IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

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| JENNIFER ELLER,<br><br>Plaintiff,<br><br>v.<br><br>PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS, ET AL.,<br><br>Defendants. | ) | Case No.: 18-cv-03649-TDC/TJS |

**DEFENDANTS' OPPOSITION TO MOTION FOR DISCOVERY SANCTIONS**

Defendants Prince George's County Public Schools, Board of Education of Prince George's County, and Monica Goldson ("Defendants"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 37 and the Court's inherent authority, hereby file this Opposition to Plaintiff's Motion for Discovery Sanctions ("Motion"). The reasons why Plaintiff's Motion should be denied are set forth in the accompanying memorandum of points and authorities.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Defendants' Opposition to Motion for Discovery Sanctions, Memorandum of Points and Authorities in Support thereof, and all exhibits, were served via the Court's CM/ECF system on this 7th day of September, 2020, to:

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FOR THE DISTRICT OF MARYLAND

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| JENNIFER ELLER,<br><br>Plaintiff,<br><br>v.<br><br>PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS, ET AL.,<br><br>Defendants. | ) | Case No.: 18-cv-03649-TDC/TJS |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR DISCOVERY SANCTIONS**

Defendants Prince George's County Public Schools ("PGCPS"), Board of Education of Prince George's County ("Board of Education"), and Monica Goldson ("Defendants"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 37 and the Court's inherent authority, hereby file this Opposition to Plaintiff's Motion for Discovery Sanctions ("Motion"). The reasons why Plaintiff's Motion should be denied are set forth below.

## Background[1]

The Board of Education controls the education policies of Prince George's County, Maryland. PGCPS is one of the nation's 25 largest school districts, has 208 schools and centers, more than 130,000 students, and nearly 19,000 employees.

Jennifer Eller ("Plaintiff"), a transgender woman, was formerly employed by the Board of Education as a teacher from 2008 until her voluntary resignation in 2017. First Am. Compl. at ¶ 15. Plaintiff exercised her Family Medical and Leave Act leave beginning in October of 2016, and did not return back to school prior to resigning at the end of the school year in 2017. Ex. 1 at 80:10-12.

[1] The Court may be familiar with the factual background of this case given its Orders [ECF Nos. 44, 47] requiring Plaintiff to submit to an Independent Mental Examination under Fed. R. Civ. P. 35.

According to her First Amended Complaint, Plaintiff was transitioning and began to wear articles of feminine attire in March of 2011. First Am. Compl. at ¶ 44. Plaintiff transferred to Friendly High School for the 2011-2012 school year. *Id.* Plaintiff alleges that she was subjected to a sex (gender identity) based hostile work environment by students, parents, and staff as a result of transitioning and becoming a transgender woman. *Id.* at ¶ 45.

Despite this alleged hostile work environment, it was not until February 20, 2015, that Plaintiff filed her internal 4170 Complaint or Harassment Incident Report ("4170 Complaint") regarding a February 13, 2015, incident where Assistant Principal Robinson allegedly misgendered Plaintiff. Pl.'s Mot., Ex. G.

Moreover, it was not until June 3, 2015, that Plaintiff filed her Charge of Discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") alleging a hostile work environment on the basis of her sex. Pl.'s Mot., Ex. H. Plaintiff filed an Amended Charge of Discrimination with the EEOC on April 26, 2016, alleging retaliation, a continued hostile work environment, and for the very first time indicating that her Charge of Discrimination was a "continuing action." Ex. 2.

Finally, it was not until November 28, 2018, that Plaintiff filed her Complaint [ECF No. 1] in this Court and First Amended Complaint [ECF No. 4] on December 20, 2018. In her First Amended Complaint, Plaintiff asserts claims against Defendants for deprivation of equal protection in violation of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 (Count I), hostile work environment in violation of Title VII (Count II), Title IX (Count III), Maryland Fair Employment Practices Act ("FEPA") (Count IV), and the Prince George's County Code ("County Code") (Count V), and retaliation in violation of Title VII (Count VI), Title IX (Count VII), FEPA (Count VIII), and the County Code (Count IX).

## Procedural Posture

The Parties filed their Post-Discovery Joint Status Report [ECF No. 74] on August 13, 2020. Plaintiff filed her Motion for Sanctions [ECF No. 75] on August 21, 2020. On September 1, 2020, the Court issued its Paperless Order [ECF No. 78] requiring the parties to submit a Joint Status Report not later than fourteen (14) days after the resolution of Plaintiff's Motion for Sanctions and tolling all remaining deadlines. Finally, on September 2, 2020, the Court referred this case to U.S. Magistrate Judge Charles B. Day for settlement conference. [ECF No. 79].

## Argument

### I. LEGAL STANDARD

The Court has authority to redress discovery conduct under the Federal Rules as well as its own inherent powers.

Fed R. Civ. P. 37(b)(2)(A) provides in part that:

> If a party or a party's officer, director, or managing agent – or a witness designated under Rule 30(b)(6) or 31(a)(4) – **fails to obey an order to provide or permit discovery**, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.

Fed R. Civ. P. 37(b)(2)(A) (emphasis added). Here, Plaintiff never filed a motion to compel discovery and no order to provide or permit discovery was entered by the Court.

In *Sampson v. City of Cambridge, Md.*, 2008 WL 7514364 (D. Md., May 1, 2008), this Court explained the Court's authority to issue sanctions due to spoliation as follows:

> Federal courts have two sources of authority to issue sanctions due to spoliation. First, a court may issue sanctions under Rule 37 when a party commits spoliation in violation of a specific court order. *United Med. Supply Co., Inc. v. United States,* 77 Fed. Cl. 257, 264 (2007). The court's second source of power to impose sanctions for spoliation is its inherent authority to control the judicial process. *Id.* at 263 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)).

*Sampson v. City of Cambridge, Md.*, 2008 WL 7514364, at *4 (D. Md., May 1, 2008).

In her Motion, Plaintiff asserts facts that implicate the court's inherent authority to impose sanctions because she alleges that Defendants violated the general duty to preserve relevant evidence.

As this Court articulated in *Simone v. VSL Pharmaceuticals, Inc.*, 2018 WL 1365848 (D. Md., March 16, 2018):

> Spoliation is the "destruction or material alteration of evidence ... or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (internal citations omitted). In order to prove that spoliation warrants a sanction, a party must show that:
>
> > (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a culpable state of mind; and (3) the evidence that was destroyed or altered was relevant to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.
>
> *Charter Oak Fire Ins. Co. v. Marlow Liquors, LLC*, 908 F. Supp. 2d 673, 678 (D. Md. 2012) (internal citations, quotation marks, and brackets omitted); *see also Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D. Md. 2008) ("This standard applies when a party is seeking any form of sanctions for spoliation, not just an adverse inference jury instruction").

*Simone v. VSL Pharmaceuticals, Inc.*, 2018 WL 1365848, at *1 (D. Md., March 16, 2018).

First, with regard to duty, the Court in *Simone* explained:

> The first consideration in determining whether spoliation has occurred is whether a party breached its duty to preserve potentially relevant evidence. Once a party reasonably anticipates litigation, it is obligated to implement a "litigation hold" to ensure that potentially relevant evidence under its control is identified, located, and preserved for use in the anticipated litigation. *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009).

*Simone v. VSL Pharmaceuticals, Inc.*, 2018 WL 1365848, at *2 (D. Md., March 16, 2018).

Second, the Court in *Simone* summarized the requisite culpable state of mind:

> The second consideration in the spoliation analysis is whether the party's loss or destruction of the potentially relevant evidence was accompanied by a culpable state of mind. "In the Fourth Circuit, for a court to impose some form of sanctions for spoliation, any fault—be it bad faith, willfulness, gross negligence, or ordinary negligence—is a sufficiently culpable mindset." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 529 (D. Md. 2010) (*citing Goodman*, 632 F. Supp. 2d at 518, 520). In the context of spoliation, ordinary negligence is the failure to identify, locate, and preserve evidence, where a reasonably prudent person acting under like circumstances would have done so. *See In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 519 (S.D.W. Va. 2014). A finding of gross negligence requires a similar showing as ordinary negligence, but to a greater degree. *Id.* Willfulness and bad faith will only be found where a party has engaged in "intentional, purposeful, or deliberate conduct." *Id.* (quoting *Victor Stanley*, 269 F.R.D. at 529). While bad faith requires the destruction of evidence "for the purpose of depriving the adversary of the evidence," *Goodman*, 632 F. Supp. 2d at 520, willfulness only requires a demonstration of intentional or deliberate conduct resulting in spoliation. *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008).

*Simone v. VSL Pharmaceuticals, Inc.*, 2018 WL 1365848, at *4 (D. Md., March 16, 2018).

Third, the Court in *Simone* described the requirements for relevance and prejudice:

> The final consideration in determining whether spoliation has occurred is the relevance of the spoliated evidence. "The test for relevance for purposes of establishing the third element is somewhat more stringent than merely meeting the standard provided in Federal Rule of Evidence 401." *Sampson*, 251 F.R.D. at 179. In the context of spoliation, lost or destroyed evidence is relevant if "a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it." *Victor Stanley*, 269 F.R.D. at 531 (internal citations omitted). In addition, in order for a court to impose sanctions, "the absence of the evidence must be prejudicial to the party alleging spoliation." *Id.* ("Put another way, a finding of 'relevance' for purposes of spoliation sanctions is a two-pronged finding of relevance and prejudice."). When a party alleging spoliation shows that the alleged spoliator acted willfully or in bad faith in failing to preserve the evidence, "the relevance of that evidence is presumed in the Fourth Circuit." *Id.* at 532. Even where the relevance of spoliated evidence is presumed, however, "the spoliating party may rebut this presumption by showing that the innocent party has not been prejudiced." *Id.*

*Simone v. VSL Pharmaceuticals, Inc.*, 2018 WL 1365848, at *4 (D. Md., March 16, 2018).

Finally, as to any sanctions imposed, the *Simone* Court explained:

> Spoliation sanctions should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." Goodman, 632 F. Supp. 2d at 523 (internal quotation marks omitted). Federal courts may impose a number of

> types of sanctions for spoliation: "assessing attorney's fees and costs, giving the jury an adverse inference instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of dismissal or judgment by default." Victor Stanley, 269 F.R.D. at 533 (citing Goodman, 632 F. Supp. 2d at 506). A court must "impose the least harsh sanction that can provide an adequate remedy." Id. at 534 (quoting Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010)).

*Simone v. VSL Pharmaceuticals, Inc.*, 2018 WL 1365848, at *7 (D. Md., March 16, 2018).

II. PS-74 DISCIPLINARY REPORTS

Plaintiff first seeks redress for PS-74 Forms that were not maintained at Friendly High School. PS-74 Forms are Student Discipline Referrals and are typically used by teachers to report infractions by students. Ex. 3 at 62:6-9.

**A. Plaintiff's Motion is Untimely**

Plaintiff's Motion is untimely with regard to PS-74 Forms. This Court explained the timeliness requirements for spoliation motions in *Goodman v. Praxair Services, Inc.*, 632 F.Supp.2d 494 (D. Md. 2009):

> The lesson to be learned from the cases that have sought to define when a spoliation motion should be filed in order to be timely is that there is a particular need for these motions to be filed as soon as reasonably possible after discovery of the facts that underlie the motion. This is because resolution of spoliation motions are fact intensive, requiring the court to assess when the duty to preserve commenced, whether the party accused of spoliation properly complied with its preservation duty, the degree of culpability involved, the relevance of the lost evidence to the case, and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved. *See, e.g., Silvestri,* 271 F.3d at 594–95. Before ruling on a spoliation motion, a court may have to hold a hearing, and if spoliation is found, consideration of an appropriate remedy can involve determinations that may end the litigation or severely alter its course by striking pleadings, precluding proof of facts, foreclosing claims or defenses, or even granting a default judgment. And, in deciding a spoliation motion, the court may order that additional discovery take place either to develop facts needed to rule on the motion or to afford the party deprived of relevant evidence an additional opportunity to develop it from other sources. The least disruptive time to undertake this is *during* the discovery phase, not after it has closed. Reopening discovery, even if for a limited purpose, months after it has closed or after dispositive motions have been filed, or worse still, on the eve of trial, can completely disrupt the pretrial

> schedule, involve significant cost, and burden the court and parties. Courts are justifiably unsympathetic to litigants who, because of inattention, neglect, or purposeful delay aimed at achieving an unwarranted tactical advantage, attempt to reargue a substantive issue already ruled on by the court through the guise of a spoliation motion, or use such a motion to try to reopen or prolong discovery beyond the time allotted in the pretrial order.

*Goodman v. Praxair Services, Inc.*, 632 F.Supp.2d 494, 508 (D. Md. 2009).

Here, as she acknowledges in her Motion, Plaintiff was put on notice regarding Defendants' failure to preserve the PS-74 Forms on July 17, 2019. Pl.'s Mot., Ex. O. However, Plaintiff did not file her Motion for Sanctions until August 21, 2020, more than one (1) year later, and after the close of discovery. Plaintiff cannot offer any satisfactory explanation as to her delay.

Moreover, Plaintiff took the depositions of Principal Adams on November 13, 2019, Principal Pope-Brown on December 12, 2019, Principal Thompson on January 22, 2020, and Principal Pope-Brown (corporate capacity) again on March 11, 2020. In each of these depositions, Plaintiff questioned the witnesses regarding the maintenance of PS-74 Forms. In sum, Plaintiff was dilatory in bringing the lost PS-74 Forms to the Court's attention warranting denial of her Motion.

**B. Plaintiff Has Not Suffered Prejudice**

Even if not untimely, which it is, Plaintiff's Motion should be denied because she has not suffered any prejudice. Defendants concede that they had a duty to preserve PS-74 Forms as a matter of policy. PS-74 Forms were required to be placed into student files and maintained as student records. Ex. 3 at 64:9-16. In addition, Defendants concede that the failure to retain the PS-74 Forms was due to ordinary negligence as a result of the guidance secretaries failing to perform their duties at Friendly High School. Ex. 3 at 67:8-68:19. However, Defendants dispute that Plaintiff has been prejudiced and that many of the PS-74 Forms filed and sought by Plaintiff are not relevant to her claims for hostile work environment.

In her Motion, Plaintiff attempts to supports her claim of prejudice by stating, "without these

reports, *some* instances of student-caused harassment will be evidenced by Ms. Eller's testimony alone. While this testimony is, of course, admissible and persuasive evidence, contemporaneous recordings of the discrimination would likely be even more convincing to a factfinder." Pl.'s Mot. at 25. For the reasons set forth below, Plaintiff has not suffered prejudice.

First, Plaintiff is not prejudiced by Defendants' failure to maintain PS-74 Forms because she too maintained copies of the PS-74 Forms that she submitted to administrators from 2009 until 2016 but failed to retain and/or preserve them. As Plaintiff herself admitted, "I had a routine habit of having a photocopy of the written PS-74 that I turned in that I stored in file folders in my locked cabinet in the classroom." Ex 1 at 196:9-12, 329:19-330:1. However, Plaintiff further stated that "I never received any files or personal property from James Madison after I went out on FMLA leave, so I do not know what happened to those files." *Id.* at 195:18-196:4.

Just like Defendants, Plaintiff had a duty to preserve PS-74 Forms, which she acknowledged were in her possession, custody, and control in a locked drawer in a file cabinet in her classroom. In fact, Plaintiff testified that she never returned to her classroom after leaving in October of 2016 until her resignation in June of 2017, while out FMLA leave, likely because she took employment at Target and the Department of Defense. *Id.* at 79:15-80:5; 82:21-83:7. The current record is devoid of any steps Plaintiff took to preserve and/or retrieve these records, which were in her possession that she now claims to be vital to her case.

Simply put, Plaintiff cannot allege prejudice and should not be able to seek redress for Defendants' failure to preserve the PS-74 Forms when she too failed to preserve the PS-74 Forms, which were in her possession, custody, and control.

Second, Plaintiff's administrators also testified that completed copies (with the administration's actions taken against a student) of the PS-74 Forms were provided to Plaintiff. For

example, Principal Adams and Principal Pope-Brown testified regarding the process for completing, investigating, and responding to PS-74 Forms and stated that the completed document is supposed to be given to the teacher. Ex. 4 at 23:5-25:7; Ex. 5 at 95:8-22, 159-:12-160:6. Moreover, Principal Thompson testified that he would personally provide Plaintiff with a completed copy of the PS-74 Forms or leave it in her mailbox. Ex. 6 at 158:7-159:7. Again, Plaintiff cannot be prejudiced since she failed to preserve and maintain the same forms for which she seeks relief against Defendants.

Third, while Defendants did not maintain the PS-74 Forms submitted by Plaintiff at Friendly High School, approximately forty-three (43) PS-74 Forms completed and submitted by Plaintiff to her administrators were retrieved from Plaintiff's e-mail account and produced in discovery on May 19, 2020. This production consisted of PS-74 Forms as early as September 7, 2011, and as late as March 4, 2015. Moreover, out of the forty-three (43) PS-74 Forms that were retrieved, only three (3) addressed instances of alleged harassment relating to Plaintiff's transgender status. Ex. 7.

Fourth, Plaintiff is not prejudiced because there also exist numerous other contemporaneous recordings of alleged discrimination that may be more convincing to a factfinder. Contrary to Plaintiff's assertion that "instances of student-caused harassment will be evidenced by Ms. Eller's testimony alone," the parties have produced hundreds of e-mails from Plaintiff documenting alleged incidents or concerns during her tenure going back as far as 2011. These e-mails were largely the exhibits offered during the depositions of Principal Adams, Principal Pope-Brown, Principal Thompson, and Principal King. In fact, Plaintiff cannot deny that the vast majority of her complaints were made by e-mail instead of via the PS-74 Forms.

Fifth, Plaintiff is not prejudiced because she cannot recall the names of the students for which she submitted PS-74 Forms. As stated above, the PS-74 Forms should have been maintained in the student's file. However, without the name of the student, there is simply no way to search for the PS-

74 Forms within student files.

For example, Plaintiff testified that she was subjected to a hostile work environment during the 2010-2011 school year at Kenmoor Middle School. Ex. 1 at 226:22-227:10. However, with regard to student concerns, Plaintiff testified that she did not know the names of the students and did not submit PS-74 Forms. *Id.* at 243:6-17, 245:8-20, 245:21-246:4, 247:11-20.

During the 2011-2012 school year at Friendly High School, Plaintiff could only recall submitting PS-74 Forms for one student, who she testified was suspended for one week, as a result of her complaints. *Id*. at 316:4-317:14.

During the 2012-2013 school year, Plaintiff could not recall the names of the students she filed PS-74 Forms for intentionally misgendering her. *Id.* at 321:6-12. Similarly, Plaintiff could not recall the names of the students for which she submitted PS-74 Forms in the 2013-2014 school year. *Id.* at 325:20-326:8, 326:18-327-:7. Likewise, Plaintiff could only recall the name of one student during the 2014-2015 school year. *Id.* at 329:5-14. Finally, Plaintiff only identified one student (the same student from the prior school year) during the 2015-2016 school year that was removed from her class. *Id.* at 336:1-338:10.

With regard to her tenure at James Madison Middle School from August 2016 to October 2016, Plaintiff testified that her workplace became hostile beginning in September of 2016. *Id.* at 259:17-260:9. However, other than one student, Plaintiff could not recall the names of any other students using improper pronouns to describe and her and could not recall whether she submitted PS-74 Forms. *Id.* at 260:10-261:22.

Finally, Plaintiff's Answers to Defendants' First Set of Interrogatories are equally uninformative and identified no incidents of discrimination or hostile work environment and no students engaging in such acts. Plaintiff must be bound by her sworn Answers.

9. Please identify each and every incident of discriminatory treatment on the basis of your sex (including any other category you contend is encompassed by sex discrimination) by Defendant that you believe occurred. For each alleged occurrence, please (a) provide the date of the alleged discrimination; (b) identify all persons engaging in conduct that you believe constituted such discrimination; (c) state the words, actions, or conduct that constitute the basis of your claim of discrimination; (d) state your claimed injury as a result of the alleged discrimination; and (e) state when and to whom you reported the alleged discrimination, what you reported, what action you requested taken, and what action you are aware of being taken.

**Response to Interrogatory 9**: Plaintiff objects to this Interrogatory as duplicative and unduly burdensome where she has already identified numerous instances of discriminatory treatment in the Complaint and additional information regarding instances of discrimination would be contained in documents and information within Defendants' custody and control, and more easily accessible by Defendants than Plaintiff, to the extent they occurred at the hands of Defendants' agents and employees. The Interrogatory fails to adequately define what is meant by "discrimination" or "discriminatory treatment." Plaintiff further objects to this Interrogatory to the extent that what qualifies as "discrimination" or "discriminatory treatment" calls for a legal conclusion. Plaintiff further objects to this Interrogatory as compound. Without waiving any of the objections and qualifications noted herein, Plaintiff is still reviewing documents recently produced by Defendants and will supplement this response in accordance with the Federal Rules of Civil Procedure.

10. Please identify each and every incident of hostile work environment by Defendant that you believe occurred. For each alleged occurrence, please (a) provide the date of the alleged hostile work environment; (b) identify all persons engaging in conduct that you believe constituted such hostile work environment; (c) state the words, actions, or conduct that constitute the basis of your claim of hostile work environment; (d) state your claimed injury as a result of the alleged hostile work environment; and (e) state when and to whom you reported the alleged hostile work environment, what you reported, what action you requested taken, and what action you are aware of being taken.

**Response to Interrogatory 10**: Plaintiff objects to this Interrogatory as duplicative and unduly burdensome where she has already identified facts supporting her claim of hostile 10 work environment in the Complaint and additional information regarding the hostile work environment she experienced would be contained in documents and information within Defendants' custody and control, and more easily accessible by Defendants than Plaintiff, to the extent the conduct occurred through Defendants' agents and employees. The Interrogatory fails to adequately define what is meant by "hostile work environment." Plaintiff further objects to this Interrogatory to the extent that what qualifies as a "hostile work environment" calls for a legal conclusion. Plaintiff further objects to this Interrogatory as compound.

> Without waiving any of the objections and qualifications noted herein, Plaintiff is still reviewing documents recently produced by Defendants and will supplement this response in accordance with the Federal Rules of Civil Procedure.

Ex. 8. In sum, without the names of students for which PS-74s were submitted by Plaintiff, searches for these documents could not even be performed.

Sixth, Plaintiff is not prejudiced by the failure to preserve PS-74 Forms because, with respect to student discipline imposed by administrators as a result of Plaintiff's complaints, Principals Adams, Pope-Brown, Thompson, and King were questioned regarding their responses to incidents for which they could recall and the responses they believe they would have taken based on the guidelines from the Student Code of Conduct.

Seventh, Plaintiff is not prejudiced by Defendants' failure to preserve PS-74 Forms because she was inexcusable in her delay (4 years) in the filing of her EEOC Charge of Discrimination, which prejudiced Defendants.

In *Booth v. County Executive*, 186 F.Supp.3d 479 (D. Md. 2016), this Court explained the interplay between the 300-day limitations period and hostile work environment claims under Title VII. Specifically, the Court stated,

> By contrast, hostile work environment claims often arise from repeated conduct that may occur over "a series of days or perhaps years." *Id.* at 115, 122 S.Ct. 2061. A court thus may consider a hostile work environment claim "so long as an act contributing to that hostile work environment takes place" within 300 days of the filing of the charge. *Id.* at 105, 122 S.Ct. 2061; *see also Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 139–41 (4th Cir.2007).

*Booth v. County Executive*, 186 F.Supp.3d 479, 485 (D. Md. 2016),

However, as the Supreme Court made clear in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), a Defendant may seek relief from the Court due to delay caused by the employee.

**This Court previously noted that despite the procedural protections of the**

> **statute "a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense** because of ***2077* an inordinate EEOC delay in filing the action after exhausting its conciliation efforts." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 373, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977). **The same is true when the delay is caused by the employee, rather than by the EEOC**. Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) ("[A] party may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party"). **In such cases, the federal courts have the discretionary power to "to locate 'a just result' in light of the circumstances peculiar to the case**." *Id.*, at 424–425, 95 S.Ct. 2362.

*Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002) (emphasis added).

Defendants intend to seek relief from the Court in its Motion for Summary Judgment and limit the scope of Plaintiff's hostile work environment claims due to Plaintiff's inexcusable delay of waiting (four) years prior to the filing of her EEOC Charge of Discrimination. If granted, in whole or in part, Plaintiff will not be prejudiced by the PS-74 Forms that were not maintained during the period of time stricken by the Court, if any.

Finally, it is important to note that Defendants do not dispute the fact that Plaintiff filed or made complaints about her students via the PS-74 Forms or even e-mails. In fact, Defendants agree that Plaintiff may be able to offer evidence regarding her complaints via her own testimony and her e-mails. Instead, Defendants challenge Plaintiff's complaints of incidents as establishing a hostile work environment. For all of the foregoing reasons, Plaintiff's Motion for Sanctions should be denied.

## III. E-MAILS PREDATING FALL 2014

PGCPS uses Google Apps, which is a free web-based application that is provided to school systems. Ex. 9 at 20:22-21:1. Google Apps provides e-mails, documents, websites, and a number of different applications for its users. *Id.* at 21:5-8. Google Apps includes Google Vault, which is an archival system for e-mail and documents that allows users to retain, search, and export content

for eDiscovery and compliance matters. *Id.* at 24:2-6. Any e-mail within Google Vault remains there forever even if the user deletes the e-mail from his or her mailbox. *Id.* at 24:6-10.

Google Vault was implemented by PGCPS on November 1, 2015. *Id.* at 44:18-19. However, PGCPS had e-mails stored from its predecessor program, Postini, for one year, which were migrated over into Google Vault. *Id.* at 45:3-7. Therefore, all e-mails from November 1, 2014, to June of 2019, were searched and responsive e-mails were produced in discovery.

With respect to e-mails prior to November 1, 2014, PGCPS did not have systematic administrative access to them and these e-mails would not show up in any archival system. *Id.* at 26:6-15. However, e-mails that a user did not delete would remain in that user's specific mailbox even if that user left the employ of PGCPS. *Id.* at 26:12-27:15

For these e-mails, PGCPS' IT Department can only access them by going into the system, logging in as the user, change the user's passwords, and do a manual search of a specific user's mailbox. *Id.* at 26:19-27:22. This practice is rarely, if ever done. *Id.* at 38:12-17.

As Ms. Tranmer indicates in her attached Declaration, the IT Department can search the emails of former employees without issue because former employees do not have/need access to the e-mails and domain. Ex. 10 at ¶ 15. However, logging in as another current employee/student is not desirable for retrieval of e-mails and is burdensome for several reasons. *Id.* at ¶ 13.

First, the employee or student would not have access to the system while the IT Department has control of his or her login to complete the manual search. *Id.* Second, the employee/student could disrupt the IT Department's search by changing the password in the middle of the process. *Id.* Third, the IT Department wants to avoid any potential claim that unauthorized action was taken while it had access of another user's login. *Id.* Rather, it would be more desirable to request that a current employee do a manual search of his or her own emails and produce the results. *Id.* at ¶ 14.

Here, Defendants took extraordinary efforts and expended considerable time and resources requesting, searching, and producing e-mails predating November 1, 2014, once it was made known that such e-mails may exist.

First, Defendants produced Plaintiff's entire mailbox (from the time Plaintiff became employed until November 1, 2014) on May 19, 2020. Second, Defendants requested the custodians identified by Plaintiff to search for any e-mails and document on hard drives containing the term "Eller." *Id.* at ¶ 17.

Third, Defendants requested the custodians identified by Plaintiff to perform a second search of their e-mails and hard drives. *Id.* at ¶ 18 This search complied with Plaintiff's vague, ambiguous, overbroad, and unreasonable suggested search terms as follows:

> "transgender", "transgenders", "gender identity", "gender identities", "sex change", "sex changes", "gender change", "gender changes", "sex transition", "sex transitions", "gender transition", "gender transitions", "gender expression", "gender expressions", "sex expression", "sex expressions", "misgender", "misgenders", "transsexual", "transsexuals", "tranny", "trannies", "transvestite", "transvestites", "fag", "fags", "faggot", "faggots", "homo", "homos", "booty warrior", "booty warriors", "shemale", "shemales", "guy in a dress", "chick with a dick", "a he/she" or "the he/she", "(gender or sex) /5 (transition or change or expression)"

*Id*.

Plaintiff initially provided a custodian list of twenty-three (23) names. *Id.* at ¶ 19. Plaintiff later provided a subsequent list of eighty-seven (87) names, which included the original twenty-three (23) names. *Id.*

Twenty-one (21) of the eighty-seven (87) individuals were not readily identifiable based on the information provided. *Id.* at ¶ 20. Two (2) of the eighty-seven (87) individuals were later identified to be union representatives, and not under the employ of Defendants. *Id.* at ¶ 21. Thirteen

(13) of the eighty-seven (87) individuals were later identified as being students. *Id.* at ¶ 22 Three (3) of the eighty-seven (87) individuals remain unidentified. *Id.* at ¶ 23.

Ms. Tranmer prepared instructions for current employees to search their e-mails for the first email search for all e-mails and documents containing the term "Eller" prior to November 1, 2014. *Id.* at ¶ 24. Separate and subsequent to the first set of instructions prepared, Ms. Tranmer prepared a second set of instructions for current employees to search and produce all emails and documents prior to November 1, 2014, containing the following terms:

> "transgender", "gender identity", "gender identities", "sex change", "gender change", "sex transition", "gender transition", "gender expression", "sex expression", "misgender", "transsexual", "tranny", "trannies", "transvestite", "fag", "faggot", "homo", "booty warrior", "shemale", "guy in a dress", "chick with a dick"

*Id.* at ¶ 25.

It was unnecessary to include in the instructions for the second search, search terms with an "s" added to the end of the word because the system would automatically pick up those terms in the results for the terms without the "s" added. *Id.* at ¶ 26.

Moreover, the last two requested search terms, "a he/she" or "the he/she" and (gender or sex) /5 (transition or change or expression), were omitted from the instructions due to system limitations for complex searches. *Id.* at ¶ 27. The "/" was incompatible and the system would interpret the request without the "/" and return every email including the word "he" and/or "she". *Id.*

Ms. Tranmer personally searched forty (40) of eighty-seven (87) e-mail boxes including all of the students, former employees, and employees who did not respond to Defendants' request for search. *Id.* at ¶ 28. Ms. Tranmer searched for sixteen (16) of the forty (40) e-mail boxes of

current employees due to various reasons including requests for assistance and unresponsiveness to requests for the employee to conduct a search. *Id.* at ¶ 29.

Defendants produced the e-mails and documents found via uploading the documents onto Arnold & Porter's Kiteworks program and organized the production via custodian name. For those custodians for which folders were not created, no documents were retrieved/found. Despite these extraordinary efforts and compliance with Plaintiff's search criterion, Plaintiff's remain unsatisfied as no smoking gun was found.

Defendants were put on notice of potential litigation only when they were notified of Plaintiff's EEOC Charge of Discrimination after July 14, 2015. Pl.'s Mot., Ex. H at 1. As a result, Defendants cannot be held responsible for any deletion by any custodian that took place prior to July 14, 2015, when it received Notice from the EEOC. Rather, it is only those e-mails and/or documents that originated *prior to* November 1, 2014, that custodians may have deleted *after* July of 2015 (Plaintiff's left her employment in October of 2016), which can be attributed to Defendants.

Plaintiff seems to imply that Defendants should have sent notice to all 19,000 employees to refrain from deleting *any* e-mails or documents pertaining to Plaintiff. This is unreasonable. With regard to employees at Friendly High School, there is simply no way to ascertain whether e-mails and/or documents "referencing" Plaintiff or the vague, ambiguous, and overbroad terms requested by Plaintiff were deleted without deposing each and every employee during that time frame. However, it is worth mentioning that Plaintiff's failed to ask even the administrators, which she did depose, whether they ever deleted e-mails and/or documents relating to Plaintiff.

Even if a litigation hold letter was issued, which it was not, it is reasonable to assume that responsive documents may have been deleted by custodians due to Plaintiff's inexcusable delay in

waiting four (4) years to file her Notice of Charge of Discrimination. As set forth above, Defendants intend to seek relief against Plaintiff in their Motion for Summary Judgment, which may affect the scope of any prejudice to Plaintiff.

Moreover, it also important to note that the vast majority of documents produced both prior to and after November 1, 2014, related to school wide e-mails to all staff and documents related to curriculum. Plaintiff cannot refute this. Because any prejudice to Plaintiff is speculative and due, at least in part to her own inexcusable delay, Plaintiff's Motion for Sanctions should be denied.

IV. SECURITY CAMERA RECORDINGS

Since 2013, all PGCPS schools have security cameras. Ex. 12 at 17:3-5. The security cameras consist of older analog Dedicated Micros cameras and newer Genetec IP cameras. *Id.* at 11:1-13. From 2011 to 2016, Friendly High School had Dedicated Micros analog cameras. *Id.* at 20:13-21.

Dedicated Micros cameras operate twenty-four (24) hours a day and seven (7) days a week and automatically overwrite themselves once the storage hard drive is filled. *Id.* at 29:12-16. These cameras could overwrite themselves in as little as three (3) to four (4) weeks depending on the amount of activity being recorded. *Id.* at 29:17-30:15.

If an incident has occurred and the school requests a copy of a video, the video footage is downloaded and burned to either a CD or DVD. *Id.* at 33:3-12. Moreover, if downloaded and saved, security footage is stored by date, school, and time frame. *Id.* at 44:2-6.

**A. Plaintiff's Motion is Untimely**

Plaintiff's Motion as to security camera recordings is also untimely for the same reasons that the Motion is untimely as to PS-74 Forms set forth above. Here, Plaintiff was put on notice that no security camera recordings existed on July 3, 2019. Pl.'s Mot, Ex FF. Plaintiff even states in her Motion that "[b]ased on Defendants' representations *at the July 3, 2019, meet-and-confer*, *Plaintiff*

*understood* that 'footage of these incidents, or any other incidents that would have been responsive to RFP 8, would have been captured at the time but none exists as of today because it was not retained.'" Pl.'s Mot. at 14.

Despite understanding on July 3, 2019, that no security camera recordings were maintained, again, Plaintiff proffers (and cannot proffer) no justifiable reason why she waited over one (1) year to bring her spoliation motion before the Court. As a result, Plaintiff's Motion should be denied as untimely.

**B. Defendants' Did Not Have a Duty to Preserve Recordings of August 27, 2015, and September 23, 2015**

Plaintiff incorrectly asserts, at least with respect to Friendly High School, that "Defendants maintain a 90-day over-write policy for the recordings made by these cameras." Pl.'s Mot. at 27. The 90-day over-write policy applied only to Genetec IP cameras, which Friendly High School did not have from 2011 to 2016.

Furthermore, during discovery, Plaintiff only provided Defendants with three (3) dates to search for security camera footage. They were September 13, 2013, August 27, 2015, and September 23, 2015. Pl.'s Mot. at 13-14.

With regard to the September 13, 2013, incident, Defendants did not have a duty to preserve any such footage because they could not have anticipated litigation by Plaintiff as she did not file her EEOC Charge of Discrimination until June 3, 2015. By that time, the cameras would have long since overridden themselves.

With respect to the August 27, 2015, and September 23, 2015, incidents, Plaintiff argues that Defendants should have anticipated litigation due to her February 20, 2015, 4170 Complaint. Pl.'s Motion at 14. This is a stretch.

Plaintiff's 4170 Complaint specifically alleges discrimination against Assistant Principal

Robinson for misgendering Plaintiff inside of her classroom. Pl.'s Mot., Ex. G. Plaintiff raises no concerns in her 4170 Complaint about students misgendering and/or otherwise harassing her in the hallways. There is nothing about the 4170 Complaint that would suggest that litigation should be anticipated let alone litigation involving harassment by students. For these reasons, Plaintiff's 4170 Complaint did not create a duty on Defendants to preserve video footage of incidents on August 27, 2015, and September 23, 2015, both of which allegedly involve students.

Plaintiff also argues that Defendants should have anticipated litigation due to her filing of the EEOC Charge of June 3, 2015, which she prepared with the assistance of counsel. Ex. 1 at 342:2-18. This too is unfounded as Defendants did not have a duty to preserve due to Plaintiff's failures.

First, Plaintiff's Charge of Discrimination lists the dates of discrimination from "August 2011 – Present." Pl.'s Mot., Ex. H. The Charge of Discrimination is dated June 3, 2015. Plaintiff does not allege in her Charge of Discrimination that her charge is a continuing action. Therefore, the alleged incidents of August 27, 2015, and September 23, 2015, were outside the scope of Plaintiff's initial Charge of Discrimination. As a result, Defendants had no duty to preserve any footage of those incidents, which at that time, had not even occurred and that Plaintiff failed to administratively exhaust.

Rather it was not until Plaintiff' filed her Amended Charge of Discrimination in April, 26 2016, when she alleged continued harassment (from her June 3, 2015, Charge of Discrimination) and that her Charge was a continuing action. Ex. 2. Because Plaintiff did not put Defendants on notice until April of 2016, the August 27, 2015, and September, 23, 2015, had overridden themselves and Defendants did not have a duty to preserve the footage from these incidents.

Second, Plaintiff's EEOC Charge and Amended Charge of Discrimination do not set forth any dates other than the February 13, 2015, incident involving Assistant Principal Robinson. Plaintiff

(with the assistance of counsel) failed to provide Defendants with notice of the specific incidents and dates of those incidents for which any security footage could be preserved. Therefore, it is simply ridiculous to suggest that Defendants should have preserved video footage from August 27, 2015, or September 23, 2015, when her own EEOC Charges do not even reference that date or any other date for that matter as to specific incidents of harassment by students constituting a hostile work environment.

Plaintiff's overbroad and general contentions that she "*may be* prejudiced in her effort to demonstrate the severity and upsetting nature of the harassment," are overblown and again unsubstantiated.

As set forth above, Defendants did not have a duty to preserve the specific video footage she requested in discovery. In addition, Plaintiff fails to indicate that there are no cameras in classrooms. Moreover, Plaintiff did not even inquire in discovery, let alone, provide the Court with evidence as to where specifically cameras were located in Friendly High School in relation to Plaintiff's classroom, or where alleged incidents of harassment allegedly took place. Furthermore, Plaintiff did not inquire in discovery, let alone provide the Court with evidence as to the picture quality of the cameras located in Friendly High School, and whether they capture sound (which they do not). For all of these reasons, Plaintiff's Motion for Sanctions should be denied.

V. 30(b)(6) DEPOSITION DESIGNEES

Lastl Plaintiff alleges that Defendants should be sanctioned because their corporate designees were ill prepared. Pl.'s Mot. at 14-18. However, Plaintiff's Motion should be denied for several reasons.

First, corporate designee depositions in this case took place on March 6, 2020 (Bret Tranmer), March 9, 2020 (Amana Simmons, Esquire), March 11, 2020 (Robin Pope-Brown), April 24, 2020

(Cindy Guilday), April 28, 2020 (Robin Welsh), and April 30, 2020 (Laurie Tranmer). At no time did Plaintiff raise issue with the sufficiency of any witness testimony until July 28, 2020, when her counsel requested a meet and confer. Ex. 11.

During the meet and confer conference that took place on August 4, 2020, Defendants offered Plaintiff the opportunity to take additional depositions to redress any concerns she had regarding the corporate designee testimony. Plaintiff, via her counsel, Mr. Mogul, indicated that he would confer with his team and consider this option. No response was ever provided by Plaintiff. Nevertheless, Plaintiff now seeks to sanction Defendants without ever filing a motion to compel. This is improper.

As this Court explained in *Scott v. Old Navy, LLC*, 2019 WL 5682800 (D. Md., May 13, 2019):

> If an entity produces an inadequately prepared designee, either a motion to compel or for sanctions may be appropriate. *Id.* at 239. On the one hand, if the designee is wholly unprepared without justification, sanctions may be proper. *Id.* at 240. But on the other hand, if a designee is prepared in good faith but unable to provide answers to a significant number of questions, "the 30(b)(6) deposition may have to be *reconvened*, possibly with a new witness." *Id.* (quoting *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005)) (emphasis added).
>
> To the Court, the operative word is reconvened. When a dispute as to the sufficiency of a Rule 30(b)(6) designee arises, the action taken to remedy any alleged insufficiency either comes by mutual agreement of the parties or by order of the court. The parties may determine a course of action without the Court's involvement (as arguably attempted here). Or, the aggrieved party may move to compel supplementation of the depositions, or in particularly egregious cases, move to hold a second Rule 30(b)(6) deposition.
>
> A Rule 30(b)(6) corporate designee was produced and deposed on October 11, 2018. Therefore, the sanctions as permitted by Rule 37(d) are inapplicable to the circumstances at hand. If Plaintiff believed that Rule 30(b)(6) had been violated, she could have requested a new deponent, moved to compel, and then sought sanctions. *See Coryn Group II, LLC*, 265 F.R.D. at 238-40 (D. Md. 2010); *Macsherry v. Sparrows Point, LLC*, CV ELH-15-022, 2018 WL 1123696, at *2 (D. Md. Mar. 1, 2018). In not moving to compel Plaintiff has foregone any Rule 37 relief that might have been proper under the circumstances as presented. Accordingly, Plaintiff's arguments for sanctions under Rule 37(d) are also without merit.

*Scott v. Old Navy, LLC*, 2019 WL 5682800, *3 (D. Md., May 13, 2019).

Here, Defendants produced 30(b)(6) corporate designee witnesses. Plaintiff could have but did not request new deponents. Plaintiff could have but did not move to compel. In not moving to compel, Plaintiff has foregone any Rule 37 relief under these circumstances.

Second, Plaintiff complains about the testimony of Defendants' corporate designees is unavailing because much of the inquiry for these witnesses fell outside of the scope of the topics.

Third, Plaintiff spends considerable attention on Ms. Welsh's ability to testify about Defendants' training practices. However, it is worth noting that Plaintiff failed to designate any expert on the issue although one was required. As a result, Defendants intend to move to preclude Plaintiff from offering evidence regarding the efficacy of any such training offered by Defendants as expert witness testimony is required under Fed. R. Evid. 702 since the average juror does not have knowledge or expertise regarding the diversity training. If granted, any prejudice to Plaintiff is nonexistent on this area of inquiry.

Fourth, Plaintiff complains about Principal Pope-Brown's ability to testify regarding discipline imposed on students as a result of Plaintiff's complaints. However, this feat is nearly impossible without the PS-74 Forms, which were lost and, which Plaintiff did not maintain. For all of the foregoing reasons, Plaintiff's Motion for Sanctions should be denied.

## VI. PLAINTIFF'S REQUESTED SANCTIONS

Plaintiff's Motion for Sanctions should be denied. In addition, Plaintiff's request for specific sanctions are overbroad and without merit. Plaintiff first requests that eleven (11) items be as established as facts.

As set forth above, Items 1 and 2 ignore the fact that Defendants cannot be held responsible for any deletion by any custodian that took place prior to July 14, 2015, when it received Notice

from the EEOC. Rather, it is only those e-mails and/or documents that originated *prior to* November 1, 2014, that custodians may have deleted *after* July of 2015 (Plaintiff's left her employment in October of 2016), which can be attributed to Defendants.

Items 2 (to the extent it references security camera recordings) and 3 ignore the fact that Defendants owed no duty to preserve security camera recordings of incidents identified by Plaintiff during discovery. In addition, the words "severe" and "frequent" are legal conclusions for the jury to decide.

Item 4 ignores the arguments that Plaintiff was inexcusable in her delay in filing her lawsuit, inexcusable in her delay in filing this Motion, did not recall the names of the students thereby precluding any search even if the PS-74s were retained. Item 5 is factually wrong and ignores the testimonies of all the Principals to date.

Item 6 should be precluded because Principal Adams addressed the issue in his deposition. Item 7 is improper because "severe" and "frequent" are legal conclusions left for the trier of fact. Items 9, 10, and 11 are improper because they seek to provide expert testimony despite Plaintiff's failure to designate an expert witness in this case on the issue of training.

Second, Plaintiff's requested preclusion orders are vague and ambiguous and incomprehensible. As currently written, the first requested order would prohibit a witness from testifying about incidents (and written accounts thereof) that Plaintiff also testifies about. Plaintiff's second requested order ignores the fact that she failed to raise her concerns regarding corporate designee testimony prior to filing a motion to compel.

Third, Plaintiff's request for monetary sanctions is unclear. Plaintiff does not define "discovery efforts" and does not explain why she should be compensated for such efforts, which are typical in all cases. Similarly, Plaintiff does not explain why exploring Defendants' litigation hold

and document retention practices, a task done in all plaintiffs cases should be compensated to her. Finally, Plaintiff does not explain why she should be compensated for analyzing Defendants' production after April 30, 2020, when if the documents were initially produced, Plaintiff would have to expend the same amount of time she expended later to analyze this production.

**Conclusion**

For all of the foregoing reasons and any other reasons deemed just, Plaintiff's Motion for Sanctions should be denied.

Respectfully submitted,

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