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

Nancy Marcum, et al.,	:	Case No.: C2-08-CV-909
Plaintiffs,	:	Judge Holschuh
vs.	:	Magistrate Judge Abel
Board of Education of Bloom-Carroll Local School District, et al.	:	
Defendants.	:	

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT BLOOM-CARROLL LOCAL SCHOOL DISTRICT BOARD OF EDUCATION

Pursuant to FRCP 56(b), Defendants Board of Education of Bloom-Carroll Local School District (hereinafter "BCSD") respectfully moves the Court for an Order granting summary judgment in its favor. There are no genuine disputes of material fact and this Defendant is entitled to judgment as a matter of law. This motion is supported by the allegations of Plaintiffs' First Amended Complaint [Document #15], the Affidavits of Mark Fenik and Lynn Dildine (attached hereto), the depositions of Plaintiff C.V., Plaintiff Nancy Marcum and Mark Fenik (all previously filed), and the following memorandum of law.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. ALLEGATIONS MADE BY PLAINTIFFS

This action arises out of an incident that occurred on September 27, 2006 and related events that occurred over the 30 period following that incident. Plaintiffs are "C.V"[1] and her mother, Nancy Marcum. Defendant Mark Fenik (whose name is misspelled in the pleadings filed by Plaintiffs) was the Principal of Bloom-Carroll Middle School on the above date.

Plaintiffs allege that, while riding a BCSD school bus on the above date, a 17 year old student (Ryan Gueli) forced C.V. to perform oral sex on him First Amended Complaint ¶11. C.V. was 12 years of age at the time. The incident was reported to Fenik, who interviewed C.V. and others the following day. First Amended Complaint ¶¶12-13. According to Plaintiffs, Fenik "took no corrective action." First Amended Complaint ¶14. Instead, Plaintiffs allege that Fenik: (1) forced C.V. to sign a confession admitting that she had performed oral sex on the boy; and (2) retaliated against C.V. by suspending her from school for ten days. First Amended Complaint ¶¶15-16.

Thereafter, Plaintiffs alleged that they complained to Defendants that Gueli continued to ride the bus to which C.V. was assigned and that Defendants took no steps to separate them from each other. First Amended Complaint ¶17. When C.V. returned to school after her suspension, Plaintiffs allege that she was "the victim of a relentless and vicious pattern of sexually charges [sic] verbal insults, taunts and humiliating epithets" by

1 "C.V. is a minor female. The parties have agreed to protect her privacy by indentifying her by those initials.

fellow students. That behavior was reported to Principal Fenik, who "took no meaningful steps" to stop it. First Amended Complaint ¶¶18-21.

Subsequently, Plaintiffs allege that Fenik and the school district retaliated against Plaintiffs by initiating expulsion proceedings against C.V. First Amended Complaint ¶¶22-26. Plaintiffs allege that Defendants "provided no meaningful educational alternatives but instead relegated to [an alternative school that] amounted to a holding tank for juvenile offenders and misfits." First Amended Complaint ¶27. Finally, Plaintiffs allege that they "desperately attempted to secure Plaintiff's enrollment in adjacent school districts but were rebuffed in each and every turn," supposedly because Defendants "furnished negative information about Plaintiff in response to inquiries" from other school districts. First Amended Complaint ¶28.

As a result of all of the above, C.V. alleges that she suffered extreme emotional distress, mental anguish, fear, and other problems. First Amended Complaint ¶30.

In terms of legal theories, Plaintiffs assert the following claims: (1) denial of benefits in violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681 [First Claim]; (2) retaliation in violation of Title IX [Second Claim]; (3) violation of Plaintiff's right to Due Process and resulting liability under 42 U.S.C. §1983 [Third Claim]; and (4) violation of Plaintiff's First Amendment rights (presumably under 42 U.S.C. §1983, although that statute is not specifically mentioned) [Fourth Claim].

II. STANDARDS FOR GRANTING SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment is proper "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 that the moving party

is entitled to a judgment as a matter of law." *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The party moving for summary judgment has the burden of showing that there are no genuine issues of material fact in the case at issue, *LaPointe*, 8 F.3d at 378, which may be accomplished by pointing out to the court that the non-moving party lacks evidence to support an essential element of its case. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.,* L.P.A., 12 F.3d 1382, 1389 (6th Cir. 1993). In response, the nonmoving party must present "significant probative evidence" to demonstrate 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 mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). See generally *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989).

In reviewing a motion for summary judgment, this Court must determine 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 251-53). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). However, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at

252.

Under those standards, Defendant BCSD now moves for summary judgment on all of Plaintiffs' claims, each of which will be addressed individually in this memorandum.

III. STATEMENT OF UNDISPUTED FACTS

While there are many disputes in this case, Rule 56 requires that the facts be construed in a light most favorable to the non-moving party. Accordingly, the following discussion of the facts is taken in significant part from the testimony of the two Plaintiffs and supplemented by testimony from the school district's representatives only when that testimony is unrefuted.

Nancy Marcum in the mother of C.V. who was born on October 25, 1993. Deposition of Nancy Marcum, Vol. 1, pgs. 9-10. As a young child, C.V. was sexually abused by her grandmother's live-in boyfriend, Chuck Huntley, and by an older male cousin. Deposition of Nancy Marcum, Vol. 1, pgs. 68-69, 72-75; Deposition of C.V., pgs. 60-69.

After attending elementary schools in other districts, C.V. transferred to Bloom-Carroll as a sixth grader. Deposition of Nancy Marcum, Vol. 1, pgs. 40, 51. At some point after that, C.V. befriended an older boy, Ryan Gueli. Deposition of Nancy Marcum, Vol. 1, pgs. 76-84; Deposition of C.V., pgs. 73-84. During the summer between 6th and 7th grade, C.V. had sexual intercourse with Gueli. C.V. now claims that Gueli forced himself on her when that happened, although she never reported the incident to anyone. Deposition of C.V., pgs. 83-92.

At the beginning of C.V.'s 7th grade school year, she and Gueli rode the same school bus. They were friendly and occasionally sat together. Deposition of C.V., pgs. 95-101. On the afternoon of September 27, 2006, however, things changed dramatically. According to

C.V., Gueli forced her to perform oral sex on him in the back row of seats on the bus. Deposition of C.V., pgs. 103-115. Although she claims that she reported the incident to the bus driver, C.V. did not report the incident to her mother, step-father or the police. Deposition of C.V., pgs. 116-123.

At school the following morning, middle school principal Mark Fenik called C.V. to his office to question her about what happened. After initially lying about what had occurred the previous day, C.V. eventually told the truth to Mr. Fenik. Deposition of C.V., pgs. 125-130; Deposition of Mark Fenik, pgs. 83-95. C.V.'s mother was called to school for a conference and was told about the incident. Affidavit of Mark Fenik ¶8; Deposition of Mark Fenik, pgs. 105-110; 120-122. After completing his investigation, Fenik decided to suspend C.V. from school for ten days, which was the same punishment given to Gueli. Affidavit of Mark Fenik ¶7; Deposition of C.V., pgs. 135-136. In addition, the school district reported the incident to Fairfield County Children's Services and to the Fairfield County Sheriff. Deposition of Mark Fenik, pgs. 101-103.

During the ten days that she was suspended from school, C.V. had direct contact with only two of her fellow students. Deposition of C.V., pgs. 136-140. Nevertheless, C.V. and her mother claim that students who rode the bus called her names like "whore" and "slut" as the bus traveled past their home on its regular afternoon route.[2] After that happened on two consecutive afternoons, C.V. reported what was happening to her step-father, who contacted someone at the school to complain, at which point the name-calling stopped.

2 As the school bus traveled past Plaintiff's home, the bus driver drove at a speed of 35 to 40 m.p.h. At that speed, it took only " a second or two" for the bus to pass the house. Deposition of Pamela Seymour, pg. 43.

Deposition of C.V., pgs. 206-210.

C.V. returned to school on October 17, 2006. After attending school for four days, C.V. was suspended again and subsequently expelled. See Affidavits of Mark Fenik and Lynn Dildine. She never attended classes at BCSD after October 20, 2006. Deposition of C.V., pg. 143, 153-154.

During the short time that she was back at Bloom-Carroll Middle School in October of 2006, C.V. says that she was "repeatedly called names" by other students. Describing what happened in more detail, she claims that she was called a "whore" and a "cum-guzzling slut." That happened in the hallways between classes, at lunchtime and in "a couple of classes."[3] On her first day back in school, C.V. reported the name-calling to Mr. Fenik, who told her that he "would take care of it." C.V. also called her mother to report what was happening. Mrs. Marcum told C.V. to "give it a couple of days and see what happens." The name-calling continued on C.V.'s second day back at school, so she talked again to Mr. Fenik, who again told her that he would take care of it. On the afternoon of her second day back at school, kids on the school bus called C.V. names. She reported that to the bus driver, and the kids who had been calling her names stopped doing that. On her third day back at school, the name-calling continued and C.V. spoke to Mr. Fenik again. Fenik told C.V. that he had talked to some of the students to stop the name-calling. C.V. agrees that Fenik did what he could, specifically admitting that "I don't know what else he could have done." C.V. and Gueli did not attend the same school, either before or after the incident on the school

3 The name-calling in class was not loud enough for the teacher to hear what was said. C.V. simply asked the teacher if she could move away from the boys who were harassing her, and the teacher allowed her to do that without knowing the real reason for the request. Deposition of C.V., pg. 204.

bus. Affidavit of Mark Fenik ¶8.

IV. BCSD IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR DENIAL OF BENEFITS UNDER 20 U.S.C. §1681

Title IX of the Education Amendments of 1972 (20 U.S.C. §1681) provides, in relevant part, that: "No person *** shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." [4]

While Title IX expressly provides only administrative enforcement mechanisms, the Supreme Court has recognized an implied private right of action under Title IX. See *Cannon v. University of Chicago*, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979)(holding that Title IX is enforceable through an implied private cause of action), and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992)(holding that monetary damages are available for a violation of Title IX).

To prevail in a Title IX action based upon student-on-student sexual harassment, the plaintiff must prove the following: (1) student conduct that is so severe, pervasive and objectively offensive, and so undermining and detracting from the plaintiff's educational experience, that the plaintiff has been effectively denied equal access to an institution's resources and opportunities; (2) actual knowledge of the discrimination by a school official who has authority to address the improper conduct and institute corrective measures; (3) the school district's failure to respond adequately in such a way that the response amounted to deliberate indifference, which causes the student to undergo harassment or makes her

4 For the purposes of this motion, BCSD concedes that it received at least some federal funds at times pertinent to this lawsuit.

vulnerable to it. See *Davis v. Monroe County Board of Education*, 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999); *Vance v. Spenser County Pub. Sch. Dist.*, 231 F.3d 253, 257 (6th Cir. 2000). In addition, the offensive behavior must be based on sex, rather than on personal animus or other reasons. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

A. As a matter of law, the student-on-student harassment described by Plaintiffs was not severe and pervasive and did not undermine or detract from C.V.'s educational experience to the point where she was effectively denied equal access to the school district's institution's resources and opportunities.

The first element that Plaintiff must establish in a student-on-student harassment case brought under 20 U.S.C. §1681 is that the harassment was severe, pervasive and objectively offensive to the point where it undermined the student's educational experience and that the student was effectively denied equal access to the school's resources and opportunities. The *Davis* majority's discussion of what constitutes actionable harassment is significant:

> Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships" (cite omitted), including but not limited to, the ages of the harasser and the victim and the number of individuals involved ***. Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. *** Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the

> behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

Davis v. Monroe County Bd. of Educ. (1999), 526 U.S. 629, 652.

In the present case, the only harassment of C.V. alleged by Plaintiffs is name-calling. Moreover, the testimony of C.V. herself confirms that most of the name-calling occurred in the hallways between classes, at lunch and on the school bus. Most importantly, the undisputed evidence is that the harassment of C.V. by other students lasted no more than four days, from October 17 through October 20, 2006. Finally, there is no evidence suggesting that the harassment of C.V. or the school district's response to it undermined her educational experience or that C.V. was effectively denied access to the school district's resources and opportunities. C.V. did not testify that the harassment that she experienced caused: (1) her to not attend school; (2) her to not attend certain classes; (3) her to withdraw from extra-curricular activities; or (4) her grades to suffer. Thus, as a matter of law, Plaintiffs cannot meet the first element of their Title IX claim.

Compare the facts in this case with those in cases finding that the evidence produced by the student was sufficient to establish the "severe and pervasive" requirement of this type of claim. In *Davis*, *supra*, a male student fondled a female student's breasts, spoke in vulgar language to her, acted in a sexually suggestive manner toward her, and told her that "I want to get into bed with you" and "I want to feel your boobs." 526 U.S. at 633-636.

In *Doe ex rel Doe v. Coventry Bd. of Educ.*, 630 F. Supp. 2d 226 (D. Conn. 2009), a female student was sexually assaulted by a male student. They continued to attend the same school together. After the male student was arrested, the plaintiff was taunted and called names by the male student's friends and received harassing phone calls and letters from his

friends for a period of at least a year. The court observed that:

> *** the mere fact that Mary Doe and Jesse attended school together could be found to constitute pervasive, severe, and objectively offensive harassment so as to deny Mary Doe equal access to school resources and opportunities. The evidence shows that Jesse was permitted to continue attending school with Mary Doe for three years after the assault, leaving constant potential for interactions between the two. Although the Defendant argues otherwise, a reasonable jury could conclude that Jesse's mere presence at the high school was harassing because it exposed [Mary Doe] to the possibility of an encounter with him.

630 F. Supp. 2d at 233.

In contrast, the facts in the case at bar are similar to those (or even less egregious) than those in the following cases, all of which resulted in the court granting summary judgment in favor of the Defendants because the alleged misconduct was not deemed severe, pervasive and disruptive to the plaintiff's education: *Brodsky v. Trumbull Bd. of Educ.,* 2009 U.S. Dist. LEXIS 8799, 2009 WL 230708 (D. Conn. 2009)(plaintiff's breasts and buttocks were touched in a school hallway and other students called plaintiff was called a "whore," a "prude" and a "bitch" on various occasions over several months); *Soriano v. Bd. of Educ. of City of New York*, 2004 U.S. Dist. LEXIS 21529, 2004 WL 2397610 (E.D.N.Y. 2004)(two incidents of offensive touching); and *Sauerhaft v. Bd. of Educ.,* 2009 U.S. Dist. LEXIS 46196, (S.D.N.Y. 2009)(a series of sexually-oriented and highly offensive e-mails sent to the plaintiff over the course of a week).

Viewed in a light most favorable to Plaintiffs, the evidence in this case establishes the following:

1) Following her suspension from school as a result of the incident that occurred on the school bus on September 27, 2006, students on a school bus traveling past C.V.'s house yelled out the window of the bus and called her offensive names. That happened twice and could not have lasted for more than two seconds on each occasion.

2) After C.V. retuned to school on October 17, 2006, students frequently called her offensive names in the hallways and at lunch on October 17, 18 and 19.

3) On one occasion, two boys called C.V. an offensive name in a classroom.

4) On the afternoon of October 18, kids on the school bus called C.V. offensive names.

5) After attending school for three days, C.V. was suspended again and subsequently expelled. She never attended classes at BCSD after October 20, 2006.

6) C.V. did not miss any school days, classes or extra-curricular activities and her grades did not suffer because of the harassment she experienced.

7) Gueli did not attend C.V.'s school after the incident of September 27, 2006.

As a matter of law, Plaintiffs cannot establish that the harassment of C.V., which by her own testimony consisted on name-calling only, was severe, pervasive or that it undermined or detracted from her educational experience.

B. The requirement that that harassment must have been actually known by a school district official who had authority to address the improper conduct and institute corrective measures.

For purposes of summary judgment, BCSD concedes that Plaintiffs' testimony that principal Mark Fenik and C.V.'s bus driver were notified of student harassment of C.V. creates a factual dispute on this element of the claim. Defendant does not concede, however, that anyone in a position of authority had knowledge of the harassment of C.V. that she claims occurred in a classroom setting. See footnote 4 *supra*.

C. The school district was not deliberately indifferent to Plaintiffs' complaints of student-on-student harassment.

Liability may be imposed on a school district in a case of this nature only if the district fails to respond to complaints of student-on-student harassment in a way that can be categorized as "deliberate indifference." See *Davis, supra*. The deliberate indifference

"must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 645. Deliberate indifference is demonstrated "only where the [school district's] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id*. at 648. The school district is not required to eliminate the harassment or ensure that students conform their conduct to certain rules. Rather, "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Id*.. at 648-649. The school district need not expel every student accused of misconduct, as victims do not have a right to particular remedial demands. Finally, the courts should not second guess the disciplinary decisions that school administrators make. *Davis*, 526 U.S. at 649. The Sixth Circuit adopted those standards and followed *Davis* in *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000). In the words of the *Vance* court:

> [A] minimalist response is not within the contemplation of a reasonable response. Although no particular response is required, and although the school district is not required to eradicate all sexual harassment, the school district must respond and must do so reasonably in light of the known circumstances. Thus, where 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.

Vance, at 261.

Although the *Vance* court reversed summary judgment in favor of the school district on a Title IX student-on-student harassment claim, the factual differences between that case and this one are evident. Rather than recounting the lengthy recitation of facts in the *Vance* case, Defendant would simply refer this court to the *Vance* court's statement of facts

at 231 F.3d 256-257. On those egregious facts, the court had no difficulty concluding that reasonable minds could find "deliberate indifference" on the part of the school district under those facts, concluding that:

> where 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.

The most recent Sixth Circuit case to consider *Davis* is *Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6th Cir. 2009), where the court reversed summary judgment in favor of a school district. Evidence presented by the plaintiff in that case established that students made inappropriate sexual comments and initiated physical contact with the plaintiff over a period of years, that the school responded primarily by giving verbal reprimands to the perpetrators, which largely stopped the harassment by the reprimanded student but which did not stop harassment by others, and that the harassment eventually lead to a criminal sexual assault. On appeal, the Sixth Circuit found a genuine issue of material fact on the question of deliberate indifference, noting that, although the school had responded to the complaints of harassment, it was aware that the action that it had taken had not been effective.

In the present case, BCSD allegedly knew about two types of harassment of C.V. On two of the days C.V. was suspended from school, students on the bus that drove past her house called her offensive names. C.V.'s step-father reported what had happened to the school, at which point the name-calling stopped. Deposition of C.V., pgs. 206-210. After C.V. returned to school when her suspension ended, students called her offensive names

between classes and at lunchtime C.V. reported the name-calling to Mr. Fenik, who told her that he "would take care of it." The name-calling continued on C.V.'s second day back at school. C.V. talked to Fenik again, who again told her that he would take care of it. On the afternoon of her second day back at school, kids on the school bus called C.V. names. She reported that to the bus driver and the kids who had been calling her names immediately stopped doing that. On her third day back at school, the name-calling continued and C.V. spoke to Mr. Fenik again. Fenik told C.V. that he had talked to some of the students to stop the name-calling. Significantly, C.V. agrees that Fenik did what he could, specifically admitting that "I don't know what else he could have done." On her fourth day back at school, C.V. was suspended for the "i-Pod incident" and never attended Bloom-Carroll schools again. Deposition of C.V., pgs. 188-206.

Plaintiff's own testimony confirms that the harassment of C.V. from the school bus stopped very quickly after it was reported to school district officials. With respect to the in-school harassment of C.V., the evidence shows that principal Fenik talked to students shortly after it was reported to him. Although the in-school harassment continued for two additional days, its total duration was not more than four days. While Mr. Fenik's "talk to" with students did not stop the name-calling immediately, it was not unreasonable for him to start with that approach to see if it worked. Had C.V. remained a student at Bloom-Carroll and had the harassment continued, perhaps more aggressive methods would have appropriate. But for the four-day period of time that C.V. attended Bloom-Carroll Middle School after the harassment commenced, BCSD there was simply no opportunity for BCSD to know if its efforts would be effective. Mr. Fenik's initial response to the problem can in no way be characterized as inadequate. As C.V. herself stated, "I don't know what else

[Fenik] could have done." Deposition of C.V., pg. 205.

As a matter of law, BCSD's response to C.V.'s complaints of student-on-student harassment did not rise to the level of "deliberate indifference."

IV. BECAUSE THERE WAS NO IMPROPER RETALIATION BY SCHOOL DISTRICT OFFICIALS, BCSD IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR RETALIATION

Plaintiffs' Amended Complaint asserts several claims for impermissible retaliation. The Amended Complaint's "Second Claim" alleges retaliation in violation of Title IX,[5] the "Third Claim" alleges violations of Plaintiffs' Due Process rights because the school district failed to prevent its administrators from retaliating, and the "Fourth Claim" alleges that improper retaliation by school district administrators constituted a violation of Plaintiffs' First Amendment rights. Although the Third and Fourth claims do not specifically cite 42 U.S.C. §1983, that is the only statute that would afford Plaintiffs a right to recover damages for violation of their federal constituional rights and must therefore be the basis of Plaintiffs' claims based on an alleged violation of their First Amendment rights.

Generally, the Amended Complaint alleges two specific types of retaliation by school district administrators: (1) after Plaintiffs complained to Fenik and acting Superintendant Lynn Dildine about the failure of the middle school's administration and teachers to take action to protect C.V. from the perpetrator of the sexual assault on the school bus and from the taunting and bullying to which she C.V. was being subjected at school, Fenik and Dildine "retaliated against and demonized Plaintiff C.V. by suspending her for an

5 At least for the purposes of summary judgment, BCSD assumes that Plaintiff's Second Claim asserts a viable cause of action for retaliation under Title IX. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 184, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).

inappropriate display of affection *** notwithstanding their actual knowledge of the fact that the assault on the school bus was a forcible sexual attack upon her [Amended Complaint ¶39]; and (2) because C.V. and her mother complained of post-suspension harassment at school, Fenik and Dildine retaliated against C.V. by "prosecuting and then expelling Plaintiff C.V. "on the false charge of theft of in [sic] iPod" [Amended Complaint ¶ ¶41, 63]. For the reasons that follow, BCSD is entitled to summary judgment on these claims.

Rather than repeating a previous discussion of facts pertinent to Plaintiff's "retaliation" claims, BCSD simply incorporates by reference the argument appearing at pgs. 10-15 of the motion for summary judgment filed on behalf of Defendant Mark Fenik.

Obviously, a school district can be held liable for discrimination under Title IX only upon a finding that district employees improperly discriminated against the plaintiff. Likewise, a government entity cannot be held liable under §1983 absent an underlying constitutional violation by its agents or officers. *City of Los Angeles v. Heller,* 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *Smith v. Thornburg,* 136 F.3d 1070 (6th Cir. 1998). Because neither Mr. Fenik nor Mr. Dildine improperly retaliated against C.V., none of Plaintiffs' retaliation claims can withstand summary judgment.

Even if the school district's employees improperly retaliated against Plaintiff, however, BCSD cannot be held liable for damages under 42 U.S.C. §1983.

As a matter of law, a political subdivision of a state cannot be held liable under §1983 on a theory of *respondeat superior* for an injury inflicted by its employees. Only when the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by a city's officers

may liability be imposed under §1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). To attach such liability to a government entity such as a school district, a §1983 plaintiff must allege and prove a direct causal link between the municipal custom or practice and the constitutional deprivation. *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 508 (6th Cir. 1996).

While Plaintiffs appear to recognize the principles of *Monell* (see allegations made in ¶¶59-63 of the Amended Complaint), there is simply no evidence suggesting that BCSD had a policy of encouraging or tolerating retaliation against students by its administrators. BCSD is therefore entitled to summary judgment on Plaintiffs' constitutional claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed electronically this 18th day of February, 2010. Notice of this filing will be sent to all counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ W. Charles Curley
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