UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JANE DOE, Plaintiff,	)	
	)	No. 1:13-cv-428
-v-	)	
	)	HONORABLE PAUL L. MALONEY
FOREST HILLS SCHOOL DISTRICT, DANIEL BEHM, TERRY URQUHART, and ANNE EDSENGA, Defendants.	)	

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on the parties' cross-motions for summary judgment. (ECF Nos. 68 and 73). In this case, Plaintiff Jane Doe asserts Title IX and § 1983 equal protection claims based on allegations that Forest Hills and its administrators failed to respond adequately after she reported that she was sexually assaulted by another student. Specifically, she alleges that the Defendants acted unreasonably under the circumstances by failing to conduct their own investigation into the incident and failing to protect Plaintiff from ongoing harassment from the alleged assailant and other students, in violation of Title IX. She also alleges violations of the equal protection clause of the Fourteenth Amendment based on the district's failure to train its employees on how to handle sexual assault complaints and the Defendants' alleged deliberate indifference to her assault and ongoing harassment from other students.

Plaintiff filed a motion for summary judgment (ECF No. 68), Defendants responded (ECF No. 85) and Plaintiff replied (ECF No. 91). Defendants also filed a motion for summary judgment (ECF No. 73), Plaintiff filed a response (ECF No 81), and Defendants filed a reply (ECF No. 90). Oral argument was

held on February 10, 2015. (ECF No. 95.)

For the reasons discussed below, Plaintiff's motion for summary judgment will be **GRANTED IN PART AND DENIED IN PART**. Summary judgment is **GRANTED** in Plaintiff's favor on Count IV and **DENIED** as to the remainder of the complaint. Defendants' motion for summary judgment is also **GRANTED IN PART AND DENIED IN PART.** Summary judgment is **GRANTED** as to all Defendants on Count II and in Defendants Behm, Edsenga, and Urquhart's favor on Counts III and IV because they are entitled to qualified immunity. The official-capacity claims against Behm, Edsenga, and Urquhart are also **DISMISSED** as duplicative of the claims against the District. The remainder of the motion is **DENIED**.

I. BACKGROUND

A. Initial Incident and Report

At the time relevant to this suit, "Jane Doe" was a sophomore at Forest Hills Central High School. She alleges she was sexually assaulted by another student, "MM," on November 3, 2010 in a band practice room after school. The next day, Doe told two friends that she had been assaulted, and those girls urged Doe to tell a teacher. Doe drafted a note explaining the assault, one friend added a few sentences asking their teacher to read it, and Doe signed it and left it on the teacher's desk. (*See* ECF No. 70-2.) The note recounts that Doe was hanging out with MM after school when he pulled her into a practice room, turned off the lights, and started kissing her, then put his hands down her pants and digitally penetrated her. The note explains that she was crying and struggling to push him away as he pinned her to the ground and tried to rape her, but she was able to escape after her phone rang and she struck his groin forcefully. Finally, the note says that MM came out of the practice room with his pants still down and threatened Doe

if she told anyone.

When Doe's teacher read the note, she immediately contacted a school counselor and notified the principal, Defendant Terry Urquhart. Urquhart recognized the serious nature of the allegations and in summary fashion asked Doe if the note was true, and Doe responded affirmatively. Urquhart initially believed her due to her extreme emotional reaction. Urquhart quickly contacted Glenn Nevelle, the Kent County Sheriff's Deputy who is a liaison to the Forest Hills Schools, as well as Plaintiff's parents. At the initial meeting with Doe's parents, Urquhart asked them to consider whether they would file a police report. There is a dispute over whether the principal tried to discourage Doe from reporting the matter to law enforcement or merely advised her and her parents that it would be difficult for Jane if they pursued it.

Because Nevelle was busy on November 4, the principal and Doe's parents met with him early the next morning. At that meeting, Nevelle urged Doe to get a "rape kit" done at the YWCA and a police report was filed concerning the incident.

B. School's Investigation

After he met with Doe and her parents on November 4, Urquhart reviewed with the school security officer, Daane Spielmaker, the surveillance footage filmed on November 3 at the school. Urquhart and Spielmaker were able to find footage of Plaintiff and MM walking around the school. (ECF No. 75-4.) There is no camera in the area where the alleged assault took place. Urquhart reviewed the footage and thought that it did not sustain Doe's account of the assault in material respects, so he also reviewed it with other staff members. They agreed that Plaintiff's recount of the assault did not seem to match her demeanor and actions shown on the video. Specifically, Urquhart noted that MM was walking normally (not as if he had just been hit in the groin), MM was fully dressed with his shirt tucked in (not disheveled as if he had

just had his pants down), MM was not far behind Doe when they appeared back on camera, and Doe did not run away or seek an area where there were other people.

Over the next few days, Urquhart identified two students and a cafeteria worker who were near the practice room during the time the assault was alleged to have occurred. Urquhart interviewed them, but none heard or saw anything unusual. Urquhart did not take notes or record these interviews other than noting in his planner that they occurred. Urquhart did not interview any of Plaintiff's friends or the students who she talked to immediately after the assault, including one student to whom the police determined she reported the assault. Urquhart later interviewed MM. In his statement to the police (ECF No. 75-3), MM wrote that Doe confessed that she liked him but was afraid he was a "player." He wrote that they had a short conversation and then just went their separate ways. Urquhart knew that MM had a history of disciplinary issues at school. Urquhart also heard rumors about MM being involved in some kind of sexual misconduct when he was younger, but he never looked into or determined what happened in that incident. Urquhart never sought or received a copy of the rape kit report. The nurse who examined Doe found small tears and lacerations that she stated were consistent with penetration. However, the examination was done two days after the assault, which led the police and the prosecutor's office to question its value to prove in criminal litigation that penetration had occurred. Rather than seek a copy of the rape kit, Urquhart relied on Nevelle's characterization of the results as "inconclusive."

Defendants assert that the following week, the detective assigned to the case, William Heffron, told Urquhart not to conduct a parallel investigation to the Sheriff's Office investigation. However, Heffron denies making any such statement. Urquhart explained that his investigation was "pretty much done" at that point, so he did not do any further work. Instead, he waited for the police investigation to reveal any

information that would support Doe's story, thinking that the police had the power to do more in-depth investigation than he could. Urquhart did not have any involvement in the police investigation, but received periodic updates from Nevelle. Urquhart's conclusion was that he could not determine whether the assault had occurred or not after his short investigation, and thus MM was not immediately disciplined in any way.

Two weeks after Doe's alleged assault, Urquhart was notified of rumors that another female student was sexually assaulted by MM in a car in the school parking lot. Although she initially denied the rumors, a few days later that student reported to Urquhart that she was indeed assaulted. She was not interested in "pressing charges," but the Sheriff's Department added that assault to their investigation.

Doe's parents inquired about the progress of the school's investigation and why MM had not been disciplined on December 10, 2010. At that point, Urquhart told Doe's parents that he could not do anything without proof and he was waiting on the police investigation. Later, assistant superintendent Edsenga tried to gather evidence from prosecutors, but the prosecutors did not share any information with her.

C. School's Response and Continuing Harassment

Although he had doubt there was support for the allegations, Urquhart notes that he notified teachers, told Doe and MM not to talk about the incident at school, allowed Doe to come to the counselor's office when she felt upset, told Doe to report any problems to him, allowed her to park in a different parking lot, and agreed to drive Doe home one day if she needed it because she was overwhelmed. Doe and MM shared the same sixth-period class for about two and a half weeks after the alleged assault occurred. However, the class was co-taught and one teacher would take Doe out with the students who needed extra help to keep them separated. Urquhart suggested moving Doe to another class,

but her parents objected because they did not want to disrupt her learning. MM's mother reacted similarly to the suggestion that MM be moved to another class. MM was eventually moved on November 20, 2010, after the second student reported being assaulted by MM. Doe and MM continued sharing the same lunch hour for the rest of the school year. Thus, Plaintiff ate her lunch in the library each day rather than in the cafeteria to avoid encountering MM.

Plaintiff asserts that after the assault she was afraid to stay after school and she withdrew from activities that would require her to do so. She also spent significant time in the guidance counselor's office and missed classes. Although school officials repeatedly told MM to stay away from Doe, MM followed her around school, blocked her exits from bathrooms and classrooms, called her ugly and a liar, hissed at her, keyed her car, and would push people in the hallway into her. Plaintiff reported this behavior to teachers and her counselor, but her counselor merely told her to ignore MM and try to avoid him. Defendants assert that this behavior was never reported to Urquhart, but the record shows that many of these incidents were reported by Doe's parents, as discussed below.

Additionally, Doe asserts that the school's lack of a response to her initial allegation and failure to discipline MM suggested to the other students that she was lying, and the student body essentially ostracized her. She lost friends and was harassed by her classmates at school and online. The cyberbullying can be seen in Plaintiff's Exhibit 14. (ECF No. 70-11.) Plaintiff was also involved in a confrontation at school with someone who was defending MM, and when she tried to attend a basketball game other students chanted until she left. Plaintiff began seeing a professional counselor at Pine Rest Christian Mental Health Services soon after the assault. Defendants note that Doe did not tell her Pine Rest counselor about the continuing harassment at her Nov. 15, Nov. 29, Dec. 6, Dec. 13, or Dec. 20 appointments. Instead,

she reported decreased anxiety and depression on Dec. 13 and 20. However, much of the harassment occurred during the spring semester.

Doe's parents were very concerned with Doe's social ostracization. Their emails to Urquhart and Edsenga were frequent and ongoing from mid-November until late April. The first email dated November 15, 2010 (ECF No. 75-7) notified Urquhart that Doe was having a difficult time, was being "confronted for unusual reasons a couple of times," and was quite emotional and uncertain, so she would be seeing a specialist at Pine Rest during school hours. Urquhart asked the school counselor to follow up with Doe concerning this first email.

On November 18, Urquhart took Doe's father around the school to see where the assault occurred and talk about security and the investigation. Doe's father sent an email to Urquhart on November 29, 2010 expressing his frustration with the speed of the investigation and the failure of the school to discipline MM or remove him from proximity to Doe. (ECF No. 75-12.) The email also notes that students, staff, and parents had been talking about the incident, and it requests that Urquhart openly address the assault so staff and students would understand. It also requests that Urquhart not wait for the results of the Sheriff's investigation to act. Urquhart's response on December 1 notes that he cannot take disciplinary action without proof and the school's investigation "ha[d] not turned up that proof as of yet." (ECF No. 75-13.) He indicates that he was hoping the Sheriff's Department investigation would provide proof.

After initially declining authorization of any charges against MM, the Kent County Prosecutor's Office filed a Criminal Sexual Conduct- Fourth Degree petition in juvenile court against MM, who on November 3, 2010 was sixteen years old, a minor under Michigan law. The court record indicates that the report of a second assault by MM spurred a reevaluation of Doe's complaint.

Doe's father sent another email on December 10, 2010 (ECF No. 75-13) calling for MM's suspension in light of the formal charges brought against MM. The email states that MM's presence at school created a hostile environment for Doe. That same day, Urquhart met with superintendent Behm and assistant superintendent Edsenga and determined that MM would be suspended from the basketball team due to the criminal charges. Despite vociferous objections and threats of a lawsuit from MM's mother, MM was suspended for the remainder of the season.

Doe's parents next sent an email to Edsenga on January 23, 2011, which notified her that Doe "no longer feels safe attending activities after school, including academic study sessions" because she was afraid of encountering MM. (ECF No. 75-13.) The email also explains that Doe cannot attend basketball games because students blame her for MM being benched and some students made comments that forced her to leave a basketball game. They also noted that "subtle instances of intimidation by [MM] continue" and Doe had withdrawn from after-school activities like cheerleading. The email questions why three months had passed since the attack without action by Forest Hills and explains their concern that no further action would be taken. Urquhart investigated the allegations in the email of January 23 and didn't find evidence to support the allegations. Specifically, he noted that Doe did not try out for cheerleading prior to the assault, so the assault could not be the reason she withdrew from that activity. However, Doe asserts that she did not need to try out for cheerleading because she was already promised a spot on the squad. Also, Urquhart investigated the basketball incident solely by talking to the teacher who was at the game. Because that teacher did not see the harassment, Urquhart concluded that it did not happen. (ECF No. 75-23.) Edsenga sent a written response to the email (ECF No. 75-24) acknowledging that Doe felt blamed or isolated from other students but stating that no one on her staff had knowledge of MM or other students

mistreating Doe. She requested that Doe notify a teacher or administrator if such behavior occurred and promised to follow up with teachers and ask them to watch out for that behavior. She also wrote that Doe should speak with a teacher or administrator if she wanted to stay after school and they would figure out how to make her feel safe.

Doe's mother sent the next email to Edsenga on February 3, 2011, again expressing concern that MM remains in school and has done "little intimidating things" and expressing concern about security issues at the school. (ECF No. 75- 25.) The next week, Doe's mother sent another email to Edsenga that included copies of the cyberbullying that Doe had been experiencing on the social media website Formspring.com. The email notes that "this is only part of the daily issues that she has to deal with" and that MM "has stepped up his intimidation while at school yesterday and two of her teachers observed his antics." Edsenga responded with only "Thanks for sending this on." School administrators tried to trace the anonymous internet postings but were unsuccessful.

On February 18, 2011, Doe's mother sent another email to Edsenga that asked about her contact with prosecutors and the decision to move MM to another school. (ECF No. 75-28.) Edsenga replied that she had not heard anything from the prosecutors and the administrators were "still waiting for more information from the courts to assist in our decision making." (*Id.*) The next documented email from Doe's mother was sent to Edsenga on April 14, 2011. (ECF No. 75-29.) In that email, Doe's mother expressed her surprise that MM was allowed to attend an after-school track meet and requested that someone tell MM that he is not allowed to talk to Doe. In a follow up email the next day, Doe's mother notified Edsenga that MM walked behind Doe at the track meet, "whispering things." (*Id.*) Urquhart checked with the counselor and athletic director, but neither knew about this incident. Doe also did not recall the incident at

her deposition. (ECF No. 70-21 at PgID # 729.) In the email, Doe's mother also expressed her concern that MM stayed after school every day to shoot hoops because Doe had to cross through the gym to get to the locker room for soccer. Finally, the email conveyed information from the prosecutors about MM's trial and an allegation that he engaged in witness intimidation. (ECF No. 75-29.) Edsenga's response was to ask if Doe was reporting MM's comments to administrators or counselors; she noted that Urquhart was unaware of the issues. (*Id.*) On April 18, 2011, Doe's mother sent another email to Edsenga reporting that a teacher noticed MM "lurking" in the gym after school and told him to go home. (ECF No. 75-30.)

The next day, April 19, 2011, Doe's mother notified Edsenga that MM pushed someone into Doe as she was walking down the hall, writing "I want you to know that he is becoming more aggressive with different tactics and he should be told to stay away from her." (ECF No. 75-31.) Urquhart looked into this incident by watching the surveillance tapes and talking to students who were in the hallway. One of MM's friends told the assistant principal (Craig McCrumb) that the shove was done on purpose, so the assistant principal "disciplined" MM in some unknown fashion. However, inexplicably MM's discipline summary (ECF No. 70-8) does not reflect any discipline imposed by McCrumb that fits this incident and time period. Finally, Doe's father took notes at a May 6, 2011 meeting with school administrators. The notes reflect that Doe's parents reported that "small acts of intimidation continue to take place" and were concerned that the onus was entirely on Doe rather than the school to monitor MM.

During this time, MM's criminal defense lawyer was in communication with superintendent Behm. He repeatedly suggested that Doe's allegations were made up and insinuated that he had evidence that implicated her credibility, including evidence that the handwriting on Doe's initial statement was not Doe's. (ECF No. 70-13.) These communications were not shared with Plaintiff nor produced when Plaintiff

requested all documentation of the investigation through the Freedom of Information Act.

D. Eventual Resolutions

Doe decided to switch schools at the end of her sophomore year; she attended Forest Hills Northern for the duration of her junior year. MM pled guilty to misdemeanor assault on June 27, 2011. The plea colloquy with MM contains admissions of conduct constituting criminal sexual conduct in the fourth degree, a crime for which two years imprisonment can be imposed on an adult. (*See* ECF No. 86-14 at PgID #1729.) The school imposed a five-day suspension in response that was served at the beginning of the 2011-12 school year. MM transferred to another school in the middle of the 2011-12 school year. On October 5, 2011, eleven months after the alleged assault, Behm sent a letter expressing that the matter was closed. He apologized for the length of time it took to reach a conclusion, noted the five-day suspension, and said that there was insufficient evidence to impose a greater sanction. Doe eventually transferred back to Forest Hills Central for her senior year.

E. Later Proceedings

On August 12, 2011 Doe filed a complaint with the U.S. Department of Education's Office of Civil Rights alleging that the District failed to respond appropriately to a report of sexual assault. On September 28, 2012, the OCR determined that "there is sufficient evidence to support a finding that the District failed to promptly and appropriately respond to alleged-sexual harassment in violation of[,] and that its grievance procedures not comply with[,] Title IX requirements." (ECF No. 69-5.) The District signed a Resolution Agreement that would remedy the Title IX violations.

On April 18, 2013, Doe filed this litigation. Her complaint alleges that the Defendants violated Title IX through deliberate indifference to alleged sexual harassment (Count I) and retaliation by withholding

protections conferred by Title IX (Count II). The complaint also asserts violations of § 1983 based on the district's alleged unconstitutional policies that had a disparate impact on female students (Count III) and the district's failure to train and supervise its employees (Count IV).

II. LEGAL FRAMEWORK

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out the absence of evidence to support the nonmoving party's case. *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Once the moving party has carried its burden, the nonmoving party must set forth specific facts, supported by evidence in the record, showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586. The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–252. The function of the district court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Resolution Trust Corp. v. Myers*, 9 F.3d 1548 (6th Cir. 1993) *(citing Anderson,* 477 U.S. at 249).

III. ANALYSIS

A. Admissibility of OCR Findings

A preliminary issue is the admissibility of the OCR report. Defendants assert that it is hearsay and inadmissible and should be disregarded. Defendants acknowledge that such documents could be admissible under Fed. R. Evid. 803(8) as a record of a public office's investigation, but they argue that it is nonetheless not admissible because the circumstances of the OCR's investigation indicate a lack of trustworthiness. Specifically, Defendants assert that the OCR investigation was sloppy and incomplete because the investigators did not (1) review the surveillance video, (2) interview MM, his attorney, or his family, (3) interview the school counselor or assistant principles, or (4) interview Behm or Edsenga. Further, Defendants argue that the OCR's findings should not be considered because the OCR uses the "mere reasonableness" standard while courts must apply the "deliberate indifference to known acts of harassment" standard.

Defendants are correct that the OCR report is hearsay because it is a statement by an out-of-court declarant offered for the truth of the matter asserted–*i.e.*, that Defendants' actions were insufficient under Title IX. *See Alexander v. CareSource*, 576 F.3d 551, 561 (6th Cir. 2009) (holding that Ohio Civil Rights Commission determination was hearsay). However, such reports that contain an "agency's conclusion or opinion formed as the result of a factual investigation" are admissible under Fed. R. Evid. 803(8). *Id.* at 561-62. An official report's exclusion is warranted only if the court finds that "the sources of information or other circumstances indicate lack of trustworthiness." *Id.* at 563. Plaintiff points to *Communities for Equity v. MHSAA,*, which found that an OCR report from a *different incident* was admissible at trial because it could help the trier of fact determine whether Title IX was violated. 137 F. Supp. 2d 910 (W.D. Mich. 2001).

In this Circuit, "[t]o determine whether a report is trustworthy, courts consider the following four factors: (1) the timeliness of the investigation upon which the report is based, (2) the special skill or experience of the investigators, (3) whether the agency held a hearing, and (4) possible motivational problems." *Alexander*, 576 F.3d at 563 (citations omitted). Thus, for example, a report is untrustworthy if it is "prepared by an inexperienced investigator in a highly complex field of investigation." *See Fraley v. Rockwell Int'l Corp.*, 470 F. Supp. 1264, 1267 (S.D. Ohio 1979). However, the above "list of factors is not exclusive; any circumstance which may affect the trustworthiness of the underlying information, and thus, the trustworthiness of the findings, must be considered when ruling upon the admissibility of factual findings under this rule." *Alexander*, 576 F.3d at 563.

The OCR investigation involved evidence from both parties, including "documentation submitted by the District and [Doe's] parents" and interviews with Doe's parents, Doe, "district administrative staff, and the District's police liaison." The report is 20 pages long and recounts in expansive detail all of the information relied upon by the agency. (ECF No. 69-5.) Thus, it is clearly distinguishable from *Alexander v. CareSource*, in which "it was unclear what evidence the investigator considered in reaching her conclusion." 576 F.3d at 563. The parties do not address the four factors listed above. The investigation was instituted on August 12, 2011, less than a year after the assault and before the school officially closed its investigation. Thus, it was timely. The record contains no information about the skills or experience of the investigators, but Defendants do not allege that the investigators had lackluster skills or experience. No hearing was held, which generally weighs against the credibility of the determination, but the District was given a chance to respond in writing, which is generally equivalent to a hearing under due process law. Finally, Defendants do not allege that the OCR had any motivational problems that would impact the report.

The alleged defects in the investigation do not establish that the report is untrustworthy and thus inadmissible for purposes of these motions. The OCR's failure to watch the surveillance tapes, interview MM, his attorney, or his family are matters to be considered when determining the weight to give the report, but they do not rise to the level of making the entire report unreliable. Likewise, failure to interview Behm and Edsenga, while questionable, does not render the report inadmissible.

Thus, the OCR report is admissible. The Court considered the Defendants' qualms about the report and the differing standards of review when assigning weight to the report. The OCR's conclusion is by no means outcome determinative, but it does weigh in Doe's favor.

B. Title IX

Counts I and II of Plaintiff's complaint allege violations of Title IX. Count I alleges that Plaintiff was subjected to a hostile educational environment due to sex-based harassment that was so severe, pervasive, and objectively offensive that it deprived Plaintiff of access to educational opportunities or benefits provided by the school, in violation of Title IX. Plaintiff alleges that the Defendants had actual knowledge of (1) the sexual assault and (2) continuing harassment, but it failed to promptly and appropriately respond, instead acting with deliberate indifference. Plaintiff asserts that the Defendants' policies discourage sexual assault victims from coming forward and have a disparate impact on female students. Count II alleges that the school district officials retaliated against Plaintiff by failing to investigate or prevent further harassment because she insisted upon involving law enforcement.

A school district is liable for student-on-student harassment under Title IX when (1) the harassment is sufficiently "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit;" (2) an official with the authority to take corrective action has actual

knowledge of the harassment; and (3) the school is deliberately indifferent in its response or lack thereof because it responds in a way that is clearly unreasonable under the circumstances. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258-59 (6th Cir. 2000). In their motion, Defendants argue that summary judgment is appropriate because they were not deliberately indifferent and school officials did not have actual knowledge of severe, pervasive, and objectively offensive harassment. The parties do agree that Behm, Edsenga, and Urquhart were officials with authority to take corrective action under the second prong.

1. The Davis Decision

A brief review of Justice O'Connor's majority opinion in *Davis* is helpful to focus the inquiry at bar and construe subsequent case law authorities to which the court has been directed.

Davis was a "student on student" sexual harassment case and the majority opinion represents an extension of the *Gebser* case which dealt with teacher on student harassment. 526 U.S. 629. The *Davis* court extended potential liability "in certain limited circumstances." *Id.* at 643. The majority also noted that direct liability under Title IX for deliberate indifference attaches only where the school has "some control over the alleged harassment." *Id.* at 644.

The court also noted that victims of harassment do not have a Title IX right to make particular remedial demands and courts "should refrain from second guessing the disciplinary decision made by school administrators," citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *Id.* at 648. Likewise, the Davis majority posited the school's duty as merely responding in a manner that is not clearly unreasonable. *Id.* at 649. Finally, the court observed that "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Id.*

Justice O'Connor took great pains to articulate the narrow confines of the court's ruling, brushing aside the concerns expressed in Justice Kennedy's dissent for himself and three other members of the court. Justice Kennedy's concerns included (1) absence of guidance of what constitutes an actionable denial of "equal access to education," *id.* at 676; (2) lack of workable definition of actionable peer harassment, *id.* at 677; (3) the asserted threshold of harassment (severe, pervasive, and objectively offensive) fails to narrow Title IX liability grounded on the effect on a child's ability to get an education, *id.* at 678; (4) the majority's test invites second guessing of school administrators and even a "clearly unreasonable" standard invites submission to juries rather than summary disposition, *id.* at 679; and (5) damage to federalism asserting that the majority decision displaces state and local control of schools with the "vast apparatus of federal power," *id.* at 685.

2. Deliberate Indifference

A school is "deliberately indifferent" when its response to student-on-student harassment is "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 649. Merely investigating and doing nothing more is not a reasonable response. *Vance*, 231 F.3d at 260. Likewise, if a school district knows that "its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Id.* Thus, in *Vance*, the school district acted unreasonably because "talking to the offenders produced no results, [yet the school] continued to employ this ineffective method." *Id.* at 262 (quotations omitted).

Defendants argue that there was no "known" act of sexual harassment because there was insufficient proof that MM ever assaulted Doe. They note that the video surveillance did not match Doe's story, that the rape kit was "inconclusive," and there were no witnesses to corroborate Jane's story.

Defendants argue that they had to balance the rights of both MM and Doe and there were legal constraints on their ability to take certain disciplinary actions. Defendants appeared to apprehend (1) a race discrimination suit because MM is African-American, and (2) violating the McKinney-Vento Homeless Assistance Act because MM was homeless for a period of time. Precisely, the tension predicated by the Kennedy opinion in *Davis*. Defendants argue that they could not have removed MM from school because they did not have proof and thus an expulsion would have violated MM's due process rights.

Additionally, Defendants assert that even though they did not remove MM from the school, they undertook multiple steps to protect Doe from harassment and retaliation, including:

> The District separated Jane and [MM]; told [MM] to stay away from Jane (and reminded him of that on multiple occasions); notified staff of the incident and directed them on multiple occasions to watch out for any issues; changed [MM]'s schedule to remove him from Jane's class; increased supervision of [MM] and Jane during passing time; offered counseling services to Jane; agreed to transport her home if she became overwhelmed; allowed her to park in a different parking lot; and offered to help make arrangements for her if she wanted to stay after school and did not feel safe. On the few occasions where Jane's parents made a specific complaint about [MM] or others, which generally occurred well after the alleged incidents, the District promptly investigated. When the complaints were substantiated, the District took remedial action. For instance, after the pushing allegation in mid-April 2011, [MM] was disciplined and there were no subsequent reported incidents between Jane and [MM]. In addition, when [MM] pled guilty to misdemeanor simple assault in August 2011, the District imposed a five-day academic suspension.

(ECF No. 74 at PgID #865.) Ultimately, the District argues that it was not required to suspend or expel MM to comply with the plaintiff's specific remedial demands.

In her motion for summary judgment, Plaintiff argues that Defendants were deliberately indifferent because the school waited on the police investigation, failed to take interim precautionary measures to keep MM away from Doe, and failed to address the continuing harassment from Doe's peers. Doe points to the

OCR's findings that the school failed to take interim measures to separate MM and Doe and failed to investigate properly, causing a hostile environment for Doe and potentially chilling other students from coming forward.

The Supreme Court has said that a court can determine whether a school's response is clearly unreasonable as a matter of law if the evidence supports such a finding. *See Davis*, 526 U.S. at 649 ("There is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law.") However, when the record does not support a finding as a matter of law, the deliberate indifference question can be submitted to the jury as a question of fact. *See Patterson v. Hudson Area Schs.*, 551 F.3d 438, 450 (6th Cir. 2009) ("The Pattersons have demonstrated that there is a genuine issue of material fact as to whether Hudson's responses to DP's reported student-on-student sexual harassment were clearly unreasonable in light of the known circumstances."); *Roe ex rel Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1039 (E.D. Cali 2009) ("a question of material fact exists as to whether GUSD exhibited deliberate indifference.") Whether a defendant has been deliberately indifferent is treated as a fact question in other contexts as well. *See Moore v. Duffy*, 255 F.3d 543 (8th Cir. 2001); *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000); *Marsh v. Arn*, 937 F.2d 1056 (6th Cir. 1991).

The parties each cite numerous Title IX cases, attempting to prove by analogous facts that they are entitled to judgment in their favor. However, none of the cases is similar enough to be convincing that either party is entitled to summary judgment as a matter of law. The record creates a question of fact as to whether the school's responses were clearly unreasonable in light of the known circumstances.

First, a jury could find that the school was deliberately indifferent because MM and other students

harassed Doe for the remainder of the school year, and administrators merely "talked to" MM repeatedly; when this proved ineffective, the school should have done something different. Taking the facts in the light most favorable to Plaintiff, the record establishes that administrators knew about the ongoing harassment and did little about it. Plaintiff's parents repeatedly notified administrators that MM was engaging in acts of intimidation. In response, the school put the onus on Plaintiff to report the incidents and avoid MM, and merely continually reminded MM to stay away from Doe. The cumulative nature of Doe's parents emails should have spurred a more significant reaction. Consistent with *Vance*, a jury could find that the school was clearly unreasonable because it continued to merely talk to MM when it knew that that tactic was ineffective. The jury could conclude that the lack of response was particularly unreasonable during the time when MM's reported actions were escalating in aggressiveness. At the very least, there are some factual disputes concerning MM's ongoing antics throughout the spring semester that foreclose summary judgment.

Second, a jury could determine that the school was deliberately indifferent due to a limited investigation into the initial report of sexual assault. Here, the school admitted that it was waiting for the police investigation to make its determination and did not suspend MM until after he pled guilty to state charges. Deliberate indifference has been found in cases where school officials are slow to act or investigate. *See Doe v. Rutherford Cnty. Bd. of Educ.,* No. 3:13-cv-328, 2014 WL 4080163 (M.D. Tenn. Aug. 18, 2014). Here, it is undisputed that the school did not close the matter until nearly a year after the assault. Finally, the school clearly did not comply with Title IX guidance in its investigation, as the OCR found. The Department of Education suggests a 60-day investigation, opportunities for the parties to present witnesses and evidence, a determination based on a preponderance of the evidence, a written notice of the outcome, the opportunity to appeal the finding, and measures to protect the complainant during

the pendency of the investigation. (*See* ECF No. 69-1.) It is undisputed that Forest Hills did not complete its investigation within 60 days, did not allow either party to present witnesses or evidence, did not make a determination or give written notice until nearly a year after the assault, and did not allow an appeal of its decision. The record could also support a potential jury finding that the school's measures to protect Doe were ineffective. Although failure to comply with Title IX guidance does not, *on its own*, constitute deliberate indifference, it is one consideration. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). Even more, Urquhart never sought the results of the rape kit, instead relying on Nevelle's characterization of its results as "inconclusive," failed to interview Doe's friends, and waited months for someone else to make a conclusion as to whether the assault happened. Based on the record, a jury could find that the investigation in its scope and the delay to ultimate conclusion was clearly unreasonable and represented deliberate indifference by the school and administrators.

The Defendants' argument that it was not indifferent to "known" acts of harassment because the allegations were never substantiated is unavailing and circular. First, the tenor of the required proof the district seemed to require was nothing short of a signed confession or video tape of the alleged assault or the subsequent harassment. Next, a school cannot conduct a sub-par investigation and then claim that it did not know about harassment because its investigation did not turn up proof beyond peradventure to support the charges. Indeed, Title IX imposes many duties on a school that must occur before a final investigation substantiates a complaint. Courts consider whether acts of harassment were "known" for the purpose of determining whether the school was on *notice* that there was a potential issue. Thus, if no one complains, a school is not liable. However, once complaints are lodged, the school's duties under Title IX are triggered. Forest Hills cannot escape liability due to its inability to conclusively substantiate Doe's

complaint to avoid its Title IX duties. Further, after the second complaint of an assault by MM, a jury could certainly find that the school was on notice that there was a risk to students. Apparently, at least arguably, the second report had *no* impact on the school's response. Thus, a jury could find that the Defendants' actions were insufficient and deliberately indifferent.

Taking the facts in the light most favorable to Defendants for purposes of Plaintiff's motion, the record likewise does not support summary judgment in Plaintiff's favor. The Defendants here did not ignore the complaints or completely fail to act, as in *Davis* and a number of other cases cited by Plaintiff. Instead, Urquhart took some action as soon as Doe reported the assault, immediately calling the school's police liaison and contacting Doe's parents. As noted above, the school's failure to follow Title IX guidance while conducting its investigation does not automatically mean it was deliberately indifferent. Although the investigation could have been more thorough, a jury could determine that it was not clearly unreasonable. Further, the school did make certain accommodations for Plaintiff, from moving MM to another class to increasing supervision in the hallways. Again, the measures could have been more effective, but a jury could determine that the school's response was not clearly unreasonable. MM was disciplined, first by suspension from the basketball team and then by an academic suspension. Urquhart also did not completely ignore the later harassment incidents as they were reported to him. Although these investigations were similarly cursory, a jury could determine that administrators were merely negligent and not deliberately indifferent. Ultimately, the school's actions were not so clearly unreasonable that the Court can find in Plaintiff's favor as a matter of law. Summary judgment is not warranted.

3. Knowledge of Severe, Pervasive, and Offensive Harassment

Next, Defendants argue that they are not liable under Title IX because Plaintiff cannot establish that

she was subjected to "severe, pervasive, and objectively offensive" harassment. They assert that Doe's parents reported only "sporadic complaints of teasing and bumping" that do not surpass the threshold of severe and pervasive harassment. Defendants cite cases where students engaged in egregious harassment for comparison.

Plaintiff must prove "that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school." *Davis.*, 526 U.S. at 650. She alleges that she was raped, then intimidated and ridiculed by the assailant and other students at her school. She asserts that she was emotionally distraught, missed a number of classes hiding in the counselor's office, and chose not to participate in after-school study sessions and extracurricular activities because of the fear that she would encounter and be harassed by MM.

If a jury believes Doe's testimony, it could certainly find that both the rape and the later harassment were so severe, pervasive, and objectively offensive that it deprived her of access to educational opportunities provided by the school. Plaintiff correctly notes that the Sixth Circuit has held that a single instance of sexual assault can be sufficiently severe to satisfy the Title IX standards, and that "rape and sexual abuse obviously qualif[y] as . . . severe, pervasive, and objectively offensive sexual harassment." *Vance*, 231 F.3d at 259 n. 4; *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999). Thus, the assault itself is sufficient to satisfy this prong. Further, Plaintiff missed classes and other activities because of the ongoing harassment, suggesting that it was severe and pervasive. Accordingly, there is at least a question of fact concerning this prong and summary judgment is not appropriate in favor of Defendants.

For these reasons, both Plaintiff's and Defendants' motions for summary judgment on Count I are **DENIED**.

4. Retaliation

In Count II, Plaintiff asserts that Urquhart discouraged her parents from referring the matter to law enforcement and subsequently retaliated against Plaintiff by failing to investigate the matter properly or stop the later harassment because she chose to involve law enforcement. Neither party substantively addresses this argument in their motions. However, the Plaintiff has not presented sufficient evidence to create a question of fact on the retaliation claim, so summary judgment will be granted in Defendants' favor on Count II.

Plaintiff's mother testified that at the initial meeting with Urquhart on November 4, 2010, she felt that Urquhart tried to talk her out of pressing charges and involving law enforcement. She testified as follows:

> Q. [Y]ou've made the assertion here that somehow Terry tried to talk you out of pressing charges?
>
> A. We felt that way, yes.
>
> Q. Okay, what did he say?
>
> A. He said he could handle it internally. He said that – we asked him, you can suspend him? You can – you can handle this on your own? And he said yes. Have you ever done this before? He said yes. And then he suggested we – we needed to think about it, because it would be very hard for [Doe] to stay at that school if we pressed charges.
>
> . . .
>
> Q. The fact is, it is difficult coming forward with a complaint like your daughter's, right?
>
> A. I found that out, yes.
>
> Q. And Terry was telling you the real-life scenario of concerns that he had?
>
> A. Uh-huh.

Q. And he was sharing them with you?

A. Yes.

Q. He wasn't trying to talk you out of filing charges with the police, was he?

A. We had that impression, that they didn't want other people to know that this has happened at the school.

Q. Did he tell you that?

A. No.

(ECF No. 75-37 at PgID # 1285.) Doe's mother also testified that she believed it was appropriate for Urquhart to tell her about the difficulty Doe would likely face. (*Id.* at PgID #1286.) Urquhart testified "adamantly" that he never discussed student dynamics after claims of assault with Doe's parents. (See ECF No. 75-34 at PgID #1206.) He also testified that he told Doe's parents about the option of filing a police report and offered to call a police officer right away if they wanted to do so. (*Id.*)

The record reflects that Urquhart called the school's police liaison first, immediately after hearing Doe's allegation and even before he called Doe's parents. (ECF No. 75-34 at PgID # 1203.) Further, a police report was filed during a meeting set up by Urquhart; Doe's mother testified that she did not initiate contact with the police to press charges. (ECF No. 75-37 at PgID #1287.) Urquhart even testified that he told Doe's parents that the school might have to file a police report even if they chose not to, depending on the results of the school's investigation. (ECF No. 75-34 at PgID #1205.) Thus, it appears that Urquhart was more than willing to involve law enforcement and took affirmative steps to do so.

In light of the above evidence, Doe's mother's testimony does not create a material question of fact to avoid summary judgment. A rational jury would have no basis to find that the alleged shortcomings in

the school's treatment of Doe's complaint were in retaliation for Doe's decision to involve law enforcement. Plaintiff's theory is ill-supported and makes little sense given Urquhart's actions. Accordingly, Defendant's motion for summary judgment on Count II is **GRANTED**.

C. Section 1983 Claims

Counts III and IV of the complaint allege violations of § 1983. Count III alleges that Defendants violated Doe's right to "personal security and bodily integrity and Equal Protection of Laws," and alleges that the school district's policies were unconstitutional and had a disparate impact on female students. Count IV alleges that Forest Hills School District violated Doe's right to equal access to education by failing to train and supervise its employees. Specifically, Doe alleges that the district failed to train its employees on the proper investigative techniques required and how to protect complainants and take steps to prevent sexual violence, and the school failed to provide a grievance procedure, use the right standard of evidence, and notify both parties of the outcome of the complaint.

1. Defendant's Motion for Summary Judgment

a. Due Process

Defendants argue that Plaintiff has not established a § 1983 claim based on a violation of the due process clause. However, Plaintiff's response makes clear that she relies on the equal protection clause only, not the due process clause. Thus, this argument need not be addressed.

b. Equal Protection

Plaintiff asserts that her right to equal protection has been violated in two ways: (1) the District failed to train its employees on how to investigate sexual harassment and thus it was deliberately indifferent to the risk of future harassment and Doe's injuries; and (2) the individual Defendants were deliberately

indifferent to Plaintiff's situation. Defendants assert that Plaintiff can only state a claim of an equal protection violation if she shows that her complaints were treated differently than those brought by male students.

The equal protection clause prevents states from engaging in actions that "(1) burden a fundamental right, (2) target a suspect class; or (3) intentionally treat one individual differently from others similarly situated without any rational basis." *Shively v. Green Local Sch. Dist. Bd. of Educ.*, 579 F. App'x 348, 356 (6th Cir. 2014). The Sixth Circuit has repeatedly recognized an equal protection claim based on a school's deliberate indifference to the allegations of student-on-student harassment. *Id.* at 357 (gender and religion harassment); *Williams v. Port Huron Sch. Dist.*, 455 F. App'x 612, 618 (6th Cir. 2012) (racial harassment). Deliberate indifference is simply one way to show discriminatory intent.

Although a violation of the equal protection clause can certainly be established by showing that a female's complaints were not treated the same as a male's complaints, such a theory is not the *only* way to establish a violation. The cases cited by Defendants happen to be cases where such a theory was the sole theory advanced by the plaintiff. *See Buchanan v. City of Bolivar*, 99 F.3d 1352, 1360 (6th Cir. 1996) (dismissing race claim because plaintiff misunderstood burden of proof and did not establish unequal treatment claim). Accordingly, Defendants' motion for summary judgment cannot be granted on this basis.

c. Qualified Immunity

The next basis for granting summary judgment advanced by Defendants is that Defendants Behm, Urquhart, and Edsenga are entitled to qualified immunity for actions taken in their official capacities. The Court assumes Defendants actually intended to request qualified immunity based on the individual capacity claims. Defendants argue that any potential constitutional violation was merely the result of a reasonable mistake, and thus the Defendants are shielded from liability and the burden of trial through qualified

immunity. Plaintiff argues that the equal protection right to be free from student-on-student harassment is well established and Defendants had fair warning that failing to investigate and address sexual assault would deprive a female student of her constitutional rights.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is a legal question for the court to resolve. *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009) (citing *Elder v. Holloway*, 501 U.S. 510, 516 (1994)). When resolving a governmental employee's assertion of qualified immunity, the court determines (1) whether the facts the plaintiff has alleged or shown establishes the violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of the incident. *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 567 (6th Cir. 2013) (citing *Pearson v. Callahan,* 555 U.S. 223, 232 (2009)). Courts may examine the two prongs in any order, depending on the facts and circumstances of the case. *Id.* at 567-68.

Once the qualified immunity defense is raised, the plaintiff bears the burden of demonstrating both that the challenged conduct violates a constitutional or statutory right and that the right was so clearly established at the time that "'every reasonable officer would have understood that what he [was] doing violate[d] that right.'" *T.S. v. Doe*, 742 F.3d 632, 635 (6th Cir. 2014) (quoting *Ashcroft v. al-Kidd*, – U.S.–, 131 S. Ct. 2074, 2083 (2011)) (alterations in *T.S.*). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In determining whether a law is clearly established, ordinarily this Court looks to decisions of the Supreme Court and the Sixth Circuit. *Carver v. City of Cincinnati*, 474 F.3d 283, 287 (6th Cir. 2007); *see Andrews v. Hickman Cnty., Tenn.*, 700 F.3d 845, 853 (6th Cir. 2012) ("When determining whether a constitutional right is clearly established, we look first to the decisions of the Supreme Court, then to our own decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeals."). Although a prior case need not be directly on point, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 131 S. Ct. at 2083. The clearly established prong will depend "substantially" on the level of generality at which the legal rule is identified. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The right must be clearly established in a particularized sense, and not at a general or abstract sense. *Id.* at 640. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (internal citation and citations omitted). "This standard requires the courts to examine the asserted right at a relatively high level of specificity and on a fact-specific, case-by-case basis." *Bletz v. Gribble*, 641 F.3d 743, 750 (6th Cir. 2011) (edits omitted) (quoting *Cope v. Heltsley*, 128 F.3d 452, 458-59 (6th Cir. 1997)).

As noted above, whether the school administrators acted with deliberate indifference is a close call and a factual question for the jury. Accordingly, it cannot be said that "every reasonable officer would have understood" that Doe's rights were violated. *See T.S.*, 742 F.3d at 635. The general/abstract right to be free from student-on-student harassment is well established. *Shively*, 579 F. App'x at 358. However, Plaintiff has not presented any controlling caselaw from the Sixth Circuit or the Supreme Court that

establishes that the unlawfulness of Defendants' actions in the mandated "particularized sense" was apparent or that they were "plainly incompetent" or "knowingly violated the law." In her brief, Plaintiff cites only *Shively*, an unpublished Sixth Circuit case in which the plaintiff was harassed physically, verbally, and online based on her gender and religion for four years and school administrators did absolutely nothing to stop the harassment or punish the perpetrators. 579 F. App'x at 358. The factual situation here is readily distinguishable–the harassment lasted for a significantly shorter duration and the school did undertake *some* measures to investigate and protect Doe. Therefore, it was not clearly established that the Defendants' actions violated Doe's equal protection rights. At oral argument Plaintiff cited *Patterson v. Hudson Area Schools* as a factually closer case that clearly established the law because the school district took *some* measures to combat severe bullying. 551 F.3d 438. However, the Sixth Circuit merely found that there was a question of fact concerning the school's deliberate indifference under Title IX in that case. Thus, *Patterson* did not provide clear guidance to schools that the measures taken by the defendants violated the equal protection clause.

Plaintiff has not met her burden to demonstrate that Defendants Behm, Urquhart, and Edsenga violated a clearly established right, so they are entitled to qualified immunity. *See Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991) (holding that it is plaintiff's burden to show that defendants violated a clearly established right). The individual-capacity § 1983 claims against these Defendants are accordingly **DISMISSED**.

d. Official Capacity Claims

Next, Defendants argue that the official-capacity claims against Behm, Edsenga, and Urquhart should be dismissed because they are essentially claims against the District and are thus redundant.

Defendants are correct that the claims against them in their official capacities are treated as claims against the District. There is no requirement that such claims be dismissed, but courts are free to dismiss such redundant claims pursuant to their inherent authority to manage cases. *Scott v. Tipton Cnty.*, No. 10-2616, 2011 WL 2515976, at *3 (W.D. Tenn. June 22, 2011) ("'The Sixth Circuit has never specifically decided whether district courts should actually dismiss official capacity claims where the local governmental entity is already a party.' However, that is the general practice of district courts in this circuit.") (collecting cases); *Moore v. City of Phila.*, No. 14-133, 2014 WL 859322 (E.D. Penn. Mar. 5, 2014) (slip op). To avoid unnecessarily cluttering the docket, the official-capacity § 1983 claims against Behm, Edsenga, and Urquhart are **DISMISSED**.

e. Remaining Claims Against the District

i. Count III: Deliberate Indifference

As noted above, there remain material issues of fact concerning whether the Defendants acted with deliberate indifference. This forecloses summary judgment in favor of the District as to Count III.

ii. Count IV: Failure to Train

The final issue in Defendants' motion is whether the District can be liable on a failure to train claim. Defendants assert that Plaintiff's claim cannot succeed because she has not identified any custom or policy of the District that caused its employees to violate her rights. Plaintiff asserts that a policy or custom can be established by (1) showing the school's failure to provide adequate training in light of foreseeable consequences, or (2) showing that a final policymaker's actions were clearly unreasonable. Plaintiff argues that the school district knew of the need for training under Title IX but chose not to provide such training, and that Superintendent Behm is the final policymaker and his response to Plaintiff's complaints was

deliberately indifferent.

Defendants plainly misstate the law by asserting that a school district may be held liable *only* if an unconstitutional act was committed pursuant to an official school policy or custom. They cite *Soper*, which states that "[a] local governmental entity may be held liable under 42 U.S.C. § 1983 for violations of federal law committed pursuant to a governmental 'policy or custom.'" 195 F.3d at 853. The limiting word "only" is plainly missing from that statement of law and *Soper* did not address whether the school district had a custom or policy. Likewise, Defendants twist *Monell* beyond its holding to suggest that an official policy is necessary. In that case, the Supreme Court explicitly stated, "we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be," and held only that local governments are not liable for injuries inflicted by their employees or agents under a respondeat superior theory. 436 U.S. 658, 694-95 (1978).

Instead, it is well established that § 1983 liability may arise from "constitutional violations resulting from failure to train municipal employees." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 380 (1989) (interpreting *Monell*). When a municipality's failure to train its employees rises to the level of deliberate indifference to the rights of its inhabitants, that shortcoming is considered a city policy or custom that is actionable under § 1983. *Id.* at 388. In the context of police training, the Supreme Court explained:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390. Accordingly, it is immaterial that the school district did not act pursuant to an official, written policy or custom. Summary judgment is not warranted in favor of Defendants based on this argument.

For these reasons, Defendants' motion for summary judgment is **GRANTED** as to Defendants Behm, Urquhart, and Edsenga on both the individual and official capacity § 1983 claims against them, but **DENIED** as to the District on the § 1983 claims.

2. Plaintiff's Motion for Summary Judgment

Plaintiff asserts two § 1983 theories: (1) that the District failed to train its employees on how to handle sexual harassment complaints in the face of the obvious risk that employees' responses would be deficient if they were not trained, and (2) that the District is liable because the individual defendants were deliberately indifferent to Plaintiff's ongoing harassment. For the same reasons discussed above, the second argument presents a question of fact that a jury must resolve.

To succeed on a failure to train or supervise claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury. *See Russo v. City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir. 1992). Two situations have been identified as justifying a conclusion of deliberate indifference based on failure to train or supervise. First, failing to provide adequate training in light of foreseeable consequences that could result from a lack of instruction amounts to deliberate indifference. *Ellis ex rel Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700-701 (6th Cir. 2006). For example, not training police officers in the use of deadly force when they are armed with guns and required to arrest fleeing felons is deliberately indifferent. *Id.* at 701. Second, it is deliberate indifference when the school fails to act in response to repeated complaints of

constitutional violations by its students. *Id.* Because Plaintiff does not allege that the school has conducted deficient investigations into sexual abuse or ignored sexual harassment before, she must rely on the first option to prove deliberate indifference.

a. Training or Supervision was Inadequate

Here, Behm admits that the District did not provide *any* training to its employees about how to respond to sexual assault complaints. Edsenga, who was tasked as the Title IX coordinator, likewise did not have any significant training on how to handle sexual assault allegations. (ECF No. 70-22 at PgID # 733-34, 735-36, 740.) She noted that she attended a Title IX training five years prior to this incident, but it addressed only equal opportunities for women and she did not remember much of the training. Edsenga also said that sexual harassment has been discussed in other trainings she attended, but again she didn't remember the training. At her deposition she was still unsure whether Title IX applied to this case. Urquhart also did not know that Title IX applied to sexual assault follow up and he stated that he never attended training about how to respond to sexual assault allegations. (ECF No. 70-25 at PgID #759, 779.) Even the superintendent did not recall having any training on Title IX, only general harassment issues, and didn't think that the assault was a Title IX issue. In April 2011, Behm received a U.S. Department of Education letter which clearly outlines a school's duties to respond to allegations of sexual assault under Title IX and train its employees likewise. (ECF No. 69-2.) Because Behm admits that zero training was provided, there is no question that the first prong of the analysis is met–the training or supervision was inadequate for the tasks performed.

b. Inadequate Training the Result of Deliberate Indifference

Plaintiff can also prove that the inadequate training was the result of the municipality's deliberate

indifference because it failed to provide that training when the foreseeable consequence was a violation of students' equal protection rights. The U.S. Department of Education's "dear colleague" letter explains that there were more than 800 reported incidents of rape and attempted rape and 3,800 other incidents of sexual batteries at public high schools during the 2007-08 school year. Because sexual assault claims arise frequently in the public high school context, it is certainly foreseeable that the failure to train school staff on how to handle such claims would cause disastrous results. The Department of Education has made it clear to school administrators that training and proper responses to sexual assault claims are required. (ECF No. 69-1, 69-2.) Just like failing to train a police officer on when to use his or her gun, failing to train a school principal on how to investigate sexual assault allegations constitutes deliberate indifference. It is inevitable that these situations would arise at some point, and the complex Title IX requirements virtually ensure that an investigation done without any formal training would be deficient.

c. Inadequacy was Closely Related to or Actually Caused the Injury

Finally, Plaintiff's asserted injuries were closely related to or actually caused by the school's failure to train Behm, Edsenga, or Urquhart on how to respond to allegations of sexual assault and prevent further harassment. Plaintiff asserts that Defendants' actions violated her rights under the equal protection clause and were the proximate cause of her emotional distress, psychological damage, and damage to her character and standing in the community.

The record here reveals that additional training would have prevented Plaintiff's injuries, at least in some measure. There is no dispute on this record that Forest Hills did not materially comply with the investigation methods and grievance procedures suggested by the U.S. Department of Education (*See* ECF No. 69-5); rather, the only dispute under Title IX is whether those failures constitute deliberate indifference.

But under the umbrella of a § 1983 failure to train claim, the Court must undertake the admittedly difficult task of "predicting how a hypothetically well-trained [person] would have acted under the circumstances." *City of Canton*, 489 U.S. at 391. Here, there is no indication that the school administrators acted with bias or ill-will, but rather their testimony shows that they were acting as they thought was reasonable. Thus, their shortcomings appear to be in significant measure the result of inadequate training; if they had known about the guidance from the Department of Education on how to thoroughly handle complaints of harassment, there is no indication that the Defendants would not have substantially followed those guidelines.

For example, administrators did not heed the admonition that "Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively." (ECF No. 69-1 at PgID #490.) Thus, if school administrators had been trained properly, it is probable that they would not have waited for the criminal process to be complete before disciplining MM or relied so heavily on information from law enforcement. Plaintiff asserts, and the record supports, the theory that if the investigation had been done promptly or the school had addressed the issue among the student body or disseminated an appropriate sexual harassment policy, as the Department of Education recommends, it is likely that MM and the other students would not have continued to harass Doe for the remainder of the school year based on speculation that Doe lied about the assault. Training concerning Title IX's prohibition on retaliation against complainants may also have mitigated Plaintiff's emotional distress and social ostracization. If the school had done an independent investigation and either punished or exonerated MM quickly, the issue likely would have "blown over" much more quickly. Additionally, if the school had

immediately removed Doe from contact with MM and taken effective steps to prevent any recurring harassment from MM, it is very likely that Doe would not have experienced ongoing harassment from MM for the remainder of the school year.

Therefore, if the school administrators had been adequately trained in the optimal methods of addressing sexual assault complaints, even allowing for mistakes, Plaintiff would not have suffered the injuries she alleges. Plaintiff has therefore proved the third prong of the failure to train claim, and she is entitled to summary judgment in her favor.

d. Defendants' Responses

All of Defendants' responses completely miss the mark of this analysis and do not address the above factors. For the same reasons cited above, the lack of an official school policy or custom is not fatal to this claim; § 1983 failure to train claims are well established as viable causes of action even when there is no written, official policy. Again, as discussed above, Doe does not have to prove that her complaints were treated differently than boys' complaints–that is not the sole way to prove an equal protection violation. Third, Defendants argue that a plaintiff must show prior instances of unconstitutional conduct to prove deliberate indifference. Yet, that is only one way to prove deliberate indifference, and it is not Plaintiff's theory. Instead, she has proved deliberate indifference for failure to train in light of foreseeable consequences, a recognized way to prove deliberate indifference in the Sixth Circuit.

For these reasons, Plaintiff's motion for summary judgment on her § 1983 failure to train claim is **GRANTED.** She has shown that the district's complete failure to train its employees on how to respond to sexual assault complaints and sexual harassment was deliberately indifferent and caused her injury. There are no factual disputes remaining that are relevant to this claim.

IV. CONCLUSION

For the reasons discussed above, the court will **GRANT IN PART AND DENY IN PART** both Plaintiff's and Defendants' motions for summary judgement. (ECF Nos. 68 and 73.)

ORDER

For the reasons discussed in the accompanying opinion, Plaintiff's motion for summary judgment (ECF No. 68) is **GRANTED IN PART AND DENIED IN PART.** Summary judgment is **GRANTED** in Plaintiff's favor on Count IV and **DENIED** as to the remainder of the complaint.

Defendants' motion for summary judgment (ECF No. 73) is also **GRANTED IN PART AND DENIED IN PART.** Summary judgment is **GRANTED** on Count II as to all Defendants. Summary judgment is **GRANTED** in Defendants Behm, Edsenga, and Urquhart's favor on Counts III and IV because they are entitled to qualified immunity. Thus, the individual-capacity § 1983 claims against Behm, Edsenga, and Urquhart are **DISMISSED.** The official-capacity claims against Behm, Edsenga, and Urquhart are also **DISMISSED**. The remainder of the motion is **DENIED**.

IT IS SO ORDERED.

Date: March 31, 2015

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge