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

REPLY TO JANE DOE'S MEMORANDUM OF LAW IN OPPOSITION TO THIRD-PARTY DEFENDANTS' MOTION FOR A STAY OF PROCEEDINGS

The arguments asserted in Jane Doe's Memorandum of Law in Opposition to Third-Party Defendants' Motion for a Stay of Proceedings (Doc. 114) ("Memorandum in Opposition") must be denied and the Motion to Stay Proceedings (Doc. 108) granted as (1) 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") demonstrate a likelihood of success on the merits of their interlocutory appeal in light of the Supreme Court's grant of certiorari in *Gloucester County School Board v. G.G.*, 16-273 and the defects in the Equal Protection and right to privacy claims; (2) Defendants can demonstrate substantial harm as discovery will prove a waste of resources where the appeal in this case and in *G.G.* will have a substantial impact on the litigation strategies and course of the proceedings; (3) Intervenor Third-Party Plaintiff Jane Doe ("Doe") cannot direct this Honorable Court to any concrete harm that will result if the stay is granted; and (4) the public interest favors a stay of the proceedings. The basis for this reply is outlined, more fully, below.

I. LAW & ARGUMENT

A. DEFENDANTS HAVE ESTABLISHED A LIKELIHOOD TO PREVAIL ON THE MERITS OF THE APPEAL.

On page two of the Memorandum in Opposition, Doe asserts that Defendants are not likely to prevail on the merits of their appeal because this Honorable Court "has already twice held that Jane, and not [the Board], 'is likely to succeed on the merits of' both Jane's Title IX claim and her Equal Protection claim." This argument ignores that this Court did not have the benefit of the U.S. Supreme Court's grant of certiorari on October 28, 2014 in *Gloucester County School Board v. G.G.*, 16-273, when it issued those decisions. In *G.G.*, the United States Supreme Court granted certiorari to the following questions of law:

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

Both of these questions are central to Defendants' appeals in *Bd. of Educ. of Highland School v. U.S. Dept. of Educ.*, 6th Cir. 16-4107 and *Bd. of Ed of Highland School v. Doe*, 6th Cir. No. 16-4117. While Defendants certainly do not presume that a grant of certiorari guarantees success on the merits, it certainly increases Defendants' likelihood of success on the merits of Defendants' appeal, which is precisely the standard this Honorable Court must apply. Indeed, the grant of certiorari leaves in place the United States Supreme Court's stay of the preliminary injunction entered by the United States District Court for the Eastern District of Virginia until the United States Supreme Court issues its judgment, another factor which demonstrates an increased likelihood of success on the merits. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (mem.).

Doe attempts to downplay this increased likelihood of success on the merits by claiming that "*G.G.* does not present any of the constitutional claims that this Court relied on in issuing a preliminary injunction." Mem. in Opp. at 2, Doc. 114. Page ID# 1985. However, Doe cites no legal precedent that a party seeking a stay during an interlocutory appeal must demonstrate complete and total success on the merits regarding all the issues asserted on appeal. Doe attempts to sidestep the impact of the grant of certiorari by arguing that "*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." This argument misses the mark, however, because the standard for granting a stay of the proceedings is not whether Defendants will prevail on the merits of their case. Rather, the standard is whether "the party seeking the stay will prevail on the merits of the appeal." *W. Tennessee Chapter of Associated Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1027–29 (W.D. Tenn. 2000). The fact that *G.G.* will not affect the merits of Doe's case

relating to the school environment is wholly irrelevant to the merits of Defendants' appeals, which have absolutely nothing to do with Doe's claims relating to the school environment.

Even employing the standard as Doe errantly articulates it does not help Doe's cause here. Doe's claims involving the school environment are claims that are specifically brought under Title IX. *See* Compl. in Intervention ¶¶ 96-99, Doc. 32, Page ID# 480 (discussing the school environment claims and tying them directly to "violations of Title IX"). So Doe's success or failure on those claims relates directly to whether Doe's alleged transgender status is protected by Title IX. And that question will be decided by Defendants' Sixth Circuit appeal and by the Supreme Court's decision in *G.G.* So Doe's assertion that these claims will be unaffected by *G.G.* as a reason for this Honorable Court to move forward with the proceedings is wholly misplaced.

Moreover, Doe's assertion that Doe is likely to prevail on the merits of the right to privacy claim alleged in Count III of Doe's complaint is overly optimistic. This circuit "extend[s] the right to informational privacy only to interests that implicate a fundamental liberty interest." *Lambert v. Hartman*, 517 F.3d 433 (6th Cir. 2008). Thus, "[t]his circuit [. . .] will only balance an individual's interest in nondisclosure [. . .] against the public's interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998). There is, simply put, no fundamental right to keep one's sex private. Therefore, Doe's privacy claims do not aid Doe in establishing a likelihood of success on the merits.

Even under a less exacting standard employed in other circuits, Doe's theory requires, at a minimum, that one can have a reasonable expectation of privacy in one's biological sex that warrants government protection from disclosure under the Due Process Clause. That view is

unprecedented. *See Carcano v. McCrory*, M.D.N.C. No. 1:16cv236, 2016 WL 4508192, *23 (M.D.N.C. Aug. 26, 2016) (ruling "[t]he law in this area is substantially underdeveloped" and "Plaintiffs have not demonstrated that they are entitled to preliminary relief on this claim"). This claim is even more tenuous in Ohio where birth certificates, which record an individual's sex, are "public record." See *id.* at * 22-23 ("the sex listed on a person's birth certificate does not appear to qualify doe constitutional protection" because "individuals have no constitutionally-protected privacy interest in information that is feely available in public records"); OHIO REV. CODE ANN. § 3705.23(A)(1) (indicating that vital records are public record that "shall issue . . . to any applicant"); OHIO REV. CODE ANN. § 3705.01(O) (defining "[v]ital records" to include "certificates or reports of birth"); OHIO REV. CODE ANN. § 3705.13 (providing "the office of vital statistics shall issue a certification of birth containing the new name" in the event of "a legal change of name"); *see also* Highland's Opp. to Doe's Mot. PI, Decl. of Shawn Winkelfoos, Ex. U, Doc. 65-10, Page ID# 1277 (copy of Certification of Birth indicating sex as male).

Finally, Doe attempts to downplay this increased likelihood of success on the merits by claiming that "*G.G.* does not present any of the constitutional claims that this Court relied on in issuing a preliminary injunction." Mem. in Opp. at 2, Doc. 114, Page ID# 1985. However, Doe cites no legal precedent that a party seeking a stay during an interlocutory appeal must demonstrate complete and total success on the merits regarding all the issues asserted on appeal. Rather, Defendants must show and have shown "serious questions going to the merits of the district court's decision." *W. Tenn. Ch. of Assoc. Builders & Contractors, Inc.*, 138 F. Supp. 2d at 1027. This Court's opinion on Doe's Equal Protection claim is unprecedented. No Circuit has held that people who identify as transgender are entitled to heightened scrutiny, as this Honorable Court did. As the Opinion and Order admits, "[t]he question of the level of scrutiny in

an equal-protection claim was not squarely before the *Smith* [*v. City of Salem*] Court." Op. and Order at 31, Doc. 95, Page ID# 1761. Indeed, this Honorable Court cited only a pair of district court decisions from California and New York that analyzed whether people who identify as transgender were entitled to heightened scrutiny and held that they were. But in each case, the reasoning those courts relied on has been undermined by this Circuit's precedent. *See* Mem. Supp. Mot. Stay P.I. Pending Appeal at 8-12, Doc. 103, Page ID# 1853-7 (discussing Sixth Circuit precedent that contradicts the reasoning of *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) and *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y 2015)). After applying strict scrutiny this Honorable Court further held that Defendants could not even satisfy rational-basis review. But even a court that applied intermediate scrutiny to similar claims came to the opposite conclusion of this Honorable Court. That court held that "the protection of bodily privacy is an important government interest and that the State may promote this interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions." *Carcano*, 2016 WL 4508192 at *17. Because this Honorable Court's decision on the Equal Protection issues is unprecedented, this Court should find that serious questions exist. *See W. Tenn. Ch. of Assoc. Builders & Contractors, Inc.*, 138 F. Supp. 2d at 1027 (noting Defendant had raised serious questions by citing "circuit court decisions in its favor.").

Based on the foregoing, the arguments asserted in the Memorandum in Opposition must be rejected and the Motion to Stay GRANTED as Defendants have demonstrated a likelihood of success on the merits of their interlocutory appeals in light of the Supreme Court's grant of certiorari in *G.G.* and the defects in Doe's Equal Protection and right to privacy claims.

B. DEFENDANTS WILL SUFFER INJURY ABSENT A STAY OF PROCEEDINGS.

On pages three through four of the Memorandum in Opposition, Doe distorts Defendants' arguments in order to obscure the harm that the parties will suffer absent a stay of the proceedings. Specifically, Doe accuses Defendants of arguing "that the mere filing of an appeal to an interlocutory order 'divest[s] this Honorable Court of jurisdiction.'" Mem. in Opp. at 3, Doc. 11, Page ID# 1986. What Defendants actually argued is that the filing of the interlocutory appeal "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" – in this case, the Board's Title IX claims against the Department of Education and Doe's Title IX and Equal Protection claims against Defendants. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400 (1982). Clearly, this Honorable Court retains jurisdiction over the remaining claims. Indeed, Defendants would not need to file a motion to stay the proceedings if an appeal of an interlocutory order divested this Honorable Court of jurisdiction over the case in its entirety.

Doe further mischaracterizes Defendants' arguments by asserting that Defendants believe "discovery will be wasteful because the Sixth Circuit will fully dispose of the case on appeal." Mem. in Opp. at 4, Doc. 11, Page ID# 1987. Defendants make no such argument. What Defendants actually argued is that a ruling from the Sixth Circuit "will substantially impact, if not prove dispositive, with respect to Doe's Title IX and Equal Protection claims" and may prove dispositive with respect to the Board's Title IX claims against the Department of Education. Mot. to Stay Proceedings at 6, Doc. 108, Page ID# 1956. It is Defendants' position, recognized as valid by other courts in this circuit in cases involving Title IX interlocutory appeals, that "[t]he litigation will not be conducted in the same manner" depending on the outcome of the appeals on these specific issues and that a ruling from the Sixth Circuit may "affect the theories to be

pursued [in discovery and] at trial." *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).[1] And while a ruling at the appellate level will not resolve all of the claims, it may substantially impact the parties' position on settlement regarding the entire case. All of this will be achieved without Defendants being compelled to engage in lengthy, expensive, and perhaps needless discovery while these issues are resolved at the appellate level.

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. Accordingly, discovery will prove a waste of both this Honorable Court's and the parties' resources, and the Defendants have demonstrated substantial harm.

Based on the foregoing, the arguments asserted in the Memorandum in Opposition must be rejected and the Motion to Stay should be GRANTED.

C. <u>DOE WILL NOT BE HARMED BY A STAY OF PROCEEDINGS</u>.

On pages four through five of the Memorandum in Opposition, Doe erroneously argues that Doe will suffer harm because the Board filed a motion "to stay the injunction pending appeal." However, the filing of a motion does not actually demonstrate any harm, since the motion has not been granted. As a result, Doe's claim that Doe will suffer harm "if [the injunction] is stayed" is speculative at best and does not demonstrate any actual concrete harm. To the contrary, there is currently an injunction in place directing Defendants to treat Doe as a girl, with which Defendants are in full compliance. *See* Op. and Order at 43, Doc. 95, Page ID# 1772. Thus, the filing of the motion to stay the preliminary injunction does not demonstrate any actual, concrete, harm to Doe.

[1] Defendants acknowledge again, so that there is absolutely no confusion, that Count III of the Complaint in Intervention (Doc. 32) will not be directly before the Sixth Circuit.

Doe's claim that "the existing preliminary injunction may not be fully adequate to safeguard her interests at a new school facility" also does not demonstrate any actual harm, nor is it a reason for this Court to deny Defendants' requested stay of the proceedings. Mem. in Opp. at 5, Doc. 11, Page ID# 1988. Doe's motion for preliminary injunction asked expressly for the following relief: "that she be treated as [a] girl . . . including being referred to by her female name and female pronouns and being able to use the same restrooms as other girls at Highland Elementary School during the coming school year." Jane Doe's Mot. for a P.I. at 2, Doc. 35. Doe's request was granted; it is not Defendants' burden to bear that the temporary relief requested may not adequately address harm Doe now alleges Doe may face at some point in the future. Nor is the correct remedy for some future potential harm to waste all parties' and this Honorable Court's time and resources engaging in discovery while the issue is likely being fully resolved by the Supreme Court's pending decision in *G.G.* Rather, if Doe finds in the future a need to seek another injunction, it would be proper for Doe to request that the stay be lifted for the limited purpose of seeking an expansion of the injunction. Additionally, Doe will not be moving to the next school facility until next school year, which begins several months after a decision from the Supreme Court in *G.G.* will be issued. Thus, Doe cannot manufacture this harm as a reason for this Court to deny the requested stay.

Finally, Doe argues that Defendants "ignore[] the harms Jane will experience if she is unable to proceed on her sex-based harassment and privacy claims" because Doe is allegedly experiencing "sex-based harassment" "from her peers and school personnel." Mem. in Opp. at 5, Doc. 114, Page ID# 1988. This argument completely ignores Defendants' repeated representations to opposing counsel that they take any allegations of harassment involving Doe extremely seriously and that any reported allegation will be promptly investigated and, if

credible, redressed. Indeed, counsel for the Board made this precise representation during a conference call with this Honorable Court.

Since making this commitment, Doe's counsel has not contacted Defendants regarding any harassment from Doe's peers or school personnel. And while Doe's counsel objected, and continues to object in the Memorandum in Opposition, to the manner in which Defendants notified the school community regarding the injunction, Defendants are not aware, and Doe has not made Defendants aware, of any harassment that actually resulted from this notification. *See* Mem. in Opp. at 5, Doc. 114, Page ID# 1989. Quite simply, from the commencement of this litigation through the present time, Defendants are not aware of a single credible report that Doe is the subject of any harassment, whether that harassment be from peers or school personnel.

Finally, this Court should balance the harms in the same way that the Supreme Court did in *G.G.* The Supreme Court's recall and stay of the mandate required the Court to consider similar factors to those at issue here. *Hollingsworth v. Perry*, 130 S. Ct. 705, 709-10 (2010) (per curiam). In balancing the harms, the Supreme Court thus determined that the harm to the school, whose policies would have been overturned and to the students, whose privacy rights would have been infringed, by the injunction outweighed the risk to a student who had been accommodated with individual-user restrooms while the case moved forward. The Supreme Court's certiorari grant in *G.G.* leaves in place the stay that the Supreme Court issued in that case. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (mem.). Because the Supreme Court has balanced the harms and issued a stay on the side of school district in a case with similar facts, this Court should follow the Supreme Court's lead and issue a stay of the proceedings here until the Supreme Court is able to give guidance on the relevant legal issues.

Based on the foregoing, and because Doe cannot direct this Honorable Court to any present harm that will result if the proceedings are stayed, the arguments asserted in the Memorandum in Opposition must be rejected and the Motion to Stay should be GRANTED.

D. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A STAY.

On page six of the Memorandum in Opposition, Doe asserts that "the public interest weighs in favor of denying [Defendants'] motion to stay proceedings" because "the public interest rests in the protection of constitutional and civil rights." While Defendants certainly do not dispute that the public interest rests in the protection of constitutional and civil rights generally, this Honorable Court already issued an injunction directing Defendants to treat Doe as a girl. *See* Op. and Order at 43, Doc. 95, Page ID# 1772. While Doe again makes vague references to "sex-based harassment," Defendants note, once again, that there they are not aware of any known harassment. Mem. in Opp. at 6, Doc. 114, Page ID# 1989. And resolution of such claims cannot be accomplished until either the Sixth Circuit or the Supreme Court resolve the questions surrounding how sex in Title IX is defined. This Court should follow the lead of other district courts in this Circuit and find "that constitutional interests are best protected if the Court waits for guidance from the Sixth Circuit on an issue that is undisputably central to the complete and fair disposition of the case." *W. Tenn. Ch. of Assoc. Builders & Contractors, Inc.*, 138 F. Supp. 2d at 1029.

In light of the foregoing, the public interest favors a stay of the proceedings. Accordingly, the arguments asserted in the Memorandum in Opposition must be rejected and the Motion to Stay should be GRANTED.

II. 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,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 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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