UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JANE DOE, Plaintiff, v. MICHIGAN STATE UNIVERSITY, Defendant.	No. 1:18-cv-390 HONORABLE PAUL L. MALONEY

OPINION

This matter is before the Court on Defendant Michigan State University's motion to dismiss. Defendant argues that Plaintiff Jane Doe has failed to state a claim under Title IX based on her theory that an official MSU policy caused her alleged sexual assault by three members of the MSU basketball team on April 11, 2015. However, the Court finds the allegations in Plaintiff's complaint to give rise to a plausible claim for relief, so the motion will be denied.

I. Factual Allegations

The following facts are alleged in Plaintiff's complaint and must be taken as true for purposes of Defendant's Rule 12 motion.

A. Alleged Assault of Plaintiff and Response by MSU

On April 11, 2015, Plaintiff, proceeding as Jane Doe—an 18-year-old freshman majoring in Sports Journalism—encountered three members of the Michigan State basketball team at Harper's Bar in East Lansing, Michigan. (ECF No. 23, ¶¶ 15–19.) Plaintiff was approached by John Doe 1. (*Id.*) He offered to buy her a drink and introduce her to the

other members of the team. (*Id.*) Plaintiff accepted. Eventually, one of the players asked Plaintiff to come to their apartment for a party and told Plaintiff that her roommate was already there. (*Id.*)

Plaintiff alleges that she did not have much to drink but was "having a hard time" holding on to her glass and began to feel progressively "discombobulated" after she arrived at the players' off-campus apartment. (¶ 20.) She felt extremely hungry and thirsty, and she lacked the motor-control to formulate a text. (¶¶ 20–24.) Because of her limited consumption of alcohol and disproportionate symptoms, Plaintiff suspects that she was drugged.

Plaintiff alleges that while she was at the apartment, three members of the basketball team— John Does 1, 2, and 3—raped her. (¶ 26–31.) After the alleged rapes, Plaintiff remembers nothing other than waking up on the couch in the apartment a few hours later. She called a taxi and returned to her dorm. (*Id.*)

At some point that day or shortly thereafter, Plaintiff told another dorm-mate what had happened. That friend took Plaintiff to the MSU Counseling Center on April 20, 2015. (¶ 33–34.) Plaintiff reported the rape to her counselor and completed initial intake paperwork. (*Id.*)

Plaintiff alleges that when it came out that her purported attackers were members of the MSU basketball team, "the counselor suddenly announced to [her] that [they] needed another person in the room with [them]." (¶ 34.) She says that the "counselor's demeanor completely changed." (*Id.*)

Another person was brought in, but Plaintiff did not know who they were or why they were needed. (¶ 36.) This person allegedly told Plaintiff either to file a police report "or deal with the aftermath of the rape(s) on her own." (¶ 37.) The staff also allegedly "made clear" that Plaintiff would be subject to media scrutiny and would "face an uphill battle" if she reported her rape to the police. (¶ 38.)

She says that the staff told her that they "had many other students in the same situation who had reported, and it has been very traumatic for them." (¶ 39.) The counselors further suggested that they had seen a lot of these cases with "guys with big names" and the best thing to do is to "just get yourself better . . . ." (¶ 40.) One staff member allegedly said, "if you pursue this, you are going to be swimming with some really big fish." (¶ 41.)

After meeting with the counselors, Plaintiff did not report the rapes to police; she asserts that she became too frightened. She also claims that the counselors did not advise her to seek STD or pregnancy testing, medical treatment, or a physical exam. (¶¶42–44.) Nor did the staff alert Plaintiff of her option to report the rape to the Office of Institutional Equity or notify her of her Title IX rights. (*Id.*) Plaintiff acknowledges that the counselors referred her to the Michigan State University Sexual Assault Program (SAP), but because of her prior experience at the counseling center, she delayed going to SAP for ten months. (¶¶ 45–46.) Plaintiff continued to see the attackers around campus, which caused her panic and flashbacks. (¶¶47–48.) She "lived in fear every day that she would see her attackers." (*Id.*)

Plaintiff struggled with mental health issues after the assault. (¶49–52.) Six months after the attack, Plaintiff was admitted to an outpatient psychiatric day program for intensive psychiatric treatment. (*Id.*) She also withdrew from the Fall 2015 semester. (*Id.*) Plaintiff

also asserts that MSU administrators forced her to explain that the assaults were the reason she was withdrawing so that MSU would refund her tuition. (*Id.*)

Plaintiff rejoined MSU in January of 2016. (¶ 53.) She began treatment sessions with SAP in February, but she shifted to treatment at a private psychiatric clinic because she did not feel comfortable with the program or therapist. (¶¶ 55–56.) She continues treatment and has been prescribed several medications to help address her depression, anxiety, panic attacks, and insomnia. (*Id.*)

B. Allegations of Other Incidents of Sexual Assault by Male Athletes

Plaintiff has amended her complaint to plead with specificity how MSU has demonstrated a pattern or policy of indifference to sexual assault of female MSU students committed by male athletes.

She alleges that MSU has "fostered a culture" in which female victims are discouraged from reporting sexual assaults by male athletes. She also alleges that MSU actively sought to conceal the names of MSU athletes when mentioned in police records, and that MSU allowed its Athletic Director and/or coaches investigate sexual assault complaints involving MSU athletes. "According to a former MSU sexual assault counselor, if an athlete was involved, normal protocol and policy were 'swept away' and the complaint was handled by the administration and athletic officials 'behind closed doors.'" (¶ 66.) She asserts that MSU's policy was designed to "suppress public knowledge" and "prevent prosecution" of MSU athletes, and that the policy "emboldened" male athletes and allowed them to commit acts of sexual assault without consequence.

Plaintiff supports the broad assertions made above with specific information pertaining to four other victims who were assaulted by MSU basketball or football players between 2009 and 2014:

Helen (¶¶ 75–85)

- "Helen" was allegedly assaulted by two athletes on November 20, 2009, but she did not report the assault until about two months later, when she was arrested as a Minor in Possession. She stated that she was suicidal, so she was transported to Sparrow Hospital.
- Sparrow workers called the MSU police, and Helen reported the rape. She gave a supplemental statement about a week later.
- Police also took statements from the alleged perpetrators, but they were not named in the report. One player stated, "[H]e did not see anything wrong with what happened because 'they were all drunk.'"
- Plaintiff alleges that the incident was never reported to the Title IX office, the assailants were never charged, and Helen was never advised of her right to a Title IX investigation despite an MSU Police protocol that the officer notify the victim that he will file a complaint with the student judicial system if the victim does not want to file on her own behalf.

Donna (¶¶ 86–99)

- "Donna" was allegedly sexually assaulted by three MSU basketball players in 2010.
- Donna did not report her assault until she overheard a student-coworker mention that she, too, had been sexually assaulted by MSU basketball players.
- Donna and her parents reported the assault to MSU Athletic Director Hollis
- Hollis said he would investigate, but Plaintiff alleges that he never reported the incident to police or the Title IX office—despite his being a mandated reporter under university protocol.
- Plaintiff says that Hollis instead talked to the athletes privately.

- Hollis had a second meeting with Donna and her parents. He told them there was nothing that could be done about the assault.
- The players were never disciplined, and no criminal charges brought.
- No Title IX investigation occurred.

Brenda (¶¶ 100–116)

- Plaintiff alleges that "Brenda" was sexually assaulted by two freshman MSU basketball players on August 28, 2010 in the players' dorm room.
- The players reportedly cornered Brenda in their dorm, removed her underwear, took her to the ground and penetrated her orally, vaginally, and anally. Brenda repeatedly told them to stop.
- One player allegedly later admitted that he could "understand how" Brenda would not "feel free to leave."
- Brenda reported the assault to MSU police and the players were moved from the dorm to different on-campus housing.
- MSU represented that the Dorm Director Paul Rinella handled moving the perpetrators, as normal under the Residence Life Process.
- Plaintiff asserts that it was actually the President's Office and General Counsel's office that intervened and handled the move.
- Plaintiff cites an employee-to-employee email, written five days after the incident, referencing a sexual assault by "high profile student athletes" which states that "the Office of the President is involved." (ECF No. 23-5.)
- A subsequent email two days later mentions that "the male residents along with the basketball office might be willing to make their 'temporary' housing assignment a permanent one."
- The Title IX office did not contact Brenda until the Education Department's Office of Civil Rights (OCR) instructed MSU to conduct a Title IX investigation into Brenda's case.

- In the meeting, Title IX Office Director Paulette Granberry-Russel asked Brenda, "Why didn't you run away?"
- Brenda never received a Title IX report, and she was never advised of any of her Title IX rights including academic accommodations or counseling.
- MSU General Counsel Kristine Zayko later represented to OCR that Rinella had removed the players from the dorm. Plaintiff claims that this statement was false, as Rinella was in the hospital at the time, had no knowledge of the incident until later, and emails document the involvement of President Simon's office.

Lily (¶¶ 117–120)

- Allegedly, in 2011, MSU's head football coach had a football player accused of sexual assault talk to his mother about what had happened instead of going through the normal protocol for handling incidents involving sexual assault.
- After the incident MSU Attorney Kristine Zayko asked the SAP Counselor Lauren Allswede "if it would matter" that the player was "in fact kicked off the team."
- Six years later, the football coach had a press conference to address the sexual assault of a female student by three MSU football players. At the conference, he stated "This is new ground for us, it's not happened previously."

C. Additional Factual Allegations

In addition to the specific facts pertaining to Plaintiff and the other alleged victims of sexual assault, Plaintiff includes other information relating to "trends" observed by MSU's sexual assault counselors, and other MSU policies. These allegations include:

- Kristine Zayko omitted other information from the OCR inquiry into Brenda, including that Allswede had expressed a concern in her report that there was a pattern sexual assault among the male basketball players. (¶¶ 133–134.)
- Allswede again voiced concerns of a pattern in response to the 2018 NCAA investigation.

- The Athletic Department did not participate in the university's committees enacted to prevent or respond to sexual assault.
- SAP Counselors were not allowed to attend a meeting where sexual assault cases were discussed with the OIE and police
- Plaintiff includes a significant discussion of Director of SAP, Shari Murgittroyd (¶¶141–154 and alleges that she observed a culture at MSU of minimizing or ignoring sexual misconduct including that:
  - Untrained professionals at MSU discouraged victims from reporting sexual assaults;
  - MSU administrators did not act on complaints of sexual harassment; and
  - When SAP employees disclosed reports of sexual assault by athletes, the employees were discouraged and there were questions as to whether the reports were "valid."

II. Legal Framework: Motion to Dismiss

A complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief above the speculative level, *Twombly,* 550 U.S. at 555, and the "claim to relief must be plausible on its face" *Id.* at 570. "A claim is plausible on its face if the 'plaintiff pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). If the plaintiff does not "nudge[] [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. for Bio-Ethical Reform,* 648 F.3d at 369. The Sixth Circuit has noted that courts "may no longer accept conclusory legal allegations that do not include specific facts necessary to establish the cause of action." *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050 (6th Cir. 2011). However, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need *detailed* factual allegations"; rather, "it must assert *sufficient* facts to provide the defendant with 'fair notice of what the . . . claim is and the grounds upon which it rests." *Rhodes v. R&L Carriers, Inc.*, 491 F. App'x 579, 582 (6th Cir. 2012) (citing *Twombly*, 550 U.S. at 555) (emphasis added).

III. Discussion

A. Title IX Generally

Title IX prohibits sex discrimination in education programs that receive federal funding. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). Title IX is enforceable through a private right of action. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)).

Generally, to plead a Title IX claim based on sexual harassment, a plaintiff must allege facts demonstrating deliberate indifference by the recipient of federal funding. *Id.* at 290. Deliberate indifference occurs when the recipient's response—or lack of response—to known acts of sexual harassment "is clearly unreasonable in light of the known circumstances." *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 648 (1999); *see Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367–68 (6th Cir. 2005).

In other words, deliberate indifference does not occur through a collection of sloppy, or even reckless oversights; it arises from obvious indifference to sexual harassment. *See Doe v. Claiborne Cty., Tennessee*, 103 F.3d 495, 508 (6th Cir. 1996). The standard for deliberate indifference is a "high bar," and is not a "mere reasonableness" standard. *Stiles ex rel. D.S. v. Grainger Cty., Tennessee*, 819 F.3d 834, 848 (6th Cir. 2016). Title IX does not require recipients of federal funding to purge their institutions of actionable sexual harassment and does not require the institutions to undertake any particular disciplinary sanctions. *Id.*

Sexual harassment can be actionable under Title IX whether it is perpetrated by a teacher, *Gebser*, 524 U.S. at 290, or if the harassment is at the hands of another student. *Davis*, 526 U.S. at 660. When the harassment is student-on-student, the recipient of federal funding may be held liable under Title IX when (1) they are deliberately indifferent to sexual harassment, (2) of which they have actual knowledge, (3) that is so severe, pervasive, and

objectively offensive that it deprives the victims of access to the educational opportunities or benefits provided by the school. *Id.*

Additionally, the funding recipient's deliberate indifference must *cause* the deprivation of educational opportunities and benefits. *Id.* Liability arises "where the funding recipient 'exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it under the recipient's programs." *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 298 F. Supp. 3d 1089, 1101 (W.D. Mich. 2017) (quoting *Davis*, 526 U.S. at 645).

B. Pre-Assault Liability Under Title IX

It is conceivable that Title IX liability may also attach "where a third party's actions are the direct result of an official policy." *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788 (M.D. Tenn. 2016); *see also Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170, 1178–79 (10th Cir. 2007) (involving a university policy for hosting potential student athletes that created circumstances where sexual assaults occurred, and the administration had been warned by the district attorney). In these "pre-assault" cases, universities may be held responsible where "they have actual knowledge of sexual assaults committed in a particular context or program or by a particular perpetrator or perpetrators." *Roskin-Frazee v. Columbia University*, 2018 U.S. Dist. Lexis 28937, at *14 (S.D.N.Y Feb. 21, 2018); *see also Univ. of Tennessee, supra.* In other words, "something more than general knowledge of assaults campus-wide (i.e. some greater specificity) is required to satisfy the actual knowledge requirement for [Title IX

liability]." *Tubbs v. Stony Brook Univ.*, 15-cv-0517, 2016 WL 8650463, at *9 (S.D.N.Y. Mar. 4, 2016) (collecting cases).

Here, Plaintiff pursues a pre-assault liability theory based on MSU's alleged policy of deliberate indifference to sexual assault perpetrated by male athletes. She asserts that MSU had actual knowledge of prior incidents of sexual assault by male athletes, but handled complaints made against them differently than other students, and that the different handling of those sexual assaults created a culture of permissible sexual assault which in turn caused her assault. To support the viability of her theory, Plaintiff relies primarily on *Simpson v. University of Colorado Boulder* and *Doe v. University of Tennessee*. Accordingly, those cases warrant more extensive discussion.

First, in *Simpson*, the Tenth Circuit explained that a university could be held liable for being deliberately indifferent to the risk of sexual assault where it had "sanctioned, supported, even funded, a program (showing recruits a 'good time') that, without proper control, would encourage young men to engage in opprobrious acts." *Simpson*, 500 F.3d at 1177. The court analogized to *Monell* liability, indicating that it read *Davis* and *Gebser* to allow for liability when a violation of Title IX was "caused by official policy" including "a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient." *Id.* at 1178. As the *Simpson* court explained, "Implementation of an official policy can certainly be a circumstance in which the recipient exercises significant 'control over the harasser and the environment in which the harassment occurs.'" *Id.* (quoting *Davis*, 526 U.S. at 644).

Accordingly, because the university's football coach: (1) knew of the serious risk of sexual harassment and assault during the university's football recruiting visits, (2) knew that sexual assault had indeed occurred during the recruiting visits, but (3) continued the unsupervised recruiting program "to show high school recruits 'a good time,'" the *Simpson* court concluded that a reasonable juror could find that the need for more or different training "was so obvious and the inadequacy so likely to result" in Title IX violations, that the coach was deliberately indifferent to the need. *Id.* at 1185 (citing *Canton v. Harris*, 489 U.S. 378, 390 (1989). The *Simpson* court thus reversed the district court's grant of summary judgment. *Id.*

In *Doe v. University of Tennessee*, the court considered and accepted the *Simpson* "deliberate indifference" theory of Title IX liability while ruling on the university's motion to dismiss. There, several women alleged that, while attending UT, they had been subjected to sexual assaults by members of the football and basketball teams. 186 F. Supp. 3d 788 (M.D. Tenn. 2016). The plaintiffs claimed that the university—and particularly the Athletic Department—had known about assaults dating back more than twenty years and had responded inadequately by attempting to cover the assaults up, failing to report the incidents, failing to implement appropriate discipline, and/or allowing the perpetrators to continue to play on their teams and remain on campus. *Id.* at 792. The plaintiffs also accused UT of instituting policies that fostered sexual assault:

> In particular, the FAC alleges that the UT Athletic Department has engaged in a pattern of "encouraging parties with underage drinking to benefit recruiting. As a further example of UT's fostering of a sexually hostile environment, the FAC points to the fact that UT has adopted as its football anthem the song "Turn Down for What" by rapper Lil' Jon, who—according

> to the FAC—has been long associated with "sexual violence and rape culture." Further, on November 19, 2014, UT's Athletic Department surprised the football team with a visit from Lil' Jon, following his recent release of the song and music video "Literally, I can't," which contains crass lyrics and images about pressuring women to engage in sexual activity.

Id. at 793 (citations to the record omitted).

The court then considered whether these allegations were sufficient to plead a plausible Title IX violation. It began by noting that the Sixth Circuit had not addressed whether Title IX liability could be "premised on an official policy of the funding recipient, rather than on actual knowledge and deliberate indifference to known acts of harassment," *Id.* at 805 (emphasis in original), but concluded that a careful reading of *Gebser and Davis* supported such a theory, as it had been explained in *Simpson*. Thus, it concluded that, if the question was presented, the Sixth Circuit would adopt this theory of liability by referencing its past Title IX decisions that had expanded liability to situations (1) where the funding recipient was deliberately indifferent to prior acts of harassment against the same plaintiff by different third-party perpetrators and (2) where the school had actual notice of prior harassment—by a single perpetrator—of victims other than the plaintiff. *Id.* Accordingly, the court found that the plaintiffs had raised two cognizable theories of pre-assault liability under Title XI.

First, in line with *Davis*, the plaintiffs could pursue their claim that "UT had actual knowledge of prior incidents of sexual assault by UT football and basketball players that were sufficient to put UT on notice of the risk to the plaintiffs, yet UT was deliberately indifferent in failing to adequately address this risk, including failing to change its remedial measures which were not effective." *Id.* at 806.

The court found support for this theory based on many allegations in the complaint: (1) allegations that the university had actual knowledge of an inordinate number of prior incidents of sexual assault by university football and basketball players; (2) UT's athletic department attempted to cover up the incidents and failed to work with police and other university administrators; that the university did not discipline the perpetrators; (3) UT misused the Tennessee Uniform Administrative Procedures Act, allowing perpetrators to delay discipline or avoid it altogether; and (4) UT used a method for selecting administrative judges to hear misconduct cases that did not comply with Title IX. *Id.* These alleged facts stated a "before" claim that UT had actual knowledge of a pattern of prior assaults by football and basketball players against female students and was deliberately indifferent to that behavior, which caused the plaintiffs' own assaults. *Id.* at 807.

Second, the court concluded that the plaintiffs had adequately pleaded the existence of several official policies "that rendered the plaintiffs vulnerable to assault." *Id.* at 809. The university had attempted to distinguish from *Simpson*, arguing that the plaintiffs had failed to allege an official policy, so that even if the *Simpson* theory of liability was accepted within the Circuit, it would not apply. The court disagreed, citing the plaintiffs' allegations relating to "UT's alleged policies of "encouraging and condoning similar types of events to entertain athletes and recruits, handling athlete discipline, housing students, and lack of sexual harassment training." While the court noted that the plaintiffs had not pleaded "a university policy of hosting a discrete event at which assaults took place," it concluded that the plaintiffs had still pleaded sufficient facts to rely on *Simpson*.

The factual allegations in *University of Tennessee* mirror the allegations made by Plaintiff in this matter. Plaintiff has alleged a pattern of sexual assault by members of the MSU basketball and football teams. She alleges that MSU handled those reports of sexual assault differently than reports made against other students, and that the Athletic Department handled such claims "behind closed doors."

When Plaintiff disclosed her own assault, the demeanor and response of MSU's counselors "changed drastically" when she mentioned that the perpetrators of her assault were on the basketball team. The counselor told her that someone else needed to be in the room—someone that has apparently never been identified, and Plaintiff alleges that she still is unaware of why this third party's presence was required. Statements by this unknown person like "you'd be swimming with some big fish" or "the best thing to do is get yourself better" were clearly intended to discourage Plaintiff from reporting the assaults. Perhaps if these allegations were all that had been pleaded, Plaintiff would fall short of alleging a plausible claim that MSU had an official policy of treating athletes accused of sexual assault differently. However, Plaintiff asserts that her own experiences can be corroborated in two different respects that lend additional credence to her claim.

First, she claims that a counselor within SAP named Lauren Allswede had voiced concerns to the administration about a pattern of sexual assault among male basketball players. That information was allegedly omitted from a Department of Education Office of Civil Rights inquiry by MSU attorney Kristine Zayko. Additionally, SAP Director Shari Murgittroyd allegedly observed that "untrained professionals . . . discouraged victims from reporting sexual assaults" and that when SAP employees disclosed to the administration that

there had been a report of a sexual assault by a male athlete, the employees were "discouraged" from following up or investigation and questioned as to whether the report was "valid." Allswede and Murgittroyd also observed that MSU's athletic department did not participate in university-wide committees enacted to prevent or respond to sexual assault.

Second, Plaintiff's allegations regarding the handling of other instances of sexual assault by male athletes—and particularly basketball players—provide additional support for her theory that MSU was aware of a pattern of sexual assault and responded deliberately indifferently. Plaintiff pleads several instances where officials within the Athletic Department handled sexual assault complaints against male athletes in a manner that did not comport with the ordinary procedures for such investigations.

On one occasion in 2010, a female student ("Donna") and her parents reported a assault by two members of the basketball team to MSU Athletic Director Hollis. Plaintiff alleges that Hollis handled the sexual assault report himself. Hollis allegedly told Donna and her parents that he would investigate, but he never reported the incident to police or the Title IX office—despite his being a mandated reporter under university protocol. Plaintiff says that Hollis instead talked to the athletes privately. Hollis then had a second meeting with Donna and her parents. He told them there was nothing that could be done about the assault. No Title IX investigation was ever initiated.

Additionally, the Office of the President was "involved" in handling a sexual assault complaint made against three members of the basketball team in August of 2010. Ultimately, it was the Office of the President, in tandem with the Athletic Department, that concluded that the players would be moved to different on-campus housing. However, Attorney Zayko

later represented to the Office of Civil Rights that the decision to move the athletes had been made by Dorm Director Paul Rinella, pursuant to the normal "Residence Life Process." Zayko's representation, at least based on the facts contained within the Amended Complaint, appears to be in serious jeopardy; Plaintiff claims that Rinella was in the hospital at the time, and did not learn about the incident until significantly later, so he could not have made the decision to move the athletes.[1]

Finally, in 2011, MSU's head football coach allegedly handled a report of sexual assault by one of his players by having the player discuss "what had happened" with the his mother. No formal investigation—inside or outside of the Athletic Department—occurred, although the player was reportedly later dismissed from the team presumably for the sexual assault.

The Court finds that the allegations in Plaintiff's complaint render plausible her claim that MSU maintained official policies that left her and other female students vulnerable to sexual assault by male athletes. Plaintiff has sufficiently pleaded that MSU allowed reports of sexual assault to be handled "off-line" by the Athletic Department and outside the normal channels of Title IX investigations. Similarly, the attempts to cover-up or otherwise obfuscate the University's handling of sexual assault reports made against male athletes, the attempts to conceal the names of prominent male athletes when mentioned in police reports, and the attempts to discourage female victims from reporting their own assaults all tend to show that

[1] The University holds up this example as evidence that they were not deliberately indifferent to sexual assault, as the victim's primary concern had been moving the offenders to other housing. However, an assault by basketball players was handled differently by high-ranking MSU officials, outside the bounds of a Title IX investigation. Further, the circumstances suggest that MSU knew it had handled the investigation improperly by allegedly misrepresenting the factual circumstances of the decision to the Office of Civil Rights. Such a misrepresentation would be powerful evidence of an illicit official policy since it goes directly to the Office of the President and the Athletic Department.

sexual assaults by male athletes were handled in ways that would minimize scrutiny and potential punishment for such acts. If such a policy or custom existed, it is plausible that the policy itself was a cause of Plaintiff's assault.

MSU's arguments to the contrary do not carry the day for disposition of the instant motion.

First, it argues that it cannot possibly be responsible for criminal acts of its students that occur on private property, under circumstances outside of its control. However, Plaintiff's claim is not a traditional *Davis* claim. She is arguing that MSU's official policy, regarding the treatment of male football and basketball players accused of sexual assault, caused her sexual assault. The courts that have considered the viability of "official policy" claims have generally concluded that assaults that occur outside of university locations are still actionable, so long as the Plaintiff can persuade a finder of fact that the school's policy *caused* the assault. *See Doe v. Baylor Univ.*, 336 F. Supp. 3d 763, 779–81 (W.D. Tex. 2018).

This differentiates Plaintiff's claim from either *Doe v. Ohio State Univ. Bd. of Regents*, 2006 U.S. Dist. LEXIS 70444 (S.D. Ohio Sept. 28, 2006) or *Samuelson v. Oregon State Univ.*, 725 F. App'x 598, 599 (9th Cir. 2018), where the courts found that the universities in question lacked control over the context of each plaintiff's assault. *See Samuelson*, 725 F. App'x at 599 ("Given the specific circumstances in this case, Samuelson has failed to allege that her sexual assault occurred 'under' an OSU 'program or activity,' or that OSU's deliberate indifference "subjected" her to the assault."); *See Doe* at *34 (concluding that OSU could not "possibly be expected to control the social activities of each of its more than 50,000 students."). Here, the Court finds it plausible that MSU's alleged

policy or custom of inadequately handling and discouraging reports of sexual assault by male athletes could plausibly have caused Plaintiff's injury.

MSU also asserts that Plaintiff has failed to state a claim by relying on allegations relating to other victims that pre-date her claims by up to five years. This is a challenge to causation; MSU essentially claims that Plaintiff has not established that John Does 1–3 were aware of the previous assaults, so they would not have known about the alleged official policy, and thus it could not have caused emboldened them to assault Plaintiff. However, this is an argument better suited to a motion for summary judgment. At this stage, Plaintiff need not prove certain her right to relief. While ultimately it will be Plaintiff's burden to convince the trier of fact to accept her theory of causation—an uphill climb—the Court cannot now say that her theory of causation is implausible.

Similarly, MSU relies on *Doe v. Claiborne County* to assert that Plaintiff's claim fails because she has not adequately pleaded an official policy or custom under Title IX. 103 F.3d 495 (6th Cir. 1996). However, in that case, the Sixth Circuit concluded that the district court correctly dismissed the plaintiff's § 1983 claim at the summary judgment phase because she had not proffered sufficient evidence to conclude that the School Board, as an official policy making body, had a custom of deliberate indifference to the sexual abuse of its students. *Id.* at 508. "Because the failure to present sufficient evidence to establish the existence of a policy of inaction ends the inquiry, we express no view on whether, if such custom had been established, the inaction of the School Board would have amounted to deliberate indifference." *Id.* The *Claiborne County* court also concluded that the plaintiff's § 1983 claims failed for lack of evidence of causation because even assuming a custom or policy

existed, Plaintiff had presented no evidence of a direct causal connection between the policy and the sexual abuse inflicted upon her. *Id.* at 509.

Based on the different postures of the respective cases, the Court does not find *Claiborne County* readily applicable. Here, based on the facts pleaded in the complaint, the Court can draw inferences which lead to the conclusion that Plaintiff may plausibly establish the existence of an official policy or custom, and that the custom bore a causal relationship to the assault she suffered, as has already been discussed. While MSU is free to revisit these arguments at summary judgment—once discovery has been taken and the Plaintiff has a chance to present evidence supporting her case—they do not warrant dismissal at this early juncture.

IV. Conclusion

For the reasons stated, the motion to dismiss will be **DENIED.**

ORDER

In accordance with the foregoing opinion, the Court **DENIES** the motion to dismiss (ECF No. 25.)

IT IS SO ORDERED.

Date: August 21, 2019

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