

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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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. :

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JANE DOE’S MEMORANDUM IN OPPOSITION TO AN EVIDENTIARY HEARING

Jane Doe respectfully submits this memorandum as discussed with the Court at the status conference on September 7, 2016.

I. An Evidentiary Hearing May Be Unnecessary

As the Sixth Circuit has held, evidentiary hearings need not be conducted where the issues relevant to a preliminary injunction motion are primarily issues of law. *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 246 (6th Cir. 2011); *see also Caspar v. Snyder*, 77 F. Supp. 3d 616, 639 (E.D. Mich. 2015). There are many avenues this Court can take to resolve Jane's motion solely on the law and without resorting to an evidentiary hearing. The only purported factual disputes that Plaintiff Board of Education of the Highland Local School District ("Highland") have identified go to the question of the extent and cause of any harm to Jane. *See* Dkt. 61 at 31 (listing Highland's purported factual disputes).¹ But under governing precedent, Jane can establish harm as a matter of law based on the Court's resolution of the purely legal question of whether Jane is likely to succeed on the merits. As Jane and Highland agree, irreparable harm is presumed if the Court finds that Jane has demonstrated a likelihood of success on the merits of her constitutional claim. Dkt. 10 at 26 (Highland arguing that irreparable harm is presumed for constitutional violations); Dkt. 36-3 at 27 (filed under seal) (Jane making the same argument); *ACLU of Ky. v. McCreary Cty. Ky.*, 354 F.3d 438, 445 (6th Cir. 2003). If the Court finds that Jane has established a likelihood of success on the merits of her constitutional claim, Highland's purported factual disputes about harm would thus be irrelevant to the Court's consideration of the motion. Similarly, irreparable harm may be

¹ Highland seemed briefly to take the position at the September 7 status conference that the parties dispute whether Jane's birth certificate says she is male, or whether Jane has been diagnosed with gender dysphoria. As to the birth certificate, Jane does not dispute that she was assigned as male at birth. *See* Dkt. 36-3 at 5 (filed under seal). As to the gender dysphoria diagnosis, Highland itself has said that Jane was diagnosed with gender dysphoria. *See* Dkt. 61 at 1. Those are not disputed facts.

presumed based on a showing of likelihood of success on the merits of the Title IX claim. *See Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001); *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771, 777 (S.D. W. Va. 2012). Thus, legal conclusions the Court could potentially reach after oral argument may render Highland's purported factual disputes immaterial.

Moreover, Highland's purported disputes go to the extent of the harm to Jane, or to the question whether Jane was harmed entirely and exclusively by Highland's conduct (which she has never alleged). The Court need not resolve either of those issues to grant Jane's motion for preliminary injunction. Even absent the legal presumptions discussed above, the Court does not need to conduct an evidentiary hearing to determine that irreparable harm is threatened here, or that *some portion* of the harm is traceable to Highland's discriminatory conduct. For instance, Highland argues in its most recent brief that Jane's "suicide risk ha[s] been downgraded from high to moderate." Dkt. 61 at 11. But the admission that Jane faces a "moderate" risk of suicide is alone sufficient to establish a risk of irreparable harm without necessitating an evidentiary hearing. And Highland's argument that Jane suffers from other problems in addition to gender dysphoria, *see id.* at 29, goes to the extent of causation, an issue that may be relevant to an eventual damages calculation but that need not be resolved to issue a preliminary injunction.

Highland's introduction of declarations of purported experts does not create the necessity for an evidentiary hearing. Although it would be illuminating to cross-examine Highland's experts—whose opinions are far outside the widely accepted standards of care—this Court is well able to evaluate the proposed experts' respective opinions based on their written statements. And to the extent Highland's position is that a hearing is necessary to resolve disputed factual issues related to their experts' contention that Jane's gender dysphoria "is highly likely to

resolve” and that it is “ethically questionable whether...gender affirming treatment should be pursued,” it is not Highland’s role (nor that of its counsel or experts) to supplant the judgment of Jane’s guardians and healthcare providers about the appropriate treatment for her. At any rate, evaluating the relative persuasiveness of competing expert testimony is not the kind of fact finding necessary to resolve a motion for a preliminary injunction.²

Finally, Highland has taken the position that its own motion for a preliminary injunction (Dkt. 10) does not require an evidentiary hearing, and can be resolved based on oral argument and briefing alone. The same analysis applies here. The issue of irreparable harm to Jane is equally raised by both motions. *See* Dkt. 10 at 26 (discussing irreparable harm); *id.* at 30 (arguing that Student A—*i.e.* Jane—would not be harmed by an injunction against the federal government’s enforcement of Title IX, and that an injunction in Highland’s favor “will therefore harm no one”). Therefore, Jane respectfully requests that the Court resolve both motions as a matter of law and set them for a consolidated oral argument.

II. Jane’s Proposed Alternative Schedule

To the extent the Court disagrees that it can resolve Jane’s preliminary injunction motion without addressing factual disputes relating to harm, Jane is fully prepared to proceed with an evidentiary hearing on that question (or any other factual question the Court wishes to address) beginning on September 20 and continuing through that week. That said, as just discussed, such a hearing may or may not be necessary, depending on the Court’s view of some of the purely

² Indeed, Highland’s counsel took exactly that position in the *Students & Parents for Privacy* case in the Northern District of Illinois. At oral argument on a preliminary injunction motion in which both sides had submitted expert declarations, Highland’s counsel took the position that expert depositions were not necessary until “later in the case.” Transcript of Proceedings – Preliminary Injunction Hearing at 129, *Students & Parents for Privacy v. United States Department of Education*, No. 16 C 4945 (N.D. Ill. Aug. 15, 2016) (excerpted page attached as Exhibit 1).

legal issues presented by the motion. For that reason, Jane respectfully proposes that the parties present oral argument on September 20, 2016. If, following that argument, the Court is prepared to rule without resolving factual issues, it can do so. If, on the other hand, the Court wishes to take evidence on any factual disputes, the parties will conduct an evidentiary hearing—tailored to the disputes identified by the Court for resolution—to address any factual questions the Court has after argument. Such an evidentiary hearing could be held on September 21, 2016 and the following days as necessary. That arrangement would be more efficient for the Court and the parties, and would permit the Court to resolve whatever factual issues it finds necessary to make a complete record.

CONCLUSION

For the foregoing reasons, Jane Doe respectfully requests that the Court set oral argument for September 20, 2016 and tentatively set an evidentiary hearing for September 21 through 23, 2016, if after argument disputed factual issues are found to be material to the Court's ruling.

Dated: September 8, 2016

Respectfully submitted,

By: s/ John Harrison

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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

Exhibit 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY,)
a voluntary unincorporated)
association; C.A., a minor, by)
and through her parent and)
guardian, N.A.; A.M., a minor,)
by and through her parents and)
guardians, S.M. and R.M.; N.G.,)
a minor, by and through her)
parent and guardian, R.G.;)
A.V., a minor, by and through)
her parents and guardians, T.V.)
and A.T.V.; and B.W., a minor,)
by and through his parents and)
guardians, D.W. and V.W.,)

Plaintiffs,)

v.)

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 SCHOOL DIRECTORS OF)
TOWNSHIP HIGH SCHOOL DISTRICT 211,)
COUNTY OF COOK AND STATE OF ILLINOIS,)

Defendants,)

and)

STUDENTS A, B, and C, by and through)
their parents and legal guardians)
Parents A, B, and C, and the)
ILLINOIS SAFE SCHOOLS ALLIANCE,)

Intervenor Defendants.)

No. 16 C 4945

Chicago, Illinois
August 15, 2016
9:30 a.m.

TRANSCRIPT OF PROCEEDINGS - PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE JEFFREY T. GILBERT, MAGISTRATE JUDGE

1 talks about gender dysphoria in, I think it's 302.85 at
2 page 453, says individuals with gender dysphoria have a marked
3 incongruence between the gender they have been assigned,
4 usually at birth, referred to as natal gender, and their
12:50:27 5 experienced/expressed gender. This discrepancy is the core
6 component of the diagnosis. There must also be evidence of
7 distress about this incongruence, which is consistent with
8 what the American Psychiatric Association says, is that the
9 presence of a clinically significant distress associated with
12:50:47 10 the condition is really what creates the disorder.

11 How is Dr. Josephson's statement that a transgender
12 individual meets the criteria for maintaining a delusion, a
13 false, fixed belief minimally responsible to reason that is
14 always seen as a problem, consistent with what the APA says
12:51:12 15 and what the DSM says in -- about gender dysphoric people?

16 MR. TEDESCO: Your Honor, I think that's a question
17 for expert depositions and further exploration.

18 THE COURT: You're the guy who -- when the intervenor
19 defendants came in here and said they wanted to take his
12:51:33 20 deposition --

21 MR. TEDESCO: Yeah.

22 THE COURT: -- you said we don't need to do that.

23 MR. TEDESCO: Yeah, but I'm saying later in the case,
24 for all the reasons you've specified for that; that the
12:51:40 25 opinions -- and, look, Your Honor, this is a hotly disputed