Wenk et al v. O'Reilly et al Doc. 124

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETER WENK, *et al.*	:	
	:	**Case No. 2:12-CV-00474**
Plaintiffs,	:	
	:	**JUDGE ALGENON L. MARBLEY**
v.	:	
	:	
EDWARD O'REILLY, *et al.*	:	**Magistrate Judge Kemp**
	:	
Defendants.	:	

OPINION & ORDER

I. INTRODUCTION

This matter is before the Court on the Parties' Cross-Motions for Summary Judgment. Plaintiff Peter Wenk seeks partial summary judgment (Doc. 88) with regard to his First Amendment retaliation claims. Defendants Edward O'Reilly and Nancy Schott oppose, and move for summary judgment in their favor on all of Plaintiffs' claims (Doc. 102). For the reasons stated herein, Plaintiff's Motion is **DENIED**; Defendants' Motion is **GRANTED IN PART AND DENIED IN PART**.

II. STATEMENT OF FACTS

Plaintiffs husband and wife Peter and Robin Wenk live in Grandview Heights, Ohio. (*Dep. of Peter Wenk*, Doc. 106 at 8). Plaintiffs have three daughters, the eldest of whom is M.W. (*Id.* at 9). M.W. requires special education services due to cognitive disabilities, including significant communication deficits, and is educated under an Individualized Education Program ("IEP"), pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"). (*Id.* at 9-10). The Wenks have been actively involved in educational planning for M.W. (*Dep. of Robin Wenk*, Doc. 105 at 18-19). Mr. Wenk has been the more vocal advocate on behalf of his daughter, though the Wenks jointly discuss and plan their goals for her. (*Id.* at

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21, 27-28). Mrs. Wenk participated in some IEP meetings regarding her daughter, but in general Mr. Wenk has attended more meetings and spoken out more frequently, as Mrs. Wenk considers him "more articulate" and better able to advocate for M.W. (*Id.* at 29).

M.W. attended the Grandview Heights City School District. Defendant Ed O'Reilly has been Superintendent of the school district since 2006. (*Dep. of Ed O'Reilly*, Doc. 103 at 12). During the 2009-2010 and 2010-2011 school years, Former Defendant Christine Sidon, a District "Intervention Specialist," severed as M.W.'s teacher of record. (*Dep. of Christine Sidon*, Doc. 83, at 12). Former Defendant Karla Hayes had been the Intervention Specialist at the District assigned to M.W. previously, and starting in 2009 Sidon and Hayes co-taught some of M.W.'s classes. (*Id.* at 13-15). During this time, the Principal at Grandview Heights High School was Jesse Truett, and Kathy Binau was the Director of Pupil Services. (*Id.* at 6).

In the 2009 and 2010 school years, Hayes and Sidon shared their responsibilities as M.W.'s teachers. (*Id.* at 15-16). They agreed that Hayes would keep any documentation, while Sidon would make calls to parents. (*Id.*). At that time, Sidon believed that Hayes was "documenting what was happening in social skills [class]." (*Id.* at 16). Thus, in 2009, Hayes began recording various notes relating to M.W., which form the nucleus of this case, at the suggestion of Truett, Binau, and school psychologist Eric Pickering. (*Id.* at 45-47). Hayes took handwritten notes, which she eventually compiled into a type-written document. (*Id.* at 19). The notes record various comments by, and observations of, M.W.

In particular, Hayes recorded the following: on October 14, 2009, that M.W. told her class that her father "puts in her tampons in her," which she found painful;[1] on December 8, M.W. told her class that "sometimes she and her dad lick each other on the faces and necks"; on

[1] According to Hayes' notes, it was this comment that prompted her to approach Truett, Binau, and Pickering, who then encouraged her to begin documenting any further information she learned. (*Hayes Notes*, Doc. 102-3 at 2).

January 27, 2010, M.W. informed her teachers that her vagina was "sticky and itchy," as a result of which Sidon called Mrs. Wenk and reported the situation; on January 28, M.W. informed her teachers that her father applied cream to her vagina; on February 10, M.W. commented that she was still experiencing discomfort; on February 18, at M.W.'s IEP meeting, Mr. Wenk told M.W.'s teachers that he "really wanted [them] to find a boyfriend for [M.W.]; on February 25, Hayes observed Mr. Wenk "kiss[] [M.W.] on the lips"; on March 10, M.W. reported again that her vagina was "sticky and itchy," and that her father continued to apply cream to it; on May 17, M.W. stated that she still experienced discomfort; on October 20, Hayes noted that Mr. Wenk "has been calling/texting/showing up in our classrooms unannounced" regarding computer issues related to M.W.; on November 16, M.W. told her class again that her father puts tampons in her and that it hurts her; on January 4, 2011, Mr. Wenk told Sidon that in order to assist M.W. with washing her hair, he sometimes showers with her; M.W. added that her father "takes off his clothes when he gets in the shower with her"; on January 6, 2011, M.W. stated to her teachers that on occasion she, her father, and their dog "sit on the carpet and scoot [their] butts across the floor"; on February 23, 2011, M.W. again noted her continuing vaginal discomfort. (*Hayes Notes*, Doc. 102-3, at 2-7). The notes also record various other observations, such as disciplinary issues with M.W. (*id.* at 3, 4), and the Wenks' involvement at school (*id.* at 2-6).[2]

During the 2009 and 2010 school years, Peter Wenk frequently interacted with District staff. In January 2010, for example, Mr. Wenk met with O'Reilly to discuss his concerns about the District's special education program. (*Aff. of Ed O'Reilly*, Doc. 102-1, ¶¶ 3-4). O'Reilly responded in a lengthy memorandum dated March 15, 2010. (*Letter from O'Reilly to Wenk*, Doc. 102-1 at 3-9). The same year, Mr. Wenk made requests relating to M.W.'s technology

[2] In her deposition, Sidon confirmed that Hayes' notes are mostly accurate, although she had "some concerns about the number of times it says that [M.W.] said that [her] dad put cream on her or [her] dad put the tampon in," because she "personally d[id] not remember it being that many times." (*Sidon Dep*. at 10).

needs, including the software and computer she used. (*Sidon Dep.* at 33-34). According to Hayes' Notes, Mr. Wenk at various times emailed and spoke in person with Sidon and Hayes regarding M.W.'s IEP (*Hayes Notes* at 2-3, 6-7), and called or appeared in person to voice his concerns relating to M.W's laptop and software, the quality of her teachers, the appropriateness of her assignments, and her personal development (*id.* at 5-7).

For the 2011-2012 school year, Sidon became M.W.'s teacher of record; Hayes, though not formally assigned to M.W., continued to interact with her. (*Dep. of Nancy Schott*, Doc. 46 at 14, 25, 47-48). Former Defendant Dawn Sayre became Principal at Grandview Heights High School. Defendant Nancy Schott began her tenure as Director of Pupil Services. (*See id.* at 7-8).

Schott first met Mr. Wenk at a meeting together with Sayre on September 2, 2011. (*Aff. of Nancy Schott*, Doc. 102-4, ¶ 5). At that meeting, Mr. Wenk discussed his desire that the District create a "special ed prom," together with special education students in the nearby Hilliard school district, in order to help address his concern that M.W. was not getting enough social experiences, or meeting new people. (*Schott. Dep.*at 31; *see also Sidon Dep.* at 25-26). Schott later recalled that at this meeting, Mr. Wenk was "very aggressive, very demanding, [and] wanted to make it clear [that] what he wanted [was] something that Dawn [Sayre] and [Schott] should respond to." (*Schott Dep.* at 50). She also described him as "disrespectful" and "unreasonable" at the meeting. (*Id.* at 57). She characterized Mr. Wenk generally as someone who "demanded what he wanted and worked to get what he wanted." (*Id.* at 51).

On October 19, 2011, the staff held a meeting with Mr. Wenk concerning M.W.'s IEP. (*Schott Dep.* at 62). Mr. and Mrs. Wenk had jointly sent a letter to the school, asking to amend M.W.'s IEP to include certain new items, and the IEP team held this meeting in response. (*Sidon Dep.* at 38). Mr. Wenk had originally wanted his attorney to attend, but agreed to go forward

without the presence of counsel. (*Schott Dep.* at 62). The meeting nearly came to an abrupt end when Mr. Wenk and Sayre argued concerning the scope of their authority and their ability to influence M.W.'s IEP. (*Sidon Dep.* at 38-39). Accordingly to Sidon, Schott "smoothed it over," and Mr. Wenk left. (*Id.* at 39). In an October 20, 2011, email after this meeting, Schott wrote that she was hopeful that the meeting "laid the groundwork for future meetings that will help eliminate [Mr. Wenk's] long-time assumption that 'what he wants, he gets.'" (*October 20, 2011 Email chain*, Doc. 103-7 at 1) (*see also Schott Dep.* at 52).

In an exchange on October 24, 2011, Hayes emailed Schott, O'Reilly, and Sayre that Mr. Wenk had contacted Teresa Rill, to request that his phone number and email addresses be removed from the school district's new "rapid parent notification system." (*October 24, 2011, Email Chain*, Doc. 103-8 at 4). Schott responded that Mr. Wenk had purposely removed his email "as a way to force [the school officials] to spoon feed him information since he can officially take the position that he doesn't have email access." (*Id.* at 3).[3]

Around November 17, 2011, Schott held another meeting with Mr. Wenk, though she did not explicitly remember the exact meeting in her deposition. (*Schott Dep.* at 62). Defendants argue, in any case, that "inclusions issues were not discussed" at this meeting. (Doc. 102 at 40).

In Fall 2011,[4] Hayes approached Defendant Schott regarding her "concerns" for M.W.; neither Schott nor O'Reilly solicited this information from Hayes. (*Aff. of Karla Hayes*, Doc. 102-2, ¶ 4; *Supp. Aff. of Karla Hayes*, Doc. 102-3, ¶ 5). According to Hayes, her action was inspired, at least in part, by the then-recent news regarding child molestation by Jerry Sandusky at Penn State University, and accordingly she determined that she "was not going to sit on the

[3] Hayes replied to the email chain that she and Sidon came to the same conclusion (*id.* at 2), a representation that Sidon herself denies (*Sidon Dep.* at 35).
[4] According to Schott's deposition, she met with Hayes and Sidon over a two-day period some time on or about November 16 until November 18, 2011. (*Schott Dep.* at 62).

documentation any longer." (*Sidon Dep.* at 42). According to Schott, she "learned about" M.W. and her parents via information received from Hayes and Sidon; no other individual ever reported any allegations of abuse. (*Schott Aff.*, ¶¶ 6-7; *Schott Dep.* at 22). Schott generally spoke with Hayes and Sidon together, in their classroom. (*Schott Dep.* at 27). Schott did not make any written notes of these conversations. (*Schott Aff.*, ¶¶ 6-7; *Schott Dep.* at 22). Nor did Schott make any independent investigations or inquiries. (*Schott Dep.* at 22).

Schott recalls that "either day before I made the call or that day," she was told by Hayes and Sidon that "M.W. [] made the comment that she wasn't going to have sex again because it hurt." (*Id.* at 6). This comment, Schott stated, was the "trigger" for her calling Franklin County Child Services ("FCCS"). (*Id.*).

On November 18, 2011, Defendant Schott called FCCS to report suspected child abuse by Mr. Wenk. (*Schott Dep.* at 19). Before calling, she consulted Defendant O'Reilly, as well as a school-district attorney. (*Id.*). Schott testified that, before she called, she informed O'Reilly about the allegations that Mr. Wenk showered with M.W.; that M.W.'s vaginal areas were "sticky"; that Mr. Wenk inserted tampons for M.W.; and that M.W. commented that she did "not want[] to have sex again because it hurt." (*Id.* at 20). Schott asked O'Reilly whether she should "make the call," and he agreed that she should. (*Id.* at 21). O'Reilly requested that Schott write a memorandum summarizing what she told him, and what she did after speaking to him. (*Id.* at 20). The memorandum, dated the same day, states that Schott had spoken with Sidon and Hayes "to verify their ongoing concerns about the questionable and suspicious behaviors that [M.W.] has reported to have occurred at home between her dad and her. As I shared with you, most of the behaviors are sexually explicit and, in my professional opinion, fully warranted my calling [FCCS]." (*Mem. from Schott to O'Reilly, 11/18/2011*, Doc. 46-1 at 56).

Schott's memorandum notes that she called FCCS at 12:26 pm, and gave her report to Kimberly Hines. (*Id.*). Schott described what Hines told her about the process that would follow after her report, and the memorandum concludes by telling O'Reilly that "if [he] would like more explicit details of the actual incidents reported, please let me know." (*Id.*). According to Schott, O'Reilly never requested any further details. (*Schott Dep.* at 20).

Schott testified that she informed FCCS of her concerns relating to the following events: the observation of Mr. Wenk kissing M.W. "open mouthed at school" (*id.* at 22); that M.W. "came to school with a swollen stomach, morning sickness, nausea, and presented symptoms like she was pregnant" but, after the school contacted Mrs. Wenk, M.W. "came to school with a hospital bracelet on," and "the vomiting and her appearance of swollen stomach immediately disappeared after the hospital visit" (*id.* at 25);[5] that M.W. reported that her father would insert tampons for her (*id.* at 27); that Mr. Wenk "showered with [M.W.] naked and helped her wash her hair" (*id.*); that M.W. complained frequently about "itchiness in her vaginal area" (*id.*); that M.W. stated that she was "not going to have sex anymore because [she] kn[e]w it hurts," and when asked how she knew, "put [her] head down and did not answer" (*id.*); that M.W. stated that "her and her dad [were] naked and crawl[ed] across the floor" (*id.* at 30); and that Mr. Wenk "insisted [on] including in the IEP that [M.W.] would have a boyfriend" (*id.*), and that he had an "obsession" with his daughter having a boyfriend (*id.* at 31). Although she admitted that it "was not anything to do with the sexual abuse," she also informed FCCS that Mr. Wenk was "unkempt" in appearance, because on a number of her interactions with him, his hair was not groomed, his shirt was ruffled, and he was generally "disheveled." (*Schott Dep.* at 6).

Schott further described Mr. Wenk as "creepy," "intimidating," and someone who could "fearful" and "make her skin crawl" (*Schott Dep.* at 6, 23-24, 26-27, 35, 69; Doc. 102 at 22).

[5] Schott denies that she ever reported the term "pregnant," however. (*Schott Dep.* at 25-26).

Schott added that other school staff "felt very intimidated by [Mr. Wenk] because he was very verbally aggressive," and because he "ma[de] demands, raise[d] his voice, [and] [was] disrespectful." (*Schott Dep.* at 23-24). She opined to FCCS that "as aggressive as [Mr. Wenk] is at school and with staff, [she] can't imagine him acting any different at home." (*Id.* at 35). She conceded that it would have been easier for her and her staff to address M.W.'s educational and programmatic needs if Mr. Wenk had "change[d] [his] approach," and not involved a lawyer to contest M.W.'s IEP. (*Schott Dep.* at 69). She stated that Mr. Wenk's actions "certainly [weren't] making it easy" for her and her staff. (*Id.* at 69).

In her deposition, Schott reiterated that the information she reported to FCCS was given to her solely by Hayes and Sidon (*id.* at 23, 26, 27, 29, 30, 32, 35, 37), and that when only one teacher spoke, the other acquiesced to the comment and did not disagree (*id.* at 26-27). Hayes testified that she spoke with Schott regarding M.W.; however, Hayes never shared her type-written notes with Schott, or with O'Reilly. (*Hayes Supp. Aff.*, ¶ 5). Hayes also never informed Schott, verbally or in writing, that: (1) M.W. was observed at school carrying a bucket, gagging, vomiting, and with a bloated stomach; (2) M.W. came to school wearing a hospital bracelet; or (3) M.W. stated that she "was not going to have sex anymore because it hurt[]." (*Hayes Aff.*, ¶ 3). Sidon testified in her deposition that neither she, Hayes, or anyone else in her presence ever informed Schott that: (1) M.W. talked about having sex (*Sidon Dep.* at 39); (2) Mr. Wenk discredited or was controlling of his wife (*id.* at 39-40); (3) Mr. Wenk kissed M.W. on the lips (*id.* at 40); (4) M.W. came to school vomiting or with a bloated stomach (*id.* at 40-41); (5) M.W. showered with her father naked (*id.* at 41); (6) Mr. Wenk put cream on M.W.'s vagina (*id.*); (7) Mr. Wenk and M.W. crawled on the floor naked (*id.* at 42); or (8) Mr. Wenk demanded a list of potential boyfriends for M.W. (*id.*). Also, in contrast to Schott's descriptions of Mr. Wenk,

Sidon recalls that she "trusted" Mr. Wenk and "had a good relationship" with him; she never found him to be "creepy," "intimidating," to "make her skin crawl" or make her "fearful" (*Sidon Dep.* at 28). Sidon conceded, however, that Mr. Wenk was "verbally aggressive" only "a couple of times." (*Id.*).

No disciplinary action was ever taken against Hayes or Sidon on account of any failure to report to FCCS the allegations contained in Schott's report. (*Schott Dep.* at 42-44).

After the FCCS report by Schott, Mr. Wenk's communications with school staff ceased. (*Schott Dep.* at 70). As a result of the report, the Grandview Heights Police Department ("GHPD") opened an investigation relating to Mr. Wenk. GPHD Detective Harper contacted Mr. Wenk around Christmas 2011. (*P. Wenk Dep.* at 124). Later, Detective Gillespie wanted Mr. Wenk to come for a further interview relating to the case, on the grounds that there had been allegations that Mr. Wenk raped his daughter. (*Id.* at 125-26). Ultimately, in early 2012, the accusations were found to be unsubstantiated, and the case was closed. (*Id.* at 164).

After the 2011 school year, Sidon retired, and Hayes was assigned as M.W.'s teacher for the 2012-2013 term. The assignment was made by O'Reilly, who was aware that Hayes had reported some of the information concerning M.W. to Schott. (*O'Reilly Dep.* at 172-73). The Wenks requested that the assignment be changed. (*P. Wenk Dep.* at 121-22). O'Reilly declined, on the grounds that, according to Mr. Wenk, "only [Hayes] had the correct credentials," and because of "a matter of scheduling." (*Id.* at 120). After Plaintiffs filed their Amended Complaint adding Hayes as a Defendant, O'Reilly changed the assignment. (*Id.* at 122).

III. PROCEDURAL POSTURE

Plaintiffs commenced this action on June 4, 2012, alleging First Amendment retaliation and violations of substantive Due Process against O'Reilly, Schott, and Dawn Sayre. (Doc. 1). On July 9, Defendants filed a Motion to Dismiss (Doc. 9), but on December 14, Plaintiffs moved

to amend their complaint (Doc. 44). In their First Amended Complaint, Plaintiffs added Sidon and Hayes as Defendants, and alleged a claim for conspiracy pursuant to 42 U.S.C. § 1983, while omitting their substantive Due Process claim. (Doc. 44-1). Defendants again moved to dismiss, on February 11, 2013 (Doc. 63), which this Court denied on September 13 (Doc. 96). During the time, Plaintiffs voluntarily dismissed with prejudice their claims against Defendants Sidon, Hayes, and Sayre; only O'Reilly and Schott remain. (Doc. 89, 93).

On July 9, 2013, Plaintiff Peter Wenk filed under seal his Motion for Partial Summary Judgment *sub judice*. (Doc. 88). Defendants responded, and moved for summary judgment in their favor on all counts, as to both Peter and Robin Wenk. (Doc. 102). The matter is fully briefed (*see* Doc. 111, 113). Oral argument on the Motions was held March 10, 2014.

IV. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides, in relevant part, that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." A fact is deemed material only if it "might affect the outcome of the lawsuit under the governing substantive law." *Wiley v. United States,* 20 F.3d 222, 224 (6th Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, (1986)). The nonmoving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.,* 8 F.3d 335, 339-40 (6th Cir. 1993). The suggestion of a mere possibility of a factual dispute is insufficient to defeat a motion for summary judgment. *See Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir. 1992) (citing *Gregg v. Allen-Bradley Co.,* 801 F.2d 859, 863 (6th Cir. 1986)). Summary judgment is inappropriate, however, "if the

dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson,* 477 U.S. at 248.

The necessary inquiry for this Court is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden,* 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson,* 477 U.S. at 251-52). In evaluating such a motion, the evidence must be viewed in the light most favorable to the nonmoving party. *United States S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient to survive the motion; there must be evidence on which the jury could reasonably find for the opposing party. *See Anderson,* 477 U.S. at 251; *Copeland v. Machulis,* 57 F.3d 476, 479 (6th Cir. 1995).

The standard of review for cross-motions for summary judgment "does not differ from the standard applied when a motion is filed by only one party to the litigation." *Sierra Brokerage Servs.,* 712 F.3d at 327.

V. ANALYSIS

Plaintiffs assert two claims under 42 U.S.C. § 1983: retaliation for speech protected by the First Amendment, and civil conspiracy. (*First Amended Complaint*, Doc. 44-1, ¶¶41-47, 48-51). Under § 1983, a plaintiff must show "that (1) a person; (2) acting under color of state law; (3) deprived him of his rights secured by the United States Constitution or its laws." *Abdulsalaam v. Franklin Cnty. Bd. of Comm'rs*, 637 F. Supp. 2d 561, 574 (S.D. Ohio 2009), *aff'd*, 399 F. App'x 62 (6th Cir. 2010). Defendants do not dispute that they are persons acting under color of state law. Thus, the Court must consider whether Defendants acted to deprive Plaintiffs of their rights under the United States Constitution.

A. First Amendment Retaliation

As this Court has explained, a claim for First Amendment retaliation requires a Plaintiff to show that: (1) he "engaged in constitutionally protected activity"; (2) Defendants' adverse action "caused Plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity"; and (3) the adverse action "was motivated, at least in part, as a response to the exercise of [Plaintiff's] constitutional rights." (*Opinion and Order Denying Motion to Dismiss*, Doc. 96 at 7) (citing *Jenkins v. Rock Hill Local School Dist.*, 513 F.3d 580, 585-86 (6th Cir. 2008)).

For the purposes of these Motions, Defendants do not dispute that Mr. Wenk "was engaged in some amount of constitutionally protected conduct." (*Defendants' Response & Motion for Summary Judgment*, Doc. 102 at 35). Defendants argue, however, that "there is no evidence in the record that Plaintiff Robin Wenk engaged in any protected conduct." (*Id.* at 36). Plaintiffs respond that Mrs. Wenk was "in full support" of her husband's advocacy, and that she signed the "critical letter" seeking amendments to her daughter's IEP, thus involving her in the protected conduct that forms the basis of this case. (Doc. 111 at 31).

With regard to the second factor, Defendants also admit "that a **false** report to child protective services can, and has been construed by this Court . . . to be adverse and could chill an ordinary person from continuing to engage in protected speech." (*Id.*) (emphasis in original). Since, Defendants conclude, "a comparison of what was reported to [Defendant] Schott and what Schott reported to FCCS reveals the information is substantially equivalent," the report made by Schott was not "false" and therefore insufficient to satisfy this element. (*Id.*). Plaintiffs counter that their success "does not turn on the truth or falsity of the information disclosed," since an act taken in retaliation for the exercise of a constitutionally protected right "is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." (*Plaintiffs'*

Response & Reply, Doc. 111, at 30) (quoting *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998). Plaintiffs add that to the extent Mr. Wenk suffered an adverse action, Mrs. Wenk did as well, since "a reasonable wife would be chilled from further protected activity upon learning that he[r] husband had been accused of the felony of child sexual abuse." (Doc. 111 at 32) (citing *Thompson v. N. Am. Stainless, LP*, 131 S.Ct. 863, 868 (2011)).

The Parties' dispute comes to a head with regard to the third factor. Plaintiff Peter Wenk argues that summary judgment in his favor is appropriate since, in essence, the falsity of Schott's report to FCCS, coupled with the closeness in time of the report with Plaintiff's protected conduct, is sufficient to infer an intent to retaliate. (Doc. 88 at 17-18; Doc. 111 at 32). Plaintiff asserts that the FCCS report is replete with "second-hand accusations," many of which are based, according to Plaintiff, on Mr. Wenk's "verbal aggressiveness," and not any actual allegations of sexual abuse. (*Id.* at 17). Plaintiff also notes that the report contains allegations against his "creepy" and "discomforting" character. (*Id.*). Plaintiff concludes that because the report is "character assassination, pure and simple," which focuses only on his advocacy for his daughter, and reveals her intent to silence him. (*Id.* at 18).

Defendants retort that Plaintiffs cannot rely on mere temporal proximity to prove causation, since Schott filed the report with FCCS "approximately two and one-half months after she first met with Pete Wenk to discuss inclusion issues." (Doc. 102 at 39-40). Instead, Defendants insist that Plaintiffs "must identify 'conduct or specific statements made by [the Defendants] that would link [the adverse action] with a protected activity.'" (*Id.* at 39) (quoting *Buchko v. Cty. of Monroe, MI*, 506 F. App'x 400, 405 (6th Cir. 2012)). They argue that, regardless of what Schott might have noted about Plaintiff, Schott's statements to FCCS "do not indicate that the report was made *because* Pete Wenk complained to school officials." (*Id.* at 40)

(emphasis in original). While Defendants acknowledge that circumstantial evidence can be used to prove causation for retaliation claims, they argue that Plaintiffs have failed to do so here, given that the only discrepancies between what the staff members reported to Schott, and what Schott reported to FCCS, were "minor," and the "substance and bulk of what Schott reported was accurate." (*Id.* at 41-42).

Finally, Defendants add that Schott had a legitimate, non-retaliatory reason for making the report, in that she is a "mandatory reporter of abuse and neglect of children" under Ohio law, and therefore would have taken the same action even in the absence of the protected activity. (*Id.* at 43-44). Because Schott "had no choice" but to report, Defendants argue, the report would have been made "regardless of anything else that was transpiring with the Wenk family," thus necessitating dismissal. (*Id.* at 45-46). Plaintiffs disagree, principally because they consider the affirmative defense raised by Defendants to be inappropriate for consideration at the summary judgment stage. Because this defense is "a burden *of persuasion*," Plaintiffs argue, it arises only after Plaintiffs have established their *prima facie* case for retaliation. (Doc. 111 at 36-37) (emphasis in original) (citing *A.C. ex rel. J.C. v. Shelby Cnty. Bd. of Educ.*, 711 F.3d 687, 698 (6th Cir. 2013)).

1. Constitutionally Protected Activity

Defendants concede that Plaintiff Peter Wenk engaged in constitutionally protected activity when he advocated on behalf of his daughter's education. With respect to Plaintiff Robin Wenk, there is ample evidence in the record to support the conclusion that Robin Wenk participated in advocating on behalf of her daughter, given that she attended various meetings, spoke on a least one occasion with Defendant Schott (*Schott Dep.* at 53-54), supported her husband's advocacy, and co-authored the letter seeking amendments to M.W.'s IEP. Therefore, summary judgment for Defendants against Mrs. Wenk is inappropriate.

2. Adverse Action

This Court has already held that a "false report to FCS alone would chill a person of ordinary firmness from engaging in speech." (Doc. 96 at 10). Moreover, "[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." *Bloch v. Ribar*, 156 F.3d at 681-82 (release of humiliating private information was actionable when it "was motivated at least in part as a response to the [plaintiffs'] exercise of their first amendment rights.); *see also Paige v. Coyner*, 614 F.3d 273, 283 (6th Cir. 2010) (county official's call to local employer, which "would be proper if prompted by purely business or governmental concerns," runs afoul of § 1983 "if prompted by retaliatory motives."); *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002) (existence of probable cause would not justify arrest, if officer's true motivation was retaliation for the arrestee's prior statements).[6]

Accordingly, Plaintiff Peter Wenk has sufficiently demonstrated that he suffered an adverse action in this case. Plaintiff Robin Wenk has equally succeeded, in that a charge of child abuse leveled at her husband in retaliation for their advocacy is sufficient to chill a person of ordinary firmness from continuing to engage in that activity. *See Thompson v. N. Am. Stainless, LP*, 131 S.Ct. 863, 868 (2011).

3. Causal Connection

Section 1983 imposes liability for adverse actions where "there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the

[6] The Court recognizes the legitimate policy concern Defendants raise with regard to the threat of liability faced by mandatory reporters, such as teachers and administrators, for even *true* allegations of child abuse, if their reporting of the abuse is animated in part by a desire to retaliate for constitutionally protected conduct. The Court finds that this concern is alleviated, however, by the burden-shifting analysis, which protects government actors where the adverse action "would have been taken 'even in the absence of the protected conduct.'" Greene, 310 F.3d at 897 (quoting *Mount Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)). *See infra*, Part V.A.4.

plaintiff's protected conduct." *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999). At this step, "the subjective motivation of the defendants is at issue." *Id.* In general, Plaintiffs must "proffer evidence sufficient to raise the inference that [their] . . . protected activity was a motivating factor for the adverse decision." *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002). In attempting to raise this inference, Plaintiffs can look to both circumstantial and direct evidence for support. *Thaddeus-X*, 175 F.3d at 399.

When an adverse action occurs "very close in time" after a protected activity, "such temporal proximity between events is significant enough to constitute evidence of a causal connection." *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008). Indeed, temporal proximity, "when considered with [] other evidence of retaliatory conduct, is sufficient to create a genuine issue of material [fact] . . . [to] survive[] summary judgment." *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 365-66 (6th Cir. 2001). But "where some time elapses" between when the actor learns of a protected activity and the subsequent adverse action, the plaintiff "must couple temporal proximity with other evidence of retaliatory conduct to establish causality." *Mickey*, 516 F.3d at 525.

In the context of First Amendment retaliation claims, the lapse of "a matter of months, or less" is sufficient to establish a causal connection. *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 305 (6th Cir. 2012) (quotation omitted). In *Dye*, the Court of Appeals reasoned that when only two months had passed between the protected speech and the adverse action—a demotion—the temporal proximity "was sufficient to show a causal connection," and the district court erred in granting summary judgment against the plaintiffs. *Id.* But the court also clarified that the lapse of time with regard to the plaintiff's termination, which was "more than two years after the protected conduct," was "simply insufficient to show a causal connection based solely on a

temporal-proximity theory." *Id.* Without additional evidence of causation, summary judgment on that claim was appropriate. *Id*. *See also Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 283 (6th Cir. 2012) (retaliation under Family and Medical Leave Act; "less than two months" from plaintiff's notification of leave to his termination sufficient to establish causation for retaliatory discharge); *Paige*, 614 F.3d at 283 (one week lapse sufficient indirect evidence of retaliatory motive, in First Amendment retaliation claim); *Bryson v. Regis Corp.*, 498 F.3d 561, 571 (6th Cir. 2007) (also under Family and Medical Leave Act retaliation; three month sufficient to show temporal proximity causation); *Dixon v. Gonzales*, 481 F.3d 324, 334 (6th Cir. 2007) (in Title VII retaliation case, lapse of ten years insufficient to establish causal connection); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 563 (6th Cir. 2004) (lapse of three months sufficient to show causal connection in Title VII retaliation claim).

In this case, Plaintiffs have succeeded in raising a dispute of material fact as to Defendant Schott's motives in calling FCCS. Schott made her report only a few months after first meeting Mr. Wenk, and indeed less than a month after his most recent, and aggressive, in-person interaction with her, which occurred at meeting on October 19, 2011. (*Sidon Dep.* at 38-39). Days later, Schott emailed the IEP team and expressed her hope that Mr. Wenk would learn that his "long-time assumption that 'what he wants, he gets'" would not last. (Doc. 103-7 at 1). On October 24, 2011, Schott again expressed in an email to members of the IEP team that Mr. Wenk was acting in a "way to force [school staff] to spoon feed him information." (Doc. 103-8 at 3). Less than a month later, Schott filed her report. (*Schott Dep.* at 19).

In addition to the temporal proximity, Plaintiffs have raised a dispute of material fact with regard to the inconsistencies in Schott's report. Hayes and Sidon repeatedly denied that they communicated to Schott various allegations which appeared in Schott's report to FCCS.

Neither Hayes nor Sidon ever told Schott that M.W. talked about how she would not have sex again because it hurt, or that M.W. came to school gagging, vomiting, and with a bloated stomach . (*Hayes Supp. Aff.*, ¶ 5; *Hayes Aff.*, ¶ 3; *Sidon Dep.* at 39-42). Moreover, Sidon testified that neither she, nor Hayes, ever informed Schott that Mr. Wenk kissed M.W. on the lips, that she showered with her father naked, or that they crawled on the floor together naked. (*Sidon Dep.* at 40-42). Yet, Schott maintains that she learned of the allegations against Mr. Wenk from no source other than Hayes and Sidon. (*See, e.g.*, *Schott Dep.* at 23, 26, 27, 29, 30, 32, 35, 37). Moreover, Schott's report was burdened with irrelevant personal allegations against Mr. Wenk, including his "unkempt" appearance, his "verbal aggressiveness," and the fact that he "intimidated" the staff and acted "creepy." (*Schott Dep.* at 6, 23-24, 26-27, 35, 69; Doc. 102 at 22; *cf. Sidon Dep.* at 28).

At the same time, not everything that Schott reported conflicted with what she was told by Hayes. And Schott in fact made her report immediately after she was informed by Hayes of the observations Hayes had made over the past two years. (*See Hayes Aff.*, ¶ 4; *Hayes Supp. Aff.*, ¶ 5). Indeed, at oral argument, Plaintiffs' counsel conceded that Schott was not made aware of the allegations recorded in Hayes' Notes until late October or early November, only a few weeks before she actually made her report. These facts militate against an implication that Schott was motivated by a desire to retaliate.

But the Court has grave concerns as to why Schott did not make a report to FCCS even before she received word of the "trigger" event, given that the earlier allegations, including M.W.'s comments about her father's insertion of her tampon, her father putting cream on her vagina, and their crawling on the floor, are themselves unsettling and grave enough to have been brought immediately to the attention of FCCS. The fact that Schott had these allegations for

several weeks (although the Parties cannot be sure of when, in fact, she was told), yet still chose not to report them to FCCS, and furthermore the fact that Hayes and Sidon *never* approached FCCS with this information, could allow a jury to conclude that Schott intended to use the allegations as a way to retaliate against Mr. Wenk on account of his advocacy at school. Accordingly, neither party has demonstrated the absence of a dispute of material fact, and thus summary judgment is inappropriate. This should not be surprising, for, as the Sixth Circuit has explained, in the First Amendment context, "[a] defendant's motivation for taking action against the plaintiff is usually a matter best suited for the jury." *Paige*, 614 F.3d at 282.

4. Burden-shifting

In a First Amendment retaliation case, "once a plaintiff shows that her constitutionally protected conduct was a substantial factor in an adverse [action], the burden of persuasion shifts to the defendant to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct." *Sowards v. Loudon Cnty., Tenn.*, 203 F.3d 426, 431 n.1 (6th Cir. 2000) (quotation and alteration omitted). Unlike a case under Title VII, the plaintiff in a First Amendment case "does not retain the burden of proof once he or she has presented sufficient evidence" of protected conduct, adverse action, and causal connection. *Kreuzer v. Brown*, 128 F.3d 359, 366 n.1 (6th Cir. 1997) (Moore, J., dissenting). Once this shift occurs, "summary judgment [for Defendants] is warranted if, in light of the evidence viewed in the light most favorable to the plaintiff, no reasonable juror could fail to return a verdict for the defendant." *Garvey v. Montgomery*, 128 F. App'x 453, 459 (6th Cir. 2005). Thus, in *Garvey*, the Court of Appeals affirmed the district court's grant of summary judgment for the defendants, finding that there was no genuine issue as to whether the plaintiff would have been discharged based on his deficient performance record, even in the absence of his protected conduct, and no

reasonable juror have concluded otherwise. *Id.* at 460-63. Plaintiffs are therefore incorrect that this factor is not amenable to summary disposition. (*See* Doc. 111 at 36-37).

On this burden-shifting issue, however, neither Party has succeeded in demonstrating the absence of a disputed issue of material fact. The testimony that Hayes came to Schott of her own accord with the allegations, based on her concerns for M.W., suggests that Schott might have taken the information to FCCS even absent Mr. Wenk's protected conduct. The inconsistencies in what she reported compared to what Hayes told her, however, suggest otherwise, especially the fact that the "trigger" for Schott's reporting—the alleged comment from M.W. that she would not have sex again, because it hurt (*see Schott Dep.* at 6)—was not something that either Hayes or Sidon ever told Schott. (*Hayes Aff.*, ¶ 3; *Sidon Dep.* at 39). Moreover, the fact that neither Sidon nor Hayes was ever reprimanded for their failure to report the information to FCCS (*see Schott Dep.* at 42-44) undercuts the notion that Schott or the District truly believed that the allegations required reporting.

Accordingly, summary judgment with regard to the First Amendment retaliation claim against Defendant Schott is **DENIED**.

B. O'Reilly's Liability

1. Supervisor Liability

Supervisor liability in §1983 cases requires more than a "mere failure to act"; rather, the supervisor "must have actively engaged in unconstitutional behavior," such as by "encourag[ing] or condon[ing] the actions of [his] inferiors." *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006). In short, liability is appropriate when the supervisor "encouraged the specific incident of misconduct or in some other way directly participated in it, or at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Leary v. Daeschner*, 349 F.3d 888, 903 (6th Cir. 2003) (quotation omitted).

In this case, the factual record is clear that Schott consulted with O'Reilly before calling FCCS: she informed O'Reilly of the specific allegations against Mr. Wenk (*Schott Dep.* at 20), and asked him explicitly whether she should "make the call" (*id.* at 21). He agreed that she should. (*Id.*). He also requested that Schott prepare the memorandum she drafted, detailing what she told him, and the actions she took afterward. (*Id.* at 20).

These allegations, combined with O'Reilly's communications with Mr. Wenk, inclusion on email chains and general knowledge the staff's interaction with Mr. Wenk (*see O'Reilly Aff.*, ¶¶ 3-4; *Email Chain*, Doc. 103-8, at 4), are sufficient to raise an inference that O'Reilly encouraged, condoned, authorized, or knowingly acquiesced to Schott's alleged unconstitutional conduct. They are not sufficient, however, to establish that no jury could fail to find in favor of Plaintiffs. Thus, summary judgment is **DENIED**.

2. *Retaliation by Assigning M.W. to Hayes*

Plaintiffs' allegations of direct retaliation by O'Reilly consist only of the fact that O'Reilly assigned Hayes as M.W.'s teacher of record for the 2012-2013 term, after Sidon retired. When Mr. Wenk objected, O'Reilly pointed out that Hayes had the "correct credentials" to teach M.W., and that the school's scheduling necessitated it. (*P. Wenk. Dep.* at 120). Plaintiffs have identified no legal basis for finding an adverse action here, or evidence demonstrating a causal connection to Plaintiffs' protected conduct. Moreover, they have not explained why O'Reilly would not have assigned M.W. to Hayes upon Sidon's retirement in the absence of their protected conduct. Summary judgment for Defendants on this claim is therefore **GRANTED**.

C. Section 1983 Conspiracy

A claim for civil conspiracy pursuant to § 1983 requires a plaintiff to show "that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the

complainant." *Hooks v. Hooks*, 771 F.2d 935, 944 (6th Cir. 1985). "Rarely in a conspiracy case will there be direct evidence of an express agreement among all the conspirators"; thus, circumstantial evidence may provide adequate proof of conspiracy. *Bazzi v. City of Dearborn*, 658 F.3d 598, 606 (6th Cir. 2011) (quotation omitted). Plaintiffs must still provide evidence, however, from which to infer that the defendants acted in concert in [depriving Plaintiffs of their constitutional rights]." *Spadafore v. Gardner*, 330 F.3d 849, 854 (6th Cir. 2003).

Defendants argue only that there can be no conspiracy without a successful retaliation claim (Doc. 102 at 48), and even if Plaintiffs' claim for retaliation succeeds, there is "no evidence that Schott and O'Reilly acted in concert to retaliation against Plaintiffs" (*id.* at 49). Plaintiffs offer no arguments in rebuttal.

In short, neither party has offered evidence in favor or against summary judgment. On summary judgment, however, "the burden on the [moving] party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Although the evidence must be viewed in the light most favorable to the nonmoving party, *Sierra Brokerage*, 712 F.3d at 327, the nonmoving party must still "present significant probative evidence in support of its complaint to defeat the motion" *Moore*, 8 F.3d at 340.

Plaintiffs have failed their burden here. It is true that Plaintiffs have presented sufficient evidence for a jury to find that O'Reilly condoned, or at least knowingly acquiesced to Schott's alleged retaliation; but more is required to demonstrate a "single plan" shared by the alleged coconspirators. Summary judgment for Defendants on this count is therefore **GRANTED**.

D. Qualified Immunity

Even if Plaintiffs succeed in proving a constitutional violation, the Court must still consider whether the constitutional right at issue was clearly established at the time of the

violation, of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A right is clearly established "if there is binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point." *Risbridger v. Connelly*, 275 F.3d 565, 569 (6th Cir. 2002) (citation omitted). "For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Gaspers v. Ohio Dep't of Youth Servs.*, 648 F.3d 400, 416 (6th Cir. 2011) (quotation omitted).

"The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is 'the central meaning of the First Amendment.'" *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964)). This Court has already found that the right of Plaintiffs to criticize Defendants, and their policies, and to advocate for their daughter, is "clearly established." (Doc. 96 at 12-13). Defendants argue, however, that their actions were "not objectively unreasonable" in light of this clearly established right. (Doc. 102 at 50-51).

Defendants' argument falls flat. Schott did not, as she argues, "balance[] her role as Director of Pupil Services . . . with her role as a mandatory report of abuse and/or neglect," (*id.* at 51), when a reasonable jury could conclude that she falsified and embellished the allegations against Mr. Wenk and submitted them to FCCS in order to punish him for his advocacy. Nor have Defendants removed any dispute of material fact that they acted "objectively reasonable in light of the clearly established constitutional right," *Abdulsalaam*, 637 F. Supp. 2d at 583, when Plaintiffs have proffered significant evidence to support the inference that Schott would not have filed the report if she had not been motivated, at least in part, by a desire to retaliate against Mr.

Wenk. Defendants were "on notice that [such] alleged actions were unconstitutional," *Grawey v. Drury*, 567 F.3d 302, 313 (6th Cir. 2009), and they cannot now claim qualified immunity.

Summary judgment on this ground is **DENIED.**

VI. CONCLUSION

For the reasons stated above, Plaintiffs have failed to establish the absence of a dispute of material fact with respect to their claims. Defendants have similarly failed with respect to the First Amendment Retaliation claims, and with respect to qualified immunity. Defendants have succeeded in demonstrating that summary judgment is appropriate with respect to the § 1983 conspiracy claims. Accordingly, Plaintiff's Motion for Partial Summary Judgment (Doc. 88) is **DENIED**. Defendants' Motion for Summary Judgment (Doc. 102) is **GRANTED IN PART AND DENIED IN PART**.

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: March 12, 2014