UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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JANE DOE,

Plaintiff,

v.

UNIVERSITY OF THE PACIFIC,

Defendant.

NO. CIV. S-09-764 FCD/KJN

REDACTED and AMENDED MEMORANDUM AND ORDER[1]

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[1] Pursuant to the court's order issued on the record at the December 3, 2010 hearing, plaintiff's declaration was filed December 7, 2010 [Docket #97]. The court has carefully reviewed plaintiff's declaration, and in light of her specific requests to remain anonymous, to keep the identities of other students involved in the incident sealed and to not disclose the details of the sexual conduct, in the court's discretion, it files this *redacted and amended* memorandum and order which was originally filed under seal on September 17, 2010 (Docket #70). This order redacts plaintiff's name and other students' names as well as certain graphic details of the alleged sexual assault underlying this case.

The order also corrects certain typographical errors in the September 17 order and makes other minor changes to the original order. In all other respects, the order remains substantively the same.

This matter is before the court on defendant University of the Pacific's ("defendant" or the "University") motion for summary judgment, or alternatively, partial summary judgment with respect to plaintiff Jane Doe's ("plaintiff") complaint against it. This case arises out of plaintiff, a University women's basketball team member's alleged sexual assault by three members of the University's men's basketball team. Plaintiff's friends informed the University of the assault, and thereafter, the University provided support to plaintiff, investigated the incident, convened a disciplinary board hearing, punished the three male students based on the board's findings, expelling one student and suspending the other two, and precluded all post-suspension contact with plaintiff as well as limited interaction generally between the men's and women's basketball teams, due to tensions that had arisen between the teams after the incident.

By this action, plaintiff claims the University violated Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), because it (1) did not prevent the assault (first claim for relief); (2) demonstrated "deliberate indifference" to sexual harassment in failing to respond appropriately to her complaint (second claim for relief); and (3) retaliated against plaintiff by instituting a policy limiting unsupervised social interaction between the men's and women's basketball teams (third claim for relief). Defendant moves for summary judgment, arguing that each of plaintiff's claims fail under Title IX's stringent standards: The University took steps to generally ensure the safety of its students, and plaintiff cannot establish the University's liability based on an alleged

assault on another former female student which occurred a month prior to plaintiff's assault. Further, the University conducted a fair and impartial judicial hearing, pursuant to University procedures, and Title IX does not mandate a particular remedy as urged by plaintiff; the court cannot second-guess the severity of the punishment imposed by the University on plaintiff's assailants. Finally, defendant contends the University's decision to restrict the basketball players' unsupervised interactions does not constitute a disadvantageous retaliatory action sufficient to support a Title IX claim since the decision was designed to alleviate the rising tension among the players and to protect plaintiff from the wrath of players who did not believe her.

Plaintiff opposes the motion, arguing triable issues of fact remain as to each of her claims. The court heard oral argument on the motion on September 10, 2010. By this order, the court now renders its decision, granting defendant's motion in its entirety.

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BACKGROUND[2]

1. University Policies re: Sexual Harassment and Assault

The University is a private university that has approximately 6,700 students (graduate and undergraduate). (RUF ¶ 1.) It has a "zero tolerance" sexual harassment policy that includes the admonition that the University "will not tolerate behavior that undermines the emotional, physical, or ethical integrity of any community [student] member." (RUF ¶ 2.) Some of the behavior the sexual harassment policy specifically proscribes includes "harassment or bias acts," sexual harassment, and retaliation. (RUF ¶ 3.) One of the University's General University Policies is its Policy Against Sexual Assault which: (1) applies when the alleged perpetrator or victim is a student; (2) describes the procedures a student should follow when there

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[2] Unless otherwise noted, the following facts are undisputed. (See Pl.'s Resp. to Def.'s Stmt. of Undisputed Facts, filed under seal on May 28, 2010 [Docket #54] ["RUF"].) As reflected in plaintiff's response to defendant's statement of undisputed facts (Docket #54), plaintiff does not dispute the essential facts described herein which form the necessary basis for resolution of the case. However, in an attempt to defeat summary judgment, plaintiff submitted an additional 68 alleged disputed facts in opposition to the motion. (See Def.'s Resp. to Pl.'s Add'l Disputed Facts ["RDF"], filed under seal on June 15, 2010 [Docket #59-3].) Those facts, however, are largely immaterial to the motion or are simply unfounded and conclusory *argument* in support of plaintiff's positions. Also, plaintiff often misstates the relevant testimony or evidence. As such, the court has disregarded plaintiff's statement of additional facts, except where otherwise expressly noted herein.

Additionally, defendant filed various objections to plaintiff's evidence offered in opposition to the motion. (Docket #s 59, 59-3.) While many of the stated objections have merit, the court nonetheless overrules defendant's objections as moot, since even considering the entirety of plaintiff's proffered evidence, she has not established a material, triable issue of fact, and therefore, cannot withstand summary judgment. Moreover, the court notes as set forth above, that much of the objected-to evidence is irrelevant to the motion, and thus, the court has not considered it in rendering its decision.

is reason to believe "a violation has occurred and the perpetrator is a student;" (3) provides that "violations of [the] policy may result in sanctions up to and including dismissal or suspension from the University;" and (4) states that "[p]rosecution by the criminal justice authorities is not a requirement for the student judicial process to be initiated. (RUF ¶ 4.) The sexual harassment and sexual assault policies are part of the Student Code of Conduct and General University Policies which are contained in the student handbook, *Tiger Lore*. (RUF ¶ 5.) The University provides these policies to students at the mandatory new student orientation and during various University programs on sexual assault, and the policies are available online on the University's website. (RUF ¶ 6.)

The University presents a number of sexual assault prevention and alcohol education programs throughout the year to its student body. For example, at the mandatory new student orientation, new students participate with trained student leaders in facilitated discussions regarding the University's Policy Against Sexual Assault. During orientation, new students also attend an educational presentation called "The Way We See It," which addresses alcohol, sexual assault, and other challenging situations facing college students. (RUF ¶ 8.) Throughout the school year, the University also brings in nationally recognized speakers to address and educate the University's students on the effects of alcohol and drug use, sexual assault, and other risk factors for college students. These presentations are also made to discrete student groups such as members of the fraternities and sororities and student

athletes. (RUF ¶ 9.) Additionally, all University-provided student housing complexes are staffed with Resident Advisors, who receive specialized training to address alcohol, drugs and sexual assault and are required to host educational programs on these topics for their student residents. (RUF ¶ 10.)

Specifically with respect to the University's Athletic Department, every year the University and the Athletic Department hold training sessions on sexual assault issues for students and student athletes. (RUF ¶ 11.) University employees, including the Athletic Director, receive sexual harassment training every two years. (RUF ¶ 12.) The University Athletic Director also attends training specifically on Title IX. (RUF ¶ 13.)

Finally, the University provides support to students who report that they have been a victim of sexual assault, including counseling with the University's professional Student Victim Advocate, medical treatment, if needed, and reassignment of housing or classes if requested by the student. (RUF ¶ 18.) The University's Student Victim Advocate is Maryann Pearson ("Pearson"). (RUF ¶ 14.) Pearson, who is certified in her field, is a former police officer who is on call 24 hours a day, seven days a week, to respond to sexual assault victims, advocate for victims and, generally, be a resource for victims throughout the reporting process. (RUF ¶s 15-16.)

2. <u>Plaintiff's Assault</u>

Plaintiff alleges she was sexually assaulted on May 10, 2008. (RUF ¶ 19.) According to plaintiff, a men's basketball player, hereinafter referred to as "Student 1," offered her a ride to another party at campus housing. (RDF ¶ 19.) She

asserts, however, that Student 1 did not take her to another party but instead to his campus apartment. (RDF ¶ 21.) Another men's basketball team member, hereinafter referred to as "Student 2," rode with Student 1 and plaintiff to the apartment. Once they arrived at the apartment, plaintiff states that Student 1 and Student 2 took off her clothes; [redacted] Plaintiff states she struggled to put her clothes back on, when a third member of the men's basketball team, hereinafter referred to as "Student 3," came into the apartment. Plaintiff describes that Student 3 forced her into a closet and [redacted];" plaintiff states that she complied with his demands in order to end the situation; [redacted] (Id.)[3]

After the incident, plaintiff told several friends about the assault, identifying Student 1, Student 2 and Student 3 (sometimes collectively referred to herein as "Respondent Students"), as her assailants. (RUF ¶s 20, 22.) One of plaintiff's friends tape-recorded with his telephone, plaintiff's description of what happened to her.[4] (RUF ¶ 21.) Two days

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[3] This is plaintiff's account of the incident as stated in her opposition to the motion; defendant disputes some of the facts. However, the dispute is not pertinent to resolution of the motion.

[4] The tape recording revealed plaintiff stating: [redacted]

later, plaintiff flew home to Colorado for summer recess without reporting the assault to either the University or the Stockton Police Department. (RUF ¶ 23.)

On May 12, 2008, plaintiff's friends told Alisha Valavanis ("Valavanis"), the Women's Assistant Basketball Coach, about the assault.[5] (RUF ¶ 24.) Coach Valavanis immediately informed the Head Women's Basketball Coach, Lynne Roberts ("Roberts"), of plaintiff's friends' report of the assault. (RUF ¶ 25.) One of plaintiff's friends played the tape recording for the coaches. (RUF ¶ 26.) Coach Roberts then telephoned plaintiff to check on her well-being. (RUF ¶ 29.) Later that night, Coach Roberts telephoned plaintiff's home and spoke to plaintiff's parents to make sure they were aware of the alleged assault. (RUF ¶ 30.)

[redacted]

[5] As of May 12, 2008, the University was not aware of any previous complaints of sexual misconduct against Student 1, Student 2 or Student 3. (RUF ¶ 27.) Plaintiff disputes this fact, arguing that the University was aware that a similar sexual assault had occurred one month prior and that Student 2 was a "possible suspect." As set forth below, plaintiff misstates the evidence. The victim in the prior incident never identified Student 2 as one of her assailants, and that previous, alleged victim only first identified Student 2 by name in July 2008. Plaintiff also contends the University was aware, since August 2007, that Student 3 had called Coach Roberts a "bitch," and the women's basketball team's coaches warned players to stay away from Student 3 because he had a reputation for being sexually promiscuous and aggressive towards women. (RDF ¶s 52-53, 56-59.) As discussed below, these facts do not establish the University's knowledge of any specific, sexual misconduct by Student 3, which would have put the University on notice that Student 3 posed a threat of sexually *assaulting* women students.

Early the next morning, on May 13, 2008, Coach Roberts told Lynn King ("King"), the University's Athletic Director, about the assault, and King immediately contacted the Vice President of Student Affairs, Dr. Elizabeth Griego ("Griego"). (RUF ¶ 31.) That same morning, Griego met with King, Michael Belcher ("Belcher") (Director of the University's Public Safety Department), Coach Roberts, Coach Valavanis and Heather Dunn Carlton ("Carlton") (the University's Director of Judicial Affairs) to determine the next steps. (RUF ¶ 32.) Following the meeting, the University officials interviewed the students who reported the incident. (RUF ¶ 33.)

On May 14, 2008, the University issued a campus-wide safety alert of a possible sexual assault and reported the incident to the Stockton Police Department. (RUF ¶s 34-36.) Also on May 14, Griego and Coach Roberts attempted to speak with plaintiff by telephone. (RUF ¶ 37.) They did not speak with her that day, but did talk with her father. (RUF ¶ 38.) In that telephone call, and in subsequent correspondence dated the same day, the University inquired as to plaintiff's health, discussed the next steps that the University intended to take, and urged plaintiff to schedule a physical examination and to speak with the police. (RUF ¶ 39.) The University offered plaintiff sexual assault victim resources, including in-person or telephone counseling services, and suggested she take advantage of the University's Victim Advocate Program, which plaintiff ultimately did. (RUF ¶ 40.) In addition, in light of the seriousness of the reported assault, University officials advised plaintiff's parents that the University intended to convene a Judicial Review Board to

consider plaintiff's allegations. (RUF ¶s 41-44.)

Despite the University's encouragement, plaintiff did not press criminal charges against any of her assailants. (RUF ¶ 45.) Nonetheless, the University, in accordance with its policies, initiated its independent judicial process. (RUF ¶s 41-47.)

3. <u>University Judicial Review Board Proceedings</u>

Pursuant to the University's Student Judicial Procedures, on June 6, 2008, the University sent written notice to Respondent Students, specifying their alleged violations of the Student Code of Conduct ("SCC") and the General University Policies ("GUP") and advising that an evidentiary hearing would begin on June 16. (RUF ¶ 47.) The University charged Respondent Students with violating four provisions of the SCC: (1) behavior which violates federal, state and local laws, General University Policies, Student Housing Policies, Fraternal Organization Policies and the University's Policy Against Sexual Assault and Harassment; (2) intentionally or recklessly causing physical or psychological injury or harm or causing reasonable apprehension of or threats of such injury or harm to any individual at a time or place within the jurisdiction of the Code; (3) knowingly making or delivering materially false or misleading written or oral statements to a University official; and (4) attempting, conspiring to commit, or aiding and abetting violations of the SCC. (RUF ¶s 48, 50, 52.) Respondent Students were also charged with violating GUP 8 which provides, in pertinent part, that: "All members of the University community shall be able to pursue their interests free from sexual assault or harassment. This

policy pertains to incidents of sexual assault and sexual harassment between students or where the alleged perpetrator is a student[.]" (RUF ¶s 49, 51, 53.) The University also instructed Respondent Students that they could not have any contact with plaintiff and could come onto campus only as authorized by certain University officials. (RUF ¶ 54.)

Between May 13 and June 11, 2008, University officials conducted interviews of Respondent Students and various witnesses present on the evening of the assault. (RUF ¶ 55.) On June 10, with plaintiff's parents' permission, Carlton, the University's Director of Judicial Affairs, interviewed plaintiff by phone. (RUF ¶ 56.) Plaintiff told University officials that she felt reassured that the University seemed intent on going forward with the judicial proceedings regardless of whether she filed criminal charges. (RUF ¶ 57.) In preparation for the hearing, the Director of Judicial Affairs trained the Board members in the judicial procedures applicable to the hearing and on sexual assault issues, including showing them a PowerPoint presentation supplied by plaintiff's representatives. (RUF ¶ 61.)

On June 16, 2008, the University commenced the evidentiary hearing against Respondent Students. (RUF ¶ 59.) Under the University's Student Judicial Procedures, a student may be dismissed from the University only if found responsible for a violation based on clear and convincing evidence. (RUF ¶ 60.) As an accommodation to plaintiff, the University arranged for plaintiff to provide her testimony to the Board in a building across campus from where Respondent Students testified. (RUF ¶ 62.) At plaintiff's request, her testimony was not presented

live to Respondent Students but instead was tape recorded and played for Respondent Students immediately following the completion of her testimony. (RUF ¶ 63.) Plaintiff concedes she appreciated these accommodations. (RUF ¶ 64.) During the hearing, Respondent Students had follow up questions for plaintiff but she refused to answer them. (RUF ¶ 65.)[6] Throughout the University's judicial process, Pearson provided counseling support to plaintiff. (RUF ¶ 66.) Plaintiff elected not to hear the testimony from Respondent Students or any other witness. (RUF ¶ 72.)[7]

In all, the Board heard over 15 hours of testimony, from plaintiff, Respondent Students and nine other witnesses. (RUF ¶s 67-70, 74.) The Board also reviewed written statements provided by plaintiff, Respondent Students and the nine other witnesses. (RUF ¶ 67.)

During the hearings, the Board heard evidence that: (1) plaintiff was at a party earlier in the evening with other members of the women's basketball team, where she consumed alcoholic beverages (RUF ¶ 75); (2) after the first party, plaintiff went to a second party with many of the same people who had attended the first party (RUF ¶ 76); (3) at some point, plaintiff left that party and got a ride with Student 1 over to his apartment at the Townhouses (university housing), but the Board heard conflicting testimony as to the circumstances of the

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[6] Plaintiff states she was not aware of these questions until the following week. (Id.)

[7] As of the date of her deposition, plaintiff has never read any of the witness statements or transcripts from the hearings. (RUF ¶ 73.)

ride (RUF ¶ 77);[8] (4) plaintiff flirted with several individuals that night, including one of the Respondent Students and she kissed another man at the party (RUF ¶ 79) (plaintiff testified this did not happen (RUF ¶ 80)); (5) plaintiff could have left the Townhouses when one of the other attendees decided to leave but instead plaintiff willingly went upstairs with Student 1 and Student 2 (RUF ¶ 81); [redacted] (8) plaintiff admitted she did not recall specifically whether she said the word "no" at any point during the sexual conduct that occurred between her and Student 1, Student 2 and Student 3 (RUF ¶ 84); [redacted] and (9) plaintiff claimed that she did not consent to all of this sexual conduct (RUF ¶ 86). In total, this key evidence caused the Board to doubt whether all of the sexual activity that occurred was non-consensual. (Id. at ¶s 75-77, 79-86.)[9]

On June 24, 2008, after deliberating for over 10 hours, the Board completed its written report and recommended sanctions

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[8] Plaintiff testified Student 1 offered her a ride, but the Board also heard evidence that plaintiff was not offered a ride but had requested a ride to the Townhouses from Student 1. (RUF ¶ 78.)

[9] Plaintiff contends that sometime after the hearing concluded but before the Board's decision was reported, Griego told plaintiff that she believed the men's basketball players were telling the truth, and that they were popular students who did not need to force anyone to have sex with them. Plaintiff claims Griego told her Respondent Students were victims too. Defendant disputes these facts. (RDF ¶ 35.) For the reasons set forth below, the parties' factual dispute is not determinative of an issue on the motion.

against Respondent Students. (RUF ¶ 87.) The University informed plaintiff of the decision on June 25. (RUF ¶ 88.) The Board recommended that Student 3 be dismissed based on its finding that there was clear and convincing evidence that he had committed four sexual assault-related violations;[10] dismissal meant that Student 3 was no longer enrolled as a student and was prohibited from entering campus. (RUF ¶s 89-90.) However, as to Student 1 and Student 2, the Board found that there was no such clear and convincing evidence that they committed similar violations. (RUF ¶ 91.)[11] The Board did, however, find that the evidence showed, by a preponderance, that Student 1 and Student 2 committed certain sexual-related offenses against plaintiff.[12] It recommended they be suspended for one and two semesters, respectively. The Board provided further that Student 1 and Student 2 could be reinstated as students only upon their completion of education and training in substance abuse and sexual assault awareness. (RUF ¶ 92.) Student 1 and Student 2 were barred from campus for the durations of their suspensions.

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[10] At the hearing, Student 3 denied any involvement whatsoever in the incident, and the Board did not believe his testimony. Ultimately, Student 3 was held responsible on the charges related to sexual assault, inflicting psychological harm, sexual harassment and making false statements. (RUF ¶ 89.)

[11] As to Student 1 and Student 2, the Board heard conflicting testimony as to the consensual nature of the subject sexual contact with plaintiff.

[12] The Board found by a preponderance of the evidence that Student 1 was responsible on the charges related to sexual assault, inflicting psychological harm, sexual harassment and aiding and abetting. The Board found by a preponderance of the evidence that Student 2 was responsible on the charges related to sexual assault, inflicting psychological harm and sexual harassment. (RUF ¶ 91.)

(RUF ¶ 93.) They were permitted onto campus only to meet with University officials to go over the terms of their suspensions and to later fulfill the conditions of their suspensions regarding scheduled alcohol and sexual misconduct counseling. (RUF ¶ 94.) Griego met with Basketball Head Coach Bob Thomason and Student 1 and Student 2 to review the Board's findings and to discuss the terms of the suspensions, including the "no-contact" provisions relating to plaintiff and that they were barred from campus; the University Department of Public Safety was informed of the bar as well. (RUF ¶s 95-96.)

If Student 1 and Student 2 returned to the University as students, they were required to adhere to several probationary terms, including a strict "no-contact" rule with plaintiff, precluding all communication or attempted communication with plaintiff or her family, including by person, electronic or other means, directly or indirectly. (RUF ¶s 97-98.) Student 1 and Student 2 would be expelled if they committed any additional violations of the SCC. (RUF ¶ 99.) Additionally, their academic transcripts and permanent University records would reflect the suspensions. (RUF ¶s 100-01.)

As allowed by the University's Judicial Procedures, on July 1, 2009, Respondent Students appealed the sanctions. (RUF ¶ 102.) The University permitted plaintiff to submit a statement in support of her belief that the University had not imposed sufficient sanctions. (RUF ¶ 103.) After three days of deliberation, on July 10, the Appeals Committee denied Respondent Students' appeals and upheld the Board's decisions. (RUF ¶ 105.)

4. Post-Hearing Activities

After the denial of Respondent Students' appeal, the University Athletic Director conferred with the men's and women's basketball coaches regarding how best to protect plaintiff when she and potentially Student 1 and Student 2 returned to the University; they discussed the tension between the two programs and how best to avoid future incidents. (RUF ¶ 106.) Many players on the men's basketball team did not believe plaintiff was telling the truth and disagreed with the sanctions levied against Respondent Students. (RUF ¶ 107.) The Athletic Director believed the most challenging situations would be social occasions attended by members of both basketball teams, where alcohol was consumed. (RUF ¶ 108.) He accordingly implemented a temporary measure that the men's and women's basketball teams would not interact in social settings. (RUF ¶ 109.) For example, if one basketball team was at a party or a bar off campus and members of the other team arrived at that location, the teams members who came second would have to leave. (RUF ¶ 110.) This temporary measure separating the teams was intended to make plaintiff's transition back to school as comfortable as possible, to avoid any further harm to plaintiff and to ease the tensions between the teams. (RUF ¶ 111.) Plaintiff was informed that this temporary measure would be in place during a "cooling off" period between the members of two teams. (RUF ¶ 112.) The Athletic Director never intended the temporary measure separating the teams to be a punishment to plaintiff (it applied equally to both teams); rather, he believed it was a reasonable policy decision to make in light of the circumstances. (RUF ¶s 113-

115.)[13]

At the end of the summer, plaintiff took a leave of absence from the University. (RUF ¶ 116.) During the months following the alleged assault, the University told plaintiff that her scholarship would be available to her if she decided to return to the school, and that it would do everything in its power to make her transition back to the University as smooth as possible. (RUF ¶ 117.) If she did return, the University indicated it would review with her what else it could do to assist her return to campus life. (RUF ¶ 118.) If Student 1 and Student 2 returned to campus, they were under a "no-contact" rule regarding plaintiff. (RUF ¶ 120.)

On October 30, 2008, plaintiff informed Coach Roberts by email that she would not return to the University. Plaintiff stated that she would have returned had Student 1 and Student 2 been expelled. (RUF ¶s 122-123.)

On March 18, 2009, plaintiff filed this action, alleging the University violated Title IX.

5. Prior Sexual Assault Incident Involving a Former University Student

In the early morning of Monday, April 7, 2008, the Stockton Police Department informed the University's Department of Public Safety that a former University student had reported that she was sexually assaulted over the weekend at a campus party, in the

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[13] In addition to implementation of this policy, plaintiff testified that Coach Roberts told her that Athletic Director King had instructed the entire men's basketball team to have no contact whatsoever with plaintiff, including even saying "Hi" to her. (RDF ¶ 45.) For the reasons set forth below, plaintiff's testimony does not raise a triable issue of fact sufficient to withstand summary judgment on her retaliation claim.

early hours of Sunday, April 6. (RUF ¶ 128.) The alleged victim, hereinafter referred to as "Former Student," told police she was forcibly raped by two African-American males with thin builds and shaved heads, the first male approximately 6'3" tall and the second male approximately 5'6" tall. (RUF ¶ 129.)

The University's Department of Public Safety worked with the Stockton Police Department to investigate the incident. (RUF ¶ 135.)[14] Former Student reported that the assault occurred in the "A" section of the Townhouses. (RUF ¶ 139.) Officers at the Stockton Police Department learned from the resident advisor on duty at the Townhouses that there was only one registered party in that section of the Townhouses on the evening of the alleged April 2008 assault. (RUF ¶ 140.) The Police Department interviewed the individuals who lived at that apartment and who attended the party, and conducted a full physical inspection of the apartment, with officers from the University's Public Safety Department present. (RUF ¶ 141.) The investigation by the Stockton Police Department revealed that the only African-American male identified as being present at the party did not match the description Former Student gave of either of her alleged assailants. (RUF ¶ 142.) The individual present at the

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[14] A Memorandum of Understanding ("MOU") between the City of Stockton and the University governs when the University's police officers investigate crimes on campus. (RUF ¶ 136.) Pursuant to the MOU, if a major crime such as a sexual assault is involved, the University notifies the Stockton Police Department who then decides whether the Police Department or the University's public safety officers will conduct the investigation. (RUF ¶ 137.) Generally, the Stockton Police Department takes the lead role in major investigations. (RUF ¶ 138.)

party was not any of the Respondent Students. (RUF ¶ 143.)

Later in April, University police, including Belcher, the University's Public Safety Director, responded to an unregistered party in Building A of the Townhouses and made contact with Student 2. (RDF ¶ 13.) Belcher testified that after that contact, he had a "gut feeling" that Student 2's apartment may have been involved in the Former Student incident since Student 2 had reported to the Stockton police that he had had a similar party a few weeks prior and that non-students were in attendance. (RDF ¶s 14-15.)[15] Belcher testified that while Student 2 matched certain aspects of Former Student's description of her alleged assailants, including that he was African-American, thin and had cropped hair, he did not match the height description (Former Student described her assailants as 5'6" and 6'3" and Student 2 was, according to Belcher, much taller at 6'8"). (Id.) Nonetheless, Belcher told the Stockton Police Department about his contact with Student 2. He testified, however, that he did not believe he could have investigated the matter further with Student 2, at that time, since any such investigation would simply be "racial profiling," in light of the fact that Belcher and the Stockton Police had no evidence to support any allegations against Student 2. (RDF ¶ 16.)

The Stockton Police Department attempted to contact Former Student to obtain additional information that might provide new leads for its investigation. (RUF ¶ 145.) Former Student

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[15] Contrary to plaintiff's suggestion, Belcher did not testify that he had a "gut feeling" Student 2 was involved in the Former Student assault; rather he testified he believed Student 2's apartment may have been the location of the assault. (Id.)

refused to cooperate with the Police Department's investigation. (RUF ¶ 146.) Because the Police Department does not prosecute sexual assault cases when the victim is uncooperative, it put its investigation on hold. (RUF ¶ 147.) Former Student likewise refused to communicate with anyone at the University concerning the incident. (RUF ¶ 148.)[16]

As of May 10, 2008, the date plaintiff was assaulted, Former Student had provided the Stockton Police Department with only a general physical description of her alleged assailants, which was insufficient either to identify the assailants or establish that they were University students. (RUF ¶ 149.) The University could not go forward with its judicial proceedings concerning the Former Student assault because it did not have information regarding the identities of the assailants or could not establish that they were students of the University. (RUF ¶ 150.)[17]

In a later email account on June 25, 2008, Former Student told Carlton, the University's Director of Judicial Affairs, that she had sexual contact with only one individual, who forcibly raped her, but that one or two other men were in the room at the time of the alleged assault. (RUF ¶s 130-131.) Upon receipt of the email, the University immediately issued a campus-wide safety alert. (RUF ¶ 132.) That same day, the University held a public

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[16] As set forth below, it was not until July 2008 that Former Student cooperated with the University in an attempt to identify her assailants.

[17] Plaintiff disputes this fact, arguing the University had sufficient facts to continue investigating the matter, and that further investigation could have lead to a University judicial hearing. Plaintiff's dispute does not raise a material issue of fact relevant to the motion for the reasons set forth below.

forum at the Townhouses. (RUF ¶ 133.) Belcher attended the forum to answer questions. (RUF ¶ 134.)

Only in July 2008, after the Board hearing had occurred in plaintiff's case, did Former Student finally agree to view a photo lineup in an attempt to identify her alleged assailants. (RUF ¶ 151.) During her review of the photo lineup (which included photographs of Respondent Students), Former Student identified Student 1 and Student 2 and told the University Police Department that she was "60-70%" certain that Student 1 and Student 2 were in the room when she was assaulted, but she did not identify them as her assailants. (RUF ¶ 152.)[18] Indeed, Former Student stated that her assailant was not among those persons pictured in the lineup. (Id.)

STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any," which it

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[18] Plaintiff attempts to dispute this fact, stating that Former Student specifically identified Student 2 by name as one of her assailants, citing the Hilgart Deposition Exhibit 3. The cited evidence does not support plaintiff's contention. (RUF ¶ 152.) There, Hilgart describes that Former Student said Student 2, who she had met previously, was "only standing naked by the doorway . . . when [the] incident [assault] occurred." (RUF ¶ 152.)

> believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. at 324. Indeed, summary judgment should be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288-289 (1968). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P. 56(e). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing

law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 251-52.

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 289. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Rule 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical

doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-87.

ANALYSIS

Tile IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).[19] In Davis v. Monroe County Board of Education, the Supreme Court concluded that the "recipients [of federal educational funds] may be liable for their deliberate indifference to known acts of peer sexual harassment." 526 U.S. 629, 648 (1999). Applying Davis, the Ninth Circuit held that Davis "set forth four requirements for the imposition of school district liability under Tile IX for student-on-student harassment." Reese v. Jefferson School Dist. No. 14J, 208 F.3d 736, 739 (9th Cir. 2000). First, the funding recipient must exercise substantial control over both the harasser and the context in which the harassment occurs. Second, the victim's sexual harassment must be so severe, pervasive, and objectively offensive that it deprives the victim of access to educational opportunities or benefits provided by the school. Third, the funding recipient must have actual knowledge of the harassment. Fourth, the funding recipient must have acted with deliberate indifference to the known harassment. The deliberate

[19] Here, for purposes of the motion, the University does not dispute it is a recipient of federal funding.

indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it; deliberate indifference occurs "'only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of known circumstances.'" Id.[20]

In establishing these standards in Davis, the Supreme Court emphasized that a school may be held liable for student-on-student harassment only "under . . . [the] limited circumstances" where the four requirements are met. Davis, 526 U.S. at 643-44. The Court expressly noted that recipients of federal funds have no general obligation to purge their schools of "actionable peer harassment" (recognizing the impossibility of such a requirement), and they need not "engage in particular disciplinary action." Id. at 648 (remarking that the dissent "erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands"). The Court held that "courts should refrain from second guessing the disciplinary decisions made by school administrators." Id.; see also Oden v. Northern Marianas College, 440 F.3d 1085, 1089 (9th Cir. 2006) (holding that liability against the school could not rest on the college's decision not to fire the alleged harasser instructor because he was "punished significantly" (by a four-week suspension without pay) and the aggrieved party is "not entitled to the precise remedy that he or she would prefer"). The Court held:

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[20] With respect to each of plaintiff's claims, defendant does not dispute that the sexual harassment at issue here was sufficiently persuasive and severe to met the standards of Davis.

> School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.

Davis, 526 U.S. at 648 (recognizing that Title IX does not impose general requirements that schools "remedy" peer harassment or ensure that students conform their conduct to certain rules, rather the school must "merely respond to known peer harassment in a manner that is not clearly unreasonable"). In that regard, the Court specifically acknowledged that in the appropriate case, summary judgment is properly entered where a school's response to the harassment was "not clearly unreasonable as a matter of law." Id. at 649.

1. Plaintiff's First Claim for Relief for Violation of Title IX Based on the University's Alleged Failure to Prevent the Assault on Plaintiff

In plaintiff's first claim for relief, she alleges defendant violated Title IX by its failure to prevent the assault on plaintiff; plaintiff contends that the University was deliberately indifferent to Former Student's assault, and its failure to properly investigate that incident lead to plaintiff's attack.[21]

[21] Plaintiff appears to base this claim for relief exclusively on the University's alleged failure to properly investigate the Former Student assault; however, the court notes that to the extent plaintiff seeks to base this claim on the allegation that the University *generally* failed to ensure the safety of its students, such a claim cannot prevail. The University produced abundant evidence demonstrating its efforts to ensure its students' safety, including specifically its efforts to educate students about sexual harassment and assault and to protect students from it. Plaintiff does not dispute this evidence. (RUF ¶s 1-18.)

Contrary to plaintiff's protestations, as set forth above, the undisputed evidence demonstrates that the University acted reasonably in responding to Former Student's report of an assault. (RUF ¶s 128-148.) Significantly, insofar as it relates to plaintiff's case, the University cannot be held liable for plaintiff's attack based on the Former Student incident, since prior to May 10, 2008 when plaintiff was attacked, the University had *no* knowledge of who assaulted Former Student. (RUF ¶s 149-150.) Indeed, prior to May 10, Former Student had only given a general description of her assailants, as African-American, thin, shaved heads and heights of 5'6" and 6'3". The description did not identify any University student as her attacker. (RUF ¶s 129-131.) After making the initial report to the police, Former Student refused to cooperate in any further investigation of the matter, which stymied law enforcement's efforts and ultimately caused law enforcement to place the investigation on hold. (RUF ¶s 145-148.) The University did not have actual knowledge of the identities of Former Student's assailants before plaintiff's assault, and thus, had no basis to believe that Respondent Students were involved.

Plaintiff's citation to Belcher's testimony regarding his "gut feeling" that Student 2's apartment may have been the location of Former Student's assault does not raise a triable issue of fact establishing the University's deliberate indifference to Former Student's report of her assault. (RDF ¶s 4-16.) Belcher did not pursue his hunch because while Student 2 had some characteristics which matched Former Student's assailants, significantly, Student 2's unusual height (6'8") did

not match. Indeed, prior to plaintiff's assault, the University and the Stockton police simply had no information tying Student 2 to the Former Student assault. As a result, Belcher reasonably concluded that any investigation of this African-American man smacked of unlawful, racial profiling.

Additionally, plaintiff's reliance on the University's alleged knowledge that Student 3 was a womanizer who had a bad reputation among female students is also unavailing. (RDF ¶s 52-53, 56-59.) There was absolutely no evidence connecting Student 3 to the Former Student incident; and, even assuming the University had been aware of Student 3's reputation, that knowledge would not have lead them to suspect any involvement in the Former Student assault based on the information given by Former Student.[22]

Here, despite the lack of information, the University worked with the Stockton Police Department to fully investigate the assault, which included a physical inspection of the apartment in question and interviews of attendees at the party. (RUF ¶s 139-141.) Further, as a follow-up to the email from Former Student in June 2008, the University issued a campus-wide safety alert and conducted a student forum at the Townhouses to answer any student questions. (RUF ¶s 132-134.) Finally, having exhausted

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[22] Plaintiff's evidence relating to Student 3's previous conduct toward the women coaches and females generally is not relevant to this claim for relief. See Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274, 279 (1998) (holding that school district's actual knowledge of inappropriate teacher comments did not put school district on actual notice that teacher had sexual relations with a student).

all leads at the time,[23] neither the University nor law enforcement could proceed further as Former Student refused to cooperate or provide any further assistance in the investigation. (RUF ¶s 142-143.)

It was not until July 2008, two months *after* plaintiff's assault, that Former Student cooperated with the University in an effort to identify her assailants. (RUF ¶ 151.) However, to date their identity remains unknown. Ultimately, Former Student stated only that she was "60 to 70%" certain that Student 1 and Student 2 were in the room when she was attacked; significantly, she never identified them as her attackers. She specifically stated that her attacker was not one of the persons pictured in the photo lineup (which depicted all three Respondent Students), and she stated that her recollection was that during the attack, Student 2 only stood naked near the door of the room.[24] (RUF ¶ 152.) Critically, this information came to light only *after* the assault on plaintiff and *after* the judicial hearing.

Such information cannot give rise to a cognizable Title IX claim. Reese, 208 F.3d at 740 (holding that when the school is not actually aware of the harassment or the harassers' identities until after the school year was over, it cannot be deemed to have subjected the plaintiff to the harassment). Here, at best, plaintiff alleges the University "should have known" that

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[23] Law enforcement discovered that only one African-American male attended the party, and they interviewed that person and determined that he did not match the description given by Former Student.

[24] As described above, plaintiff misstates the evidence relating to Former Student's identification of Student 2. At no time did Former Student identify Student 2 as her attacker.

Respondent Students raped Former Student, or that the University was *negligent*, citing Belcher's failure to pursue his "gut feeling," thus causing plaintiff's attack. However, in Davis, the Court expressly rejected the view that Title IX liability could be established on the broader "knew or should have known" standard applicable in negligence actions. 526 U.S. at 642; see also Doe v. Butte Valley Unified Sch. Dist., No. 2:09-245, 2009 U.S. Dist. LEXIS 35902, *12-13 (E.D. Cal. April 28, 2009) (finding deficient the plaintiff's allegation that defendants knew or should have known of the alleged sexual molestation and harassment, since that precise theory of constructive knowledge was expressly rejected by the Court in Davis); Roe v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1033 (E.D. Cal. 2009) (emphasizing that "deliberate indifference" describes a state of mind more blameworthy than negligence). Here, even assuming the University acted negligently in its investigation of the Former Student incident, that negligence does not give rise to an actionable claim by plaintiff. Oden, 440 F.3d at 1089 (finding the school not liable where the record showed at most, the college was "negligent, lazy, or careless" in its investigation which included a significant delay in disciplining the alleged harasser). However, as set forth below, the court finds that plaintiff has failed to offer any evidence to demonstrate that the University acted negligently in this matter. To the contrary, their actions prior to and in response to plaintiff's assault were "clearly not unreasonable" and thus, liability cannot attach.

2. Plaintiff's Second Claim for Relief for Violation of Title IX Based on the University's Response to Plaintiff's Report of the Assault

In her second claim for relief, plaintiff alleges the University violated Title IX in failing to respond appropriately to her complaint of sexual assault. Plaintiff contends defendant acted deliberately indifferent to her rights during the course of the University judicial hearings, by refusing to expel all three Respondent Students, and through implementation of retaliatory policies directed at her. As set forth above, a school may be civilly liable for student-on-student harassment only where the plaintiff can prove that the school acted with "deliberate indifference" to sexual harassment of which it had actual knowledge. Here, the University produces evidence, which is not disputed by plaintiff, that: (1) it acted promptly to investigate the reported assault on plaintiff; (2) it provided counseling services to plaintiff; (3) it encouraged plaintiff to file criminal charges with the police department but regardless of whether she did so, it instituted internal judicial procedures to investigate the charges against Respondent Students; (4) it ultimately punished Respondent Students significantly, expelling Student 3 and suspending Student 1 and Student 2; and (5) it offered to accommodate plaintiff in whatever way she needed in order to make her transition back to the University smooth (this included holding her scholarship open). (RUF ¶s 41-105.)

Despite this undisputed evidence, plaintiff argues triable issues of fact exist based on the University's conduct in the judicial hearings, their ultimate decision with respect to the

punishment of Respondent Students, and their implementation of certain policies post her complaint. As to the judicial hearing itself, plaintiff makes several claims: First, she argues the Board was improperly trained by the University. However, plaintiff offers no evidence in support of this assertion, and the undisputed evidence is to the contrary. The University provided training to the Board using a PowerPoint presentation supplied by *plaintiff's* counsel's psychologist-consultant. (RUF ¶ 61.)

Second, plaintiff argues the University and Board took a "blame-the-victim" approach in the investigation and hearing procedures. Again, however, plaintiff offers no evidence in support of this contention. That the Board questioned plaintiff about the specific sexual conduct at issue, including whether she consented to the conduct and how she expressed that consent or lack thereof, is not evidence that the University "blamed" plaintiff for the assault. It is undisputed that the Board questioned Respondent Students similarly, and ultimately, the Board, giving far more credence to plaintiff's testimony, determined that Respondent Students had violated the University's policies--to such a significant degree that Student 3 was expelled and Student 1 and Student 2 suspended (with permanent notations on their academic records and stringent probationary terms). (RUF ¶s 89-101.)

Moreover, plaintiff's argument ignores a fundamental legal precept that the University cannot elevate the rights of the alleged victim above the rights of the alleged assailant. California law is clear that a college owes fair procedures to

all of its students. Gupta v. Stanford Univ., 124 Cal. App. 4th 407, 411 (2004). Thus, contrary to plaintiff's suggestions, her testimony as an alleged victim did not automatically carry greater weight than that of the other witnesses, including Respondent Students. See Theriault v. Univ. of S. Maine, 353 F. Supp. 2d 1, 15 n. 18 (D. Me. 2004) (observing that an accused assailant must be afforded a fair hearing).

Third, plaintiff argues the University erred in failing to introduce evidence of Student 3's history of sexual misconduct. Plaintiff contends the Board should have been informed of the coaches' previous warnings to female players to stay away from Student 3. Again, plaintiff mischaracterizes the relevant evidence. The coaches' warnings were not based on any charges of sexual assault by Student 3; rather the sole basis for the coaches' statements were that Student 3 had a reputation as a "womanizer" who had dated several members of the women's team, resulting in jealous feelings among them. (RDF ¶ 53.) As defendant points out, it is axiomatic that there is a profound difference between the violent acts of a sexual predator and a reputation for sexual promiscuity. See Doe v. Capital Cities, 50 Cal. App. 4th 1038, 1054-55 (1996) (holding that employer's knowledge that an employee had "used his position of authority to extract or coerce sexual favors [was] not knowledge that he would first drug and then attack a potential employee . . . [those] are qualitatively different situations).[25]

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[25] Contrary to plaintiff's argument, J.K. v. Arizona Bd. of Regents, No. CV-06-916, 2008 U.S. Dist. Lexis 83855 (D. Ariz. Sept. 30, 2008) is simply inapposite to this case. In J.K., the school had actual knowledge of the student's extreme sociopathic

Finally, plaintiff argues the University acted with deliberate indifference to her report of the assault by failing to present evidence of the Former Student incident to the Board. As set forth above, plaintiff's argument is largely based on a misstatement of the evidence (her incorrect contentions that the University had sufficient information to believe Respondent Students were involved in the Former Student assault and that Former Student had identified Student 2 as her assailant). To the contrary, at the time of the June 2008 hearing, Former Student was refusing to cooperate with the police or the University and never identified Student 2 as her assailant. (RUF ¶s 145-150.) At that time of the Board hearing, Former Student had only provided a general description of her attackers, as African American men (5'6" and 6'3") with slim builds and close-cropped hair. None of the Respondent Students matched the description. Indeed, it was unknown whether the assailants were University students. It was only one month after the hearing, in July 2008, that Former Student cooperated with the University, identifying Student 1 and Student 2 as two persons who she thought were in the room while she was attacked (she said she was only "60 to 70%" certain of this fact). (RUF ¶ 152.) She also specifically stated that Student 2 only stood naked in the doorway of the room where she was attacked; she never identified Student 2 as her attacker. (Id.)

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behavior towards women and despite that knowledge and the student's explusion from a summer camp, the school allowed the student to return to campus, and he thereafter raped a fellow student. In this case, as set forth herein, there is no evidence the University had any actual knowledge of previous sexual misconduct by Respondent Students.

Since none of this was known prior to the Board hearing, the University could not raise the Former Student incident during the judicial procedures against Respondent Students. In fact, precisely contrary to plaintiff's argument, the University may well have violated Respondent Students' rights by introducing evidence of Former Student's assault. Said evidence could have been highly prejudicial to Respondent Students, particularly considering that the only central tie to them was that they were African American males.[26]

Plaintiff also argues the University's indifference is shown by its failure to expel Student 1 and Student 2. Plaintiff's argument fails as a matter of law. It is well established that a school has no obligation to "engage in particular disciplinary action." Davis, 526 U.S. at 648; Oden, 440 F.3d at 1089 (under Title IX an "aggrieved party is not entitled to the precise remedy that he or show would prefer"). This court cannot sit as a "Super-Administrator" and second-guess school disciplinary decisions. Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1123 (10th Cir. 2008) (affirming summary judgment where the school did not discipline the alleged harassers in any respect

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[26] Again, plaintiff's reliance on Belcher's deposition testimony that he had a "gut feeling" that Student 2 was involved in the Former Student assault is unavailing. Again, she misstates the testimony. Belcher testified that he had a "gut feeling" that Student 2's apartment might have been the location of Former Student assault, not that Student 2 was Former Student's assailant. This belief does not raise a triable issue of fact relevant to this claim. Belcher reported his belief to the police. Ultimately, neither the police nor Belcher could not act on the "gut feeling" as Student 2 did not match the description given by Former Student, and she refused, until July 2008, to assist law enforcement in its investigation of the crime. (RDF ¶ 14.)

due to problems of proof in determining whether the subject conduct was consensual). Rather, schools "must merely respond to known peer harassment in a manner that is not clearly unreasonable." Id. For the reasons set forth above, the University responded reasonably to plaintiff's report of the assault; its decision to suspend, rather than expel, Student 1 and Student 2 was not clearly unreasonable. After a lengthy hearing, the Board could not find by clear and convincing evidence that Student 1 and Student 2 violated the SCC and GUP; however, it did find certain violations by a preponderance of the evidence. Those violations the Board found merited a suspension. The suspensions were significant; Student 1 was suspended for two semesters and Student 2 for one semester. (RUF ¶s 89-91.) Each was to be reinstated to the University only upon completion of additional education and training in substance abuse and sexual assault awareness. (RUF ¶ 92.) They were barred from campus while suspended. (RUF ¶ 93.) Their probation terms prohibited any direct or indirect contact with plaintiff or her family and provided that any further violation of the SCC would result in their dismissal from the University. (RUF ¶s 97-99.) Finally, their official academic transcripts and permanent academic records would reflect their suspensions. (RUF ¶s 100-101.) These undisputed facts demonstrate the reasonableness of defendant's decision, and therefore, plaintiff cannot establish a violation of Title IX on this basis. Davis, 526 U.S. at 649 (recognizing the propriety of granting summary judgment where a school's response to the harassment was "not clearly unreasonable as a matter of law").

Lastly, plaintiff argues that the University acted unreasonably in response to her charges against Respondent Students by instituting the policy precluding unsupervised, social interactions between the men's and women's basketball teams. For the same reasons discussed below, under plaintiff's retaliation claim, plaintiff cannot establish a triable issue of fact on her second claim for belief based on that policy. The policy was implemented to protect plaintiff and it did not disproportionately affect her.

3. Plaintiff's Third Claim for Relief for Violation of Title IX Based on the University's Alleged Retaliatory Acts

In her third cause of action, plaintiff contends the University violated Title IX by instituting the policy precluding unsupervised, social interaction between the men's and women's basketball teams. Plaintiff contends the teams blamed her for the policy and that the University instituted the policy in order to retaliate against plaintiff for making her complaint against Respondent Students.

In 2005, the Supreme Court explicitly determined that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment." Jackson v. Birmingham Bd. of Education, 544 U.S. 167, 173 (2005). Accordingly, the court held that when a funding recipient retaliates against a person because he complains of sexual discrimination, this constitutes

intentional discrimination on the basis of sex in violation of Title IX.

However, in permitting claims for retaliation under Title IX, the Supreme Court has neglected to provide a scheme by which such claims may be analyzed. Most courts, following the lead of the Supreme Court in turning to Title VII jurisprudence generally for Title IX cases, have adopted the Title VII framework for Title IX retaliation cases. Under Title VII jurisprudence, a plaintiff must first establish a *prima facie case* of retaliation, which involves a three-prong test showing that: (1) the plaintiff engaged in protected speech; (2) the plaintiff experienced a materially adverse action either after or contemporaneously with the protected activity; and (3) there was a causal link between the protected activity and adverse action. See e.g. Atkinson v. LaFayette College , 653 F. Supp. 2d 581, 594 (E.D. Pa. 2009); Burch v. University of Cal. Davis, 433 F. Supp. 2d 1110, 1125 (E.D. Cal. 2006). If the plaintiff satisfies her prima facie case, then the burden shifts to the defendant to articulate a "legitimate, nondiscriminatory reason for its actio[n]." Atkinson, 653 F. Supp. 2d at 594. Once the defendant meets that burden of production, the burden shifts back to the plaintiff to show, by a preponderance of the evidence, that the defendant's proffered explanation was false, and that retaliation was the real reason for the adverse action. Id. Thus, in order to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that the employer's proffered non-discriminatory reason was either a *post hoc* fabrication or

otherwise did not actually motivate the employment action; that is, the proffered reason is a pretext. Id. at 594-95.

Here, the University argues that it is entitled to summary judgment on two grounds: First, it argues plaintiff has failed to set forth a *prima facie* case of retaliation. Second, it contends that, even assuming a *prima facie* case exists, plaintiff has failed to rebut the University's legitimate non-discriminatory reasons for its actions. As to its first argument, the University does not dispute that plaintiff engaged in activity protected by Title IX in reporting the alleged assault, but it argues that plaintiff has no evidence to demonstrate either (1) that its policy *disadvantaged* plaintiff or (2) that a retaliatory *motive* played a substantial role in prompting the University to institute the bar on unsupervised interaction between the teams.

Defendant is correct on both issues. The temporary policy barring unsupervised social contact between the two teams was not directed specifically at plaintiff; indeed, the restriction applied equally to all members of both teams. (RUF ¶ 114.) Plaintiff remained free to attend all her classes, athletic events and University-sponsored activities. She was free to socialize with her teammates and other members of the University community as she wished. She would have been free to socialize with the men's basketball team in supervised settings. Thus, there is no evidence sufficient to raise a triable issue of fact that the policy seriously impaired her educational experience at the University. Furthermore, plaintiff proffers no evidence of any retribution she sustained from members of the basketball

teams as a result of the policy.[27] Plaintiff's blanket characterization of the policy as "draconian" is not evidence that the policy impacted her educational experience. She claimed in her opposition that the policy "even [barred the teams from] attending each other's games or doing joint workouts," however, she offers no evidence in support of this allegation, and in fact, none exists, as the policy only precluded unsupervised contact between the teams.

Nor has plaintiff raised evidence sufficient to create a triable issue of fact as to defendant's motive in instituting the policy. The University explained its motive: to mitigate tensions between the two teams, which if not curbed, could have made plaintiff the target of various forms of harassment. (RUF ¶ 111-115.) It is undisputed that many members of both teams testified before the Board and others voiced concerns generally that they disagreed with the Board's decision and did not believe plaintiff's version of the events. (RUF ¶s 71, 107.) Based on the obvious and anticipated tension between the teams, the University's decision to temporarily limit the teams' social interactions in unsupervised settings was clearly reasonable.

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[27] Plaintiff's citation to an alleged directive implemented by King that all members of the men's basketball team should have no contact with plaintiff whatsoever does not raise a triable issue of fact on this claim. Most significantly, the evidence is hearsay, as plaintiff describes what Coach Roberts allegedly told her about what King told the men's players. There is no independent evidence of any such directive by King. Moreover, plaintiff returned to the University for only a few weeks before ultimately deciding to transfer, and she offers no evidence that during that short period she suffered any direct retribution by any student, including any men's basketball players.

Indeed, plaintiff does not dispute defendant's proffered evidence, establishing that its policy "was intended to make plaintiff's transition back to school as comfortable as possible, to avoid any further harm to plaintiff, and to ease the tensions between the teams." (RUF ¶ 106-115). Plaintiff argues only that growing tensions between plaintiff and her family and Griego, following issuance of the Board's decision evidences the University's retaliatory motive in instituting the policy. The court disagrees. First, this evidence, even assuming its truth, is irrelevant to the issue since Griego did not institute the policy, rather the Athletic Director, King, implemented the policy. Additionally, even acknowledging the disagreement plaintiff and her parents had with Griego and the school's decision to not expel all of the Respondent Students, that disagreement does not explain why the policy should be seen as a retaliatory action against plaintiff. As set forth above, the policy was not directed at plaintiff, and she has no evidence of how the policy affected her, if at all. Rather, the policy was of limited duration, had minimal impact on any student, and applied equally to both teams.

Moreover, even if plaintiff could establish a prima facie case, her claim would nonetheless fail as she has no evidence to establish that the University's proffered legitimate reason for the policy was actually a pretext for discrimination. To make such a showing plaintiff must demonstrate "weaknesses, implausibilities, inconsistencies, or contradictions" in the proffered explanation such that a fact finder could rationally find the reason unworthy of credence. Atkinson, 653 F. Supp. 2d

at 607. Here, the evidence is clear that the University has consistently stated that its basis for implementing the policy was to protect plaintiff and to reduce and defuse tensions among the players of both teams. Furthermore, plaintiff's bald assertions of pretext are untenable, considering the University's encouragement of plaintiff to pursue the case in the University judicial system, its accommodation of her needs during that process and the provision of emotional support and counseling to plaintiff, its severe discipline of Respondent Students, and its attempts to accommodate a smooth transition back to school for plaintiff (which included keeping plaintiff's scholarship open). (RUF ¶s 39-41, 63-66, 89-98, 116-121, 125.) Under the facts here, it would defy rational explanation for the University to take all of these steps protective of plaintiff's interests while simultaneously retaliating against her. Therefore, the court grants summary judgment in defendant's favor as to plaintiff's third claim for relief.[28]

[28] Because none of plaintiff's claims survive summary judgment, her claim for punitive damages likewise must fail. As such, the court need not decide whether punitive damages are available under Title IX. Citing a Fourth Circuit case, Mercer v. Duke Univ., 401 F.3d 199, 202 (4th Cir. 2005), defendant argues that Title IX does not, as a matter of law, permit an award of punitive damages. However, the Ninth Circuit has not decided the issue, and there is other caselaw to support the contrary position. See Waid v. Merrill Area Public Schools, 91 F.3d 857 (7th Cir. 1996)(holding that Title IX provides for the awarding of punitive damages); Burns-Vidlak by Burns v. Chandler, 980 F. Supp. 1144, 1146 (D. Hawaii 1997). Moreover, the Supreme Court's decision in Barnes v. Gorman, 536 U.S. 181 (2002), holding that punitive damages may not be awarded in private suits brought under the ADA and the Rehabilitation Act, does not definitely answer the question here.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment as to plaintiff's complaint against it is GRANTED in its entirety. The Clerk of the Court is directed to close this file.

IT IS SO ORDERED.

DATED: December 8, 2010

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE