UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, Plaintiff, vs. UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his official capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as United States Attorney General; and VANITA GUPTA, in her official capacity as Principal Deputy Assistant Attorney General, Defendants.	Case No. 2:16-cv-524 Judge Algenon L. Marbley Magistrate Judge Kimberly A. Jolson

JANE DOE'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HER MOTION TO INTERVENE AS A THIRD-PARTY PLAINTIFF

Jane Doe, an eleven-year-old transgender girl in the Highland Local School District, who is identified as "Student A" throughout the Complaint in the above-captioned action, submits the following reply memorandum of law in further support of her motion, by and through her legal guardians, Joyce and John Doe, to intervene in this case as a third-party plaintiff pursuant to Federal Rule of Civil Procedure 24.

PRELIMINARY STATEMENT

Despite its protestations to the contrary, Highland has placed Jane Doe's legal interests at the heart of this matter. Intervention would allow the Court to more efficiently and comprehensively adjudicate the interrelated claims raised by Highland and Jane.

Highland has for years intentionally discriminated against Jane. After an extensive investigation, the United States Department of Education's Office for Civil Rights found that Highland's treatment of Jane violated Title IX and counseled Highland to stop discriminating against her; in response, Highland refused to alter its discriminatory conduct and filed this lawsuit instead, seeking to enjoin the federal government from enforcing Title IX. Highland thus lacks any reasonable basis to argue that Jane lacks a substantial interest in this case, or would not be directly affected by its outcome. By this lawsuit Highland seeks to continue discriminatory practices and conduct that directly, and profoundly, affect Jane. She should therefore be permitted to intervene in the case, so that her voice can be heard and her interests adequately protected.

Jane is entitled to intervene as of right, as the federal defendants acknowledge. *See* Dkt. 25 ("Defendants take no position on [Jane's] request for permissive intervention and do not oppose her request to intervene as of right insofar as it relates to her proposed third party claims and the individual remedies, including damages, that she seeks."). And even if intervention as of right were unavailable, permissive intervention would plainly be appropriate here. Although Highland suggests that Jane's involvement will deprive it of "its right to litigate the case that it filed," Dkt. 24 at 1, Jane's offering facts about her mistreatment by Highland is not a detour from this case, it is necessary context for the discriminatory conduct for which Highland now seeks legal protection. Highland's argument that it would be prejudiced by Jane's introduction of relevant facts (which might "complicate" the effort to persuade the Court to sanction Highland's unlawful conduct, *see* Dkt. 24 at 10-11) lacks merit. Providing relevant and necessary information to the Court cannot plausibly establish prejudice.

Jane's intervention will not change the factual and legal disputes at the core of this matter, but rather will streamline the resolution of those issues. Both the Federal Rules of Civil Procedure and basic fairness require that Jane be involved in this case, which will directly impact her legal interests.

ARGUMENT

I. Jane Is Entitled to Intervene as of Right

The parties agree on the applicable elements, and Highland apparently agrees that the first element (timeliness) is satisfied. Highland argues that each "interest" or claim that Jane asserts must separately satisfy the test for intervention, and thus divides Jane's interests in the case into Title IX claims and constitutional claims. Dkt. 24 at 3 (citing *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 292-94 (6th Cir. 1983)). This framing inaccurately states the nature of the "interest" required of a prospective intervenor under Federal Rule of Civil Procedure 24(a). "Interest" is not merely a synonym for "cause of action." *See, e.g.*, *Jones v. Prince George's Cty., Md.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003) ("As the Rule's plain text indicates, intervenors of right need only an 'interest' in the litigation—not a 'cause of action'"). Here, Jane has a concrete and cognizable interest in this Court's ruling on the legality of Highland's conduct, because that conduct directly affects—and, indeed, is directed at—her. She seeks to assert multiple causes of action to vindicate a single interest—being treated in a fair and nondiscriminatory way by her school. If framed as a single interest, Highland's brief appears to concede that all requirements for intervention as of right are satisfied here—Highland does not contest the first or fourth elements as to Jane's constitutional causes of action, and does not contest the first, second or third elements as to Jane's Title IX cause of action. Even addressing Highland's argument on its own terms, however, Jane is entitled to intervene as of right here, because her constitutional and Title IX claims both independently satisfy the required elements.

A. Jane's Constitutional Claims Satisfy the Elements for Intervention as of Right

Jane's constitutional claims against Highland constitute a "substantial legal interest in the case," and denying her the opportunity to intervene in this matter would significantly impair her "ability to protect that interest." *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Highland claims that Jane's "desire to use intimate 'school facilities alongside . . . girls'" is purely a Title IX claim, Dkt. 24 at 4; however, Jane's right to be treated equally, without discrimination based on sex, is protected under both Title IX and the Equal Protection Clause of the Fourteenth Amendment. Jane's constitutional claim against Highland, standing alone, is sufficient to satisfy all elements necessary for intervention as of right.

That Highland would prefer to defend its discriminatory practices on administrative procedure grounds without having to defend their constitutionality, *see* Dkt. 24 at 4, also has no bearing on Jane's direct interests in this case, which puts the treatment of transgender students in Highland schools directly at issue. As the Sixth Circuit has long recognized in cases involving discrimination at school, students have a legal interest in enforcing nondiscrimination laws that could be impaired absent intervention. *See Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("Although the Supreme Court has yet to define what constitutes a sufficient interest to satisfy the interest requirement of Rule 24(a)(2), it has generally been accepted that students, parents of children in the school system and parent organizations have a sufficient interest in eliminating segregation in the schools to satisfy this requirement, and that their interest could be impaired by the disposition of a school desegregation case.").

As to the second element, Highland's litigation, which seeks to vindicate the very conduct that Jane contends violates her legal rights under both Title IX and the Fourteenth Amendment, plainly implicates Jane's "substantial legal interest" sufficient to support

intervention as of right. Jane's claims give her a "legally enforceable right," which is *more* than the Sixth Circuit requires to satisfy this element. *See Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (noting that proposed intervenors may have a significant legal interest even without a "legally enforceable right," and that the Sixth Circuit has rejected "the notion that Rule 24(a)(2) requires a specific legal or equitable interest," and permitting minority students to intervene in litigation challenging affirmative action (citations omitted)).

As for the third element, as Jane noted in her opening brief, the burden is "minimal," and Jane only needs to show that it is "possible" that her interests will be impaired if she is not allowed to intervene. *Miller*, 103 F.3d at 1247. Highland suggests that this element cannot be satisfied because the outcome of its case would not be *preclusive* as to future separate litigation by Jane, Dkt. 24 at 5, but that argument is inconsistent with controlling law, which does not require claim-preclusive effect to support intervention as of right. *See, e.g., N.E. Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1007-08 (6th Cir. 2006) (citing *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992) for the proposition that "potential *stare decisis* effects can be a sufficient basis for finding an impairment of interest"). Here, a ruling that Highland's treatment of transgender students is legally permissible might influence courts ruling on subsequent constitutional challenges, even if such a ruling would not have preclusive effect on Jane's ability to bring a separate case raising these claims. Moreover, where timeliness concerns are implicated, a party's interests may be impaired even if she could bring a separate lawsuit as an alternative. *See id.* at 1008. Here, Jane and Highland have both informed the Court of their intention to seek preliminary injunctions, so time is of the essence. Jane's constitutional claims clear the minimal bar of the possible impairment element.

B. **Jane's Title IX Claim Satisfies the Elements for Intervention as of Right**

Highland makes much of Jane's concession that the Defendants are capable of addressing the question of whether Highland's actions violate Title IX. *See* Dkt. 24 at 6. But that concession is relevant only to one part of Jane's Title IX claim. In addition to seeking a declaration that Highland's conduct violates Title IX, Jane also seeks damages on her Title IX claim and injunctive relief that is specific to her circumstances. The government has effectively conceded that it cannot adequately represent Jane as to those aspects of her Title IX claim. *See* Dkt. 25 ("Defendants…do not oppose [Jane's] request to intervene as of right insofar as it relates to her proposed third party claims and the individual remedies, including damages, that she seeks."). In light of Jane's individual claims, Highland's argument about the presumption of adequate representation has no merit. Indeed, Jane's request for damages, standing alone, is sufficient to overcome the presumption. *See Blackwell*, 467 F.3d at 1008 (reliance on the presumption of adequate representation was "misplaced" where the proposed intervenor and the existing party did not have "the same ultimate objective"); *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (holding that representation was inadequate where the proposed intervenor and the existing party each wished to sue for personal recovery of damages). Because Jane seeks individual remedies, and because the government has effectively conceded that it will not represent Jane's interests as to those remedies, the fourth element is satisfied here. Jane therefore should be permitted to intervene as of right.

II. **Permissive Intervention Is Also Appropriate Here**

In any event, the Court should exercise its discretion to permit Jane to intervene. Upon "timely motion, the [C]ourt may permit anyone to intervene" who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). Jane's

claims plainly share common questions of law and fact with the claims presently before the Court in this action. Highland does not contest that Jane meets this standard.

Instead, Highland argues that intervention should be denied because Jane's claims require "fact-intensive" discovery that it believes is irrelevant to its claims. Dkt. 24 at 9. However, Jane's claims are directly related to the issues of law and fact raised by Highland's complaint. More than 30 paragraphs of Highland's complaint are devoted to Jane. Dkt. 1 ¶¶ 3-4, 59-73, 75-77, 93-98, 100-103, 106, 108, 118, 119, 151. Moreover, Highland has put in issue the very factual questions it now claims are irrelevant to the action. For example, Highland's complaint asserts that: "The term 'sex' as used in Title IX and its regulations refers to biological sex—that is, a person's status as male or female as determined by biology." Dkt. 1 ¶ 20, *see also id.* ¶ 157. Yet Highland argues that a determination of *Jane's* proposed claims would "likely involve a battle of the experts, which will increase the time of discovery and the costs of litigation for all parties." Dkt. 24 at 9. Highland's concern that it will be required to bring forth evidence to support the allegations of its complaint does not justify denying a motion to intervene where no party disputes that Jane's claims share common questions of law and fact with the claims alleged in that complaint. The discovery processes typical of any litigation cannot establish prejudice sufficient to justify denial of a motion to intervene. *See United States v. Marsten Apartments, Inc.*, 175 F.R.D. 265, 268 (E.D. Mich. 1997) ("Although some additional discovery may need to be taken, this alone is insufficient to establish prejudice.").

Intervention will promote, rather than hamper, judicial efficiency. The Court will be able to address all claims related to this common set of facts in one action, rather than in multiple actions. *See Students & Parents for Privacy v. United States Dep't of Educ.*, No. 16 C 4945, 2016 WL 3269001, at *3 (N.D. Ill. June 15, 2016) (stating that "plaintiffs do not account for the

fact that granting the motion to intervene could obviate subsequent lawsuits" and granting transgender students' motion to intervene in a case substantially similar to the one before this Court); *Usery v. Brandel*, 87 F.R.D. 670, 678 n.8 (W.D. Mich. 1980) (noting that "permissive intervention under the Rules was a device aimed at promoting court convenience and efficiency, predicated on a desire to avoid a multiplicity of actions where possible" and "the Court does not believe it is improper to count the desirability of involving all concerned parties as a factor weighing in favor of Rule 24(b) intervention by permission").

Jane's motion to intervene is also timely, as required by Rule 24(b), unlike the cases cited by Highland regarding delay. *Cf. Kasprzak v. Allstate Ins. Co.*, No. 12-cv-12140, 2013 WL 1632542, at *4 (E.D. Mich. Apr. 16, 2013) (denying motion for permissive intervention where discovery had already closed and intervenors waited for more than a year to intervene); *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (denying motion for permissive intervention where motion to intervene was filed six months after the court had already set a discovery schedule).

III. Participation as an Amicus Curiae Is Insufficient to Protect Jane's Interests in the Case and Would Be Inefficient for the Court

Highland's suggestion that Jane participate as an amicus curiae rather than intervening misconstrues the law on permissive intervention. Participation as an amicus simply cannot substitute for intervention where, as here, Jane has important interests that she alone must pursue. It is only by participating as a party that Jane can secure the individual relief she seeks.

In all three cases cited by Highland in which courts required proposed intervenors to participate as amici instead, the court found that the proposed intervenors "shared the same ultimate objective" for the case and ultimate relief from the court. *See Ohio v. EPA*, 313 F.R.D. 65, 69 (S.D. Ohio 2016) ("Plaintiffs do not hold interests adverse to the Farm Bureau's. Rather,

both the Farm Bureau and the existing Plaintiffs share the same ultimate objective in this litigation: injunctive relief setting aside the Clean Water Rule."); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000) ("The Federal Defendants and the [proposed intervenors] agree fully, however, that the plaintiffs' ultimate goal in this case—to nullify the status of Crooked Lake as part of the Sylvania Wilderness—should not prevail."); *Bradley v. Milliken*, 828 F.2d 1186, 1193 (6th Cir. 1987) ("[T]he present class representatives and proposed intervenors share the same ultimate objective in a unitary school district."). And in each case, the court found that the intervenors' claimed different interests were merely disputes over litigation strategy. *See Stupak-Thrall*, 226 F.3d at 477 ("[Proposed intervenors] want to be parties so that they can file motions and appeals, rather than merely amicus briefs—that is, [they] want some say in deciding litigation tactics."); *Ohio*, 313 F.R.D. at 70 ("In sum, the distinctions between Plaintiffs and [proposed intervenors] resemble a dispute over litigation strategy, not a difference in interests capable of casting substantial doubt on the adequacy of Plaintiffs' representation."); *Bradley*, 828 F.2d at 1193 ("Although the litigation strategy has altered, this objective has not been abandoned by current counsel.").

For Jane, participation as an amicus curiae is no substitute for participation as a party in this case. Although Jane's claims and the federal government's anticipated defenses overlap in some ways, they diverge in a number of ways that are relevant. As noted above—among other differences—Jane is seeking damages and a preliminary injunction, neither of which have been sought by the government. Jane therefore proposes to intervene not merely in order to be involved in directing litigation strategy, but rather to vindicate important and unique interests. If denied intervention and forced to proceed as an amicus now, Jane can only protect her interests by filing a separate case, which would create duplicative litigation, repetitive briefing, and

unnecessary additional expense for the parties and the Court. That result is easily avoided, and Jane should be permitted to intervene.

CONCLUSION

For the foregoing reasons, Jane Doe respectfully requests that this Court GRANT her Motion to Intervene.

Dated: August 11, 2016

Respectfully submitted,

By: s/ John Harrison

John Harrison (OH Bar No. 0065286)
Linda Gorczynski (OH Bar No. 0070607)
HICKMAN & LOWDER, L.P.A.
1300 East 9th Street, Suite 1020
Cleveland, OH 44199
(216) 861-0360 (tel)
(216) 861-3113 (fax)
JHarrison@Hickman-Lowder.com
LGorczynski@Hickman-Lowder.com

Jyotin Hamid*
Joseph Weissman*
Derek Wikstrom*
Jennifer Mintz*
Matthew Hartz*
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000 (tel)
(212) 909-6836 (fax)
jhamid@debevoise.com
jweissman@debevoise.com
dwikstrom@debevoise.com
jfmintz@debevoise.com
mhartz@debevoise.com

Christopher Stoll*
Asaf Orr*
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street Suite 370
San Francisco, California 94102
(415) 392-6257 (tel)
(415) 392-8442 (fax)
cstoll@nclrights.org
aorr@nclrights.org

Attorneys for JANE DOE

* admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing instrument via the Court's CM/ECF filing system.

s/ John Harrison
John Harrison