

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

NORTH CAROLINIANS FOR PRIVACY,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:16-cv-845-TDS-JEP
)	
U.S. DEPARTMENT OF JUSTICE AND)	DEFENDANTS' RULE 26(f)
U.S. DEPARTMENT OF EDUCATION, et al.,)	REPORT
)	
Defendants.)	
)	
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Pursuant to Fed. R. Civ. P. 26(f) and L.R. 16.1(b), a telephonic conference was held on July 18 at 3:00 p.m. EST and was attended by James A. Campbell and J. Caleb Dalton for plaintiff North Carolinians for Privacy (NCFP), and by Benjamin L. Berwick and Sheila Lieber for defendants.

Discovery and Pretrial Plan

Defendants believe that discovery and a trial are neither necessary nor appropriate in this case, and that, instead, all issues can and should be resolved through cross-motions for summary judgment. Based on conversations with plaintiff's counsel, the undersigned counsel for defendants understands that, in the event that the Court denies plaintiff's pending motion to intervene in *United States of America v. North Carolina*, No. 1:16-cv-00425-TDS-JEP,¹ plaintiff would agree that this case should be resolved through dispositive motions rather than a trial. However, the parties part ways when it comes to discovery. Plaintiff seeks to reserve the right to take limited discovery in this matter, while, for two reasons, defendants believe that discovery is not appropriate.

¹ The United States has opposed intervention in *United States v. North Carolina*, No. 16cv425, for the reasons stated in its recent opposition brief. See ECF No. 100. Were the Court to grant plaintiff's motion to intervene, the schedule for discovery in *United States v. North Carolina* would likely need to be adjusted.

First, plaintiff challenges agency action and raises procedural and substantive claims under the Administrative Procedure Act (APA). Generally, in a case challenging agency action, “the role of a reviewing court is limited, and the standard of review of an agency action is one that is highly deferential to the agency. The Court’s role is only to assess whether the agency’s decision is ‘within the bounds of reasoned decision-making.’” *Audubon Naturalist Soc’y of The Cent. Atl. States, Inc. v. U.S. Dep’t of Transp.*, 524 F. Supp. 2d 642, 659 (D. Md. 2007) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 105 (1983)). Thus, as a general matter, APA claims are not subject to fact development through discovery and trial. *Cf. Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Am. Canoe Ass’n, Inc. v. EPA*, 46 F. Supp. 2d 473, 475 (E.D. Va. 1999). Limitations on discovery related to APA claims apply even where a plaintiff alleges that an agency action violates the Constitution, as plaintiff does here. *See Tafas v. Dudas*, 530 F. Supp. 2d 786, 802 (E.D. Va. 2008).

Second, all of plaintiff’s claims—including their two non-APA claims—turn on questions of statutory and regulatory interpretation—that is, whether defendants’ interpretations of Title IX of the Education Amendments of 1972 and the Violence Against Women Act, and their implementing regulations, are reasonable. If the Court resolves those issues in defendants’ favor, then, in all likelihood, defendants should prevail on all of plaintiff’s claims—at the very least, it would substantially narrow the issues in this case.

Therefore, defendants believe that this case can be resolved through expedited dispositive motions and without any discovery, and propose the following schedule:

- Plaintiff’s motion for summary judgment shall be filed on or before August 19, 2016.
- Defendants’ opposition and cross-motion for summary judgment shall be filed on or before September 9, 2016.

- Plaintiff's opposition and reply shall be filed on or before September 30, 2016.
- Defendants' reply shall be filed on or before October 14, 2016.²

Mediation

Mediation is not required under L.R. 16.4 for these cases. (To the extent necessary, the parties propose that the Court enter an order providing that the parties need not participate in mediation in this case.)

Other Issues

The parties should be allowed until Friday, August 5, 2016, to join additional parties or amend pleadings. After this date, the Court will consider whether good cause exists to join additional parties or amend pleadings. The parties do not consent to an order referring the case to a Magistrate Judge or appointing a master.

Dated: July 20, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

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/s/ Benjamin L. Berwick
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² If the Court disagrees with defendants and allows plaintiff to take limited discovery, defendants would then reserve the right to depose any witnesses identified by plaintiff, including expert witnesses, and to offer their own expert. Similarly, if plaintiff offers an expert declaration in support of its motion for summary judgment, defendants reserve the right to depose plaintiff's expert and to offer an expert of their own.

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, a copy of the foregoing Plaintiff's Rule 26(f) Report was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick
Benjamin L. Berwick