

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

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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 OF LAW IN OPPOSITION TO THIRD-PARTY
DEFENDANTS’ MOTION FOR A STAY OF PROCEEDINGS**

Jane Doe respectfully submits this memorandum of law in opposition to the motion of Plaintiff, Board of Education of the Highland Local School District (the “Board”) and the Third-Party Defendants, (together, “Highland”) for a stay of all district court proceedings (Dkt. 108).

PRELIMINARY STATEMENT

On September 26, 2016, the Court granted Jane Doe’s motion for a preliminary injunction and denied the Board’s motion for a preliminary injunction. Dkt. 95 at 2. The Court held that all four of the preliminary injunction factors weighed in Jane’s favor, while also finding that it lacked subject matter jurisdiction over the Board’s Complaint. *See* Dkt. 95 at 42, 19. On September 30, 2016, Highland moved to stay the injunction pending appeal, based largely on the same arguments it raised in its briefing on the Parties’ motions for preliminary injunctions. The Court, for a second time, “considered and rejected each of these arguments.” Dkt. 109 at 3.

Now, Highland tries yet again to persuade the Court that it is “likely to prevail on the merits” of its appeal to the Sixth Circuit, Dkt. 108 at 5, and that Highland—and not Jane—is at risk of harm. This redundant motion cannot meet the standard for granting a stay of proceedings, and fails to advance new arguments relating to the merits of Highland’s arguments or the likelihood of harm to any person other than Jane. Jane respectfully requests that the Court again reject Highland’s arguments and deny the requested stay of the district court proceedings.

ARGUMENT

The same factors that governed the motion to stay the preliminary injunction are employed to determine whether to stay proceedings: (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. Tenn. Chapter of Associated Builders*

& Contractors, Inc. v. City of Memphis, 138 F. Supp. 2d 1015, 1027 (W.D. Tenn. 2000). See also *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Highland's motion satisfies none of these factors, and should therefore be denied.

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

Highland acknowledges that it is relying on the same arguments the Court has previously considered, "incorporate[ing] the arguments asserted in the Motion to Stay Preliminary Injunction as if fully asserted" in its current motion for a stay of proceedings. Dkt. 108 at 5. The Court rightly rejected those arguments there and should do so here as well.

The Court has already twice held that Jane, and not Highland, "is likely to succeed on the merits of" both Jane's Title IX claim and her Equal Protection claim. Dkt. 109 at 5-6. Although Highland has not introduced new arguments or provided new information that should lead to a different result now, one intervening event bears mentioning: the Supreme Court granted certiorari in *Gloucester County School Board v. G.G.* However, that development does not justify staying the case. Jane's claims are broader than those now before the Supreme Court in two ways. First, *G.G.* does not present any of the constitutional claims that this Court relied on in issuing a preliminary injunction. An independently sufficient basis for the relief granted here will thus be unaffected by *G.G.* regardless of the outcome. Second, *G.G.* relates solely to facility access, meaning that it will not affect Jane's claims relating to the school environment and her right to privacy.

II. Highland Would Not Suffer Irreparable Injury Absent a Stay of Proceedings

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 *1-2 (S.D. Ohio Feb. 6, 2007).

Here, Highland claims that it will be irreparably harmed by “lengthy and expensive discovery regarding claims” over which the Court purportedly lacks jurisdiction, and that it is “exceedingly likely that the Sixth Circuit decision will prove dispositive altogether.” Dkt. 108 at 7. These arguments have no merit.

Highland erroneously states that the mere filing of an appeal to an interlocutory order “divest[s] this Honorable Court of jurisdiction over all of these issues.” Dkt. 108 at 6. That is not the law. Instead, “an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue deciding other issues involved in the case.” *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1528-29 (6th Cir. 1992); *see also Williamson v. Recovery Ltd. P’ship*, 731 F.3d 608, 626-27 (6th Cir. 2013) (same). This Court retains jurisdiction as to parts of the case in which its actions will not “alter the status of the case as it rests before the Court of Appeals.” *United States v. Gallion*, 534 F. App’x 303, 310 (6th Cir. 2013) (internal quotation marks and citation omitted). Under this well-settled law, this Court plainly retains jurisdiction over these proceedings, notwithstanding Highland’s appeal of the preliminary injunction. In fact, Highland’s motion recites language from case law directly contradicting its jurisdictional argument when Highland finds it useful to attempt to invoke this Court’s discretionary powers to stay the proceedings. Dkt. 108 at 3 (citing *Ass’n of Irrigated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008) (“[T]he filing of an interlocutory appeal does not automatically stay proceedings.”), *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936), and

Clinton v. Jones, 520 U.S. 681, 706 (1997), the latter two of which provide that district courts have discretion to stay proceedings).

Highland’s claim that discovery will be wasteful because the Sixth Circuit will fully dispose of this case on appeal is also erroneous. Highland disregards the limited scope of its appeal. Because Jane moved for a preliminary injunction on a subset of her claims, her other claims—and in particular, her claims that Highland failed to protect her from sex-based harassment and violated her privacy rights—remain to be litigated no matter how the Court of Appeals rules (and, as mentioned above, no matter how the Supreme Court rules in *G.G.*). Moreover, even if the Sixth Circuit were to hold that Jane has not established that she is likely to succeed on the merits of her Title IX and equal protection claims, such a ruling would not necessarily dispose of the subset of claims at issue in the preliminary injunction: Jane would still have an opportunity to develop a factual record and demonstrate on summary judgment or at trial that she is entitled to relief under the relevant legal standards as articulated by the Court of Appeals or Supreme Court. A stay of the proceedings would needlessly delay the development of that factual record without any benefit to the parties or the Court.

III. Jane Would Be Harmed By a Stay of the Proceedings

Highland suggests that Jane Doe will not be harmed by a stay in the proceedings because (1) this Court “already issued an injunction” and (2) Highland will purportedly “provide Doe the full panoply of safety plans, counseling, adult monitoring, and other services for Doe’s safety and well-being.” Dkt. 108 at 7-8. Both arguments are unavailing.

The first argument, that a stay of proceedings should issue because the injunction is in place, ignores that Highland filed the instant motion while it had a motion pending before this Court to stay the injunction pending appeal. Since that motion was denied, Highland has now

filed a comparable motion before the Sixth Circuit. Although the injunction currently protects Jane's interests, if it is stayed by the Court of Appeals, the need to ensure that proceedings in this Court move expeditiously toward final judgment will be even more acute. As the preliminary injunction order wends its way through the appellate process, Jane will continue attending school. These proceedings have already lasted into the first half of her fifth-grade year. Next year, she will attend sixth grade at Highland Middle School. Although her right to be treated as the girl she is for all purposes will follow her there, the existing preliminary injunction may not be fully adequate to safeguard her interests at a new school facility. It is important to the complete protection of Jane's rights that she be permitted to fully litigate all of her claims, which include but are by no means limited to equal access to facilities in every school she attends. If the appeal stretches into her sixth grade year, or longer, Jane's rights will necessarily be impaired, and she will be harmed as a result.

This argument also ignores the harms Jane will experience if she is unable to proceed on her sex-based harassment and privacy claims. The equitable remedies Jane seeks for those violations would help ensure that those violations do not continue. For example, those remedies would require Third-Party Defendants to implement the policies, procedures, and training needed to effectively address the sex-based harassment Jane experiences from her peers and school personnel. Thus, even though Jane is currently permitted to use the girls' restrooms, she is still being denied equal access to her education, a violation that she should be provided the opportunity to litigate while a narrow portion of this matter is appealed to the Sixth Circuit.

Highland's second argument is cold comfort. While the claim that Highland will continue to offer services is appreciated, it cannot substitute for full protection of Jane's safety and well-being—and litigation of her claims that Highland fostered a hostile environment and

that Highland's conduct resulted in damages to Jane. Highland's claim that it is protecting Jane and attempting to mitigate its past hostility based on her transgender status offers little relief, especially when Highland apparently cannot even bring itself to use the female pseudonym "Jane" or female pronouns. Even after the injunction issued, Highland has continued to treat Jane differently than other students, including by sending a voicemail to parents inviting complaints and "warning" them about the injunction. *See* Dkt. 106-1 at 2.

In sum, Jane will be harmed if she is prevented from continuing to litigate her claims against Highland pending appeal. The stay should be denied.

IV. The Public Interest Weighs Against a Stay

Finally, the public interest weighs in favor of denying Highland's motion to stay proceedings. As noted in Jane's response in opposition to Highland's motion to stay the preliminary injunction, the public interest 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 [lies] in the firm enforcement of Title IX."). A stay of proceedings would limit that protection to access to the girls' restrooms at Highland Elementary School and use of female pronouns and a female name. The public's interest is in a *full* vindication of constitutional rights, including the protection of public school students from sex-based harassment, and this litigation should not be stayed merely because those rights have been protected for the time being by an appropriately narrow preliminary injunction.

CONCLUSION

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

Dated: October 31, 2016

Respectfully submitted,

By: s/ John Harrison

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 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