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 OF LAW IN OPPOSITION TO THIRD-PARTY DEFENDANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

Jane Doe respectfully submits this memorandum of law in opposition to the motion of Third-Party Defendants (together, "Highland") for a stay of the order entered by the U.S. District Court for the Southern District of Ohio on September 26, 2016, granting an injunction that requires Highland to "treat Jane Doe as the girl she is, including referring to her by female pronouns and her female name and allowing her to use the girls' restroom at Highland Elementary School." *See* Dkt. 95 at 43.

PRELIMINARY STATEMENT

After hearing oral argument, the Court issued a written opinion on September 26, 2016, granting Jane Doe's motion for a preliminary injunction. Dkt. 95 at 42. In so ruling, the Court held that: (a) Jane "would be irreparably harmed absent an injunction," *id*. at 41; (b) Jane is likely to succeed on the merits of *both* her Title IX and equal protection claims, *id*. at 30, 41; (c) the "balance of equities tips especially sharply in Jane's favor" because the injunction is "narrowly tailored to permit her to use the girls' restroom" without implicating overnight accommodations or locker rooms, *id*. at 42; and (d) "the overriding public interest" lies in the firm enforcement of Jane's Title IX and constitutional claims, *id*. Recognizing that *all four* of the preliminary injunction factors weighed in Jane's favor, the District Court granted a preliminary injunction requiring Highland to "treat [Jane] as a girl and treat her the same as other girls, including using her female name and female pronouns and permitting Jane to use the same restroom as other girls at Highland Elementary School during the coming school year." *See* Dkt. 95 at 11.

Highland now repeats arguments that it already made—and that the Court already rejected—in support of its request for a stay. The Court should reject Highland's arguments again, and prevent Highland from depriving Jane of her constitutional and civil rights to be

treated consistently with her gender identity at school. Highland fails to demonstrate either a likelihood of success on the merits of its appeal or irreparable harm absent a stay. Jane, on the other hand, has suffered irreparable harm from Highland's discriminatory practices, and would continue to suffer such harm if the Court stayed its well-reasoned order. Highland's application should be denied.

ARGUMENT

In determining whether a stay of a preliminary injunction pending appeal is appropriate under Federal Rule of Appellate Procedure 8(a), a court must evaluate: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). In essence, a party must establish a "likelihood of reversal" on appeal. *Id.* Highland's application satisfies none of the four factors required by the Sixth Circuit for a stay, and Highland has not demonstrated any likelihood of reversal of the Court's order. The stay motion should therefore be denied.

I. Highland Has Not Established A Likelihood Of Success On The Merits

The Court has already determined that Jane is likely to succeed on the merits of *both* her Title IX and Equal Protection claims. In seeking a stay, Highland merely repeats the same arguments this Court has already considered and rejected, asking the Court to hold that its previous analysis was rife with errors. It was not, and Highland's arguments—already unsuccessfully advanced once—cannot rebut Jane's showing that she is likely to succeed on the merits of her claims.

With respect to Jane's Title IX claim, the Court held that the term "sex" in Title IX and its implementing regulations regarding sex-segregated bathrooms and living facilities is ambiguous, and the Department of Education and Department of Justice's interpretation is therefore entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *See* Dkt. 95 at 29. In addition, because controlling Sixth Circuit precedent independently "supports a reading that under Title IX discrimination on the basis of a transgender person's gender non-conformity constitutes discrimination 'because of sex,'" *id*. at 26, the Court held that Jane "has been denied access to the communal girls' restroom 'on the basis of [her] sex'" in clear violation of Title IX, *id*. at 29.

With respect to Jane's Equal Protection claim, the Court held that Sixth Circuit precedent "supports a conclusion that transgender individuals are a quasi-suspect class because discrimination against them is discrimination on the basis of sex." *Id*. at 32. Independently, and even absent the weight of this precedent, the Court concluded that heightened scrutiny would apply to a transgender plaintiff's claim under the Equal Protection Clause based on the factors the U.S. Supreme Court has used to determine when such scrutiny applies, *id*. at 33, 35, and that Highland has "failed to put forth an 'exceedingly persuasive justification,' or even a rational one, for preventing Jane from using the girls' restroom," *id*. at 36. The Court held that Highland "cannot show" that its restroom policy is rationally related to its interest in the privacy and safety of its students. *See id.* at 40. Instead, the Court found that "Highland's policy rests on 'mere negative attitudes [and] fear,' which are not 'permissible bases for' differential treatment, and cannot survive even rational basis review." *Id*. at 41 (quoting *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 448 (1985)). Because Highland failed to show that its policy prohibiting Jane from using the girls' restroom is rationally, much less substantially, related to its

students' interests in privacy or safety, the Court held that "Jane is likely to succeed on the merits of her claim under the Equal Protection Clause." *Id*. at 40.

In an effort to satisfy its burden of showing a likelihood of success on the merits, Highland argues that Title IX's "plain meaning" excludes consideration of gender identity, that *Auer* deference is inappropriate, that heightened scrutiny does not apply, and that Highland's purported policy satisfies rational basis review. The Court has already considered and rejected each of these arguments. Its thorough opinion is grounded firmly on Supreme Court and Sixth Circuit precedent and principles of constitutional law. *See Austin v. Wilkinson*, No. 4:01-CV-00071, 2008 WL 115094, at *2 (N.D. Ohio Jan. 10, 2008) (stay was not warranted where movants were "unlikely to prevail on their appeal because the Court's directives [were] consistent with Supreme Court precedent"). Highland has offered no new evidence or authority in support of its position and does not cite any case that would indicate any error of law made by the Court. *See, e.g.*, *Mich. State A. Philip Randolph Inst. v. Johnson*, Nos. 16-2071/2115, 2016 WL 4376429, at *5 (6th Cir. Aug. 17, 2016) (movant did not present arguments "that persuasively demonstrate that the district court committed clear error in its factual conclusions" and failed to show likelihood of prevailing on appeal). Highland simply cannot meet the burden of showing that it is likely to succeed on appeal.

II. Highland Would Not Suffer Irreparable Injury Under The Injunction

To demonstrate irreparable harm, a movant must "show the alleged harm will be both certain and immediate, and not just speculative or theoretical." *Women's Med. Prof'l Corp. v. Baird, M.D.*, No. 2:03 CV 162, 2003 WL 23777733, at *2 (S.D. Ohio Dec. 18, 2003) (citing *Mich. Coal. of Radioactive Material Users, Inc.,* 945 F.2d at 153). When determining the harm that will occur if a stay is or is not granted, a court must examine: "(1) the substantiality of the

injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *McWhorter v. Elsea, Inc.*, No. 2:00-CV-473, 2007 WL 445636, at *1 (S.D. Ohio Feb. 6, 2007).

Here, Highland erroneously claims that the injunction "strips Highland of its authority to enact policies that promote the privacy and safety of all students." Dkt. 103 at 16. Highland advanced an identical argument previously, *see* Dkt. 71 at 28, and it has no more merit now than it did then. Highland's "authority to enact policies" is not unbounded, and it cannot enact discriminatory, unconstitutional or illegal policies.

Highland also reiterates its claim that complying with the injunction is "disrupting school operations," asserting that the school has received "inquiries from over 20 parents of elementary school students." Dkt. 103 at 16; *see also* Dkt. 10 at 28 ("Compelling Highland to take an action that is so controversial within the community is bound to significantly disrupt Highland's efforts to educate the children entrusted to it."). Highland complains that it now must accommodate more than twenty students who have requested single-user restrooms, which, "absent expensive, time-consuming remodeling" will be impracticable. Dkt. 103 at 17. Highland's claim that this constitutes irreparable harm has no merit.

First, to the extent this qualifies as harm at all, it is attributable (at least in significant part) to Highland's own conduct, rather than the Court's order. Immediately after the Court issued its order, on the evening of September 26, 2016, Highland sent an audio message to parents and guardians stating that this Court had ordered Highland "to permit an elementary school student to access restrooms opposite of the student's birth sex." The message stated further that Highland "remains committed to protecting the privacy, safety and dignity of all its students," effectively communicating that the Court's order and Jane's imminent use of the girls' restrooms placed at risk the "privacy, safety, and dignity" of Highland's students. Following this

needlessly inflammatory statement, the message went on to affirmatively solicit the complaints and single-user restroom requests that the school has since received and proffered as evidence of harm—it stated that the school would "make single-user restrooms available to any student or parent who requests it," and "if you have requests, please contact the elementary school." *See* Declaration of Joyce Doe in Support of Opposition to Stay Motion ¶¶ 1-2.

This message plainly deviated from the spirit, if not the letter, of this Court's order. The injunction requires Highland to treat Jane the "same as other girls," Dkt. 95 at 11, and it is beyond serious dispute that Highland does not ordinarily send a message to parents whenever a girl will be given access to girls' facilities, let alone suggest that a girl's use of the restroom would somehow negatively affect other girls using the same restroom. Highland cannot now argue that it is harmed irreparably by a smattering of parent complaints and requests that it affirmatively solicited in response to the Court's order.

Second, as the Court has already recognized, there is "no merit" in an argument that "other students would be harmed by allowing Jane to use the bathroom consistent with her gender identity, as other students already do." *See* Dkt. 95 at 42. As the Court noted, amici from school districts in twenty states around the country have been able to adopt "inclusive policies permitting transgender students to use bathrooms and locker rooms that correspond with their gender identity" without "compromis[ing] anyone's privacy interests." Dkt. 95 at 36. As noted above, Highland's attempts to dismiss the amici by arguing that they "are not the ones scrambling to accommodate worried children and irate parents" ring hollow since Highland invited the very reaction it now complains of. At any rate, this theory of actual harm remains speculative at best. *See id*. (observing that "Highland's purported justification for its policy is 'merely speculative' and lacks any 'factual underpinning'" (quoting *Bernal v. Fainter*, 467 U.S.

216, 227-28 (1984))); *see also*, *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) (holding school district cannot justify interfering with students' civil rights based on student and community opposition).

Finally, the complaints Highland has received simply cannot justify depriving Jane of her constitutional or civil rights. The preliminary injunction order explained that "negative attitudes" and "fear," although constituting the basis of Highland's purported policy in the first place, cannot justify discriminatory treatment. Dkt. 95 at 41 (quoting *City of Cleburne*, 473 U.S. at 448); *see also*, *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") The same logic applies now that the injunction has issued. Fear of change is understandable, but just as it could not justify discriminating against Jane in the first instance, it also cannot justify reverting to a discriminatory policy by issuing a stay. Discomfort on the part of parents or students about the need to offer Jane equal treatment cannot establish irreparable harm.

III. Jane Would Continue To Suffer Irreparable Injury If A Stay Is Granted

Although Highland suggests without elaboration or support that "other parties" would not be harmed by a stay, this Court has already held otherwise. Jane will be harmed by a stay of the preliminary injunction for the exact same reasons she would have been harmed by denial of her motion. This Court rightly recognized that "Jane can show irreparable injury simply because both her Title IX claim and constitutional claim are likely to succeed on the merits," Dkt. 95 at 41, and also repeatedly noted the irreparable injury that would befall Jane if Highland were allowed to persist in its discriminatory policies. *See id.* ("The stigma and isolation Jane feels when she is singled out and forced to use a separate bathroom contribute to and exacerbate her mental-health challenges. This is a clear case of irreparable harm to an eleven-year-old girl.");

id. at 6-7 (observing that obligation to use a separate restroom would be "psychologically damaging" for a transgender child, and that "circumstances such as a history of serious health conditions and prior suicide attempts 'would amplify risk of harm to the child'" (quoting Ehrensaft Decl., Dkt. 35-4 at ¶ 42)). As the Court observed, "[s]ome issues in this case are difficult, but determining whether Jane has been harmed from the School District's policy is not one of them." *Id.* at 29. Absent a stark reversal by the Court on this point, Highland cannot establish that Jane would not be irreparably harmed by a stay.

IV. Public Interest Weighs Against A Stay

The public interest weighs strongly against a stay of the Court's injunction. The public interest clearly rests in the protection of constitutional and civil rights, particularly where the vindication of these rights is required for children to obtain an equal opportunity to learn, free from discrimination. *See, e.g.*, *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) ("[T]he overriding public interest l[ies] in the firm enforcement of Title IX."). The court's injunction squarely fulfills this purpose, as it ensures that Jane will have access to the girls restroom during the day—a basic necessity to fulfill her right to an equal education and her right to equal protection. *See* Dkt. 95 at 21 (concluding that access to a communal school bathroom constitutes an "aid, benefit[], or service[]" or a "right, privilege, advantage, or opportunity" under Title IX).

As on the other factors, Highland's arguments on this point are recycled, and they fail now for the same reasons the Court has already rejected them. Under no circumstances would the public interest be served by allowing Highland to continue to discriminate against Jane, thereby undermining the very constitutional rights at the heart of this case. The Court's

injunction does not prevent Highland from continuing to pursue its legal arguments before this Court or the Sixth Circuit; it simply stops Highland from preventing Jane from using the girl's restroom during the pendency of this case. Such injunctive relief is clearly in the public interest, and Highland's motion to stay this injunction should therefore be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Highland's motion for a stay pending appeal.

Dated: October 12, 2016

Respectfully submitted,

By: s/ John Harrison

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 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

UNITED STATES DISTRICT COURT
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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.	

DECLARATION OF JOYCE DOE

I, Joyce Doe, declare as follows:

1. On September 26, 2016, less than three hours after the Court issued its order, the school district sent a voice message to parents regarding the order through School Messenger, a program the district uses to communicate with parents.

2. The message stated:

> "Good evening. The Board of Education of the Highland Local School District has an important announcement for all parents and students.
>
> Today, a judge from the United States District Court for the Southern District of Ohio ordered the Highland to permit an elementary school student to access restrooms opposite of the student's birth sex.
>
> Highland remains committed to protecting the privacy, safety and dignity of all its students. Highland will make single-user restrooms available to any student or parent who requests it.
>
> Highland has already filed an appeal and will seek an emergency stay of the judge's order.
>
> Any updates will be communicated as soon as possible.
>
> If you have requests, please contact the elementary school. Thank you."

3. Upon listening to this message, I was concerned that Highland was drawing attention to Jane and seemed to be inviting other parents to express concerns.

This declaration was executed this 11 day of October, 2016, in Morrow County, Ohio.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Joyce Doe

Joyce Doe