IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, Plaintiff, v. UNITED STATES DEPARTMENT OF EDUCATION, ET AL., Defendants. _____ JANE DOE, a minor, by and through her legal guardians JOYCE and JOHN DOE, Intervenor Third-Party Plaintiff, v. BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, et al., Third-Party Defendants.	CASE NO. 2:16-cv-00524 JUDGE MARBLEY

MOTION OF PLAINTIFF AND THIRD-PARTY DEFENDANT BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, AND THIRD-PARTY DEFENDANTS HIGHLAND LOCAL SCHOOL DISTRICT, WILLIAM DODDS, AND SHAWN WINKELFOOS FOR A STAY OF PROCEEDINGS

Plaintiff and Third-Party Defendant Board of Education of the Highland Local School District ("Board") and Third-Party Defendants Highland Local School District; William Dodds, Superintendent of Highland Local School District; and Shawn Winkelfoos, Principal of Highland Elementary School (collectively, "Defendants") respectfully request that this Honorable Court

stay all district court proceedings in order to prevent the parties from suffering the irreparable harm of conducting further proceedings while Defendants seek further judicial review with the United States Court of Appeals for the Sixth Circuit of the Opinion and Order (Doc. 95) denying the Board's Motion for a Preliminary Injunction (Doc. 10) and granting Intervenor Third-Party Plaintiff Doe's ("Doe") Motion for Preliminary Injunction (Docs. 35-36). Defendants 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 (collectively, "Department of Education") consent to a stay of the proceedings as to the Board's claims against the Department of Education, but takes no position as to a stay of proceedings as to Doe's claims against Defendants. The basis for this motion is outlined, more fully, below.

I. STATEMENT OF THE FACTS AND OF THE CASE

On September 26, 2016, this Honorable Court issued its Opinion and Order denying the Board's Motion for a Preliminary Injunction (Doc. 10) and granting Doe's Motion for a Preliminary Injunction (Docs. 35-36). *See* Op. and Order, Doc. 95, Page ID# 1772 (denying the same).

On September 26, 2016, the Board timely filed an interlocutory appeal of the Opinion and Order denying its Motion for Preliminary Injunction as to the Department of Education to the Sixth Circuit. *See* Not. of Appeal, Doc. 96, Page ID# 1773-1775.

On September 26, 2016, Defendants timely filed an interlocutory appeal of the Opinion and Order granting Doe's Motion for Preliminary Injunction as to Defendants to the Sixth Circuit. *See* Not. of Appeal, Doc. 97, Page ID# 1776-1778.

Defendants' motion to stay all proceedings before this Honorable Court pending a resolution of the interlocutory appeal is now before this Honorable Court.

II. LAW & ARGUMENT

"Although the filing of an interlocutory appeal does not automatically stay proceedings in the district court, the district court has broad discretion to decide whether a stay is appropriate to promote economy of time and effort for itself, for counsel, and for litigants." *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp.2d 1081, 1094 (E.D. Cal. 2008). Specifically, a district court has substantial inherent power to control and manage its docket in order to achieve the orderly and expeditious disposition of case. *See, e.g., American Civil Liberties Union of Kentucky v. McCreary County, Ky.*, 607 F.3d 439 (6th Cir. 2010); *In re World Trade Center Disaster Site Litigation*, 722 F.3d 483 (2nd Cir. 2013); *Saqui v. Pride Cent. America, LLC*, 595 F.3d 206 (5th Cir. 2010). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). *See also Clinton v. Jones*, 520 U.S. 681, 706 (1997) (discussing the district court's "broad discretion to stay proceedings as an incident to its power to control its own docket").

A variety of circumstances may justify staying proceedings at the district court level, provided the stay is not "immoderate" in time and scope. *Trujillo v. Conover & Co. Comms., Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000). *See also Blinco v. Green Tree Servicing LLC*, 366 F.3d 1249, 1252-53 (11th Cir. 2004) (granting a motion to stay litigation in the district court pending an appeal from the denial of a motion to compel arbitration); *Lisa v. Mayorga*, 232 F.

Supp.2d 1325 (S.D. Fla. 2002) (granting a motion to stay proceedings on judicial economy and abstention grounds pending resolution of a related case in Florida state court), vacated, 2005 U.S. App. LEXIS 19545 (11th Cir. Sept. 8, 2005); *Summit Med. Assoc. v. James*, 998 F. Supp. 1339, 1342-43 (M.D. Ala. 1998) (concluding that a stay of all proceedings in the district court pending resolution of an interlocutory appeal based on Eleventh Amendment immunity is appropriate, unless the appeal is frivolous or brought solely for purposes of delay). Generally, courts apply the same standards for granting equitable relief in determining whether to permit a stay of proceedings. Namely, courts consider "(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." *W. Tennessee Chapter of Associated Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1027–29 (W.D. Tenn. 2000). *See also Ohio ex rel. Celebrezze v. Nuclear Reg. Comm'n,* 812 F.2d 288, 290 (6th Cir. 1987) (implying that the necessary showing of likelihood of success on the merits is inversely proportional to the strength of other factors in the moving party's favor); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (applying the same factors). These factors are applied flexibly so that "where the latter three factors strongly favor interim relief, [the district court] has required only that the petitioner demonstrate a 'substantial case on the merits,' even if ultimate success is not a mathematical probability." *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982) (quoting *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977)).

As to the first factor, Defendants are likely to prevail on the merits of their appeal based on the reasons outlined in the Memorandum of Law in Support of Motion to Stay Preliminary

Injunction Pending Appeal ("Motion to Stay Preliminary Injunction ") (Doc. 103). Specifically, Defendants are likely to prevail on the merits of their appeal because:

- The term "sex" in Title IX does not encompass the concept of gender identity because the plain language of Title IX demonstrates that (1) "sex" is a binary trait – that is, a person can either be a male or a female – and (2) "sex" is defined in relationship to reproductive functions.
- Deference should not be granted to the Department of Education's guidance regarding the term "sex" because (1) the implementing regulation at issue – Section 106.33 – unambiguously permits restrooms and locker rooms to be separated by "sex," which was understood at the time the regulation was adopted to mean male and female and (2) in addition, an agency acts contrary to the law when it supplants an established statutory term defining a protected class with a term defining a very different class of persons as Department of Education has done here by adding gender identity, a term that is non-binary, wholly subjective and fluid, to the definition of sex.
- Defendants are likely to succeed on the merits of their appeal with respect to Doe's Equal Protection claim because (1) heightened scrutiny does not apply and (2) the Board's policy of separating restrooms and other intimate facilities based on biological sex survives rational basis scrutiny.

See Mem. of Law in Supp. of Mot. to Stay Preliminary Injunction Pending Appeal at 1-15, Doc. 103, Page ID# 1846-1860.

Defendants incorporate the arguments asserted in the Motion to Stay Preliminary Injunction as if fully asserted here. While Defendants acknowledge that this Honorable Court

previously indicated its opinion as to whether Defendants are likely to prevail on the merits with respect to the Title IX and Equal Protection claims, Defendants' arguments have merit as evidenced by the fact that other courts and justices have reached a similar conclusion. *See Tex. v. United States*, No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459 *51 (N.D.Tex. Aug. 21, 2016) (holding the same as to Title IX and issuing a nationwide injunction); *G.G. v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D.Va. 2015) (holding the same with respect to Title IX); *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (Niemeyer, J., dissenting in part); *Carcaño v. McCrory*, No. 1:16cv236, 2016 U.S. Dist. LEXIS 114605, * 73-4 (M.D.N.C. Aug. 26, 2016) (holding the same with respect to the Equal Protection Clause); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (mem.) (recalling the mandate).

As to the second factor, Defendants will suffer irreparable injury absent a stay of the proceedings. As stated above, Defendants have sought judicial review regarding Title IX and the Equal Protection Clause and the Board has sought review of the jurisdictional arguments raised by Department of Education, divesting this Honorable Court of jurisdiction over all of these issues. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal"). It is anticipated that a ruling by the Sixth Circuit will prove dispositive with respect to the Board's Title IX claims against the Department of Education. Similarly, it is anticipated that a ruling by the Sixth Circuit will substantially impact, if not prove dispositive, with respect to Doe's Title IX and Equal Protection claims against Defendants. Indeed, "[t]he litigation will not be conducted in the same manner regardless of the resolution of these issues

because each of the issues goes to the heart of some or all of the [parties'] liability." *Bolon v. Rolla Pub. Schools*, 917 F. Supp. 1423, 1434 (E.D. Miss. 1996) (staying all proceedings at the district court level pending an interlocutory appeal regarding Title IX issues).

Resolution of the Title IX and Equal Protection "issues will[, therefore,] affect the theories to be pursued [in discovery and] at trial, and might also significantly alter the parties' positions on settlement. In addition, reversal of the Court's holdings after trial would require the parties to present different evidence in a new trial. In sum, the litigation will not be conducted in the same manner" based on the Sixth Circuit's ruling regarding these issues. *Id*.

In the interim, Defendants will be compelled to engage in lengthy and expensive discovery regarding claims that this Honorable Court lacks jurisdiction over while the case proceeds at the appellate level. This discovery will prove an enormous waste of this Honorable Court's and the parties' resources as the Sixth Circuit's decision regarding the Opinion and Order on the Title IX and Equal Protection issues will, at a minimum, have a monumental impact on the litigation strategies of all parties. It is also exceedingly likely that the Sixth Circuit decision will prove dispositive altogether.

As to the third factor, the stay will not harm the other parties' interests in the proceeding. As stated above, the Department of Education consents to the stay as to the claims against it. As to Doe, this Honorable Court already issued an injunction directing Defendants to "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." Op. and Order at 43, Doc. 95, Page ID# 1772. If the Sixth Circuit affirms this Honorable Court's decision, the preliminary injunction will continue to be in effect. If the Sixth Circuit reverses that decision or stays the order, Doe will have sufficient opportunity to litigate the remainder of Doe's claims in

this Court. Moreover, throughout these proceedings Defendants have, and will continue to, provide Doe the full panoply of safety plans, counseling, adult monitoring, and other services for Doe's safety and well-being.

As to the fourth factor, the public interest strongly favors a stay. Defendants are public agencies and employees. The enormous resources necessary to prosecute this case will come from public funds. However, a ruling at the appellate level will prove dispositive to some, if not all the claims. Continued proceedings before this Honorable Court while the parties await a resolution at the appellate level will only serve as a substantial, and unnecessary, drain of public resources and money.

III. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Honorable Court stay all proceedings until there is a resolution of the appellate proceedings regarding the Opinion and Order (Doc. 95).

Respectfully submitted,

/s/ Patrick Vrobel

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2016, a copy of the foregoing was sent via this Court's electronic filing system to all counsel of record.

/s/ Patrick Vrobel
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