UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JANE DOE, JOHN and MARY DOE, Parents And Legal Guardians of the Minor Child, JUNE DOE; JOHN and MARY DOE, Parents and Legal Guardians of the Minor Child, SALLY DOE,	)	
Plaintiff,	)	**Case No. 3:13-cv-00328**
	)	**Judge Aleta A. Trauger**
v.	)	
RUTHERFORD COUNTY, TENNESSEE, BOARD OF EDUCATION,	)	
Defendant,	)	

MEMORANDUM

The defendant has filed a Motion for Summary Judgment (Docket No. 77), to which the plaintiffs have filed a Response in opposition (Docket No. 93) (filed under seal), and the defendant has filed a Reply (Docket No. 104) (filed under seal). For the reasons stated herein, the defendant's motion will be denied.

BACKGROUND

I. Overview

Jane Doe, June Doe, and Sally Doe (the "Doe Sisters") are the daughters of John and Mary Doe. June Doe and Sally Doe are minors; Jane Doe recently reached the age of majority. During the time frame relevant to this lawsuit, the Doe Sisters were enrolled in, and played basketball for, Siegel High School ("SHS"), which is overseen by the defendant, the Rutherford County, Tennessee, Board of Education ("RCBE"). Alan Bush coaches the SHS girls' basketball team, and his daughter, Jane Roe, played on the team with the Doe Sisters. Jane, June, and Sally

Doe allege that, between November 29 and October 2, 2012, Jane Roe (the coach's daughter) sexually assaulted them by placing her finger in or near their rectums or vaginas without their consent during and after practice on multiple occasions. Broadly, the plaintiffs allege that, despite reporting these incidents multiple times and at multiple levels within SHS and to the RCBE, the administration slow-walked its investigation of the incident, downplayed the seriousness of the allegations, meted out only token discipline to Jane Roe (and no one else), protected Jane Roe, the coach (her father), and the team over the Doe Sisters' personal safety, retaliated against the Doe Sisters for complaining about the sexual harassment, and constructively forced them out of the school.

Based on these allegations, the plaintiffs assert claims under Title IX, 20 U.S.C. § 1682, for both discrimination and retaliation. The RCBE requests summary judgment on both sets of claims.

II. Materials Supporting the Motion

The parties in this case conducted an extraordinary amount of discovery, much of which is before the court.[1] The parties have also filed competing statements of facts with corresponding objections thereto.[2] The court has scrutinized the asserted facts and objections, as

[1] In support of the defendant's Motion for Summary Judgment, the defendant filed the following materials: (1) excerpts of certain depositions (Docket No. 80); (2) affidavits from Renee Alma Martin, Angel McCloud, Coach Bush, and Jay Seals (Docket Nos. 82-85), and (3) a summary of evidence submitted under Fed. R. Evid. 106 (Docket No. 81). In support of their opposition, the plaintiffs filed complete copies of the deposition transcripts with attached exhibits for numerous depositions. (Docket Nos. 92, 97, and 113.)

[2] In support of its Motion for Summary Judgment, the RCBE filed a Statement of Material Facts (Docket No. 79), to which the plaintiffs filed a Response (Docket No. 108) (corrected late-filed version, filed with leave of court). In support of their opposition, the plaintiffs filed a Statement

well as the underlying record. In some limited instances, the defendant is correct that the plaintiffs mischaracterized certain facts or took testimony out of context to create a misleading impression, that the plaintiffs at times appear to rely on inadmissible hearsay in support of certain facts, and that the plaintiffs made some unnecessary responses instead of just writing "admit." Given the volume of facts at issue (343 facts asserted by the defendant, 170 facts asserted by the plaintiffs), it would be unnecessarily cumbersome to detail the court's analysis of each particular fact. Suffice it to say, the court has taken the parties' objections into account in ascertaining whether particular asserted facts are material, subject to genuine dispute, supported by admissible evidence (for the truth of the matter asserted or otherwise), and material.[3]

III. Facts

The Doe family moved to the United States from New Zealand in 2006. Through October 2012, the Doe Sisters were homeschooled, primarily by their father, John Doe.

At some point, the SHS coaching staff became aware that the Doe Sisters were excellent basketball players and essentially recruited them to attend SHS and play for the girls' basketball team. The Doe Sisters decided to attend SHS because they wanted to play in a better basketball league. In the middle to end of October 2012 (apparently a few weeks or months into the 2012-2013 school year), the Doe Sisters began attending SHS and joined the basketball team. Alan Bush was the team's head coach and was supported by several assistant coaches, including Jay Seals. Coach Bush's daughter, Jane Roe, was a member of the team.

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of Undisputed Material Facts (Docket No. 95), to which the defendant filed a Response (Docket No. 14) (late-filed with leave of court).

[3] Given the voluminous record, the court's summary of the facts is not exhaustive.

The underlying incidents of harassment at issue occurred on October 29 and November 2, 2012. The incidents concerned a type of "initiation" ritual, whereby a girl on the team would attempt to place her finger up the rectum of another girl by surprise – at least sometimes while the victim was clothed. The Doe Sisters and school officials were unaware of this practice at the time, which the students referred to as "cornholing," among other names.[4]

On October 29, 2012, Jane Roe engaged in the following harassing actions: (1) she twice attempted to cornhole Sally Doe (a freshman and the youngest of the Doe Sisters) – once in the locker room before practice and once while Sally was stretching against the gym wall during practice; and (2) attempted to cornhole June Doe (the middle Doe Sister) while she was stretching during practice, shortly before making her second attempt to cornhole Sally. When she attempted to cornhole June Doe, Jane Roe told June: "You've been initiated." At least with respect to the incidents that occurred during practice, both sisters were wearing three layers of clothing when Jane Roe attempted to cornhole them. Nevertheless, when contact was made, June Doe felt Jane's Roes fingers press inside her vaginal area through her underwear, spandex, and basketball shorts. Despite two attempts, Jane Roe was not able to penetrate Sally Doe's rectum or vagina because Sally reacted quickly both times.

June Doe and Sally Doe did not report these incidents at the time they occurred. However, June Doe told Jane Roe not to attempt to cornhole their oldest sister, June Doe, who was the only Doe Sister yet to be "initiated."

Despite this admonition, Jane Roe made suggestive gestures by poking her finger at a basketball and laughing at the Doe Sisters, apparently in an effort to mimic the act of cornholing

[4] The parties continue to debate the appropriate name for this practice and how to characterize it. For purposes of this opinion, the court will refer to the practice as cornholing.

them. On November 2, 2012, Jane Roe attempted to cornhole Jane Doe (who was unaware of the prior incidents involving her sisters) while she was stretching her fingers to her toes. During the assault, Jane Doe felt Jane Roe's finger push through her clothing and into her rectum "a little bit."[5] Jane Roe laughed as if the matter were a joke. Jane Doe told Jane Roe that she would hit her if she ever did it again. Jane Doe's anus was sore after the incident.

Jane Doe went home upset and crying. She reported the cornholing incident to her father that night, after which the other two Doe Sisters told him that Jane Roe had also attempted to cornhole them. John Doe reported the incidents to Coach Bush that night, indicating that the Doe Sisters felt violated by Jane Roe's conduct. John Doe asked Coach Bush to keep the matter secret and to deal with it on his own.[6] Coach Bush verbally reprimanded his daughter, grounded her for a month, and had her apologize to the Doe Sisters the next day. He otherwise took no disciplinary action, did not inform the team about the incidents (at least with any degree of specificity), and did not report the incident to other school officials. By not reporting the incident (albeit consistent with John Doe's wishes), Coach Bush likely violated school policy requiring school officials to report any incidents of harassment or bullying within 24 hours. Furthermore, the Bush family did not view Jane Roe's (private) punishment as "serious."

After November 2, 2012, some girls on the team continued to "cornhole" each other in front of the Doe Sisters. In one instance, two of the girls may have mocked the Doe Sisters by

[5] Jane Doe's deposition transcript reflects Jane Doe's difficulty in speaking about the specific details of the incident.

[6] John Doe recorded the conversation without Coach Bush's knowledge. The record contains a complete transcript of the discussion. John Doe reiterated several times that the family sought to keep the matter secret for the time being. At no point did Coach Bush indicate that school policy otherwise required him to report incidents of harassment, hazing, or bullying within 24 hours.

pretending to cornhole each other. Nevertheless, the teammates did not cornhole, or directly threaten to cornhole, the Doe Sisters after November 2, 2012. The Doe Sisters continued to attend school and practice with the team. Other than what has already been described, no teammates attempted to "haze" or bully them in the wake of the initial incidents. However, in March 2013, in the hallways of the school, June Doe was subjected to a practice called "slicing the cheese," whereby a student "slices" her hand between a student's buttock cheeks. June Doe was initially reluctant to report these slicing incidents, because she did not feel that she could trust the adults at SHS and felt that it would be taken as a "joke." However, she did report them, and neither she nor the administration was able to determine who was "slicing" June Doe. To avoid this issue, the administration permitted June Doe to leave class five minutes early from each class; once she began leaving class early, June Doe experienced no further "slicing" incidents. The administration did not send notice to the student body to stop this alleged conduct.

On November 15, 2012, Mrs. Doe and Jane Roe's mother, Mary Doe, had a verbal altercation at an away game, stemming from a discussion about Jane Roe's conduct and the lack of discipline for it. At some point after the October 29 and November 2 incidents, Coach Bush named Jane Roe as a "team captain," despite his knowledge of Jane Roe's harassing conduct. The Doe family, particularly Mrs. Doe, took umbrage at Coach Bush's decision to promote Jane Roe to team captain under the circumstances.

On November 19, 2012, Mrs. Doe reported the cornholing incidents involving her daughters to SHS Principal Jason Bridgeman. She reported that her daughters had been sexually assaulted, and she complained that Jane Roe had not been disciplined for committing the

assaults.[7] This was the first time that Principal Bridgeman had heard of the incidents involving the Doe Sisters and of cornholing at SHS. He agreed that the allegations of cornholing involved "sexual" violations of the Doe Sisters and "appalling" conduct by Jane Roe. He immediately asked Steve Lykins, who was an Assistant Principal ("AP") and the school's Athletic Director ("AD"), to investigate the matter.[8] AP/AD Lykins may have spoken to Coach Bush, but he otherwise failed to investigate the incident and made no meaningful progress. He did not even ascertain that Jane Roe was the perpetrator of the incidents.[9]

On or about November 27, 2012, after learning that Lykins had not undertaken a meaningful investigation, Bridgeman reassigned the investigation to another Assistant Principal, Renee Martin. Prior to that date, AP Martin was not aware of any pattern of harassment or hazing occurring at SHS, nor was she aware of the practice of cornholing by SHS athletes or other students. AP Martin immediately interviewed the Doe Sisters, Jane Roe, and two other teammates. Jane Roe admitted that she had attempted to cornhole one or more of the Doe Sisters and stated that she herself had been cornholed as a freshman. Based on the interviews, AP Martin believed that Jane Roe had subjected the Doe Sisters to some type of initiation ritual. She told Jane Roe and the other two teammates that the conduct could be considered hazing and gave

[7] The record suggests that Mrs. Doe and Mr. Doe may have disagreed about the correct way to handle the incidents. Although Mr. Doe initially sought to deal with the matter privately with Coach Bush (apparently over Mrs. Doe's vehement objection), Mrs. Doe sought to involve the administration beginning on November 19, 2012.

[8] Lykins served as both an AP and as the school's AD.

[9] Lykins actually denies that Principal Bridgeman asked him to investigate the matter in the first place, creating a genuine dispute as to what actually happened. Construing the disputed facts in the light most favorable to the plaintiffs, Lykins was asked to investigate the incident and did next to nothing.

them printed materials concerning hazing. Nevertheless, during her discussion with the Doe Sisters, AP Martin told the Doe Sisters that they should "keep the issue quiet" and "not let this get out," because it would give SHS a "bad name," Siegel High School is a "family," and "we have to protect the Siegel nation."[10] AP Martin did not ask the girls if penetration had occurred. Even after being told by Jane Roe that she had been cornholed since she was a freshman and after concluding that the practice might be a form of hazing, AP Martin did not ask the other teammates she interviewed whether they had been cornholed.

At some point, AP Martin spoke with John Doe and told him that, as a general matter, "hazing has gone on forever," but "we haven't heard anything up at [SHS] about it."[11] Although the exact sequence of events is not entirely clear, AP Martin spoke with RCBE Attorney Angel McCloud concerning an appropriate punishment, spoke with Principal Bridgeman, and spoke with Coach Bush. As best the court can discern from the record, with approval from Principal Bridgeman and Attorney McCloud, she eventually communicated to Coach Bush that he should hand out "game suspensions" and that he should inform his team about the incidents and how the team members should behave going forward.

After speaking with AP Martin, Coach Bush decided to suspend his daughter for the next game, which was an away game played on November 29, 2012. Jane Roe traveled with the team, suited up for the game, and did not play. Coach Bush did not tell the team why Jane Roe

[10] Notably, all three Doe Sisters independently recalled AP Martin telling them something to this effect, which the sisters found confusing and dismaying.

[11] The plaintiffs attempt to mischaracterize AP Martin's testimony concerning hazing by quoting her out of context. She considers herself "a big advocate against hazing" and apparently served on a national anti-hazing commission. As the context of her testimony makes clear, AP Martin was aware that hazing had gone on for a long time in other schools, but she was not previously aware of cornholing or that it was taking place at SHS.

did not play. In fact, Jane Roe told the team that she sat out the game because her back was bothering her, and no one attempted to disabuse the team of this false representation. Once again, Coach Bush did not address the incidents with the team.[12]

On December 2, 2012, Mr. and Mrs. Doe emailed Principal Bridgeman to complain about the lack of meaningful discipline in response to their complaints. Principal Bridgeman told them that he would look into the matter, although he apparently took no further actions. At some point before SHS's Christmas break (perhaps on or about December 18, 2012), John Doe contacted RCBE Director of Schools Don Odom to complain about how SHS had handled the incidents involving his daughters. He reported that Jane Roe had penetrated his daughters "anally." Notwithstanding the Doe family's repeated complaints over the past two months, this was the first time that Odom had heard of the incidents. He immediately asked two "complaint managers," Paula Barnes and Attorney McCloud, to investigate the matter.[13] Under school policy, complaint managers should have been notified much earlier, likely within 24 hours of Mr. Doe's report to Coach Bush on November 2, 2012, or at a minimum within 24 hours of Mrs. Doe's report to Principal Bridgeman on November 19, 2012.[14] Furthermore, conduct that is

[12] Jane Doe testified that Coach Bush did not address the team in any fashion. By contrast, some witnesses recall that, at most, Coach Bush spoke to the team at a high level of generality that they should cease engaging in unspecified "inappropriate conduct." The court credits Jane Doe's recollection for purposes of the motion.

[13] McCloud received word of the incident on or about November 27, 2012, just eight days after Principal Bridgeman was notified of the incident by Mary Doe and her sister, and approximately 25 days after John Doe had reported the issue to Coach Bush (albeit under a promise of secrecy). As best the court can discern, McCloud was not formally identified as a "complaint manager" under school policy when she first looked into the incident in late November 2012.

[14] An internal report would have triggered an immediate preliminary investigation, an interview of the aggrieved student(s) within five school days, a written report to the Director of Schools

criminal or "may have the potential to be criminal in nature" must be reported to the "appropriate administrator" and then to the Central Office of the Board of Education. At deposition, Coach Bush acknowledged that the Doe Sisters' allegations were serious and that Jane Roe's actions could have constituted a "sexual violation." Principal Bridgeman and AP Martin also reached a similar understanding of the incident in November 2012. Arguably, none of these school officials complied with school policy in responding to the complaints.

In the December 2012 meeting with Mr. Odom, John Doe recommended that Director Odom send a notice to parents of other student athletes at SHS, notifying them of the incident and encouraging them to report any similar incidents. Mr. Odom agreed that this was a good idea and directed Attorney McCloud to draft a letter to that effect. McCloud drafted the letter and forwarded it to Principal Bridgeman at SHS on December 18, 2013.[15] McCloud emailed John Doe to inform him that the letter would go out over the holiday break. Although Principal Bridgeman stated that he would send out the letter, he claims that he forgot to send it.

On December 23, 2012, Coach Bush sent Principal Bridgeman an email recounting an incident that occurred the previous day, when John and Mary Doe verbally assaulted Mary Roe

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(*i.e.*, Odom) within 39 days of the complaint, and a written decision from the Director of Schools concerning the Complaint within five school days. School policy indicates that it is important not to identify the complainant(s) in most circumstances. School policy also defines as a "level three offense" any act "that is directly against a person or property but whose consequences do not seriously endanger the health or safety of others."

[15] The letter would have stated that SHS had recently received reports of hazing among the members of the girls' basketball team, that the reported incidents had been investigated and the "participants . . . disciplined appropriately," that any parents who believed that their children had been the victim of hazing should report it as soon as possible, that students who participate in hazing would be suspended from games and practices, and that repeated incidents would result in suspension.

(Coach Bush's wife) and some other parents. According to Coach Bush's wife, Mary Doe approached her at an away game and began yelling at her about the punishment (or lack thereof) that Jane Roe had received. According to Mary Roe, after she got up from her seat to leave, Mary Doe followed her into the lobby and continued to yell at her. At some point, John Doe joined the scene and may have accused Jane Roe and other members of the team of being "sexual predators."

It appears that, despite its assurances to the Doe family, the school did not undertake any further actions following the pre-holiday break discussions. Ms. Barnes was supposed to have a follow-up meeting with John and Mary Doe. Despite acknowledging that the allegations were "serious," Barnes did not interview John and Mary Doe until February 2013. Notably, after Coach Bush learned that the Doe Sisters had contacted the administration, Jane Doe and June Doe's playing time was reduced.[16]

On or about January 28, 2013, Director Odom learned that Bridgeman had not sent the notification letter. Odom recalls that he verbally reprimanded Bridgeman for not sending the letter, although Bridgeman does not recall being disciplined in any way. Remarkably, Director Odom decided not to send the letter at that point, believing that too much time had elapsed from the date of the underlying incidents.

In late January 2013, John and Mary Doe met with Director Odom to explain their continued dissatisfaction with the lack of disciplinary action that SHS had taken regarding Jane Roe and the failure to alert the team or the school about incidents of harassment, initiation, or

[16] As explained herein, the RCBE and Coach Bush contend that the reduction in playing time was entirely coincidental and was in fact based on decisions by Coach Bush that had nothing to do with the Doe family's complaints about him or his daughter.

hazing. Odom therefore directed Barnes and McCloud (apparently for the third time) to investigate the incident promptly. This time, at least, Barnes and McCloud took immediate action: on February 1, 2013, they finally met with John and Mary Doe and, on February 4, 2013, they conducted interviews of school administrators, basketball coaches, school resource officers, the Doe Sisters, and all other students whose names John and Mary Doe had identified as being involved in the alleged hazing. According to Barnes, during her interview, Jane Doe reported that Jane Roe stuck her "finger up [Jane Doe's] butt," which Barnes did not believe rose to the level of assault or was otherwise offensive. Among other things, Jane Roe also reported to Barnes that this activity "[g]oes on in [the] hallways" at SHS.

At some point before February 5, 2013, Coach Bush received a letter from a doctor who had been treating Jane Doe for bilateral lower leg pain related to tibial periostitis, which was causing extreme pain. The letter advised that, "over the next several days to weeks . . . [,] she avoid any high-impact (running/jumping) or conditioning activities over this time period." On February 5, 2013, Jane Doe provided Coach Bush a letter from another treating physician. The letter stated that Jane Doe "was receiving medical care from me on 02/05/13 and may return to school/work on 02/07/13," and advised the reader to "EXCUSE [Jane Doe] FROM SCHOOL PRACTICE AND GAMES UNTIL SYMPTOMS RESOLVE." Consistent with the letter's instructions, Jane Doe did not play in the team's game that night. For medical reasons (presumably from the ongoing leg issues), Jane Doe did not fully participate in practices on February 4, 6, and 7. According to Jane Doe, she was "sick" during these practices and simply rode the stationary bike while her team practiced on the court and did wind sprints. It appears that she often rode the bike during practices due to her health issues and still played as a full participant in subsequent games.

On February 8, 2013, the SHS girls' basketball team played their final regular season game, which was billed as a "Senior Night," when the seniors on the team were traditionally acknowledged in a post-game ceremony. By that point, no one had informed Coach Bush that Jane Doe's symptoms had resolved. Jane Doe, who was the only senior on the team, also informed Coach Bush that she did not want to be recognized in the postgame ceremony because she did not plan to graduate with the team. Jane Doe dressed for the game but Coach Bush decided not to play her. Coach Bush avers that he decided not to play Jane Doe because she had not fully participated in the February 4, 6, and 7 practices, had not played in the February 5, 2013 game, and had not informed him that her symptoms had resolved. Jane Doe believed that she had not "missed" any practices and did not know why Coach Busy did not play her that night. Evidence in the record shows that, with Coach Bush's knowledge of her injuries, Jane Doe had played with the team despite a physician's note on prior occasions. Also, Jane Doe testified that she spoke with Coach Seals about whether the coaches planned to play her that night, so that she could know whether to tape her legs (in preparation to play). When Coach Seals told her he was not sure, she taped her legs to prepare to play. Also, during the Senior Night game, Coach Bush did not start June Doe, even though she typically started games for SHS and generally played nearly the entire game each time.

Coach Bush's decision not to play Jane Doe and not to start June Doe precipitated a postgame altercation. Jane Doe left the court in a huff, cleaned out her locker, and left the premises. Mary Doe, incensed by Coach Bush's decision not to play Jane Doe, attempted to enter into the girls' locker room to search for Jane Doe (not realizing that she had already left) and to confront the coaches. The coaches told her she could not enter, which led to a verbal altercation. June Doe approached her mother and escorted her into the hallway. June Doe and

Sally Doe left the premises without cleaning out their lockers. When the coaches told her that she needed to leave, Mary Doe cussed at them and walked away, then walked up to AP Martin in the hallway, introduced herself, and criticized AP Martin for failing to do anything about what had happened to her daughters. After a school resource officer approached Mary Doe, she stated "Don't lay your hands on me. I know my rights," and started walking out. She also said in a raised voice that "[t]his is bloody bulls*t, sexual assault, and you all sweep it under the carpet." She made similar comments outside the school as well, adding something to the effect of, "If it was your kid you'd do something about it."

On February 11, 2013, Attorney McCloud sent a formal letter to John and Mary Doe detailing the results of the investigation. As set forth in the letter, the investigation concluded that "there was no physical harm or endangerment that resulted from this conduct," that "the behavior was discontinued after the conduct was reported," that the behavior "can best be described as inappropriate horseplay," and that "the disciplinary action taken was appropriate considering the totality of the circumstances" under the school's definition of hazing, discrimination, harassment, and bullying. Separately, on the same date, Principal Bridgeman wrote a letter to John and Mary Doe to inform them that the school and the RCBE had decided to ban them from SHS property and to ban them from attending basketball games at other RCBE schools, based on their "assaulting and threatening behavior towards students and staff" at a recent game, presumably referring to the February 8, 2013 game.[17] At deposition, Director Odom could not provide a cogent explanation as to why John Doe was banned from school property along with his wife. At any rate, on that date, the Doe family went to the police to press

[17] John Doe testified that neither he nor his wife had engaged in assaulting or threatening behavior on February 8, 2013.

charges against Jane Roe. They at least spent several hours on February 11 speaking with the police, and may have spent time speaking to the police later that week, as well.

Between February 11 and February 14, 2013, the Doe Sisters did not appear for practice and did not contact Coach Bush. Jane Doe admits that she quit as of February 8, 2013, but the remaining sisters did not believe that they had quit, nor did they tell anyone that they had quit.[18] Although Coach Bush alleges that the Doe Sisters "quit" the team, he affirmatively told Principal Bridgeman to remove the Doe Sisters from Coach Bush's seventh period class (which the team members normally attended on game days) and to suspend them indefinitely from the team. At some point after the February 8, 2013 game, someone removed Sally Doe's school books from her locker and placed them in front of the locker room.

SHS was scheduled to play in the first game of a district tournament on February 15, 2013. In the afternoon before that game, Principal Bridgeman emailed Mr. and Mrs. Doe to inform him that "Coach has decided to remove [June Doe] and [Sally Doe] from his 7th period Basketball class." Principal Bridgeman also separately informed June Doe and Sally Doe that they had been suspended from the basketball team and removed from the 7th period basketball class.

Jane Doe quit SHS on February 15, 2013, claiming that she "just couldn't take it anymore" and "had to get out of there." June Doe decided to leave SHS after Principal Bridgeman told her that she had been kicked off the basketball team. Mr. and Mrs. Doe also

[18] The record contains some "tweets" from June Doe that arguably reflect her belief that she had quit the team. Although the texts are highly suggestive, they are not definitive on this point, and it will be for the jury to decide how best to construe them.

determined that, in light of the school's failure to respond adequately to their concerns about harassment of their daughters, the daughters should be moved out of SHS.

In May 2013, Jane and June Doe received homeschool high school diplomas under the auspices of homeschool provider Bellwood Christian Academy. They admit that (1) they would not have received their diplomas any earlier if they had remained at, and graduated from, SHS, and (2) the BCA degree is given the same force and effect as a diploma from a "brick and mortar" school like SHS. In approximately May 2013, Jane Doe and June Doe were given offers to play for a college in Florida on scholarship. Jane Doe apparently accepted the offer initially, but was unable to follow through on the commitment because of brain swelling. Nevertheless, she has a standing offer to play for that college and two other colleges (located in Ohio and Tennessee). As to June Doe, she declined the offer to play for the Florida college because her sister was unable to attend. John Doe admitted at deposition that, although he speculates that Jane Doe's opportunities to play college basketball were impaired by her early withdrawal from SHS, he has no way of knowing whether his belief is true. John Doe also believes that, if June Doe had stayed at SHS and graduated in 2014 (rather than 2013), she would have had additional scholarship opportunities, but he had not specifically asked any college coaches whether June Doe's early withdrawal from SHS (and early homeschool graduation in 2013) impacted their decision whether to offer her a scholarship.

Sally Doe finished out her freshman year at SHS. At the end of the 2012-13 school year, she transferred to Stewart's Creek High School and, assuming that she meets all of her requirements, she will graduate from that institution at the same time she would have graduated from SHS.

According to at least one SHS student, cornholing has taken place on the soccer team and volleyball team.[19] Jane Roe also testified that students in general at the school had engaged in cornholing since her freshman year. Jane Roe also testified that, sometime prior to the incidents at issue in this case, members of the girls' basketball team had "put stuff" in her hair when she sleeping. Neither the referenced SHS student nor Jane Roe testified that school officials were aware of these practices until the Doe family reported the cornholing incidents to SHS officials in November 2012.

At least some SHS students viewed, and continue to view, the practice of cornholing as an acceptable type of "practical joke." In fact, one SHS girls' basketball team player testified that she believed that, if two people are friends and are "joking around" with each other, it would not be offensive for one friend to insert her finger or thumb into the anus of the other person without permission. The student also expressed that, in general, it would be unreasonable for someone to be offended by that conduct if it was done "in a joking way."

In an effort to show that they were treated unfairly, the plaintiffs have identified several examples of how the RCBE handled complaints of discrimination or other forms of harassment within the RCBE's school system. The court will address these examples in the relevant section herein.

SUMMARY JUDGMENT STANDARD

[19] The student testified that she had "heard about" the activity also taking place on the basketball team from a friend of hers. That statement is inadmissible hearsay with respect to the truth of the matter asserted. The plaintiffs also purport to reference additional testimony from this student related to incidents of cornholing, but the deposition excerpts filed do not include the correct pages. Also, the plaintiffs purport to reference certain portions of the deposition of Angel McCloud, but the plaintiffs failed to file a copy of the relevant deposition testimony. (*See* Docket No. 95 at Fact No. 128.)

Rule 56 requires the court to grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If a moving defendant shows that there is no genuine issue of material fact as to at least one essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence beyond the pleadings, "set[ting] forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party." *Moldowan*, 578 F.3d at 374 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

At this stage, "'the judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). But "[t]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient," and the party's proof must be more than "merely colorable." *Anderson*, 477 U.S. 242, at 252. An issue of fact is "genuine" only if a reasonable jury could find for the non-moving party. *Moldowan*, 578 F.3d at 374 (citing *Anderson*, 477 U.S. at 252).

ANALYSIS

I. Title IX Discrimination Claims

A. Discrimination Standard

In relevant part, Title IX provides that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. In

Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999), the Supreme Court established that Title IX can support a claim against a federal funding recipient premised on student-on-student harassment, provided that the plaintiff demonstrates the following elements:

(1) The sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,

(2) The funding recipient had actual knowledge of the sexual harassment, and

(3) The funding recipient was deliberately indifferent to the harassment.

Vance v. Spencer Cnty. Public Sch. Dist., 231 F.3d 253, 258-59 (2000) (citing *Davis*, 526 U.S. at 653).

B. First Element: Severe, Pervasive, and Objectively Offensive

For purposes of summary judgment only, the defendant concedes that Jane Roe's conduct was objectively offensive. However, it argues that, relative to each of the Doe Sisters, that conduct was not "severe and pervasive."

With respect to severity, there is a genuine dispute of material fact as to whether the incidents on October 29 and November 2, 2012 were "severe." Although none of the Doe Sisters sought medical or mental health treatment from the incidents, inserting (or attempting to insert) a finger in another person's rectum or vagina reasonably could be construed as a "sexual" act that is a severe violation of an individual's body and personal privacy. Indeed, administration officials testified that they found the actions shocking, sexual in nature, or otherwise appalling. Of course, the RCBE may be able to convince the jury that Jane Roe's actions were a practical joke, that they involved only a *de minimis* violation of the Doe Sisters' bodies, and that they were essentially acts of "inappropriate horseplay" (as the school characterized it).

With respect to pervasiveness, the issue is a closer call. The Doe Sisters were not cornholed, or threatened with cornholing, after their father reported the matter to Coach Bush. On the other hand, other girls on the team continued to engage in this practice and did so in front of the Doe Sisters. In one instance, two teammates may purposely have faked engaging in the practice to mock the Doe Sisters in some way. Furthermore, the Doe Sisters were required to continue playing alongside the perpetrator of these incidents, whose father (Coach Bush) did not punish her in front of the team, did not explain to the team what had happened or why it should never happen again, and in fact promoted his daughter to team captain, despite knowing that she had sexually assaulted the Doe Sisters. From the team's perspective (other than the Doe Sisters), Jane Roe sat out a game because her back hurt, nothing untoward had occurred, and no one was told to cease attempting to cornhole the Doe Sisters or each other. From the Doe family's perspective, the entire incident was "swept under the rug" by Coach Bush and the administration, the perpetrator was rewarded with a captainship, and no one informed the team or the student body that cornholing each other on the school premises was an inappropriate form of sexual harassment, whether done so "jokingly" or with malicious intent. Furthermore, evidence shows that hazing practices were occurring on multiple teams at SHS for at least the past few years. Under the circumstances, a reasonable jury could conclude that cornholing or similar initiation practices were pervasive at SHS (or at a minimum within the girls' basketball team) and that the prospect of future harassment pervaded the Doe Sisters' educational experience. Indeed, to this day, at least some students on the team still do not appreciate that the act of cornholing another person is an inappropriate sexual act.

On the other hand, the defendant has strong arguments as to why the conduct at issue was not "pervasive." The Doe Sisters were not subjected to bullying or harassment after the matter

was reported. Also, there is no indication that, prior to the Doe Sisters' complaints, the coaches or administration were aware of cornholing taking place at SHS in the first place. Although it a very close call concerning "pervasiveness," the court finds sufficient evidence to create a genuine dispute of fact on this element.

As to whether the harassment at issue deprived the Doe Sisters of educational opportunities at the school, it is again a close call. The Doe Sisters have provided only limited evidence concerning how the sexual harassment itself forced them to quit, or deprived them of full opportunities on, the basketball team; indeed, they testified that the sexual harassment by Jane Roe and her lack of punishment was only one of several factors that led them to quit.[20] Other factors, such as taunting at school (seemingly unrelated to Jane Roe's actions), feeling "singled out" as foreigners, and Coach Bush's reduction in the older sisters' playing time (as opposed to the underlying harassment itself) seem to have played a part in their decisions to leave SHS.[21] The defendant also points out that Jane Doe and June Doe stayed on the team and

[20] The plaintiffs argue that testimony from Susan Hunt, Mary Doe's sister-in-law, supports their claims. The plaintiffs' factual assertions concerning Ms. Hunt's testimony are spurious. For example, based on Hunt's testimony (at page 28 of her deposition), the plaintiffs assert that "Jane [Doe] cries every few days, and all of the Sisters have been upset to the point of crying over these events." (Docket No. 49 at Fact No. 165.) The underlying testimony establishes no such thing: on the referenced page, Hunt simply testified that, on one occasion, she spoke with Mr. Doe on the phone about the incident and heard his daughters crying in the background. Plaintiffs' counsel's attempt to mislead the court – or its failure to cite testimony in the record that actually supports the factual assertions – in an effort to survive summary judgment is inappropriate and in violation of Local Rule 56.01.

[21] As explained in the next section, the plaintiffs contend that Coach Bush retaliated against the Does for reporting and pressing their harassment claims against his daughter by reducing Jane Doe and June Due's playing time, humiliating Jane Doe on Senior Night by not playing her, and by kicking the youngest two sisters off the team. If true, these actions would tend to support a Title IX *retaliation* claim rather than a Title IX discrimination claim.

at the school for several months after the October/November 2012 incidents, with negligible interruption to their daily routine, and that Sally Doe in fact finished out the school year.

On the other hand, a reasonable jury could find that the girls justifiably lost faith in their school and the RCBE to protect them against unwanted harassment. Although the Doe Sisters stayed on the team and at school well after the incidents, their family also received repeated assurances during that time period that the harassment they experienced would be investigated and punished accordingly as a deterrent to future forms of harassment or hazing – first from Coach Bush, then from Principal Bridgeman, then from Director Odom. It would be somewhat perverse for the court to find that, as a matter of law, the Doe Sisters' claims should be extinguished because they attempted to "stick it out" while their coach, the school, and the County continued to assure their parents that the school would respond appropriately.

The court acknowledges that the circumstances concerning Sally Doe, who finished the school year before transferring out of SHS, are distinct from those of her sisters. Mr. and Mrs. Doe believe that Sally was "forced" to transfer schools at the end of the season. The causal relationship between the RCBE's alleged deliberate indifference to the sexual harassment claims (as opposed to actions that the Doe family believes were retaliatory) and Sally Doe's transfer is, at a minimum, more attenuated than the causal relationship posited by her sisters. Depending on the testimony adduced at trial, a directed verdict on Sally Doe's discrimination claim may be appropriate. Based on its understanding on the existing record, however, the court finds that there is sufficient evidence to create a genuine dispute of material fact as to whether the alleged deliberate indifference caused Sally Doe to be deprived of educational opportunities.

C. Actual Knowledge

Repeated harassment complaints to school officials can satisfy the actual knowledge element. *Vance*, 231 F.3d at 259.

Here, there is no evidence in the record that any official at SHS or within the RCBE had any knowledge that cornholing was taking place at SHS before the Doe family reported it to Coach Bush on November 2, 2012. Nevertheless, the facts of this case involve the peculiar circumstance in which, despite school policy, the Doe family's reports of harassment only went "up the ladder" because the Does continued to report the incidents at higher levels within the school and county administration. Coach Bush had actual knowledge of the sexual harassment allegations as of November 2, 2012, but did not report them (albeit in compliance with Mr. Doe's request). Principal Bridgeman had actual knowledge of the allegations as of November 19, 2012, and acknowledged their seriousness, yet failed to alert the Director of Schools or the authorities. Director Odom did not have actual knowledge until mid- to late-December 2012.

In light of the peculiar factual circumstances presented, a reasonable jury could conclude that, until the complaints moved up the proper channels, the Doe Sisters faced the prospect of additional harassment or at least the indignity, intimidation, and justifiable discomfort of being forced to play alongside their alleged harasser and under the coach/father who seemed to be protecting her. Thus, the defendant's foot-dragging in violation of school policy, which endured for months and at multiple administrative levels, could be construed as a failure to remedy harms that continued to accrue even after the incidents first took place. For example, in *Mathis v. Wayne Cnty. Bd. of Educ.*, 2011 WL 332066 (M.D. Tenn. Aug. 2, 2011), the student's parents reported the underlying incidents of sexual harassment, there was little to no evidence of further incidents of harassment in the weeks following the report, and the student's parents ultimately withdrew their son from school in light of the school's failure to discipline the perpetrators

appropriately. *Id.* at *2-*8. Under these factual circumstances, which are substantially similar to those presented here, this court upheld the jury's verdict, and the Sixth Circuit affirmed the court's ruling on appeal. *See Mathis v. Wayne Cnty. Bd. of Educ.*, 496 F. App'x 513 (6th Cir. 2012).

Although it is again a close call, the court finds that the plaintiffs have produced sufficient evidence to a support a finding of "actual knowledge."[22]

D. Deliberate Indifference

With respect to the third element, the RCBE can only be held liable for damages where it "intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment." *Id.* at 260 (citing *Davis*, 526 U.S. at 642). The deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it. *Vance*, 231 F.3d at 260 (citing *Davis*, 526 U.S. at 645). Deliberate indifference is shown "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Vance*, 231 F.3d at 260 (citing *Davis*, 526 U.S. at 648). By reference to *Davis*, the Sixth Circuit explained the limitations on a deliberate indifference claim premised on peer-to-peer harassment as follows:

> The recipient is not required to "remedy" sexual harassment nor ensure that students conform their conduct to certain rules, but rather, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. The deliberate indifference standard does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. The standard does not mean that recipients must expel every student accused of misconduct. Victims do not have a right to particular remedial demands. Furthermore, courts

[22] To the extent that the RCBE is arguing that actual knowledge of cannot support a finding of deliberate indifference unless there is actual *prior* knowledge of the particular type of incident at issue, the Sixth Circuit's affirmance in *Mathis* strongly suggests otherwise.

> should not second guess the disciplinary decisions that school administrators make.
>
> The Supreme Court has pointedly reminded us, however, that this is not a mere "reasonableness standard" that transforms every school disciplinary decision into a jury question. In an appropriate case, there is no reason why courts on motion for a directed verdict could not identify a response as not "clearly unreasonable" as a matter of law.

Id. (internal citations and case quotations omitted). By the same token, the mere fact that a school does "something" in response to a harassment claim does not *per se* insulate it from liability under Title IX. *Id.* "[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Id.* The Supreme Court and the Sixth Circuit have also approvingly cited the Office of Civil Rights' Title IX Guidelines, which state that, in response to known sexual harassment, a district "should take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment, and prevent harassment from occurring again." *Vance*, 231 F. at 261 n. 5 (quoting 62 Fed Reg. 12034, 12042 (1997)).

Here, there is ample evidence in the record to support a finding that employees of the RCBE or SHS were deliberately indifferent to the Does' repeated complaints of harassment. The RCBE contends that it was not "clearly unreasonable" for Coach Bush to keep the matter private in light of Mr. Doe's instructions, for Principal Bridgeman to rely on AP Martin's investigation and report in November 2012, or for Director Odom to rely on the report and recommendations of his appointed complaint managers in February 2012. On the other hand, the record shows that

Coach Bush and Principal Bridgeman may have violated school harassment reporting policies by failing to report the incidents correctly, that school officials dragged their feet for months in response to potentially serious allegations of sexual harassment, that AP Martin told the Doe Sisters to keep the matter secret so as not to damage SHS's reputation, and that the school did not attempt a formal investigation until (a) the basketball season was nearly over, and (b) the Does' repeated complaints began to boil over. It is also notable that AP/AD Lykins failed to investigate the incident adequately, that the perpetrator of the incident received only insubstantial and private discipline for her conduct, and that Coach Bush promoted Jane Roe to captain even after the allegations came out. Furthermore, it is difficult to fathom why the administration never formally informed at least the girls on the basketball team and their parents – let alone the rest of the student body – about the incidents and their inappropriateness at any point in the nearly *fourteen weeks* that elapsed between the incidents and the date the Doe Sisters left the team.

In light of these facts, a jury reasonably could agree with the basic premise of the Does' theory of the case: SHS and the RCBE placed SHS's reputation and the interests of the girls' basketball team over the Doe Sisters' interests, and SHS and RCBE officials consequently did their best to "cover up" the incidents and ensure that they were not publicized.

On the other hand, a jury might agree with the defendant that SHS and the RCBE appropriately responded to the allegations (or at least that the response was not "clearly unreasonable"), that the limited discipline imposed on Jane Roe successfully prevented the Doe Sisters from suffering further acts of harassment, that Mr. Doe and, in particular, Mrs. Doe's conduct became increasingly unreasonable, and that the Does' grievances were more about

seeing justice served on Jane Roe than on protecting the daughters from further sexual harassment. A jury will need to decide which side is correct.

Finally, although the court would find a genuine dispute of material fact based on the aforementioned evidence alone, the plaintiffs have produced evidence that SHS or the RCBE may have treated other, arguably equivalent, instances of harassment much more seriously. For example, in 2005, after a male student sexually assaulted a female student by touching or pinching her, AP Martin remanded that student to an alternative school within "a day or two." AP/AD Lykins recalled an instance in which a student was called "discriminatory" names by three other male students without a physical component to the harassment; the school suspended two of the perpetrators from school and sent the other to an alternative school. Also, AP/AD Lykins recalled an incident in which the school discovered, while reviewing surveillance video for another purpose, that a freshman boy (who was clothed) placed his "private parts" close to a girl and "asked for oral sex." Although the girl had not complained, the school sent the boy to an alternative school after learning about the incident. In these instances, the school seemed to "bring the hammer down" on acts of harassment that were arguably equivalent to or less serious than the harassment experienced by the Doe Sisters. In light of these examples, a jury could conclude that, by (arguably) slow-walking its investigation(s) and giving Jane Roe only a private "slap on the wrist," SHS and the RCBE essentially attempted to sweep Jane Roe's conduct under the rug because of her and her father's connections within the school and the athletic department.[23]

[23] The plaintiffs have attempted to provide other examples of how the administration has responded to harassment allegations. The defendant generally contends that all of these examples are irrelevant and that some of them are not supported by admissible evidence. The court finds that it will be more appropriate to resolve the admissibility of these examples through

II. Retaliation

A. Legal Standard for Title IX Retaliation Claims

In a recent published case, the Sixth Circuit found that retaliation claims under Title IX are analyzed using the same standards as Title VII retaliation claims. *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 673 (6th Cir. 2013); *see also Nelson v. Christian Bros. Univ.*, 226 F. App'x 448, 454 (6th Cir. 2008) ("Generally, the courts have looked to Title VII, 42 U.S.C. §§ 2000e, as an analog for the legal standards in both Title IX discrimination and retaliation claims.") Prior to the Supreme Court's decision in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), the Sixth Circuit had construed Title VII's anti-retaliation provision, § 2000e-3(a), as establishing a "motivating factor" standard of causation for Title VII retaliation claims. *See, e.g.*, *Bobo v. United Parcel Serv.*, 665 F.3d 741, 756-57 (6th Cir. 2012) (analyzing Title VII retaliation claims under motivating factor causation standard); *Fuhr*, 710 F.3d at 673 (applying "motivating factor" standard to Title VII and Title IX retaliation claims). However, in *Nassar*, the Supreme Court held that, based on the specific language of § 2000e-3(a), Title VII retaliation claims are governed by a "but for" causation standard. The Court found that the language utilized in each statute matters and held, in essence, that it was error to paint them all with the same brush without conducting statute-specific analyses. The decision effectively abrogated the application of the motivating factor test to Title VII claims in cases such as *Fuhr*.

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full briefing in the context of motions *in limine*. With respect to the three examples referenced in the text of this section, the defendant challenges them only on the basis of relevance. Without making any definitive ruling on their admissibility, these particular examples strike the court as relevant to the issue of deliberate indifference, although the court will of course consider the defendant's arguments to the contrary in advance of trial.

In the wake of *Nassar*, what are the implications for the causation standard applicable to Title IX claims? The answer is not self-evident. On the one hand, if this court is obligated to "look" to current Title VII jurisprudence when determining the causation standard for a Title IX retaliation claim, then but for causation would now apply, notwithstanding *Fuhr* and previous Sixth Circuit cases finding otherwise. On the other hand, the lesson in *Nassar* was that the causation standard for claims under particular federal anti-discrimination and anti-retaliation statutes must be statute-specific. Further complicating the issue is the fact that Title IX does not include an express anti-retaliation provision – thus, there is not a specific Title IX anti-retaliation provision for the court to interpret. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title IX's cause of action is implied, while Title VII's is express.") It appears that at least two district courts have acknowledged the issue without expressly resolving it. *Meyers v. Cal. Univ. of Penn.*, 2014 WL 3890357, at *12-*13 (W.D. Pa. July 31, 2014); *Miller v. Kutztown Univ.*, 2013 WL 6506321, at *3 (E.D. Pa. Dec. 11, 2013).

This court also recognizes another potential complicating factor. Title VII originally did not include a section delineating the causation standard for discrimination claims, simply stating that it was unlawful to discriminate against an employee "because of" that employee's race, color, religion, national origin, sex, or national origin – five "status"-based categories. *See Nassar*, 133 S. Ct. at 2526. After the Supreme Court construed Title VII as establishing a "but for" causation standard for discrimination claims in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Congress amended Title VII to add a separate provision, § 2000e-2(m), which specifically states that status-based discrimination claims are subject to a "motivating factor" standard of causation – effectively abrogating *Price Waterhouse* as it related to that particular issue. *Nassar*, 133 S. Ct. at 2525. Thereafter, in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167

(2009), the Court considered the causation standard for discrimination claims under the ADEA, which prohibits discrimination "because of" an individual's age. In part because Congress had amended other parts of the ADEA without adding a provision equivalent to Title VII's § 2000e-2(m), a majority of the Court agreed that "because of" established a "but for" causation standard for ADEA discrimination claims. *Nassar*, 133 S. Ct. at 2528 (discussing *Gross*). In *Nassar*, the Supreme Court considered the meaning of "because of" within Title VII's retaliation provision, which states that it is unlawful for an employer to discriminate against an employee "because" that employee engaged in protected activity. *Id.* (citing § 2000e-2(m)). Unlike Title VII's status-based anti-discrimination provision, there is not a separate section articulating a causation standard for Title VII retaliation claims. The Court construed this difference as significant and held that, like the meaning of "because" within the ADEA's anti-discrimination provision, the word "because" within Title VII's anti-retaliation provision similarly establishes a "but for" standard of causation.

Here, it is unclear what it means to "look" to Title VII with respect to retaliation claims after *Nassar*. Congress specifically amended Title VII in 1991, which the Supreme Court (in 2013) believed created a divergence between the causation standards for discrimination claims (subject to a "motivating factor" standard) and retaliation claims (subject to a "but for" causation standard). Should the federal courts' construction of Title IX, which contains no express retaliation provision, simply track the Court's interpretation of Title VII as informed by intervening *statutory amendments* to Title VII?

The parties have not addressed these potential complexities in their briefing, although the plaintiffs appear to assume that, based on pre-*Nassar* Sixth Circuit precedent, the pre-*Nassar* "motivating factor" standard applies. Because the claims would proceed even under the more

stringent "but for" causation standard, the court need not resolve the issue at this stage. The court expects that parties will either reach agreement on the appropriate causation standard or, if the issue is disputed, to brief the issue in advance of trial.

At any rate, regardless of the appropriate causation standard, *Nassar* did not disturb Sixth Circuit precedent that the *McDonnell Douglas* burden-shifting framework governs the sufficiency of the evidence at the Rule 56 stage as to Title IX claims premised on circumstantial evidence.[24]

B. Direct Evidence

Direct evidence is evidence that, if believed, requires the conclusion that retaliatory animus played a part in the challenged decision. *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 383 (6th Cir. 2002).[25] The plaintiffs argue that the RCBE has admitted that it removed the Doe Sisters at least in part because they had filed criminal charges of sexual assault against Jane Roe. This position draws support from AP Martin's testimony, in which she conceded that the "pending threat that there would be criminal charges filed against [Jane Roe]" was one of the factors that the school relied upon in making the decision to remove the Doe Sisters from the team. AP Martin also recalled that Coach Bush had told her that he felt that this decision "was best for the remainder of the girls on the team" with a "tournament game coming up." In light of

[24] Recently, in *Hollis v. Chestnut Bend Homeowners' Ass'n*, -- F.3d--, 2014 WL 3715088, at *7-*8 (6th Cir. July 29, 2014) (submitted for publication), the Sixth Circuit found that the *McDonnell Douglas* burden-shifting framework should only be utilized to analyze the evidentiary sufficiency of federal statutory claims that require a finding of intent. Although this may throw into doubt the evidentiary framework applicable to certain types of federal statutory claims, a retaliation claim under Title IX is not one of them, because it is premised on the federal funding recipient's retaliatory intent.

[25] Again, the court makes no express finding as to whether the "motivating factor" or "but for" causation standard applies here.

this testimony, there is a genuine dispute of material fact as to whether Coach Bush and the administration retaliated against the Doe Sisters for pursuing criminal charges by kicking them off the team.

If the jury credits the plaintiffs' characterization of the evidence, the causation standard will be crucial here: if the pending threat of criminal charges was just a motivating factor but not a "but for" factor, the applicable causation standard may be determinative of the claim. Because the court finds, as explained in the next section, that the plaintiffs can make out claims based on circumstantial evidence of discrimination in any case, the court need not determine whether the direct evidence supports a "but for" theory of causation at this stage.

C. <u>Circumstantial Evidence</u>

To make out a *prima facie* case, a plaintiff must show: (1) that she engaged in protected activity; (2) that this exercise of her civil rights was known to the defendant; (3) that the defendant thereafter took an action adverse to the plaintiff subsequent to or contemporaneous with the protected activity; and (4) that there was a causal connection between the protected activity and the adverse action. *See Marcum ex rel. C.V. v. Bd. of Educ. of Bloom-Carroll Local Sch. Dist.*, 727 F. Supp.2 2d 657 (S.D Ohio 2010). Once a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Id.* If the defendant meets its burden of production, the burden shifts back to the plaintiff to show that the reason given by the defendant was pretextual. *Id.*

Here, with respect to the plaintiff's *prima facie* case, the RCBE argues that the plaintiffs cannot show an "adverse action" by Coach Bush, SHS, or the RCBE. The plaintiffs' briefing concerning their retaliation claims is not a model of clarity. As best the court can discern, the plaintiffs appear to argue that the following acts or omissions were "retaliatory": (1) the RCBE's

"lack of response" or "wholly indifferent response" to their complaints; (2) Coach Bush's failure to report the sexual harassment immediately after speaking with Mr. Doe; (3) Coach Bush's or SHS's decision to kick the Doe Sisters off the team after they filed a police report; (4) Coach Bush's decision not to play Jane Doe on Senior Night; (5) June Doe's "reluctance" to seek SHS's help in dealing with the "slicing" incidents in the hallways; and (6) the defendant's decision to ban Mr. and Mrs. Doe from school property, which "reinforced [the RCBE's] indifference toward" the Doe Sisters.[26] The plaintiffs' "pea soup" approach to their retaliation claims is inappropriate, as some of these actions are not even arguably forms of "retaliation" by SHS or its teachers. As the court construes the record, the only asserted acts supporting a *retaliation* theory of liability (as opposed to acts manifesting deliberate indifference to the underlying sexual harassment claims) are Coach Bush's alleged reduction of Jane and June Doe's playing time, Coach Bush's decision not to play Jane Doe on Senior Night, the decision (by Coach Bush and as ratified by others) to remove Jane and Sally Doe from the basketball team, and the school's decision to ban Mr. and Mrs. Doe from school property.

With respect to those four grounds for retaliation, the record is muddled with respect to the "adverse action" element. It is undisputed that Coach Bush reduced Jane and June Doe's playing time, although the significance of the reduction is debatable. There is also conflicting testimony about whether Jane Doe was available to play on Senior Night and her coaches' awareness of that ability. There is conflicting testimony about whether Jane Doe and Sally Doe

[26] The plaintiffs' statement of facts also references the school's refusal to support Sally Doe's request for a waiver to participate in high school sports the next year. The court previously denied the plaintiffs' request for leave to amend their Second Amended Complaint to include a retaliation allegation premised on that asserted fact. Given the court's previous denial of the request for leave, the court will not permit the plaintiffs to introduce those facts through the "back door."

"quit" the team or whether Coach Bush suspended them. Finally, the RCBE has not provided a coherent explanation for why the school banned Mr. Doe from school property. Viewing the facts in the light most favorable to the plaintiffs, the plaintiffs have established that these incidents involved "adverse actions" by the RCBE or school employees.

As to the causation element, the plaintiffs' *prima facie* burden to show a "causal connection" (among other elements) is a burden "easily met." *See McClain v. Nw. Cmty. Corrs. Ctr. Judicial Corrs. Bd.*, 440 F.3d 320, 335 (6th Cir. 2006). Given the timing of the alleged adverse actions, which came on the heels of the Doe family's repeated complaints about Coach Bush's handling of the incidents and his daughter's role in them, the plaintiffs have established a sufficient causal connection between their protected activity and (1) the reduction in playing time, (2) the refusal to play Jane Doe on Senior Night, and (3) the decision to remove June Doe and Sally Doe from the basketball team. *See Montell v. Diversified Clinical Servs., Inc.*, -- F. 3d --, 2014 WL 2898525, at *6 (6th Cir. June 27, 2014) (submitted for publication) ("Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation.") As to banning Mr. and Mrs. Doe from school property, the event certainly seems to have been a direct response to Mrs. Doe's conduct at the February 8, 2013 game, rather than an attempt to punish her for complaining to the administration. Be that as it may, the close temporal proximity between her last complaints to the administration in late January 2013 and early February 2013 is sufficient to satisfy the low causal connection burden.

The defendant has certainly offered plausible legitimate, non-discriminatory reasons for each of these actions. They argue that Coach Bush played Jane Doe and June Doe fewer minutes

towards the end of the season because they were suffering from lingering medical issues. Jane Doe did not practice or play in games the week of February 4, 2013, and did not formally represent to Coach Bush that her symptoms had subsided. The school removed June Doe and Sally Doe from the team after they missed a week of practice without explanation. And the school banned the parents from school property after receiving reports that Mrs. Doe had engaged in verbally assaultive conduct both inside and outside of the school premises on February 8, 2013. These assertions find support in the record and are sufficient to satisfy the RCBE's burden of production.

To show pretext, a plaintiff can show (1) that the proffered reason had no basis in fact, (2) the proffered reason did not actually motivate the defendant's actions, or (3) the proffered reason was insufficient to motivate the defendant's adverse action. As is often the case, the plaintiffs reference these means of showing pretext but decline to specify which theory or theories of pretext they are pursuing.[27] As best the court can discern, the plaintiffs appear to pursue a combination of all three. Although it is a very close call, the court finds that that there are genuine disputes of fact as to whether the defendant's asserted legitimate, non-discriminatory reason for each alleged adverse action is in fact a pretext for retaliation. Jane Doe prepared to play on Senior Night and there is no indication that Coach Bush specifically asked her whether her medical condition prevented her from playing. Coach Bush may have reduced the Doe Sisters' playing time as a result of their repeated complaints about his conduct and that of his daughter. Although there is contrary evidence in the record, June Doe and Sally Doe may have intended to return to the team on February 15, 2013, and the administration arguably removed

[27] The RCBE's opening brief addresses the retaliation claim in detail. However, its Reply does not squarely address the retaliation claims.

them from the team (1) precisely because they were asserting criminal charges against Jane Roe, and (2) on grounds (missing practice) that did not justify an indefinite suspension. Finally, given that Director Odom could not offer a cogent explanation as to why Mr. Doe was banned from school property, the grounds for banning Mr. Doe (if not Mrs. Doe) are of debatable veracity.

For these reasons, the court finds that the retaliation claims will proceed to trial.

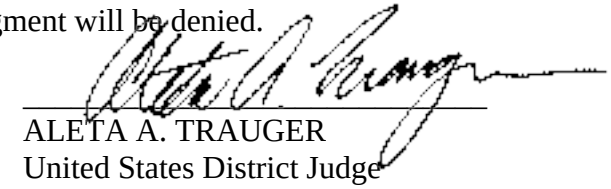
III. Summary

The court will permit the plaintiffs' discrimination and retaliation claims to proceed to trial. The court is aware that the defendant has legitimate grounds to contest the substantiality of the claims by some or of all the Doe Sisters. The court is conscious of the Supreme Court's admonition in *Jackson* that federal courts not become arbiters of all disciplinary decisions rendered by a school system. And the court is also wary that permitting Title IX "peer-to-peer" harassment claims to proceed against a school system in the absence of subsequent acts of similar harassment (at least as to some of the Doe Sisters here) could, if not appropriately cabined, unnecessarily subject schools to Title XI lawsuits.

Notwithstanding these concerns, the facts of this case, when viewed in the light most favorable to the plaintiffs, reflect a remarkably slow and ineffectual response by SHS and the RCBE to allegations of sexual harassment. The lack of response and attempt to deter future incidents understandably could have shaken the Doe family's faith in the RCBE to ensure the Doe Sisters' freedom from continuing harassment at SHS. At the same time, depending on the evidence presented at trial, there is a legitimate prospect that the court might, upon motion, direct a verdict for the RCBE on certain claims as to one or more plaintiffs. The court also expects that, through motions *in limine*, some of the evidence that the plaintiffs seek to present at trial will be limited. Subject to these caveats, the court will permit the claims to proceed to trial.

CONCLUSION

The defendant's Motion for Summary Judgment will be denied.



ALETA A. TRAUGER
United States District Judge