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, a minor, by and through her legal guardians JOYCE and JOHN DOE, Intervenor Third-Party Plaintiff, vs. BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT; HIGHLAND LOCAL SCHOOL DISTRICT; WILLIAM DODDS, Superintendent of Highland Local School District; and SHAWN WINKELFOOS, Principal of Highland Elementary School, Third-Party Defendants.	

JANE DOE'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Intervenor Jane Doe respectfully submits this memorandum of law in opposition to the Board of Education of the Highland Local School District's ("Highland") Motion for Preliminary Injunction (Dkt. 10).

PRELIMINARY STATEMENT

Jane is, as detailed in a number of her other filings in this case, an eleven-year-old transgender girl who attends Highland Elementary School. The purported policies for which Highland's motion seeks this Court's sanction were adopted because of Jane, and are directed solely at her. A court order permitting Highland to continue its discrimination against Jane would be devastating for her, and would cause significant and irreparable harm.

At the same time as Jane files this memorandum, she is also affirmatively moving for a preliminary injunction requiring Highland to stop discriminating against her and to treat her as a girl, including by referring to her using female pronouns and her female name and permitting her to use the same restrooms as other girls at Highland Elementary. Jane opposes Highland's motion for a preliminary injunction for the reasons outlined in her affirmative papers, and joins in the arguments in the opposition the Defendants are expected to file today. She submits this memorandum to supplement the arguments made in those anticipated filings, and to present to the Court additional reasons that Highland's motion should be denied.

ARGUMENT

I. Title IX Requires That Transgender Students Must Be Treated Equally

As explained in Section II of Jane's memorandum of law in support of her own motion for a preliminary injunction, Title IX requires schools receiving federal funding not to discriminate against students because of their sex. Construing the term "sex" to refer only to a student's so-called "biological sex," as Highland urges, directly contradicts the Supreme Court's broad construction of that term in both Title IX and other federal sex discrimination laws. As the

Defendants' administrative guidance recognizes, and as the Sixth Circuit has long held, this prohibition on sex discrimination includes a prohibition on discriminating against students due to their transgender status. Highland's arguments to the contrary are meritless and should be rejected.

II. The Requirement to Treat Transgender Students Equally Does Not Violate the Spending Clause

Title IX's requirement that schools allow transgender students to access activities, programs, and facilities on an equal basis with other students does not violate the Spending Clause of the United States Constitution. As the Supreme Court has long held, "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603 (2012). The requirement that schools treat transgender students equally falls well within this broad grant of authority.

Highland claims that the rule proffered by the guidance violates the Spending Clause for four reasons: (1) it allegedly imposes requirements for which states did not have sufficient notice; (2) it allegedly is coercive; (3) it allegedly imposes a rule that is unrelated to the purposes of the federal funding provided to schools; and (4) it allegedly requires schools to violate the constitutional rights of other students. None of these arguments have merit.

A. States Have Long Been on Notice That Title IX Was Broadly Intended to Eliminate All Forms of Sex-Based Discrimination in Federally Funded Schools

Highland contends that construing Title IX to require equal treatment of transgender students violates the requirement that states must have sufficiently "clear notice" of conditions attached to federal funding for particular programs and activities. Dkt. 10 at 23 (citing *Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). But as Highland's own cited

cases hold, Title IX provides sufficiently clear notice that Title IX prohibits all forms of sex discrimination in federally funded schools, including barriers that deny students an opportunity to participate equally in all aspects of school programs and activities. Since its enactment, courts have given Title IX "a sweep as broad as its language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). "'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach." *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 175 (2005).

Over the years, the Supreme Court has repeatedly rejected the argument—advanced by Highland here—that construing Title IX to prevent a wide variety of discriminatory practices was impermissible on the ground that doing so failed to give states clear notice of what the statute requires. For example, in *Jackson v. Birmingham Board of Education*, the Supreme Court held that Title IX prohibits retaliation for filing sex discrimination complaints, rejecting the notion that Congress was required to spell out such liability expressly in the statute: "The Court of Appeals' conclusion that Title IX does not prohibit retaliation because 'the statute makes no mention of retaliation,' . . . ignores the import of our repeated holdings construing 'discrimination' under Title IX broadly." *Id*. at 174. As the Supreme Court further explained: "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. . . . Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Id*. at 175.

Similarly, like Highland here, the school board in *Jackson* argued that imposing liability for retaliation would violate the Spending Clause because schools had no notice that such conduct was prohibited under Title IX. The Supreme Court disagreed, noting that "[f]unding

recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when we decided *Cannon* [*v. University of Chicago*]." *Id*. at 182. Citing its prior decisions in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 74-75 (1992) (imposing Title IX liability for sexual harassment of a student by a teacher), and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640 (1999) (imposing Title IX liability for peer sexual harassment), the Supreme Court strongly affirmed that Title IX's broad protection against sex discrimination suffices to put schools on notice that they are liable for any form of intentional sex discrimination. *Jackson*, 544 U.S. at 181-83. *See also Bennett v. Ky. Dep't of Educ.,* 470 U.S. 656, 665-66 (1985) (rejecting claim of insufficient notice under *Pennhurst* where statute made clear that there were some conditions placed on receipt of federal funds, and noting that Congress need not "specifically identif[y] and proscrib[e]" each condition in the legislation).

The same analysis applies here. A long line of cases, starting with *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and many subsequent decisions, such as *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), and *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004), have provided unambiguous notice that Title IX prohibits discrimination on the basis of sex stereotypes, a prohibition that extends to transgender people.[1] Indeed, in a recent decision affirming a transgender student's right to use the same restrooms as other students under Title IX, a Fourth Circuit judge noted that "the weight of circuit authority" recognizes that "discrimination against transgender individuals constitutes discrimination 'on the basis of sex'"

[1] These cases consider the question of discrimination on the basis of sex stereotypes under Title VII. However, courts in the Sixth Circuit look to Title VII jurisprudence for guidance in applying Title IX. *Nelson v. Christian Bros. Univ.*, 226 F. App'x 448, 454 (6th Cir. 2007) ("Generally, courts have looked to Title VII . . . as an analog for the legal standards in both Title IX discrimination and retaliation claims.").

under statutes analogous to Title IX. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 727 (4th Cir. 2016) (Davis, J., concurring) (citing *Price Waterhouse*, 490 U.S. at 250-51); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Smith*, 378 F.3d at 573-75; *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000)). This is because transgender people, by definition, "transgress[] gender stereotypes." *Glenn*, 663 F.3d at 1316; *see also Smith*, 378 F.3d at 575 (discrimination against a transgender plaintiff who inherently "fails to act and/or identify with his or her [birth] gender" is impermissible sex stereotyping). Under *Price Waterhouse*, sex stereotyping "based on a person's gender non-conforming behavior is impermissible discrimination, *irrespective of the cause* of that behavior." *Smith*, 378 F.3d at 575 (emphasis added).

Consistent with that strong judicial trend, the Department of Education and the Department of Justice have been construing Title IX to protect transgender students for several years. In October 2010, the Department of Education issued a Dear Colleague letter on bullying and harassment that explicitly noted that Title IX protects transgender students and requires schools to address bullying and harassment that targets a student based on sex stereotypes. In 2013, the Departments of Education and Justice reached a resolution agreement with the Arcadia Unified School District in California, requiring the district to treat transgender students equally with respect to sex-separated activities and facilities. Resolution Agreement, *Student v. Arcadia Unified Sch. Dist.*, OCR Case Number 09-12-1020/DOJ Case Number 169-12C-70 (Cal., Jul. 24, 2013). Since that time, the Department of Education Office for Civil Rights has resolved a number of similar complaints with comparable resolution agreements. *See, e.g.*, Resolution Agreement, *Student v. Dorchester Cty. Sch. Dist. 2*, OCR Complaint No. 11-15-1348 (S.C., Jun. 16, 2016); Resolution Agreement, *Student v. Downey Unified Sch. Dist.*, OCR Case No. 09-12-

1095 (Cal., Oct. 8, 2014). The recent guidance merely provides school districts with further notice of this growing legal consensus and with express guidance about how to apply Title IX's limited exception for sex-separated facilities to transgender students.

In sum, though Title IX does not mention gender identity (any more than it mentions any other component of a person's sex), federal courts, including the Sixth Circuit, have overwhelmingly held that discrimination based on gender identity is sex discrimination. As such, it is prohibited by Title IX, and imposing liability for that prohibited conduct does not violate the Spending Clause.

B. The Requirement to Treat Transgender Students Equally Does Not Materially Alter the Current System of Providing Separate Facilities for Male and Female Students and Is Not Coercive

Highland also erroneously contends that the guidance conflicts with existing regulations permitting schools to provide separate restrooms and other facilities for male and female students and improperly "coerces" schools into dramatically altering their current policies and practices, by effectively requiring them to abandon sex-separated facilities altogether. Dkt. 10 at 24. In fact, the guidance expressly presumes that schools will continue to have separate restrooms and other facilities for male and female students and explains how, within that established framework, schools must treat transgender students—namely, by treating transgender boys the same as other boys, and by treating transgender girls the same as other girls. Dkt. 10-3 at 3-4. Nothing in that requirement interferes with the provision of separate restrooms for male and female students or requires any material change in how schools administer sex-separated facilities.

To the contrary, as the guidance makes clear, to comply with Title IX in their treatment of transgender students, schools simply must permit them to use the same facilities as other

students, consistent with their gender identity, as other students are already permitted to do. Just as other students use facilities based on their gender identity, without any requirement that they undergo genetic testing or any other type of invasive inspection or verification of their sex, transgender students must be permitted to do the same. Thus, unlike the significant burdens at issue in *Pennhurst*, requiring that school districts treat transgender students equally imposes a minimal burden on school districts, if any. There is no need for a school to retrofit its current facilities, create new facilities, or stop providing separate facilities for male and female students. Rather, the law merely requires school and district administrators to ensure that transgender students are able to fully integrate into the school's sex-separated activities, programs, and facilities on the same terms as their peers. Requiring such a nondiscrimination policy as a condition of federal assistance is not coercive; it merely requires schools, when they are adopting and administering separate facilities for male and female students within the narrow limits permitted by Title IX, to ensure that transgender students are treated equally and permitted to use the same facilities as their peers.

The alternative—forcing transgender students to use separate facilities or facilities that conflict with their gender identity—would defeat Title IX's core purpose of eradicating sex-based barriers to educational opportunities. As the facts in this case show, such discriminatory policies isolate and stigmatize transgender students—just as Jane Doe has been isolated and stigmatized here—by singling them out for differential treatment based on their gender non-conformity and preventing them from participating in learning and other school activities on an equal basis with other students. *See, e.g.*, Joyce Doe Decl. ¶ 21; Jane Doe Decl. ¶¶ 6-7; Hill Decl. ¶ 12. Requiring schools to treat transgender students in a manner that furthers, rather than defeats, Title IX's core purpose and that requires no material change in how schools provide sex-

separated facilities (other than simply providing transgender students with equal access to those facilities) is a far cry from the imposition of burdensome new requirements that the Supreme Court has deemed impermissibly coercive in other contexts. *See*, *e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2606 (finding the imposition of sweeping new enrollment requirements under the federal Medicaid program to be coercive where the new requirements constituted not "a mere alteration of existing Medicaid" but an "enlist[ment of] the States in a new health care program"). In contrast, requiring schools to treat transgender students equally is an incremental extension or application of existing nondiscrimination requirements; it is not a "shift in kind." *Id*. at 2605.

C. Treating Transgender Students Equally Is Reasonably Related to the Purpose of Federal Funding Provided to Schools

For similar reasons, Highland's argument that the requirement to treat transgender students equally is not "reasonably related" to the purpose of the federal funding provided schools is unavailing. By its own admission, Highland is using federal funds to supplement their education-related services and programs, including special education and school nutrition programs. Congress enacted Title IX in order to ensure that federal funds are not used to support discrimination in education and to provide an effective remedy for individuals who are discriminated against based on sex in federally funded schools. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979). Protecting transgender students directly furthers and promotes those goals. The conditions imposed are therefore reasonably related to the purpose of the funding.

D. Treating Transgender Students Equally Does Not Violate Other Students' Constitutional Rights

Permitting transgender students to participate equally in sex-separated activities, programs, and facilities does not violate the constitutional rights of other students. As detailed in

Section III.A of the memorandum of law in support of Jane's motion for a preliminary injunction, courts have consistently rejected claims by students and others that the mere presence of transgender people in a sex-separated space violates their right to privacy. The cases Highland relies upon to support its argument that government actors face liability if they violate students' bodily privacy interests are either irrelevant or strongly support the rule set forth in the guidance. In *Henderson v. Walled Lake Consolidated Schools*, a student brought a hostile school environment claim under both state antidiscrimination law and Title IX based on alleged verbal abuse by the school's soccer coach. 469 F.3d 479, 484-86 (6th Cir. 2006). There was no claim related to transgender students, and the court affirmed the dismissal of the entire complaint, including the Title IX claim. *Id.* at 492, 496. *Brannum v. Overton County School Board* involved a Fourth Amendment challenge to invasive filming of students in the locker rooms by school officials. 516 F.3d 489, 498 (6th Cir. 2008) (holding that Fourth Amendment right to be free from unreasonable searches was violated when school officials installed and regularly monitored video cameras in the boys' and girls' locker rooms at a middle school).

Finally, while the Sixth Circuit has recognized that individuals may have a protected privacy interest in not being viewed unclothed by a person of the other sex, transgender persons have the same interest in privacy as others. As an initial matter, such a right has no discernible application in restrooms, which do not involve such viewing, or to any space in which such viewing is avoidable, such as locker rooms. But to the limited extent the right has any relevance here at all, it supports the requirement of treating transgender students equally, recognizing that they have the same interests in dignity and privacy as others. Because a transgender girl is a girl and a transgender boy is a boy, requiring schools to treat them as such does not violate any reasonable expectations of privacy.

III. Section 5 of the Fourteenth Amendment Provides an Independent Basis for Congress's Authority to Enact Title IX

For all of the reasons explained above, as well as for the reasons set forth in Defendants' Opposition, the requirement to treat transgender students equally, including with respect to sex-separated facilities, readily meets the requirements of the Spending Clause. Although the Supreme Court has recognized that Title IX is Spending Clause legislation, *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005), Section 5 of the Fourteenth Amendment provides an independent basis for Title IX.[2] The Supreme Court expressly left this an open question in *Franklin*, 503 U.S. at 75 n.8, and lower courts, including the Sixth Circuit, have recognized that Congress relied on its Section 5 powers in abrogating state sovereign immunity for claims under certain civil rights statutes including Title IX. *See Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Escue v. N. Ok. Coll.*, 450 F.3d 1146, 1152 (10th Cir. 2006); *Crawford v. Davis*, 109 F.3d 1281, 1282-83 (8th Cir. 1997); *see also Doe v. Univ. of Ill.*, 138 F.3d 653, 660 (7th Cir. 1998), *vacated and remanded on other grounds*, 526 U.S. 1142 (1999). In sum, Section 5 provides an independent basis for Title IX's protection of transgender students.

IV. Highland Cannot Establish Irreparable Harm

Highland has no legally cognizable interest in continuing to discriminate against Jane Doe by excluding her from the girls' restroom and denying transgender students equal access to the same programs, activities, and facilities available to other students. Therefore, Highland cannot establish irreparable harm based on purported deprivation of such an interest. As detailed

[2] Congress can enact legislation using more than one constitutionally granted power. *See, e.g.*, *Counsel v. Dow*, 849 F.2d 731, 735 (2d Cir. 1988) (asserting that Congress enacted Education of the Handicapped Act and Handicapped Child Protection Act pursuant to Fourteenth Amendment and Spending Clause); *Crawford v. Pittman*, 708 F.2d 1028, 1036 (5th Cir. 1983) (same).

above and in Jane's Motion for a Preliminary Injunction, requiring Highland to cease its discrimination against Jane would neither cause any harm nor violate any legal rights of either Highland or its students.

Complying with Title IX does not prevent Highland from implementing measures to safeguard the privacy interests of all students, and Highland may not use any need to safeguard privacy interests as a pretext to discriminate against Jane. Highland's "dignity and privacy" argument is in fact entirely speculative and baseless, as explained in Jane's Motion for a Preliminary Injunction.

Speculation that complying with Title IX may cause disruption in the school is also not the type of harm that can satisfy the "irreparable harm" analysis. Holding otherwise is tantamount to giving the school community a "heckler's veto," allowing them to undermine validly enacted and enforceable antidiscrimination protections. Courts have consistently held that schools cannot infringe on a student's legal rights based on the disruptive conduct of others. *Boyd Cty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cty., Ky.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) ("Defendants are not permitted to restrict Plaintiffs' speech and association as a means of preventing disruptive responses to it."); *Fricke v. Lynch*, 491 F. Supp. 381, 387 (D.R.I. 1980) (holding that "even a legitimate interest in school discipline" does not permit a school to "completely subvert free speech in the schools by granting other students a 'heckler's veto,' allowing them to decide through prohibited and violent methods what speech will be heard."). For that reason, among others, Highland's reliance on *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), is unavailing. *T.L.O.* involved a student who school administrators believed was engaging in conduct that violated school rules and was potentially unlawful, *id.* at

343-44, which stands in stark contrast to the cases cited above, as the school districts in those cases were seeking to prohibit students from engaging in legally protected conduct.

Highland's argument that it would suffer irreparable harm is also belied by the actual practice and experience of countless schools and workplaces across the country, which have implemented policies that allow transgender people to access the restrooms that match their gender identity, just as others are permitted to do.[3] Those policies simply make explicit what has long been an ordinary social practice: people, including transgender people, access restrooms based on their gender identity, without regard to their reproductive organs, chromosomes, or other "proof" of "biological sex." Nowhere in this country has it ever been the practice to check or require proof of these characteristics before a person enters a restroom. Permitting transgender people to use the same restrooms as others—as thousands of transgender individuals already do—imposes little, if any, burden on schools. In contrast, the benefit to transgender students—being able to participate equally in school and to interact on an equal, non-stigmatizing basis with other students—is enormous, as is the harm to those students when they

[3] *See* States' Amicus Curiae Brief in Opposition to Plaintiffs' Application for Preliminary Injunction, *Texas v. United States*, No. 7:16-cv-00054-O (N.D. Tex. July 27, 2016), ECF No. 34; *see also, e.g.*, United States Department of Education, Examples of Policies and Emerging Practices for Supporting Transgender Students (2016), *available at* http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf (last visited Aug. 16, 2016) (identifying school districts across the country that treat transgender students equally, including with respect to restrooms and other facilities); Human Rights Campaign, Corporate Equality Index: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality, *available at* http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/CEI-2016-FullReport.pdf (lasted visited Aug. 16, 2016) (identifying employers across the country that treat transgender employees equally, including with respect to restrooms and other facilities); Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, *available at*, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last visited Aug. 16, 2016) (providing that all federal transgender employees must be permitted to use the same restrooms and other facilities as other employees, consistent with their gender identity).

are isolated, stigmatized, and treated as less worthy of inclusion and respect than other students because of a sex-based characteristic over which they have no control.

V. The Balance of Interests Weighs Strongly Against Highland's Request for a Preliminary Injunction

As detailed in Section IV of Jane Doe's Motion for Preliminary Injunction, Highland's claim that Jane would not be harmed if Highland is permitted to continue its discriminatory conduct is baseless. Highland is well aware of the harm that Jane is experiencing, and for the reasons explained in Jane's affirmative motion, the balance of interests weighs strongly in Jane's favor. Highland's request for a preliminary injunction must be denied for that reason.

VI. The Public Interest Weighs Strongly Against Highland's Request for Preliminary Injunctive Relief

The public has a strong interest in ensuring that every child can attend school free of discrimination based on sex and has an equal opportunity to learn and thrive. That interest is safeguarded by Title IX and the Equal Protection Clause of the Fourteenth Amendment. The preliminary injunctive relief Highland seeks would undermine those long-established protections. In contrast, Highland has failed to demonstrate any public interest that would be served by the continuation of its discriminatory treatment of Jane and other transgender students. This factor does not support the injunctive relief Highland seeks.

CONCLUSION

For the foregoing reasons, Jane Doe respectfully requests that this Court DENY Highland's Motion for Preliminary Injunction.

Dated: August 16, 2016

Respectfully submitted,

By: s/ John Harrison

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 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