

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

BRYAN SAMUEL MOONEY, a minor )  
by and through his parent, )  
LISA MOONEY, and LISA MOONEY, )  
Individually, )  
 )  
Plaintiffs, )

vs. )

Civ. No. 04-1190-T/P

SUSAN WALLACE, Individually, )  
and HENDERSON COUNTY BOARD OF )  
EDUCATION, )  
 )  
Defendants. )

JACOB RHODES, a minor, by and )  
through his parent, DIANA RAY )  
MOORE, and DIANA RAY MOORE, )  
Individually, )  
 )  
Plaintiffs, )

vs. )

Civ. No. 04-1191-T/P

SUSAN WALLACE, Individually, )  
and HENDERSON COUNTY BOARD OF )  
EDUCATION, )  
 )  
Defendants. )

DALTON DYER, a minor, by and )  
through his parents, JOSH DYER )  
and NICHOLE DYER, and JOSH )  
DYER and NICHOLE DYER, )  
Individually, )  
 )  
Plaintiffs, )

vs. )

Civ. No. 05-1004-T/P

SUSAN WALLACE, Individually, )  
and HENDERSON COUNTY BOARD OF )  
EDUCATION, )  
 )  
Defendants. )

HALEY NICOLE RHODES, a minor, )  
and BRANDON MATTHEW RHODES, a )  
minor, by and through their )  
parents, WANDA MARIE RHODES )  
and BUSTER LEE RHODES, and )  
WANDA MARIE RHODES and BUSTER )  
LEE RHODES, Individually, )

Plaintiffs, )

vs. )

Civ. No. 05-1020-T/P

SUSAN WALLACE, Individually, )  
and HENDERSON COUNTY BOARD OF )  
EDUCATION, )

Defendants. )

ZACHARY ROBBINS, a minor, by )  
and through his parents, )  
YVONNE ROBBINS and DANNY )  
ROBBINS, and YVONNE ROBBINS )  
and DANNY ROBBINS, )  
Individually, )

Plaintiffs. )

vs. )

Civ. No. 04-1294-T/P

SUSAN WALLACE, Individually, )  
and HENDERSON COUNTY BOARD OF )  
EDUCATION, )

Defendants. )

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**REPORT AND RECOMMENDATION**

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Before the court is plaintiffs Bryan and Lisa Mooney's Motion for Sanctions Against the Defendant Henderson County Board of Education, filed June 1, 2006 (dkt #104).<sup>1</sup> Defendant Henderson

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<sup>1</sup>An identical motion was filed by every plaintiff against the Board in each of the related cases.

County Board of Education ("the Board") filed a response in opposition on June 19, 2006. The matter was referred to the Magistrate Judge for a report and recommendation. On June 22, 2006, the court held a hearing on the motion. Counsel for all parties were present and heard. For the reasons below, the court recommends that plaintiffs' motion for sanctions be DENIED.

#### **I. PROPOSED FINDINGS OF FACT**

These five lawsuits (hereinafter the "Wallace cases") stem from allegations that defendant Susan Wallace physically and/or sexually abused the minor plaintiffs while they were special education students at Beaver Elementary School in Henderson County, Tennessee, and that the Board acted with deliberate indifference to the abuse. The students and their parents filed these lawsuits in state court alleging various state and federal claims against Wallace and the Board for injuries and damages sustained as a result of the abuse. Defendants subsequently removed the cases to federal court, with jurisdiction premised upon plaintiffs' claims arising under 42 U.S.C. § 1983. All of the plaintiffs are represented by the same counsel.

In the present motion, plaintiffs allege that the Board failed timely to disclose documents responsive to plaintiffs' discovery requests, and ask the court to impose sanctions against the Board pursuant to Federal Rule of Civil Procedure 37(c)(1). Plaintiffs' motion arises from the following request for production served on the Board in July, 2004:

Request for Production No. 9: Please provide copies of any and all documents reflecting, referring or relating to complaints against any current or former employees of yours which in any way relate to allegations of inappropriate conduct and/or abuse toward students.

Pl.'s Mem. at 4. The Board initially objected to plaintiffs' request on the grounds that the request was overly broad, unduly burdensome, and sought irrelevant information. Plaintiffs responded by filing a motion to compel the Board to respond to plaintiffs' discovery request. The court scheduled a telephonic hearing on plaintiffs' motion for December 19, 2005. Prior to the hearing, however, the Board advised plaintiffs that it would withdraw its objections to the discovery request. As a result, on December 20, 2005, the court entered an Order Denying as Moot Plaintiffs' Motion to Compel Discovery and to Strike Objections.

In January, 2006, the plaintiffs learned of a similar case pending in this district, in which the Board is being sued under 42 U.S.C. § 1983 for inappropriate conduct by a teacher, Deberry v. Graves, No. 04-1241 (W.D. Tenn. removed Sept. 28, 2004). Counsel for the Board in the Wallace cases also represents the Board in Deberry. On January 13, 2006, the Board provided plaintiffs with its Third Supplemental Responses to plaintiffs' First Set of Interrogatories and Request for Production of Documents. The Board did not disclose any materials in response to request for production 9, stating that it was "presently unaware of any other documents responsive to this Request." Pl.'s Mem. at 10. Plaintiffs then pointed out to the Board that documents in the Deberry case are responsive to request for production 9, and should

be provided to plaintiffs. Counsel for the Board stated that the failure to produce the Deberry documents was an oversight on his part. The Board produced these documents to plaintiffs on March 1, 2006. Based on counsel's statements in the response brief and at the June 22, 2006 hearing on the motion, the court submits that the delayed production of the Deberry documents was due to an oversight by counsel, and was not willful, in bad faith, or done in an attempt to withhold relevant documents.

On March 24, 2006, plaintiffs submitted an open records request with the Board pursuant to Tennessee Code Ann. § 10-7-501, seeking production of all personnel files and documents that evidence complaints against employees of the Board. In response to the open records request, the Board provided plaintiffs with 27 boxes of documents. Plaintiffs allege that, in reviewing the documents, they have discovered evidence of approximately 57 additional incidents involving inappropriate conduct by school personnel and that these incidents should have been disclosed in response to plaintiffs' request for production number 9. During this time, the plaintiffs further allege that they learned during the depositions of Board members of another incident of school employee misconduct (involving Mr. Tuznic) that had not been previously disclosed in response to request number 9.

The court submits, based on the deposition testimony of Susan Bunch, that there was a genuine misunderstanding between the Board and its counsel regarding what types of documents should have been produced by the Board in response to document request 9 and the

Board's obligations in locating these complaint files. Specifically, Bunch testified in her deposition that the Board did not find certain materials responsive to plaintiffs' request for production 9 because she understood plaintiffs' request for teacher "complaints" to only include incidents that were reported to Tennessee's Department of Children Services or law enforcement. Ex. 14 to Def.'s Mem. at 279-280. The court further submits that the Board's failure to produce these additional complaints in a timely manner was not willful, in bad faith, or done in an attempt to withhold relevant documents.

In addition to this dispute concerning plaintiffs' request for production number 9, plaintiffs also argue that sanctions are necessary to reimburse them for the expense of performing a hard drive analysis on eight computers owned and operated by the Board and its employees. On January 3, 2006, plaintiffs asked to inspect the hard drives for computers assigned to Celia Barrow, Dana Johnson, Susan Bunch, the current Director of Schools, Ken Reed, Julia Parker, Jimmy Fesmire, and Susan Wallace, for the years 2001 through 2004. The Board agreed to perform a search of the hard drives for relevant information, but informed plaintiffs that the computers operated by Barrow, Johnson and Parker were damaged by a power surge in September, 2004. The Board provided a technical support employee from the Board, at no cost to plaintiffs, to perform the search and attempt to recover information from the impaired hard drives. Plaintiffs hired a technical consultant of their own to participate in the hard drive search. The searches

were performed on April 12, 16, 19, 20, 21, 25 and 26, and took over 89.9 hours to complete. The parties were able to retrieve relevant information from both the damaged and undamaged hard drives.

Plaintiffs filed the present motion on June 1, 2006, and request that the court impose the following sanctions on the Board:

1. Plaintiffs be granted a default judgment on the issue of "deliberate indifference" against the Board;
2. The Board be ordered to pay Plaintiffs their reasonable attorney's fees and expenses associated with this Motion for Sanctions;
3. The Board be ordered to reimburse the attorney's fees and expenses incurred by the Plaintiffs in uncovering withheld documents, which would include the Open Records Request, analysis of the hard drives, and prior efforts to resolve discovery disputes between the parties without court intervention;
4. The jury be informed of the Board's failure to disclose discoverable documents;
5. The Board be precluded from offering any evidence at trial which it failed to disclose in response to the Plaintiffs' discovery requests.
6. Alternatively, that this Court sanction the Board by entering an order ruling that the Board had a custom of failing to prevent abuse by teachers to children after repeated notice of the abuse and knowledge that the teachers were a danger to the students;
7. Alternatively, that plaintiffs be permitted to take or retake any depositions necessitated by the Board's failure to disclose and that the Board be responsible for all attorney's fees and expenses associated with said depositions, including preparation time.

Pl.'s Mot. at 2-3.

## II. PROPOSED CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 37(c) empowers the court to sanction a party for failing to comply with its discovery obligations. Fed. R. Civ. P. 37(c)(1). The rule provides:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or in a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

Id. Rule 37 "mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified." Roberts v. Galen of Va., Inc., 325 F.3d 776, 782 (6th Cir. 2003) (quoting Vance v. United States, No. 98-5488, 1999 U.S. App. LEXIS 14943, at \*3 (6th Cir. June 25, 1999) (unpublished)). Where a party has violated the discovery rules, the burden is on the offending party to prove harmlessness or substantial justification. Roberts, 325 F.3d at 782. The Sixth Circuit has identified four factors that the court should consider when deciding whether to impose sanctions pursuant to Rule 37:

The first factor is whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; the second factor is whether the adversary was prejudiced by the party's failure to cooperate in discovery; the third factor is whether the party was warned that failure to cooperate could lead to the sanction; and the fourth factor in regard to a dismissal is whether less drastic sanctions were first imposed or considered.



Freeland v. Amigo, 103 F.3d 1271, 1277 (6th Cir. 1997); see also Doe v. Lexington-Fayette Urban County Government, 407 F.3d 755, 765-66 (6th Cir. 2005); Osborne v. Quesenberry, No. 04-553, 2005 U.S. Dist. LEXIS 27018, at \*16 (E.D. Ky. Nov. 8, 2005) (unpublished); Hayman v. PricewaterhouseCoopers, LLP (In re Telxon Corp. Secs. Litig.), Nos. 98-2876, 01-1078, 2004 U.S. Dist. LEXIS 27296, at \*67 (N.D. Ohio July 16, 2004)(unpublished); Jack Tyler Eng'g Co. v. ITT FLYGT Corp., No. 03-2060, 2004 U.S. Dist. LEXIS 26155, at \*12-13 (W.D. Tenn. June 9, 2004)(unpublished); Maldonado v. Thomas M. Cooley Law Sch., No. 01-93, 2002 U.S. Dist. LEXIS 14370, at \*5 (W.D. Mich. July 29, 2002)(unpublished); Perry v. County of Kent, No. 00-781, 2002 U.S. Dist. LEXIS 1380, at \*6 (W.D. Mich. Jan. 24, 2002)(unpublished).

The court submits that, with respect to the recovery of data from the computer hard drives, the Board did not violate the discovery rules or otherwise fail to cooperate in discovery. The data retrieved from the hard drives was not, as plaintiffs contend, "withheld" by the Board. The Board agreed to the searches of the hard drives, and worked with plaintiffs to recover relevant information. Moreover, the Board provided the services of a technical support employee, at no cost to plaintiffs, to assist in the hard drive recovery process. The hard drive search took place over a seven-day period, and the Board's counsel was present for the hard drive analysis, which took almost 90 hours to complete. Plaintiffs' costs incurred in connection with the hard drive analysis were not caused by any discovery violations by the Board

or its counsel.

With respect to document request 9, the court submits that the Board's delayed disclosure of information regarding other complaints of abuse against school employees was harmless. Regarding the Deberry documents, the information initially was not disclosed due to counsel's oversight. Regarding the plaintiff's discovery of other complaints of abuse revealed during Board members' depositions and during plaintiffs' review of school records pursuant to the open records request, the untimely disclosure of this information was inadvertent. The plaintiffs have had the documents in their possession since April 2006, the discovery deadline has not yet passed, and the Board has agreed to make Susan Bunch or any other Board representative available for supplemental depositions on these newly discovered complaints. Finally, the court submits that the delayed disclosure of the information was not done willfully or in bad faith. Moreover, the plaintiffs have not been prejudiced by the untimely disclosures. The court submits that sanctions are not appropriate in this case.

### III. RECOMMENDATION

For the reasons above, the court recommends that plaintiffs' Motion for Sanctions Against the Defendant Henderson County Board of Education be DENIED.

Respectfully Submitted.

S/ Tu M. Pham

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TU M. PHAM  
United States Magistrate Judge

July 7, 2006

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Date

**NOTICE**

**ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.**