'stomach problems' as mentioned in one of Dr. Hurst's letters" and advised that "a psychiatric evaluation may be needed." (DSMF ¶ 43.) She also advised a one-month trial of home schooling without swimming and monitoring by Dr. Cairns, followed by another month of school attendance without swimming and continued monitoring by Dr. Cairns, followed by yet another month of school attendance with swimming and continued monitoring. (PSAMF ¶ 38.) Dr. Mansfield regarded the existing data to be insufficient to support a long-term at home placement and felt that the trials she proposed and the psychiatric evaluation and consultation would be necessary in order to support such a placement. (Malinski Aff. Ex. 4.) Dr. Mansfield's report was

⁶ The documents cited by the Kropps are all either "to whom it may concern letters," letters addressed specifically to Principal Lajoie-Cameron by Dr. Cairns, or letters sent by Dr. Glass to other medical professionals. The statement offered by the Kropps indicates merely that "Defendants received letters." (PSAMF ¶ 29.) The documents do not establish who other than Principal Lajoie-Cameron and Dr. Mansfield (the school physician) received letters from SK's care providers. Presumably, these documents were incorporated into the record reviewed by the 504 Team.

addressed to Principal Lajoie-Cameron. (Id.) Dr. Mansfield never spoke to Dr. Glass or to the Kropps prior to issuing her opinions. (PSAMF ¶ 39.) Following the issuance of her report, the Kropps revoked their consent for SK's medical providers to communicate with the School because SK's medical records had been transferred to Dr. Mansfield without advance notice to the Kropps and they considered the disclosure to Dr. Mansfield to be a breach of confidentiality. (DSMF ¶ 45, PSMF ¶ 45.) Thereafter, only Dr. Glass had permission to communicate with the School. She was the person who decided what information the School should get and what information it should not get. (DSMF ¶ 46.)

In January 2005 the Kropps decided to remove SK from school and to keep her out of school through the end of the school year. (DSMF ¶ 36.) They justify their decision based on recommendations by Dr. Glass and Dr. Cairns and based on the fact that their new allergen-free home seemed to be providing significant improvement in SK's symptoms. (PSMF ¶ 36.) The Wales School Department provided three hours of tutoring services per week to SK pending a resolution of the Section 504 accommodation matter. (DSMF ¶ 37.)⁷

Dr. Cairns sent Lajoie-Cameron a letter on January 19, 2005, indicating that SK suffers from "severe persistent" asthma requiring the use of high-dose inhaled corticosteroids along with leukotriene antagonists, treatment of gastroesophageal reflux, nasal steroids, and antihistamines to keep her allergies and her asthma under control. (PSAMF ¶ 35.) Dr. Cairns also stated that despite the use of allergy shots, SK still continues to have a strong allergic trigger for her asthma and sees notable improvement in her symptoms when at home in the allergen-free home. (Id. ¶ 36.) She opined that it

⁷ The Kropps assert that it is a material fact that the tutor's time and pay records had "School Union #44" written at the top of the forms. (DSMF ¶ 37; Malinski Aff. Ex. 13.) This is so, but they were also signed by "CLC" (Christine Lajoie-Cameron), the Principal of Wales Central School.

was reasonable that SK be kept out of school for the rest of the school year and tutored to keep her in better health. (Id. ¶ 37.) On January 20, 2005, Dr. Hurst submitted a letter in which he stated, "SK is just not as hyper-reactive as some of our other allergic patients," and recommended that SK could possibly continue to attend school for at least two months before pulling her out. (DSMF ¶ 39.)

The School convened two team meetings in February 2005. On February 2, 2005, the 504 Team⁸ convened to review supplemental medical papers and it was noted that Mrs. Kropp believed there were problems with air quality at the school, including high mold levels. The Team indicated that there was insufficient evidence at that time to support a finding that the school environment contributed to a substantially limiting or detrimental condition and that it wanted an additional "medical review to determine the [e]ffects of the school environment on [SK]." (PSAMF ¶ 30; Malinski Aff. Ex. 2.) Between this meeting and the second February team meeting, Dr. Glass dispatched a February 8, 2005, missive to Lajoie-Cameron in which she reported that SK had taken a methocholine challenge to assess if SK had chronic asthma. Dr. Glass wrote that the test confirmed that SK had "severe persistent asthma." (DSMF ¶ 47; Glass Dep. Ex. 30.) In fact, the respiratory therapist administering the test determined that SK could not finish the challenge. (Id. ¶ 48.) According to Dr. Glass, the test also established that SK was allergic to phenol. (Id. ¶ 49.) Dr. Glass never spoke to the pulmonologist at the office that administered the test, just the respiratory therapist. (Id. ¶ 52.) Nevertheless, Dr. Glass felt that the School should remove all phenols from the school environment. She provided no further information to the school on this subject. (Id. ¶ 53.) It was Dr.

⁸ Lajoie-Cameron and Burrow were again present, but not Malinski. (Malinski Aff. Ex. 2, Docket No. 33, Elec. Attach. 4.)

Glass's medical opinion based on her treatment of SK, her consultation with other physicians and her reliance on other physician's conclusions that the school environment was no longer acceptable for SK's health. (PSAMF ¶ 34.) The second team meeting occurred on February 16, 2005. On February 14, 2005, Dr. Glass prepared a memorandum regarding SK's "504 documentation" that was provided to the 504 Team on February 16. (DSMF ¶ 57; Glass Dep. Ex. 17.) In this submission, Dr. Glass characterized SK's asthma as "severe persistent" and her environmental allergies as "moderate." (Id.; PSAMF ¶ 41.)⁹

At the February 16, 2005, meeting the Team reevaluated the question of SK's ability to attend school. Dr. Glass was in attendance with the Kropps and advocated on SK's behalf. Otherwise, the composition of the Team was essentially unchanged (Lajoie-Cameron and Burrow were present, but not Malinski). Dr. Glass and the Kropps insisted that the school environment was impacting SK's health and aggravating her asthma and allergy symptoms to the point of requiring accommodation. Dr. Glass asserted that the presence of chemicals in cleaning supplies posed a particular problem. Dr. Glass and SK's parents repeatedly complained that the refusal to provide the requested accommodations was in violation of the law. (PSAMF ¶ 57.) The Team did not find that Dr. Glass's opinion was sufficient to support a finding that SK could not attend school. (Id. ¶ 30; Malinski Aff. Ex. 3.) According to the defendants, the Team did not consider Dr. Glass's letter of February 14, 2005, to be satisfactory "medical information" because the documents concerning SK's asthma and allergies were created by Dr. Glass (a pediatrician) and did not come from an asthma and allergy specialist. (Defs.' Reply

⁹ By way of comparison, in November of 2004 Dr. Glass had characterized SK's asthma as "moderate to severe" and her environmental allergies as "severe." (Glass Dep. Ex. 11.)

Statement (DRSAMF) ¶ 41, Docket No. 55.) Union 44 Special Education Director William Burrow acknowledged at the team meeting that there was "very good indirect evidence" of the impact of the school environment on SK's health but cautioned that "there is no documentation that supports that SK was having difficulty in the school environment after moving to the new house." (Malinski Aff. Ex. 3.) Burrow indicated that there was a need for the impact to be in the school in which the accommodations are being requested. (DSMF ¶ 56; DRSAMF ¶ 42.)¹⁰ The Team requested that Dr. Burrow have nine days to follow up on the new information he had received from Dr. Glass and the Kropps. (PSAMF ¶ 43.) However, the Team also advised the family to "move to the impartial hearing process."¹¹ (Malinski Aff. Ex. 3.)

SK remained out of school for the remainder of the fifth grade year and the parties' statements of fact do not contain any follow-up regarding medical information.

In March 2005, Dr. Glass apparently approached the Wales School Board about meeting individually with the members of the School Board. In his response to her letter, Robert English, Chairman of the Wales School Board, indicated that the matter must follow the 504 process as outlined by State and Federal regulations and that it would not be "in order" for Dr. Glass to meet with the School Board. (PSAMF ¶ 12.) The letter from Chairman English, like the various notices of team meetings, the minutes of team meetings and other documents related to SK's 504 process, was captioned with School Union 44 and Oak Hill Community School District letterhead. (Id. ¶ 9.) Chairman

¹⁰ The minutes of the meeting suggest that SK attended only five uneventful days of school since she began living in her family's allergen-free home. (Malinski Aff. Ex. 3.)

¹¹ The record does not indicate that any impartial hearing ever took place. Instead, it appears that the Kropps settled with at-home tutoring for the remainder of SK's fifth grade school year.

English specifically requested and chose to use Union 44 letterhead for his correspondence with Dr. Glass. (Id. ¶ 11.)

The tutoring during the remainder of SK's fifth grade year was not consistent and there were many absences on the tutor's part. As a consequence, SK did not consistently receive the allotted 10 hours of weekly tutoring. When there were problems, Mrs. Kropp felt that Lajoie-Cameron did not want to receive calls about them. (Id. ¶ 88.) According to Mrs. Kropp, Lajoie-Cameron told her she would "never get away with this" and that Mrs. Kropp "would never get what you want." (PSAMF ¶ 86.) According to Mrs. Kropp, Lajoie-Cameron often indicated that what the Kropps were asking for was an extreme measure and that another opinion should be considered. (DRSAMF ¶ 87.) Lajoie-Cameron told Mrs. Kropp she could no longer enter the building to pick up SK's assignments and had to wait by the entrance for someone to bring her those assignments, which did not always occur. (PSAMF ¶ 89.) During this time, Lajoie-Cameron also informed Mrs. Kropp that her job as drama director at the school no longer had funding.¹² (Id. ¶ 90.) Mrs. Kropp felt that the animosity between herself and Union 44 was so great that she stopped calling about the sporadic tutoring to avoid having to speak with Lajoie-Cameron. (Id. ¶ 91.) It was upsetting to the Kropps that the school administration was resisting their efforts to obtain accommodations rather than trying to see if the accommodations would work. (Id. ¶ 92.)

The 504 Team met again on August 18, 2005, to assess SK's return to school for her sixth grade year. (Aug. 18, 2005, Meeting Minutes, Malinski Aff. Ex. 5.) This time Superintendent Paul Malinski was in attendance instead of Mr. Burrow, but the Team otherwise included the same general cast: the Kropps, Dr. Glass, Lajoie-Cameron,

¹² Lajoie-Cameron denies these assertions in an affidavit attached to the defendants' reply statement.

the school nurse and a fifth and sixth grade teacher. (Id.) At the meeting, Mrs. Kropp expressed concerns about SK's health, but provided little additional medical documentation. Nonetheless, at the Superintendent's urging, the Team chose to find SK eligible for accommodations under 504. Indeed:

Each team member answered the question[:] "Does SK's asthma and allergies significantly restrict her breathing?" The team concluded that SK was extremely limited under the major life activity of breathing.

(Id.; DSMF ¶ 58; PSAMF ¶ 45.) Superintendent Malinski expected further medical documentation to be forthcoming after the determination had been made. (DRSAMF ¶ 45.) The Team adopted an individual accommodation plan and attached it to the minutes of the August 18 meeting. The plan set forth therein involved communication systems and additional responsibilities for the school nurse. The Team specified that the School would assess the cleaning products it used in other areas of the building, as it had already switched to the products the Kropps had selected for purposes of cleaning SK's classrooms. The plan provided for the School to photocopy all material safety data sheets ("MSDS") from cleaning products and provide them to Dr. Glass before SK entered the school. According to the defendants, the distributor of the products subsequently confirmed that they were phenol free. However, those assurances do not mean that cleaning products might not contain somewhere in their origination and production some trace level or even significant amounts of phenol. (DSMF ¶ 59; PSMF ¶ 59.) The plan noted, among other things, that the school had recently been painted and that there was a concern over the existence of phenols in the paint. The plan indicated: "It was going to be researched and if the paint does contain 'phenol' it takes 30 days to cure. SK would need to be out of school during this time." (Malinski Aff. Ex. 5; PSAMF ¶ 82.) In

addition, the plan stated: "Mr. Malinski will see that signs are posted at the entrances of the building." (Malinski Aff. Ex. 5.) The record reflects that this was a reference to a notice concerning the use of perfumes and colognes. Finally, for present purposes, the plan indicated that the nurse would keep a peak flow measuring tool in her office to gauge SK's symptoms as needed. (Id.)

SK came back to school for the 2005-06 school year. (DSMF ¶ 60.) The Kropps assert that "no one did the research they were supposed to do and no one told anybody" about whether the paint used at the school contained phenol. (PSAMF ¶ 82.) They also assert that the notices concerning perfumes and colognes were not posted in a timely fashion but were only being posted at the time of the team meeting held on September 27, 2005. (Id. ¶ 83.) At the September 27, 2005 meeting, Superintendent Malinski was again in attendance for Union 44 rather than Mr. Burrow. (Malinski Aff. Ex. 6.) Otherwise, the team makeup was, for practical purposes, unchanged. SK's teachers reported that SK continued to do very well in class, remaining an excellent student, and that they saw no evidence that she was having any problems except that she would go to the school nurse frequently. The school nurse indicated that "SK did not have asthma" during any of these visits according to certain peak flow tests. SK would take puffs of her inhaler as prescribed by Dr. Glass during these visits to the school nurse. The school nurse noted that SK did complain about "tightness" in her chest, but the nurse could not find any objective measurement of this symptom. (DSMF ¶ 61.) The Kropps reported that they observed SK's health decline following her return to school. (Malinski Aff. Ex. 6.) Mrs. Kropp indicated that SK's health deteriorated throughout the days of the weeks, with a rebound by Sunday, but further deteriorated as the weeks of school progressed.

Predictably, her condition improved when she returned to the allergen-free environment of her home. (PSAMF ¶ 93.) Dr. Glass asserted at the meeting that, notwithstanding the MSDS sheets, there were in fact phenols in the cleaning products. Dr. Glass also claimed that eliminating phenols was only a part of the problem, that SK was also allergic to hydrocarbons in the products. (DSMF ¶ 62.) According to the Kropps, SK's allergies to such substances were "discovered" after she experienced bronchospasm from the use of two different types of asthma medications, Albuterol and Flovent, that contain hydrofluorocarbons. (PSAMF ¶ 79.) Once Dr. Glass changed SK's asthma inhaler medication to Advair, she did not experience any similar reactions to the medication. (PSAMF ¶ 80.) Mrs. Kropp left the meeting early feeling frustration at her perception that she, her husband and Dr. Glass were being regarded as the problems. (PSAMF ¶ 84.)

Moving forward slightly, we are informed that on multiple occasions during the first six weeks of school in the fall of 2005, SK presented to the nurse's office with complaints of chest tightness and pain, difficulty breathing and peak flows below 342. (Id. ¶ 47)¹³ In fact, during the fall of 2005, SK visited the nurse's office 32 times during the first 25 days that she was in school. (Id. ¶ 48.) SK had two visits to the nurse's office specifically complaining of symptoms while in Spanish or Art class, both of which were

¹³ The Kropps again attempt to cite to the Asthma Action Plan, dated August 22, 2005, the unauthenticated exhibit that the defendants continue to ask to have stricken. The Asthma Action Plan dated August 22, 2005, specifically provided that SK's symptoms were considered to be in the yellow zone when she had some problems breathing, coughing, wheezing, chest tightness, problems working or playing and difficulty sleeping at night and peak flow meter readings of 214-342. Reviewing Bourgoin deposition exhibit 1, which has already been made part of the summary judgment record, the nurse's records for the 2004-2005 school year and the 2005-2006 school year reveal the lowest peak flow recorded by the nurse is 300 on October 5, 2005, and that prior to October, most, if not all, of the readings were in the 340-420 range. I am perplexed about the defendants' objection I have not considered the asthma action plan in setting forth the body of material facts, even though the exhibit is quite helpful in understanding the meaning of some of the other record evidence. Even without the asthma action plan, the record indicates, at minimum, a dispute of fact about whether SK experienced "asthmatic episodes" while at school and the school officials' awareness of Dr. Glass's view on the subject.

located in the basement of the building. (Id. ¶ 50.) At both the September meeting and the subsequent team meeting in October, the Kropps requested that the School move the Spanish class from the basement to a different floor due to SK's problems in that area of the school building. As recounted below, that request was denied because the Team concluded it was not appropriate to move an entire class for Spanish based upon the evidence then available. (Id. ¶ 51.)

On October 3, 2005, SK reported to the nurse that she was having significant difficulty breathing, rating her difficulties as 8 out of 10. SK's peak flows were 390, 370 and 350 at 10:50 a.m. and 360, 330 and 330 at 12:40 pm. (Id. ¶ 52.) On October 5, 2005, SK's last day of school before the next team meeting, SK reported to the nurse's office four times complaining of chest pain rated 5 out of 10 and difficulty breathing rated 7 out of 10. Her peak flows were in the yellow zone on that date. (Id. ¶ 53.)

The 504 Team next met on October 14, 2005. Among others present for the meeting were Superintendent Malinski, Principal Lajoie-Cameron, Nurse Bourgoin, the Kropps and attorneys for both sides. (Malinski Aff. Ex. 7.) Superintendent Malinski solicited comment on SK's condition since the last meeting. Mr. Kropp indicated that SK would not be returning to school. (Id.) Principal Lajoie-Cameron represented to the team that during the six school days following the September 27, 2005, meeting, SK had not given the appearance of being ill and interacted well with other students. (PSAMF ¶ 54; Malinski Aff. Ex. 7.) After a report from two of SK's teachers that she regularly asked to visit the nurse's office, Nurse Bourgoin represented that SK visited the office three or four times per day, related SK's subjective complaints of chest pain and breathing difficulty, and stated that SK's peak flow results from those six days were almost all "in

the green zone (343-427)."¹⁴ (PSAMF ¶ 55.) The Team requested additional medical information before providing any additional accommodations for SK. (Id. ¶ 56.) The Kropps complain of the School's failure to implement the following requested accommodations:

1. Implement the EPA tool kit without limitation;
2. Change all cleaning products throughout the School to "green" products;
3. Move the Spanish class from the basement;
4. Permit SK to enter the school building from a separate entrance;
5. Keep the downstairs bathroom doors closed;
6. Install HEPA filters in the school's heating and ventilation system.

(PSMF ¶ 66.) The Team was largely not satisfied that the Kropps had provided adequate medical documentation to support a need for these additional accommodations. (DSMF ¶ 66.) The Team noted that, as discussed at the previous 504 meeting, it sent a letter to the Kropps requesting medical documentation but did not receive any response. (Id. ¶ 67.)

The School also reexamined all the requests made by the Kropps at the meeting in September and described its process in the following format:

1→ School should adopt and follow the EPA Tool Kit. → **The School has reviewed the Tool Kit and is currently meeting most of its standards.**

2→ School should switch all cleaning products at the Wales Elementary School to "green" products. → **The School has not changed all of its cleaning products in the entire school. It continues to clean the areas**

¹⁴ The Kropps characterize the last statement as an intentional misrepresentation because SK's individualized green zone does not correspond to the "generic" green zone. This statement of fact is supported by Bourgoin Deposition Exhibit 5, which, the defendants point out, Nurse Bourgoin described as a "generic" document during her deposition. (Def's Reply SAMF ¶ 55.) None of this makes a lot of sense unless you view it in tandem with the Asthma Action Plan that the defendants insist on having excluded as unauthenticated, but which explains that SK's individualized yellow zone is in the 214-342 range, not the 300-400 range as indicated on the "generic" chart.

in which SK spends most of her day with the specific cleaner requested by the Kropps. It is assess [sic] moving to alternative products school wide.

3→ School should be re-cleaned in accordance with the EPA Tool Kit to rid it of the phenols that may still be present → **No Agreement at this time.**

4→ School should assess the air handling system in the school to determine how the air is circulated. → **Completed**

5→ School should assess whether a HEPA filter can be added to the air handling system. → **Completed**

6→ School should evaluate all construction or painting projects in the school to determine potential health risks to SK, and take appropriate action to reduce or eliminate such risks. → **The School has indicated that it will take into account potential health risks to SK as part of construction and painting projects.**

7→ School should move Spanish class from its current location in the basement to SK's regular classroom to minimize her time on the lower level of the school. → **No agreement at this time.**

8→ School should continue to allow SK to enter the building through a separate entrance so as to avoid walking down the hall with other students and fumes from busses should there be any. School should not require SK to knock on door to get into the building. → **No agreement at this time.**

9→ School should keep door to the downstairs bathrooms closed to reduce the traveling of air from those rooms. → **No agreement at this time. The School noted that the doors need to remain open for safety reasons.**

10→ School should consider contacting an organic chemist. → **The School indicated that it will hire a medical expert to review this matter.**

(DSMF ¶ 68.) As part of its discussion of these issues at its meeting in October, the

Team reviewed test reports concerning the School's ventilation system. These tests

showed a 65% efficiency in the filters, and the evaluator noted: "We service many schools and yours is the only one that has filtration higher than 30%."¹⁵ (Id. ¶ 70.)

At some point in October the School made an offer, reiterated in a November 2, 2005, letter from Superintendent Malinski, to purchase air purifiers for each of SK's two classrooms to further improve the air quality in those rooms, if SK would return to school. In the same November 2 letter Mr. Malinski wrote that they would continue use of green products in the sixth and seventh grade classrooms. (Id. ¶ 71.) The Kropps never responded to this offer because they were frustrated with the process and had hired an attorney to handle the communications for them because, they assert, communications with school officials had broken down. (DSMF ¶ 72, PSMF ¶ 72.) Also in October 2005, the School decided to hire an expert, Dr. Martin Broff of South Shore Allergy & Asthma Specialists, P.C., to review the matter. (DSMF ¶ 82.) Dr. Broff issued a letter report dated December 6, 2005, in which he opined that, among other things, there is "no compelling evidence that SK has severe persistent asthma."¹⁶ (Id. ¶ 83.) The School provided Dr. Broff's report to the Kropps. (Id. ¶ 74.)

Meanwhile, sometime in October or November 2005, the Kropps went to Mount Sinai Hospital in New York City for expert advice about whether SK's asthma was being exacerbated by cleaning products used in the school. (Id. ¶ 75; Glass Dep. Ex. 21.) The experts at Mt. Sinai advised that "it is unlikely that phenol is the responsible agent" for SK's difficulties, based on the representations from Hillyard Industries, but opined that mold in the basement classroom was a likely environmental factor contributing to SK's

¹⁵ The Kropps object to the hearsay nature of this report prepared by an undesignated expert. Again, it is allowed to explain the nature of the ongoing process.

¹⁶ Once more the Kropps object because Dr. Broff is not a designated expert and his report is simply hearsay. Again, I admit only the fact that such a report was made in order to lay out the ongoing process that led to this litigation.

problems at school and "every effort" should be made to reduce exposure to this factor. They advised that the School reference the EPA tool kit to test for the presence of "asthma triggers" like mold. (DSMF ¶ 76; PSMF ¶ 76.) The Kropps did not provide a copy of this letter to the School. (DSMF ¶ 77.) Dr. Glass explained that this was unnecessary because "the information that was provided to the school was adequate enough to make the accommodations that were necessary." (Id. ¶ 78.)

SK is now a seventh grader and is still being tutored at home. (Id. ¶ 84.) Her two siblings are also home schooled. (Id. ¶ 85.) The Wales Central School installed HEPA filters in its air handlers in early 2006. (Id. ¶ 87.) The Kropps complain that they were not notified of this ventilation upgrade. (PSAMF ¶ 59, DRSAMF ¶ 59.) Currently, 90% of the cleaning products used at the Wales Central School are "green" products. (DSMF ¶ 88.) Wales Central School switched to all "green" cleaning products after the commencement of the Maine Human Rights complaint and this lawsuit, but initially it agreed to immediately switch to "green" products in the classrooms used by SK. The delay in switching to entirely "green" products was caused in part by the need to educate people about the need to do so, the cost differential (25% to 30% greater cost for green products), the bureaucracy of purchasing through the school vendors, and the need to use up existing products before making a large purchase of new product. (PSAMF ¶ 58, DRSAMF ¶ 58.)

Additional factual assertions regarding Union 44's party status

Superintendent Malinski played an active part in the 504 process and even attended meetings at Dr. Glass's office to discuss SK's eligibility and the requested accommodations. (PSAMF ¶ 14.) At one point, Malinski assured Dr. Glass that he

would ensure student and staff training occurred about asthma and that the School would start to use more green products. (Id. ¶ 15.) The tutoring time cards for SK's tutors were on Union 44 forms and were processed by Union 44 staff and stored at the Union 44 main office. (Id. ¶ 17.) The school districts that make up Union 44 use the same cards and have Union 44 process them, but Union 44 does not pay the tutors' wages. (DRSAMF ¶ 17.) During the discovery process in this matter, the Kropps sent interrogatories and requests for production of documents specifically to Union 44 and those discovery requests were responded to by Union 44 with absolutely no indication that it was not the proper party. (PSAMF ¶ 18.) Further, many of the interrogatories specifically asked whether Union 44 thought certain requests for accommodations were reasonable and, if not, why not, and those questions were answered by Union 44. (Id. ¶ 19.) The defendants' answer to the complaint does not assert that Union 44 is not a proper party. (Id. ¶ 20.) Nor do any of the defendants' other filings, other than the pending summary judgment motion, assert that Union 44 is an improper party. (Id. ¶ 21.)

Discussion

The Kropps filed suit in April 2006. According to their complaint, Maine School Administrative Union # 44 is liable for violating the Rehabilitation Act, the Americans with Disabilities Act, and the Maine Human Rights Act, and for the Maine law tort of intentional infliction of emotional distress. (Compl. Counts I-IV.) The Kropps sued Superintendent Malinski on the same theories and also added a count under Section 1983 of the Civil Rights Act. (Id. Counts V-IX.) Parallel claims are advanced against Principal Lajoie-Cameron. (Id. Counts X-XIV.) The Kropps request both injunctive relief and an award of damages.

In addition to challenging the allegation of discriminatory conduct, the pending motion for summary judgment asserts that Union 44 cannot be held liable for the alleged failure to accommodate because the Wales School Department is responsible for making accommodations in its school facilities for its students, not Union 44. Although the individual defendants do not similarly contend that they cannot be liable because they were but members of the School District's 504 team, they do argue that they cannot be sued as individuals under the Rehabilitation Act or the Americans with Disabilities Act. I address these more technical challenges first before considering whether the plaintiffs have generated one or more trial-worthy claims.

A. Although Union 44 is not a proper defendant on the facts of this case, the claims against the Wales School Department Principal and Superintendent, in their official capacities, are sufficient to bind the Wales School Department.

According to the defendants, Union 44 is not a proper defendant because it has no supervisory authority or control over the schools and teachers that make up the Union. (Mot. Summ. J. at 12, Docket No. 32.)¹⁷ They indicate that Union 44 is merely an agent formed for purposes of carrying out certain administrative functions and that the proper defendant in a case of this kind is the school administrative unit attended by the student, here the Wales School Department. (*Id.*) See 20-A M.R.S.A. § 1(26) & (31) (defining "school administrative unit" and "school union," respectively). The functions of a school union are performed by the union committee which consists of the school boards of the various school administrative units that form the union. 20-A M.R.S.A. § 1902. These

¹⁷ Approximately one week before defendants filed their motion for summary judgment, plaintiff moved to amend the complaint to substitute the Wales School Department for School Union # 44 as the named defendant. The motion was denied by Magistrate Judge Cohen because plaintiff failed to "establish good cause or excusable neglect" for the failure to file the motion prior to the deadline for amendment set forth in the scheduling order. (Docket No. 29).

school boards are the agents of the school administrative units that comprise the school union. Id. Union functions are limited to the following: employing a superintendent, fixing his or her salary, providing the superintendent with an office, supplies, and assistants; determining the "relative amount of service to be performed by the superintendent in each unit," and apportioning costs for such employment among the members of the union. Id. §§ 1051, 1053, 1054, 1902(3). Additionally, a school union may assume additional responsibilities for a school administrative unit if the school board of a school administrative unit delegates those responsibilities by majority vote of its school board. 20-A M.R.S.A. § 1902(3)(F).

The record lacks evidence of any delegation to Union 44 by the Wales School Department of responsibility over the determination of the Kropps' request for accommodation of SK's alleged disability or for the determination of 504 accommodation requests generally. It is apparent that Union 44 performs certain functions related to 504 compliance, in light of its retention of a 504 coordinator, but these are simply administrative functions assigned to certain officers to perform in agency to the individual school districts. The school districts retain all of the liability for monetary damages claims, even if a school union officer exercises final decision-making authority in regard to a request for accommodation. What the record does establish is that two Union 44 officers participated in the process of administering the Kropps' request for accommodations: first Special Education Director Will Borrow, in his capacity as Union 44's ADA/504 Compliance Officer, and then Superintendent Malinski. Both of these Union 44 officers engaged in the 504 process as members of the 504 Team. Although it is true that Superintendent Malinski met with Dr. Glass and represented that certain

limited accommodations would be forthcoming, the record reflects that formal decision-making was exercised through SK's 504 Team in the context of team meetings, which were convened to carry out duties imposed specifically on the Wales School Department, not its officers, agents, or other administrative organizations. (DSMF ¶ 23; PSMF ¶ 23.) As I previously concluded in the matter of Johnson v. School Union # 107, 295 F. Supp. 2d 106, 113 (D. Me. 2003), a school union is not a proper defendant even when it carries out duties solely in service to a school administrative unit, so long as the authority exercised is vested in the school administrative unit alone. Here, the authority being exercised resided in the school administrative unit. Additionally, even if Union 44 could be liable as an administrator, there is the additional obstacle that the Wales School Department does not appear to have ever delegated decision-making authority to Union 44 with respect to the controversy at hand. Accordingly, I agree with the defendants that Union 44 is not a proper party defendant.

The fact that Union 44 is not a proper defendant on these facts does not mean that the existing civil action lacks any teeth with respect to the Wales School Department. The Kropps have named as defendants both the Wales Central School Principal and its Superintendent, both of whom exercised final decision-making authority over the Kropps' request for accommodation, albeit through the vehicle of the regulatory "team" process. Thus, even though the individual defendants cannot be personally liable under the ADA or the Rehabilitation Act, see Garcia v. State Univ. of N.Y. Health Sci. Ctr., 280 F.3d 98, 107 (2d Cir. 2001) (collecting cases), the claims against them are sufficient to assert official capacity claims and those claims, for all practical purposes, amount to claims against the Wales School Department. Principal Lajoie-Cameron and Superintendent

Malinski (particularly when taken in tandem) can fairly be regarded as the Wales School Department officials with final decision-making authority over the matter at hand,¹⁸ notwithstanding the existence of a 504 "team" process. Consequently, the claims against them are sufficient to bind the Wales School Department with respect to any relief that may be ordered by the Court. Cf. Dirrane v. Brookline Police Dep't, 315 F.3d 65, 71 (1st Cir. 2002) ("[A] suit against an officer in his official capacity is 'only another way of pleading an action against an entity of which an officer is an agent.'" (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.55 (1978))). The scope of the relief available in such official capacity claims is not presently at issue, but it appears that both compensatory damages and injunctive relief are available in official capacity claims brought under the ADA and Rehabilitation Act. See Carten v. Kent State Univ., 282 F.3d 391, 396 (6th Cir. 2002); Daniel v. Levin, 172 Fed. Appx. 147, 149 (9th Cir. 2006) (not for publication); Meyers v. Colo. Dep't of Human Servs., 62 Fed. Appx. 831, 833 (10th Cir. 2003) (not for publication).

B. The record cannot support a claim for compensatory damages because there is no evidence of economic harm or of animus toward SK on account of her disability.

First Circuit Court of Appeals precedent establishes that "under Title II [of the ADA], non-economic damages are only available when there is evidence 'of economic harm or animus toward the disabled.'" Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 17 (1st Cir. 2006) (quoting Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 126-27 (1st Cir. 2003)). Persuasive precedent from other circuit courts of appeals indicates that the claim for damages under the Rehabilitation Act requires the same showing: intentional

¹⁸ In contrast, it does not appear that Union 44 had independent authority to determine the Kropps' request for accommodation, otherwise there might be a basis for arguing that the suit against Union 44 similarly be treated as an official capacity suit against the Wales School District.

discrimination or actual animus toward the disabled. Duvall v. County of Kitsap, 260 F.3d 1124, 1136 (9th Cir. 2001) (concerning Section 504 Rehabilitation Act claims); Wood v. President & Tr. of Spring Hill Coll., 978 F.2d 1214, 1219-20 (11th Cir. 1992) (same); Scokin v. Texas, 723 F.2d 432, 440-41 (5th Cir. 1984) (same); see also Meyers, 62 Fed. Appx. at 833 (10th Cir.) (same) (not for publication). Similarly, the Maine Law Court has held that, with respect to a plaintiff's entitlement to damages under the Maine Human Rights Act in a case concerning public accommodation, the standard to be applied to a claim for damages is to be guided by federal precedent concerning the ADA. Scott v. Androscoggin County Jail, 2004 ME 143, ¶¶ 16-17, 21, 24, 866 A.2d 88, 93-95 (applying intentional discrimination standard). Based on these authorities, the Kropps' claim for damages based on the alleged failure to accommodate depends on a showing of intentional discrimination no matter which statute they proceed under.¹⁹

In their opposition memorandum the Kropps attempt to make a case for a finding of intentional discrimination based on circumstantial evidence by complaining that the defendants continually insisted that SK was capable of attending class at Wales Central School and that any further accommodations were not necessary for SK to benefit from the school program. (Pls.' Opp'n Mem. at 7, Docket No. 49.) They argue that such a position is fundamentally at odds with the medical opinion in the case, including the opinion of the school's own physician. (Id. at 7-8.) Unfortunately for the Kropps, a reasonable disagreement as to the significance of the evidence is not a sufficient basis to support a finding of animus toward the disabled.²⁰ A school surely cannot be found to

¹⁹ The Kropps concede that a showing of intentional discrimination is required to recover compensatory damages. (Opp'n Mem. at 17.)

²⁰ I draw this conclusion by looking at the facts in Scott, wherein the Maine Law Court determined a prisoner with a qualifying disability could not prove intentional discrimination under the MHRA or Title II

bear animus toward the disabled whenever it fails to adopt, without reservation, every position taken by a child's advocates. In this case, the record demonstrates that the 504 team was attentive to the Kropps' requests for accommodations, agreed to label her as substantially limited in the major life activity of breathing in order to facilitate the process, and implemented some of the requested accommodations, including the installation of HEPA filters and the use of green cleaners in SK's classrooms, the provision of tutoring services, the posting of notices at the school concerning perfumes and colognes, and the provision of an education session for students and staff, but failed to promptly install HEPA filters in the school-wide ventilation system, failed to promptly use green cleaners throughout the school, failed to relocate the Spanish class from a basement room—or failed to keep the doors to the basement restrooms closed—and failed to permit SK to enter the school through a separate door away from the commotion of herding students. Even if there exists a question whether it would have been more reasonable to simply afford these accommodations in the best interest of SK, there simply are no reasonable grounds upon which a fact finder could fairly infer that the defendants undermined the 504 process or denied any particular accommodation because they harbored discriminatory animus toward SK on account of her disability. The Kropps repeatedly assert that the defendants take the position that "there was no evidence that SK was experiencing any problems," (see, e.g., id. at 6-12 (*passim*)), and set up that

merely because the jail refused to accede to his demand that he receive his medications five times a day as recommended by his treating physician and instead limited his dosage to three times a day as recommended by the jail's physician's assistant, resulting in the prisoner's inability, due to increased symptoms, to participate fully in jail programming. 2004 ME 143, ¶¶ 29-30, 866 A.2d at 96. I also look to the facts in Carmona-Rivera, wherein the First Circuit concluded that a teacher with a qualifying disability could not prove Title II intentional discrimination in support of a monetary damages claim when the school bureaucracy caused a three-year delay in implementing her request for a first-floor classroom, private bathroom facilities in which to maintain her prosthetic device and an assigned parking space near the school's entrance. 464 F.3d at 17-18. The sort of evidence SK musters fails to suggest the sort of malice or hostility toward either SK or the disabled that would support an intentional discrimination claim.

characterization as a punching bag for a pretext argument. The problem with that approach is that it depends on a false premise. It is not true that the 504 team or, more narrowly, the defendants took the view that SK was not experiencing any problems. As the Kropps point out, the school physician acknowledged the existence of an appreciable asthma/allergy impairment. Moreover, the Team labeled SK substantially limited and implemented certain accommodations based on its understanding that she was experiencing some problems with the school environment. The dispute between the parties has always been one of degree, not one of absolutes. Thus, an accurate characterization of the defendants' position is the one quoted by the Kropps at page 11 of their opposition memorandum: "there is no evidence that the few items requested by the parents that [the Team] did not institute were *necessary* to accommodate SK." (Pls.' Opp'n Mem. at 11, quoting Mot. Summ. J. at 17.) I simply cannot credit the Kropps' attempt to cast the defendants as being willfully in denial of the existence of any problems and because of this flawed footing the Kropps' pretext argument tumbles under its own weight.²¹ In the absence of any genuine issue as to the existence of intentional discrimination or animus the Kropps' claims for non-economic damages must be dismissed.

C. The record cannot support an award of prospective relief under the federal anti-discrimination statutes because SK is not disabled under those statutes.

²¹ The Kropps also argue that evidence of tension or unpleasantness between Mrs. Kropp and Principal Lajoie-Cameron or between Dr. Glass and other doctors and school administrators supports an inference of discriminatory animus against SK. (Opp'n Mem. at 17-18.) I fail to see the logic in this argument. Those frictions were created in part because the 504 Team had not yet been convinced that all of the accommodations sought by Mrs. Kropp and Dr. Glass were reasonable and necessary. Neither had Mt. Sinai Hospital been convinced that the removal of all phenols was reasonable and necessary. That fact does not mean that Mt. Sinai Hospital harbored discriminatory animus toward SK.

The Kropps' complaint includes pleas for declaratory and prospective injunctive relief. The defendants suggest that the plea for prospective relief is moot because the Kropps have no intention of permitting SK to return to the school environment. (Mot. Summ. J. at 13 n.11.) There is nothing on the record to indicate that the Kropps have waived their request to have the Court fashion injunctive relief or have expressed an unwillingness to permit SK to attend, under any circumstances, public schools administered by the Wales School Department and/or Union 44. (See DSMF ¶ 86; PSMF ¶ 86.)

Pursuant to Title II of the ADA, Section 202: "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. Similarly, Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . 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. Under either act, injunctive relief is conditioned upon proof (1) that the plaintiff is a qualified individual with a disability; (2) that the defendants are subject to the Act; and (3) that the plaintiff was excluded from participating in or benefiting from the defendants' services, programs or activities by dint of a disability and (4) the defendant failed or refused to afford a reasonable accommodation to enable meaningful participation, benefit or access. See, e.g., Shotz v. Cates, 256 F.3d 1077, 1079 (11th Cir. 2001) (Title II); Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 85 (2d Cir. 2004)

(Rehabilitation Act); Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1046-47 (9th Cir. 1999) (addressing the burden of proving the existence of a reasonable accommodation); see also Alexander v. Choate, 469 U.S. 287, 301 (1985) (concerning "meaningful access"); Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901 (6th Cir. 2004) (observing that the language of Section 504 of the Rehabilitation Act is "nearly identical" to that of Section 202 of Title II, so that analysis of a claim under one "roughly parallels" an analysis under the other and "cases construing one statute are instructive in construing the other."). The prongs of the foregoing evidentiary burden fracture into several subparts upon application to an actual controversy. In particular, the term "disability" is merely a shorthand reference for (1) a mental or physical impairment that (2) "substantially limits" a person's ability to engage in (3) a "major life activity." 42 U.S.C. § 12102(2)(A). A substantial limitation, in turn, exists when the individual in question is:

- (1) unable to perform a major life activity that the average person and the general population can perform; or
- (2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1630.2(i). The Supreme Court has held that this standard is to be applied stringently. Thus, it has construed "significantly restricted" as "severely" restricted. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) (holding that "an individual must have an impairment that prevents or *severely restricts* the individual from doing activities that are of central importance to most people's daily lives") (emphasis added). The restriction in a major life activity is to be demonstrated with the plaintiff's personal life experience, not merely by reference to a diagnosis or opinion of impairment.

Id. at 198. Additionally, in order to demonstrate unlawful exclusion from a public program a plaintiff generally must prove (1) that the alleged disability serves to exclude the person from participation in a public program and (2) that the requested accommodations are necessary to overcome the exclusionary impact of the disability at issue. Cf. Dudley v. Hannaford Bros. Co., 333 F.3d 299, 307 (1st Cir. 2003). For a typical asthmatic treated with corticosteroids, inhalers and nebulizers, it can be very difficult to demonstrate a substantial limitation in the ability to breath. Although such a person might well be substantially limited without his or her medication, it must be demonstrated that the limitation remains substantial even when medications and treatments are in place. Sutton v. United Air Lines, 527 U.S. 471, 481-83 (1999); see, e.g., White v. Honda of Am. Mfg., 241 F. Supp. 2d 852, 856-57 (S.D. Ohio 2003) ("Numerous courts have found that individuals who are able to treat their asthma such that they are able to engage normally in physical exertion without symptoms are not substantially limited in any major life activity.") (collecting cases); Smith v. Tangipahoa Parish Sch. Bd., Civ. No. 05-6648-C-4, 2006 U.S. Dist. LEXIS 85377, *25-26 & n.9, 2006 WL 3395938, *8 & n.9 (E.D. La. Nov. 22, 2006) (finding that a substantial limitation in breathing was not established where the plaintiff had to take daily medications and carry an EpiPen at all times for an indefinite period because there was only a "potential" for the plaintiff's allergies to be severe under limited circumstances) (collecting cases).

The defendants argue that the Kropps cannot make the requisite showing that SK qualifies as disabled under the acts because she is not substantially limited in the major life activity of breathing. (Mot. Summ. J. at 14.) Determination of the substantial

limitation question is a highly individualized inquiry and it is the plaintiffs' burden to prove the existence of a qualifying disability. Williams, 534 U.S. at 199. The Kropps' presentation on this question is simply inadequate. They spend but one paragraph of their opposition memorandum addressing it and the presentation is heavy on rhetoric and thin on proof. They assert that the defendants' challenge "is clearly so contrary to the evidence [as to] warrant very little discussion." (Opp'n Mem. at 6.) They proceed to offer little to no discussion. (Id.) Essentially, their position is that SK must be severely restricted in her ability to breathe because the defendants qualified her for the 504 process and Dr. Mansfield agreed that her asthma and allergies were significant. (Id.) The Kropps' reliance on such evidence is simply inadequate to prove the existence, in fact, of an asthma/allergy impairment that substantially limits SK's ability to breathe even when she is medicated. That Dr. Mansfield regarded SK's asthma and allergies as significant and that other doctors may have considered her asthma as "severe persistent" does not explain the degree of SK's impairment or even divulge any impairment in her actual life experience once she has taken her prescribed medication. In order for a favorable finding to be made on the issue of disability, the Kropps would need to establish on the record the particular limitations that SK suffers from in terms of her own personal experience, when medicated, in such a way as to illustrate that her experience of breathing substantially departs from the experience of the average person. Williams, 534 U.S. at 199; see also 29 C.F.R. § 1630.2(j)(1). What the summary judgment record reveals is that SK's symptoms are triggered at school when she attends class in a particular classroom. When she experiences these symptoms (tightness in the chest) she uses a nebulizer in the nurse's office to administer a medication that treats the attack. Her subjective symptoms include

chest "tightness" and pain and her objective symptoms demonstrate that her respiration peak flows decline to a level that is not regarded as severe, at least not according to anything I have reviewed in the record. The Kropps fail to indicate that any functional limitation remains once SK has administered her medication in the nurse's office. Thus, although it is easy to sympathize with this young child's difficult circumstance, given the absence of any meaningful depiction of SK's experience of breathing after she treats an attack, it is simply not possible to place SK in the "severely" limited category or even to understand how her circumstance is appreciably worse than that of the many other plaintiffs with asthma in the mine run of unsuccessful cases. Accordingly, I conclude that the Kropps fail to generate a genuine issue of material fact whether SK's asthma and allergies are substantially limiting impairments with regard to her ability to breathe.

The Kropps assert that they need not demonstrate substantial limitation because an individual can qualify for protection under both acts if she has a record of a substantially limiting impairment or is regarded as substantially limited in regard to a major life activity. See 42 U.S.C. § 12102(2)(B), (C). This is, of course, generally true. But the problem with this argument is that the claim for damages, discussed above, is legally insufficient for want of evidence of intentional discrimination, and all that appears to remain, in terms of practical relief, is the prospect of injunctive relief in the form of court-mandated accommodations. Unlike monetary relief awarded to redress past discrimination, an award of prospective injunctive relief requires the Court to find that some or all of the requested accommodations are necessary in order to overcome the disability in question. Thus, the Kropps must demonstrate that SK will be excluded from the school or from some narrower benefit (like Spanish class) *because of her disability* if

she does not receive a requested accommodation. See Estades-Negroni v. Assocs. Corp. of N. Am., 377 F.3d 58, 64 (1st Cir. 2004) ("[R]equests for accommodation must be express and must be linked to a disability."). In other words, the Kropps cannot establish a claim for prospective relief in the form of specific accommodations based merely on the 504 team's past decision to qualify SK as a disabled individual under the ADA and the Rehabilitation Act. They must establish a need for an accommodation to overcome an actual disability, i.e., an impairment that substantially limits a major life activity notwithstanding SK's treatment regimen. This makes practical sense for, in order to engage in the process of weighing whether a requested accommodation is necessary to overcome a substantially limiting impairment, the Court would have to find that such a limitation exists in the first instance. Thus, even though the Wales School Department is required to afford disabled students with reasonable accommodations to ensure meaningful participation in its programs, because the Kropps fail to generate a genuine issue of fact whether SK is substantially limited in the major life activity of breathing when she is being treated for her asthma and allergies, it appears that the defendants are entitled to judgment against the claim for prospective relief as well.

Arguably, a question remains whether there is any relief, other than damages or injunctive relief, that may remain available to the Kropps under either the ADA or the Rehabilitation Act. If there is, it is not readily apparent to me what that relief might entail. Presumably, if the Kropps believe that there is some other manner of relief to which they are entitled, they will address that point in their objection to this recommended decision.

D. The MHRA claim for accommodations likely survives where the federal claims do not.

In Whitney v. Wal-Mart Stores, Inc., the Law Court held that individuals can qualify for disability protection under the Maine Human Rights Act even if they do not have an impairment that substantially limits their ability to engage in major life activities. 2006 ME 37, ¶¶ 17-26, 895 A.2d 309, 313-15. Instead, individuals may qualify as disabled under the MHRA in one or more ways:

Under the first category, a person is covered if he or she has "any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness." Rozanski [v. A-P-A Transp., Inc.], 512 A.2d [335] at 340 [(Me. 1986)] (quoting 5 M.R.S.A. § 4553(7-A) (1979)). The second category is "the physical or mental condition of a person that constitutes a substantial disability as determined by a physician or, in the case of mental disability, by a psychiatrist or psychologist. . . ." 5 M.R.S. § 4553(7-A). The third category is "any other health or sensory impairment that requires special education, vocational rehabilitation or related services." Id.

The existing record is sufficient to permit a finding that SK qualifies as disabled within the meaning of the MHRA. The relevant sections of the MHRA appear in Subchapter V, which declares it a civil right for "every individual to have equal access to places of public accommodation," 5 M.R.S.A. § 4591, and prohibits "unlawful public accommodations," id. § 4592. In particular, Subsections (1)(B) and (1)(E) of Section 4592 are germane to this litigation. See Fitzpatrick v. Town of Falmouth, 2005 ME 97, ¶ 24, 879 A.2d 21, 28 (flagging these subsections in a school accommodation case). These subsections provide the following two examples of unlawful public accommodations discrimination:

B. A failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities [; and] . . .

E. A qualified individual with a disability, by reason of that disability, being excluded from participation in or being denied the benefits of the services, programs or activities of a public entity, or being subjected to discrimination by any such entity[.]

Id. § 4592(1)(B), (E). Both of these subdivisions have the potential to expose the individual defendants to liability for actions taken in their official capacities. The defendants argue, however, that they cannot be liable because the Kropps failed to participate in the "interactive process" and failed to identify any reasonable accommodations that were not afforded to them. (Mot. Summ. J. at 16-17; Reply Mem. at 3-4.) These arguments appear to dovetail, the essential contention being that the Kropps withheld documentation despite repeated requests for supplementation of the file with respect to the SK's need for additional accommodations. It is true that the Law Court has required parents to participate in reasonable requests for diagnostic evaluations, see Fitzpatrick, 2005 ME 97, ¶¶ 33-34, 879 A.2d at 30, but this case is not really lacking in medical intervention or in opinions from medical professionals. There was a suggestion by Dr. Mansfield that SK should undergo psychiatric evaluation, but there would also appear to be some question as to the reasonableness of that request. As for the accommodations denied by the 504 Team, at least those remaining on the table during the October 14, 2005, team meeting, none appears to be *inherently* unreasonable, but nor does any one seem to be *clearly* necessary. My impression is that the determination of this claim depends entirely on reasonableness determinations, which are ordinarily questions of fact. It is not clear to me that the Court could fairly rule on the summary judgment record that none of the proposed accommodations are necessary, particularly where the Law Court has described the policy objective of the MHRA as "the establishment of a continuing process of review to permit, *where possible*, the application

of corrective measures." Me. Human Rights Comm'n v. S. Portland, 508 A.2d 948, 954 (1986) (emphasis in original) (4-3); see also id. at 955 (suggesting that the limit is set where "undue financial or administrative burden" arises). In light of these Law Court precedents, my assessment is that there is some play in the joints of the MHRA's public accommodations provisions for a court to provide the Kropps with a measure of prospective relief on the existing record. In particular, there appears to be some question as to the reasonableness of the Team's refusal to make some further accommodation(s) to permit SK to attend classes in locations other than the school basement. A fair inference available from the existing record is that SK's attendance of classes in the basement classroom leads to an exacerbation of her symptoms that requires the use of a nebulizer, so that relocation of the class as requested would alleviate SK's symptoms. This is exactly the standard suggested by the defendants in their reply memorandum. (Reply Mem. at 5.) Whether the task of fashioning such relief should be undertaken by this Court, however, is a discretionary matter because, in my view, there is no viable federal claim remaining in this case. It would also appear necessary to substitute the new officers, or perhaps even the Wales School Department, for Principal Lajoie-Cameron and Superintendent Malinski, who have both departed from their former offices.

E. The Section 1983 claims

The defendants argue that the Kropps' claims under 42 U.S.C. § 1983 must fail because there was (or is) no clearly established constitutional right to a free public education. (Mot. Summ. J. at 18-19.) In response, the Kropps waive any constitutional claim and instead argue that their Section 1983 claim is premised on the statutory rights they enjoy under the Rehabilitation Act and the ADA. (Opp'n Mem. at 19.) There is no

real reason for the Court to determine whether these statutory rights can be vindicated pursuant to the Section 1983 civil action provision because the monetary damages claims under those statutes are not viable for the reasons already discussed. Additionally, the Kropps' attempt to use Section 1983 to create individual liability on the part of Lajoie-Cameron and Malinski would almost certainly flounder on the qualified immunity analysis in any event. Furthermore, use of Section 1983 would create a remedy—individual personal liability—specifically eschewed under the ADA and Rehabilitation Act, and thus would be contrary to the First Circuit's remedy related conclusions in Diaz-Fonesca v. Puerto Rico, 451 F.3d 13, 28-29 (1st Cir. 2006) (holding that Section 1983 cannot be used to obtain money damages to vindicate rights conferred under the Individuals with Disabilities Education Act when the IDEA's own remedial structure does not allow punitive or general compensatory damages). Accordingly, I recommend that the Court grant summary judgment to the defendants on the Section 1983 claims.

F. The emotional distress claims

The Kropps assert common law tort claims against the defendants for intentional infliction of emotional distress (IIED). The defendants argue that summary judgment must enter on these claims for various reasons. (Mot. Summ. J. at 20.) The Kropps fail to respond to this aspect of the motion and have, therefore, waived their IIED claims.

Conclusion

For the reasons set forth above, I RECOMMEND that the Court GRANT the motion for summary judgment against all of the claims advanced under federal law, which are set forth in the complaint at counts I, II, V, VI, VIII, X, XI and XIII, and the MHRA claim against Union 44, which is set forth in count III, and the state law

emotional distress claims, which are set forth in counts IV, IX and XIV. If the Court should adopt my recommendation, then the only claims that will remain are the MHRA official capacity claims against the principal and superintendent of the Wales Central School, and only to the extent that those claims request prospective, injunctive relief. Those claims are set forth in counts VII and XII. Of course, those pendent claims are not within the scope of this Court's original jurisdiction and the Court would act within its discretion if it were to dismiss those claim without prejudice in order that they might be addressed in a state court. Lares Group, II v. Tobin, 221 F.3d 41, 45 (1st Cir. 2000); Flynn v. City of Boston, 140 F.3d 42, 48 (1st Cir. 1998); 28 U.S.C. § 1367(c)(3). The factors that are supposed to guide the Court's consideration of whether to dismiss pendent claims include comity, judicial economy, convenience and fairness to the litigants. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349-50 (1988). Although it appears that all of the federal claims should be dismissed, it is not mandated that the Court decline to exercise jurisdiction over the pendent state law claims. As for comity, economy and convenience, I am divided in my own view. Because this litigation has already reached the ready for trial date set in the scheduling order there is a certain convenience and judicial economy in letting it proceed in this forum and sparing a busy state court from having to reinvent the wheel. On the other hand, given the uncertainties that exist with respect to the forcefulness of the MHRA's public accommodation provisions in light of the Law Court's recent opinion in Whitney, and as informed by its earlier, similarly divided opinion in Maine Human Rights Commission v. South Portland, the remaining claim does present novel issues of state law that might best be addressed in a state forum. The parties are, of course, in the best position to advocate for themselves with regard to

fairness considerations and it would certainly be advisable for them to address the matter in their objection papers.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: February 16, 2007

KROPP et al v. MAINE SCHOOL
ADMINISTRATIVE UNION #44 et al
Assigned to: JUDGE GEORGE Z. SINGAL
Referred to: MAG. JUDGE DAVID M. COHEN
Cause: 42:12101 American Disabilities Act

Date Filed: 04/21/2006
Jury Demand: Plaintiff
Nature of Suit: 446 Civil Rights:
Americans with Disabilities -
Other
Jurisdiction: Federal Question

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