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

MEMORANDUM OF LAW IN OPPOSITION TO JANE DOE'S MOTION TO STRIKE CERTAIN DEFENSES FROM HIGHLAND'S ANSWER

The arguments asserted in the Motion to Strike Certain Defenses From Highland's Answer (Doc. 119) ("Motion to Strike") filed by Intervenor Third-Party Plaintiff Jane Doe ("Doe") must be denied as dilatory and harassing because (1) motions to strike are universally viewed with disfavor; (2) the affirmative defenses that Doe seeks to strike have some bearing on an issue in the litigation and are not insufficient as a matter of law; (3) the Sixth Circuit and a

majority of the courts in this country have rejected the application of a heightened pleading standard to affirmative defenses; and (4) the affirmative defenses that Doe seeks to strike provide fair notice of the defenses asserted in this matter. The basis for this memorandum in opposition is outlined, more fully, below.

I. LAW & ARGUMENT

A. MOTIONS TO STRIKE ARE UNIVERSALLY VIEWED BY COURTS WITH DISFAVOR.

On pages one and two of the Motion to Strike, Doe outlines the standard of review that courts apply when considering whether to grant a motion to strike. Since Doe omits the less favorable aspects of this standard, Third-Party Defendants Board of Education of the Highland Local School District ("Board"); Highland Local School District ("District"); William Dodds, Superintendent of Highland Local School District ("Superintendent Dodds"); and Shawn Winkelfoos, Principal of Highland Elementary School ("Principal Winkelfoos") (collectively, "Defendants") provide the full standard for granting a motion to strike under FED.R.CIV.P. ("Rule") 12(f) below.

Rule 12(f) provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Because striking a portion of a pleading is a drastic remedy, such motions are generally viewed with disfavor and are rarely granted." *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, No. C2-94-876, 1997 U.S. Dist. LEXIS 6090, at *6-7 (S.D. Ohio Apr. 1, 1997). *See also Chiancone v. City of Akron*, No. 5:11CV337, 2011 U.S. Dist. LEXIS 108444, at *4 (N.D. Ohio Sept. 23, 2011) ("Striking pleadings is considered a drastic remedy to be used sparingly").

Numerous "judicial decisions make clear that motions under Rule 12(f)" are "infrequently granted" because they are often "sought by the movant simply as a dilatory or

harassing tactic." 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1380, at 394 (2004). Due to "the limited importance of pleading in federal practice, and because they are often used as a delaying tactic," a motion to strike should be refused unless the matter to be stricken could not possibly have any bearing on an issue in the litigation. *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003). *See also Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953 (holding the same).

Here, the affirmative defenses that Doe seeks to strike have some bearing on an issue in the litigation and are not "insufficient as a matter of law." *Chiancone*, 2011 U.S. Dist. LEXIS 108444 at *6. Defendants address each of the defenses that Doe seeks to strike below.

1. Defenses Two (Want of Subject Matter Jurisdiction), Three (Want of Personal Jurisdiction), Four (Want of Sufficiency of Process), and Five (Want of Sufficiency of Process).

Defenses Two, Three, Four, and Five, which all deal with jurisdiction and service, have some bearing on an issue in the litigation and are not insufficient as a matter of law as the Board and District[1] did not submit to the jurisdiction of this Honorable Court in one of the manners prescribed by Rule 12(h) as to constitute a waiver of these defenses.

On pages two through three of the Motion to Strike, Doe argues that Defendants waived their affirmative defenses regarding service of process and jurisdiction by participating in the litigation prior to asserting these defenses. *See* Mot. to Strike at 2-3, Doc. 119-1, Page ID# 2036-7 (asserting that "Defendants have waived this defense [. . .] by filing multiple briefs on the

[1] Defendants acknowledge that none of these defenses apply to Superintendent Dodds and Principal Winkelfoos as Defendants waived service for both of these individuals under Rule 4. *See* Waiver of Service of Summons, Doc. 55, Page ID# 998; Waiver of Service of Summons, Doc. 56, Page ID# 999. Defendants note particular frustration regarding this aspect of Doe's motion to strike as Defendants offered at the onset of litigation to simply waive service as to the Board and District or stipulate as to service, which counsel for Doe declined. Now, after Doe insisted on perfecting service on the Board and District under Rule 4, which Doe has not done, Defendants are forced to waste additional resources responding to a motion to strike Defendants' defenses regarding the very service that Doe insisted upon.

merits of Jane's motion for a preliminary injunction"). Doe is incorrect. Rule 12(h) specifically states that the defenses of lack of personal jurisdiction, insufficient process, and insufficient service of process are "waived only if it is never offered in a Rule 12 motion, is not raised in a Rule 12 motion in which it could have been raised, or is not included in a responsive pleading." *Meadows v. Uniglobe Courier Serv.*, No. 5:08CV2530, 2009 U.S. Dist. LEXIS 65879, at *2 (N.D. Ohio July 28, 2009). *See also Fisher v. Merryman*, 32 Fed. Appx. 721, 722 (6th Cir. 2002) (holding that the "district court did not abuse its discretion by dismissing the [defendant] for lack of proper service," after defendant appeared in court to move for an extension of time in which to answer the complaint, because that motion was not a responsive pleading).

The Ohio Supreme Court, in interpreting similar language as Rule 12(h), has clarified that "[t]he only way in which a party can voluntarily submit to a court's jurisdiction [. . .] is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading. Only when a party submits to jurisdiction in one of these manners will the submission constitute a waiver of the defense." *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St. 3d 141, 144 (Ohio 2007). Both the Ohio Supreme Court and "the Sixth Circuit, [are] in lock-step with many other courts, [that] ha[ve] refused to find a waiver simply because a defendant appears in court to defend the lawsuit." *Meadows v. Uniglobe Courier Serv.*, 2009 U.S. Dist. LEXIS 65879, at *2.

While the Board and District have, as Doe notes, appeared in court to defend the lawsuit by filing briefs, they *never* submitted to jurisdiction in one of the manners prescribed by Rule 12(h) as to constitute a waiver of Defenses Two, Three, Four, and Five. Specifically, the Board and District never offered a Rule 12 motion prior to filing its answer as to waive these defenses. Moreover, the Board and District preserved these defenses by raising them in their answer – as

expressly contemplated under Rule 12(h). Thus, the Board and District properly preserved these defenses and the Motion to Strike must be denied.

As to the underlying merits of Defenses Two, Three, Four, and Five, Rule 4(j) prescribes the manner for perfecting service on a political subdivision such as the Board. Specifically, Rule 4(j) states that a service on a political subdivision is perfected only by "delivering a copy of the summons and of the complaint to its chief executive officer; or [. . .] serving a copy of each in the manner prescribed by that state's law for serving a summons." The Summons evidences that Doe attempted to perfect service on "Loren Altizer, President." Summons, Doc. 118, Page ID# 2027. Loren Altizer is not the chief executive officer for the Board. Even if he were, which he is not, the Deputy Clerk returned the Summons "unexecuted." Summons, Doc. 118, Page ID# 2027. Accordingly, Defenses Two, Three, Four, and Five, which all deal with jurisdiction and service, clearly have some bearing on an issue in the litigation and are not insufficient as a matter of law.

2. Defense Seven (Failure to Exhaust Administrative Remedies).

The defense of failure to exhaust administrative remedies is not insufficient as a matter of law as Doe is a student receiving special education services under the Individuals With Disabilities Education Improvement Act ("IDEA"). The IDEA requires plaintiffs to "exhaust their administrative remedies before bringing suit in federal court to obtain relief that is also available under the IDEA." *Covington v. Knox County School Syst.*, 205 F.3d 912, 915 (6th Cir. 2000) (omitting citations and footnote). *See also* 20 U.S.C. § 1415(l) (requiring administrative exhaustion before the filing of a civil action). Some of the relief that Doe seeks in this case may be available under the IDEA. As a result, the defense of administrative exhaustion has some bearing on an issue in the litigation and is not insufficient as a matter of law.

3. Defense Eight (Failure to Join Necessary Parties).

The defense of failure to join a necessary party is not insufficient as a matter of law. While Doe claims, in a conclusory fashion, that Doe "joined all necessary parties," this case involves multiple competing claims involving nine federal and state parties. Mot. to Strike at 3, Doc. 119-1, Page ID# 2037. It is impossible for Defendants, without the benefit of discovery, to determine whether all the parties that may potentially claim an interest in this action are joined. Specifically, Doe's claims involve actions and conduct performed by various entities and individuals over which Defendants had no control. *See, e.g.,* Answer ¶ 47, 48, 58, Doc. 115, Page ID# 1997-8 (noting instances in which the alleged conduct involved outside entities). Defendants asserted this defense, at this early stage in the proceedings, in order to preserve it and permit further discovery on the issue of whether other parties claim an interest in this matter that must be joined under Rule 19.

4. Defense Ten (Prima Facie Case).

The defense that Doe cannot establish a prima facie case under 42 U.S.C. § 1983 ("Section 1983") is clearly not insufficient as a matter of law and this argument is asserted solely as a dilatory and harassing tactic. First, issues regarding the sufficiency of Doe's Fourteenth Amendment claim are currently the subject of an appeal before the Sixth Circuit Court of Appeals in Case No. 16-4117. Moreover, as Doe readily acknowledges, this Honorable Court only ruled that "Jane is *likely* to succeed on the merits of her Fourteenth Amendment claim." Mot. to Strike at 4, Doc. 119-1, Page ID# 2038 (emphasis added). This Honorable Court never ruled on the issue of whether Doe can conclusively establish a prima facie case under Section 1983 with respect to her Fourteenth Amendment claim. Indeed, the parties have not even

exchanged initial disclosures or conducted any discovery regarding the merits of Doe's Fourteenth Amendment claim.

Even if this Honorable Court were to disregard the Section 1983 Fourteenth Amendment claim, Doe asserts a separate Section 1983 claim with respect to her right to privacy under the United States Constitution. *See* V. Compl. In Intervention ("V. Compl."), Doc. 32, Page ID# 480-1 (asserting the same). This Honorable Court has *never* ruled on the Section 1983 privacy claim. Despite this fact, Doe boldly proclaims that asserting a defense to a Section 1983 claim is "meritless." Mot. to Strike at 4, Doc. 119-1, Page ID# 2038. This defense is not meritless as it clearly has some bearing on the issues in this litigation and is plainly not insufficient as a matter of law.

5. Defense Twenty-Six (Official Capacity).

The defense of official capacity is clearly sufficient as a matter of law as the defense of official capacity action is a defense recognized by the United States Supreme Court in Section 1983 claims. *See, e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity"). Moreover, this defense is not "redundant," as Doe baselessly claims, to Defense Twenty-Five (Qualified Immunity). "Qualified immunity is an entitlement [by an individual defendant] not to stand trial or face the other burdens of litigation. The privilege is an immunity from suit rather than a mere defense to liability." *Saucier v. Katz*, 533 U.S. 194, 197 (2001) (abrogated with respect to the sequence of the qualified immunity analysis). In complete contrast, an official capacity defense is a defense that asserts that the lawsuit against the individual defendants should be "treated as a suit against the municipality" itself. *Kentucky*, 473 U.S. at 165–66. *See also Doe v. Claiborne Cty., Tenn. By & Through Claiborne Cty. Bd. of*

Educ., 103 F.3d 495 (6th Cir. 1996) (dismissing claims against a principal in his official capacity).

Based on the foregoing, the official capacity action defense has some bearing on an issue in the litigation and is sufficient as a matter of law. Moreover, the defense is plainly separate and distinct from the qualified immunity defense (Defense Twenty-Five).

6. Defense Thirty (Laches).

The defense of laches is sufficient as a matter of law because the allegations involve incidents and events that date back to Doe's transition to first grade, perhaps earlier. V. Compl. ¶ 31, Doc. 32, Page ID# 463 (alleging that Joyce Doe began requesting accommodations "[i]n the summer of 2012"). *See also* V. Compl. ¶ 27, Doc. 32, Page ID# 463 (alleging that Doe began asserting a feminine gender "from at least age four"). Doe is currently in fifth grade. V. Compl. ¶ 26, Doc. 32, Page ID# 463. Laches is "a doctrine providing a party with an equitable defense where long-neglected rights are sought to be enforced against a party." BARRON'S LAW DICTIONARY 285 (5th ed. 2003). The defense of whether Doe, and Doe's guardians, neglected to enforce their rights against Defendants where the allegations date beyond Doe's kindergarten year has some bearing on an issue in the litigation and is sufficient as a matter of law.

7. Defense Thirty-Two (Contributory/Comparative Negligence).

Defendants acknowledge that Doe does not bring a negligence action. The purpose of this defense was to place Doe on notice that Defendants intend to show that the actions of Doe and Doe's guardians, particularly in publicizing certain private details regarding Doe, have contributed to Doe's alleged damages. As a result, this defense has some bearing on an issue in the litigation and is sufficient as a matter of law.

8. Defense Thirty-Six (Attorney Fees).

This defense is not "patently false" as Doe claims (Mot. to Strike at 5, Doc. 119-1, Page ID# 2039) as Ohio law provides that, "in an action against a political subdivision [. . . p]unitive or exemplary damages shall not be awarded." OHIO REV. CODE ANN. § 2744.05. The fact that "[n]either attorney fees nor punitive damages may be awarded against a [political subdivision] pursuant to [OHIO REV. CODE ANN. § 2744.05,] merely codifies previous case law as to the unavailability of punitive damages against a municipal corporation." *Banks v. Village of Oakwood*, 57 Ohio St.3d 718, 568 N.E.2d 690 (Ohio Ct. App. 1990). *See also Henry v. Akron*, 27 Ohio App.3d 369, 501 N.E.2d 659 (Ohio 1985) (holding that "[i]n the absence of statutory authorization, neither punitive damages nor attorney fees can be awarded against a municipal corporation"); *Franklin v. City of Columbus*, 130 Ohio App.3d 53, 63, 719 N.E.2d 592 (Ohio Ct. App. 1998) (holding that neither punitive damages nor attorney fees can be awarded against a municipal corporation).

While Defendants acknowledge that the claims currently brought by Doe may provide for the award of attorney fees, Defendants asserted this defense in order to preserve it at this early stage in the litigation since discovery has not commenced and the parties may amend their pleadings. *See* Mot. to Strike at 2, Doc. 119-1, Page ID# 2036 (seeking dismissal of this defense "with prejudice," rather than without prejudice).

9. Defense Thirty-Seven (Punitive Damages).

This defense is not "irrelevant," as Doe claims, for the reasons outlined above. Mot. to Strike at 5, Doc. 119-1, Page ID# 2039. Defendants should be entitled to preserve this defense at this early stage in the proceedings as it is not insufficient as a matter of law.

10. Defense Thirty-Eight (Costs).

This defense is not "patently false," as Doe claims, for the reasons outlined above. Mot. to Strike at 5, Doc. 119-1, Page ID# 2039. Defendants should be entitled to preserve this defense at this early stage in the proceedings as it is not insufficient as a matter of law.

11. Defense Thirty-Nine (Failure to Properly Verify the Complaint).

The defense of failure to properly verify the complaint is not insufficient as a matter of law since Doe does not dispute that she failed to properly verify the Verified Complaint in Intervention. Rather, Doe asserts that "[i]t was not necessary for Jane's Complaint to be verified." Mot. to Strike at 5, Doc. 119-1, Page ID# 2039. Regardless of whether or not it was necessary for Doe to verify the Verified Complaint in Intervention, Doe submitted an allegedly verified complaint that was not properly verified. Unless and until Doe actually produces a properly verified complaint this defense remains sufficient as a matter of law.

12. Defense Forty (Reservation of Rights).

With respect to Defendants' reservation of rights, Defendants do not seek to avoid the requirements outlined under Rule 15 for amending the pleadings. *See Wells v. Farmers Alliance Mut. Ins. Co.*, No. 2:07CV00036 ERW, 2009 U.S. Dist. LEXIS 37284, at *7 (E.D. Mo. May 4, 2009) (prohibiting the same). Defendants asserted the defense solely to preserve their rights to amend their answer under Rule 15 to assert additional affirmative defenses. It is not clear how preserving their rights under Rule 15 would be a nullity, as Doe claims, or is so immaterial, impertinent, or scandalous to warrant a motion to strike under Rule 12(f).

B. THE SIXTH CIRCUIT AND A MAJORITY OF THE COURTS REJECT THE APPLICATION OF A HEIGHTENED PLEADING STANDARD TO AFFIRMATIVE DEFENSES.

On pages six through eight of the Motion to Strike, Doe erroneously asserts that "[t]his Court requires affirmative defenses to meet the heightened pleading standard set out in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)." "To be sure, [Doe] has a case from this district that supports [Doe's] position." *GE Solutions, LLC v. Lights of A., Inc.*, Nos. 1:12-CV-3131; 1:12-CV-3132; 1:12-CV-3133; 1:12-CV-3134; 1:12-CV-3136, 2013 U.S. Dist. LEXIS 63577, at *10 (N.D. Ohio May 3, 2013) (reversed, in part, on other grounds). *See also* Mot. to Strike at 6, Doc. 119-1, Page ID # 2040 (citing *Edizer v. Muskingum Univ.*, No. 2:11-CV-799, 2012 U.S. Dist. LEXIS 140010 (S.D. Ohio Sept. 28, 2012) to support Doe's argument). "But the case cannot be squared with a published Sixth Circuit opinion in which the court held that the Federal Rules of Civil Procedure do not require a heightened pleading standard for defenses." *GE Solutions*, 2013 U.S. Dist. LEXIS 63577, *10 (citing *Montgomery v. Wyeth*, 580 F.3d 455, 468 (6th Cir. 2009) as the published opinion). In *Montgomery*, the Sixth Circuit held, after the Unites States Supreme Court rulings in *Iqbal* and *Twombly*, that "[t]he Federal Rules of Civil Procedure do not require a heightened pleading standard for a statute of repose defense." *Id.*, at 468. Thus, "[u]nder the Sixth Circuit's lenient standard, even a threadbare, factually hollow, affirmative defense like this one is adequate: 'Plaintiff's causes of action are barred in whole or in part by the applicable statutes of limitations and repose.'" *GE Solutions*, 2013 U.S. Dist. LEXIS 63577, *10 (citing *Montgomery*, 580 F.3d at 467).

This interpretation is wholly consistent with the language of Rule 8. Specifically, Rule 8(a)(2) requires a plaintiff to "show" an "entitle[ment] to relief" in drafting a complaint. In stark

contrast, Rule 8(c)(1) only mandates that a responding party, "affirmatively state any [. . .] affirmative defense." These "differences in the plain language of Rule 8(a)(2) and Rule 8(c) suggest that less is required for pleading affirmative defenses." *Weddle v. Bayer AG Corp.*, No. 11CV817, 2012 U.S. Dist. LEXIS 40978, at *6 (S.D. Cal. Mar. 26, 2012).

Numerous courts have recognized that the United States Supreme Court's analysis in *Twombly* and *Iqbal* focused on complaints and Rule 8(a)(2) – not answers and Rule 8(c)(1). *See, e.g., id.*; *Chiancone*, 2011 U.S. Dist. LEXIS 108444, *12 ("Neither the Supreme Court nor any circuit court has held that *Iqbal* and *Twombly* apply to R. 8(c)"); *Petroci v. Transworld Systems, Inc.*, No. 12-CV-00729(A)(M), 2012 U.S. Dist. LEXIS 161312, at *2 (W.D.N.Y. Oct. 19, 2012) ("Both *Twombly* and *Iqbal* focused on the language of Rule 8(a)(2)"); *Paleteria La Michoacana v. Productos Lacteos*, 905 F.Supp.2d 189, 191 (D.D.C. 2012) ("*Iqbal* and *Twombly* interpreted Rule 8(a)(2) which sets forth the pleading requirements for a complaint"); *Cottle v. Falcon Holdings Management*, LLC, No. 2:11-CV-95-PRC, 2012 U.S. Dist. LEXIS 10478, at *2 (N.D. Ind. Jan. 30, 2012) ("[T]he language relied on by the Supreme Court in *Twombly* and *Iqbal* [. . .] Fed.R.Civ.P. 8(a) [. . .] is not contained in Rules 8(b) or (c)"); *Bennett v. Sprint Nextl Corp.*, No. 09-2122-EFM, 2011 U.S. Dist. LEXIS 112116, at *1 (D. Kan. Sept. 29, 2011) ("[I]n light of the difference between the applicable provisions and the fact that the Supreme court relied upon Rule 8(a)'s showing [. . .] when formulating its plausibility standard, the Court finds that Rule 8's language militates against the application of the new pleading standard to answers"). Indeed, the "national majority on the issue of *Twiqbal*'s[2] applicability to affirmative defenses [. . .] is decidedly in the direction of refusing to apply 'plausibility' to such pleadings." WILLIAM M. JANSSEN, THE ODD STATE OF TWIQBAL PLAUSIBILITY IN PLEADING AFFIRMATIVE DEFENSES, 70

[2] "*Twiqbal*" is the common abbreviation to refer collectively to the U.S. Supreme Court's federal pleading decisions in *Twombly* and *Iqbal*. *See, e.g., RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010) (identifying "*Twiqbal*" as how the Supreme Court's *Iqbal* and *Twombly* decisions are now "commonly known").

Wash. & Lee L. Rev. 1573, 1606 (2013) (compiling opinions from across the country and finding that, in cases where courts directly addressed the issue, "judges are rejecting *Twiqbal* for testing affirmative defenses by very nearly a two-to-one margin").

Because an affirmative defense may be pled in a general, threadbare, manner under this lenient standard, it "will be held to be sufficient [. . .] as long as it gives plaintiff fair notice of the nature of the defense." *Lawrence v. Chabot*, 182 F. App'x 442, 456 (6th Cir. 2006) (quoting 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1274 (collecting cases in which courts have held that there is no requirement that affirmative defenses show any facts at all). "No factual details need be provided." *GE Solutions*, 2013 U.S. Dist. LEXIS 63577, *11. Application of this standard to the present matter demonstrates that Defendants provided Doe fair notice of the nature of the defenses asserted in the Ninth (Statute of Limitations), Twenty-Seventh (Legal Capacity), Twenty-Ninth (Estoppel), and Thirty-Fifth (Statutory Immunity) Defenses as each defense provides Doe fair notice and there is no ambiguity regarding the defenses. Indeed, Defendants cannot state these defenses with greater clarity without providing factual details that need not be provided – factual details that Defendants lack at this initial pleading stage – without the benefit of discovery.

In the event this Honorable Court requires greater factual details regarding each of these defenses, Defendants attempt to provide those factual details, to the best they are able without conducting any discovery, for the Twenty-Seventh (Legal Capacity), Twenty-Ninth (Estoppel), and Thirty-Fifth (Statutory Immunity) Defenses below. A background regarding the Ninth Defense (Statute of Limitations) is not provided as it is self-explanatory.

1. Twenty-Seventh Defense (Highland Local School District Is Not A Legal Entity).

A school district is not a body corporate and politic with the express power to sue and be sued. *See* OHIO REV. CODE ANN. § 3313.17 (stating the same). Rather, as the body statutorily charged with the management and control over the territory within its territorial limits and required to make necessary rules for the government of its employees, any action that could be brought would only lie against the "Highland Local School District Board of Education." *See* OHIO REV. CODE ANN. § 3313.17 (stating that a board of education "shall be [. . .] capable of suing and being sued"); OHIO REV. CODE ANN. § 3313.47 (stating that a board of education "shall have the management and control of all public schools"). *See also Thompson v. Bd. of Educ.*, No. 3:12–cv–287, 2013 U.S. Dist. LEXIS 161175, at *8 (S.D. Ohio Nov. 12) ("[a] school district is not sui juris, rather it is the board of education which must be sued"); *Peterson v. Northeastern Local Sch. Dist.*, No. 3:13-cv-187, 2014 U.S. Dist. LEXIS 129770, at *7 (S.D. Ohio Sept. 12) (dismissing claims against a school district "as it is not an entity capable of being sued"); *Getachew v. Columbus City Sch.*, No. 2:11–cv–861, 2012 U.S. Dist. LEXIS 30663, at *4 (S.D. Ohio Mar. 8) (dismissing action against a school district because "a school district is not sui juris; rather, it is the board of education which must be sued"). The "Highland Local School District" is simply a territorial unit managed by the Board.

2. Twenty-Ninth Defense (Estoppel).

As stated above, Defendants intend to assert that the actions of Doe and Doe's guardians have contributed to Doe's alleged damages. Discovery will be necessary to develop this defense further.

3. Thirty-Fifth Defense (Statutory Immunity).

The Board is a political subdivision and the individual Defendants are political subdivision employees entitled to the benefits of statutory immunity from liability under Chapter 2744 of the Ohio Revised Code. *See* OHIO REV. CODE ANN. § 2744.01(M) (defining a political subdivision for purposes of the statute as a "school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state"); OHIO REV. CODE ANN. § 2744.01(B) (defining a political subdivision employee as "an officer, agent, employee, or servant [. . .] who is authorized to act and is acting within the scope of [. . .] employment for a political subdivision").

II. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Honorable Court **DENY** Doe's motion to strike certain defenses from Defendants' Answer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2016, a copy of the foregoing was sent via this Court's electronic filing system to all counsel of record.

/s/ Matthew Markling
Matthew John Markling (0068095)