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.

Jane Doe, a minor, by and through her legal guardians Joyce and John Doe,

Intervenor Third-Party Plaintiffs,

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.

Case No: 2:16-cv-524

Judge Algenon L. Marbley
Magistrate Judge Kimberly A. Jolson

THIRD PARTY DEFENDANTS' RESPONSE TO JANE DOE'S MEMORANDUM IN OPPOSITION TO AN EVIDENTIARY HEARING

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Through this memo, per the Court's direction during the September 7, 2016 telephonic scheduling conference, Third Party Defendants Board of Education of the Highland Local School District; Highland Local School District; William Dodds, and Shawn Winklefoos (collectively, "Highland") respond to Doe's opposition to an evidentiary hearing.

I. In light of further briefing on the issue, Highland agrees that an evidentiary hearing is unnecessary.

The question at hand is whether Doe must put on evidence at this stage of litigation to obtain preliminary injunctive relief.[1] If Doe is not obligated to produce evidence, then the evidentiary portion of the hearing currently scheduled for September 20-23, 2016 may be vacated, and the motions heard on purely legal arguments on September 20th. With the benefit of this additional briefing regarding the evidentiary question, Highland now agrees with Doe that an evidentiary hearing is unnecessary.

Doe argues that the "standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (*Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991). It is true that Title IX allows for injunctive relief against Highland.

> **(a) General provision**
>
> **(1)** A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age

[1] The parties assert various constitutional claims; should a constitutional violation be found, "a finding of irreparable harm is mandated," *Am. Civil Liberties Union of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003), so there is no evidentiary burden to show irreparable harm for those claims. The evidentiary question here came up only in respect to Title IX claims.

> Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> **(2)** In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C.A. § 2000d-7. And the Supreme Court has recognized that "remedies both at law and in equity" are available under Title IX. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72 (1992).

But Doe is wrong to assert that "irreparable harm may be presumed based on a showing of likelihood of success on the merits of the Title IX claim." (Doe's Memo. in Opp. to an Evidentiary Hr'g, Doc. 75 at 1-2). In the past, lower courts have made comparable statements. The Supreme Court, however, repudiated any general presumption of irreparable harm based on the violation of a statute in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006), *unless* Congress includes unique statutory language demonstrating its intent to depart from traditional equitable standards. *See, e.g.*, *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, (9th Cir. 2011) (after *eBay* and *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), "surely a standard which presumes irreparable harm without requiring nay showing at all is … 'too lenient'"); *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) ("The court must not adopt a 'categorical' or 'general' rule or presume that the plaintiff will suffer irreparable harm (unless such a 'departure from the long tradition of equity practice' was intended by Congress).") (quoting *eBay*, 547 U.S. at 391); *Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) ("We note that the Supreme Court has rejected the application

of categorical rules in injunction cases.") (citing *eBay Inc.*, 547 U.S. at 392-94). Generally speaking, "[a] plaintiff seeking a permanent injunction must prove that he has suffered an irreparable injury."[2] *Pelzer v. Vassalle*, No. 14-4156, 2016 WL 3626825, at *7 (6th Cir. July 7, 2016) (citing *eBay*, *Inc.* 547 U.S. at 391).

Title IX's language merely indicates that equitable relief is available. Congress included no express statutory language showing its intent to depart from the traditional four-part test for an injunction. As a result, Doe's argument for a presumption of irreparable harm is incorrect. *Cf. eBay, Inc.*, 547 U.S. at 391-92 (explaining that the Patent Act's language stating "that injunctions 'may' issue 'in accordance with principles of equity'" did not justify a presumption of irreparable harm based on a violation of the statute). The Court should consequently "exercise[] its discretion in light of the facts of the case and … not simply apply a categorical rule." *Hoop Culture, Inc. v. Gap Inc.*, No. 15-13818, 2016 WL 1696009, at *4 (11th Cir. Apr. 28, 2016).

Nonetheless, Highland agrees with Doe that "[t]here are many avenues this Court can take to resolve [Doe's] motion solely on the law and without resorting to an evidentiary hearing." (Doc. 75 at 1). The irreparable harm question before the Court simply asks what "injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Salinger*, 607 F.3d

[2] The Supreme Court made clear in *Winter* that *eBay's* principles apply equally to permanent and preliminary injunctions. *See id.* at 24 ("A preliminary injunction is an extraordinary remedy never awarded as of right"); *see also Flexible Lifeline Sys., Inc.*, 654 F.3d at 996-97 (explaining that "*Winter* reaffirms the principles relied upon in *eBay*: A plaintiff must satisfy the four-factor test in order to obtain equitable injunction relief, even if that relief is preliminary").

at 80. The Court need not even reach this question because the law is clear that school districts have the right to separate students in locker rooms, showers, and restrooms based on their physiology per 34 C.F.R. § 106.33, and the purely legal issue before the Court is about Doe's access to those facilities.

But should this Court inquire past Doe's likelihood of success on the merits, an appropriate way for Doe to show that any remedy at law is inadequate is by demonstrating that "'the particular circumstances of the instant case bear substantial parallels to previous cases' in which irreparable harm has been found." *Hoop Culture, Inc.*, 2016 WL 1696009, at *4 (quoting *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228 (11th Cir. 2008). No evidentiary hearing is required to conduct that analysis. In fact, the question of irreparable harm is a purely objective and legal one that focuses on "whether the remedies available at law, such as monetary damages, are inadequate to compensate" Doe's alleged injury. *Salinger*, 607 F.3d at 80. That is clearly the issue here, where Doe insists on future access to specific facilities, which is obviously amenable to injunctive relief. The legal question regarding access does not turn on allegations of personal subjective harm for if it did, plaintiffs would *always* be able to establish irreparable harm *regardless* of the available remedies for the alleged legal violation in question. And that would gut the traditional four-factor injunctive test no less than the presumption of irreparable harm the Supreme Court rejected in *eBay*. *Hoop Culture, Inc.*, 2016 WL 1696009, at *4 (the *eBay* Court admonished lower courts against applying "categorical rules to decisions about injunctive relief").

In this case, Doe must demonstrate a likelihood of success on the merits and draw a strong parallel between the facts of this case and those of reasonably comparable cases—

which it has already cited in the opposition memo—in which irreparable harm has traditionally been found. *See, e.g. Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771(S.D.W. Va. 2012) (student's involuntary participation in a "completely voluntary" single-sex class was irreparable harm under Title IX); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 301–02 n. 25 (2d Cir.2004) (depriving players access to championship playoff was irreparable harm); *Roberts v. Colo. State Bd. of Agric.,* 998 F.2d 824, 833 (10th Cir.1993) (denial of access to play softball was irreparable harm). Determining whether these cases are, in fact, substantially parallel simply requires the Court to "[d]raw[] fair inferences from facts [already] in the record" and consider the nature of the Title IX "claims at issue." *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC,* 774 F3d 192, 205 (3d Cir. 2014). This inquiry is legal in nature and does not call for an evidentiary hearing in any respect.

Nor is there any need for an evidentiary hearing regarding the few collateral claims in Doe's Complaint that were not discussed in the opposition memo, which pointed to issues about Doe's school records (Verified Complaint-in-Intervention, Doc. 32 ¶98) and use of Doe's requested name and pronouns by school staff (Doc. 32 ¶ 101). But Highland has already agreed to address Doe as requested (Verified Complaint for Declaratory and Injunctive Relief, Doc. 1 ¶ 67, and agreed to "respect [Doe's] gender-identity choice by not interfering with [Doe's] current gender expression." (*Id.* ¶ 70). Thus, any issues regarding names, pronouns or improper student or staff conduct directed toward Doe should be addressed simply by cooperation among the parties going forward, and Highland's counsel already pledged cooperation to that end at the September 7 scheduling conference and subsequent meet-and-confer teleconference. To the extent that any issue about records

should remain after this Court rules on the legal issues, they may be later resolved pursuant to that holding. Thus, these collateral issues pose no need for an evidentiary hearing at this stage of the litigation.

In sum, Highland agrees with Doe that an evidentiary "hearing may or may not be necessary, depending on the Court's view of some of the purely legal issues presented by the motion," (Doc. 75 at 3), and more particularly, that no evidentiary hearing should be scheduled until the Court has ruled on those foundational legal issues. But if the Court ultimately determines that an evidentiary hearing is necessary, Highland requests that the Court inform the parties of any factual questions it may have so that the parties may tailor the hearing accordingly. That arrangement would prove more efficient for both the Court and the parties, and assist the parties in presenting evidence of interest to the Court.

II. Scheduling

Counsel for Highland and for Doe met and conferred by telephone on September 9, 2016 to discuss discovery issues, at which time Highland also reported its intended response to Doe's opposition to an evidentiary hearing as reflected in this memorandum. In light of both Doe and Highland concluding that no evidentiary hearing is necessary, Highland aligns with Doe in requesting that this Court set oral argument for September 20, but would request that the Court vacate the evidentiary hearing as it is unnecessary. Pending the Court's decision on this issue, the parties are continuing apace to prepare for discovery and will again telephonically meet-and-confer on Monday, September 12, 2016.

CONCLUSION

Given the benefit of additional briefing on the question of an evidentiary hearing, Highland now aligns with Doe (and continues to align with Federal Defendants) that the question before the Court regarding the preliminary injunction motions is purely a matter of law and an evidentiary hearing is unnecessary. *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 246 (6th Cir. 2011). Of course, the factual record will undoubtedly be further developed and clarified as the case progresses toward summary judgment or trial, and such discovery as necessary to those phases may proceed accordingly.

Date: September 11, 2016

Respectfully submitted,

s/ David Langdon

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2016, I filed the foregoing document, entitled Third Party Defendants' Response to Jane Doe's Memorandum in Opposition to an Evidentiary Hearing through the Court's ECF system.

s/ David Langdon
David Langdon