Appeal No. 16-4117

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Superintendent William Dodds; Highland Local School District; Principal Shawn Winkelfoos; Board of Education of the Highland Local School District,

Third-Party-Defendants Appellants,

v.

United States Department of Education; John B. King, Jr., Secretary of Education; United States Department of Justice; Loretta E. Lynch, United States Attorney General; and Vanita Gupta, Principal Deputy Assistant Attorney General,

Defendants,

and

Jane Doe, a minor, by and through her legal guardians Joyce and John Doe,

Intervenor-Third-Party-Plaintiff Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio
Civil Case No. 2:16-cv-524 (Honorable Algenon L. Marbley)

REPLY MEMORANDUM OF LAW IN SUPPORT OF THIRD-PARTY-DEFENDANTS APPELLANTS' MOTION TO STAY PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

ARGUMENT

In this lawsuit, Third-Party Plaintiff Appellee Jane Doe seeks to use Title IX to compel Doe's school and fellow students to affirm Doe's gender identity. But Doe has no right to do so: Title IX is a tool to combat sex discrimination and it is incompatible with the concept of gender identity. Third-Party Defendants and Appellants Board of Education of the Highland Local School District ("Highland"), Principal Shawn Winkelfoos, and Superintendent William Dodds (collectively, "Highland Defendants") are sensitive to Doe's difficult psychological struggles. Indeed, Highland Defendants have provided extraordinary support to accommodate Doe's needs while satisfying their duty to protect the privacy of all of Highland's students. And while empathy is certainly due Doe, the interest that Doe asserts—easing Doe's psychological conditions by using Title IX to enter girls' private facilities—is an interest outside the text and purpose of Title IX, whereas Highland advances the privacy interest of all students—an interest grounded in the text and purpose of Title IX and its implementing regulations.

I. The Preliminary Injunction Is Inflicting Irreparable Harm on Highland that Outweighs the Speculative Possibility of Harm to Doe.

A. Highland is Suffering Irreparable Harm Under the Preliminary Injunction that Justifies a Stay.

Highland is suffering continuing and irreparable harm under the preliminary injunction. The Board of Education of the Highland Local School District is a political subdivision of the State of Ohio vested by the Ohio legislature with the power to "manage[] and control of all of the public schools of whatever name or character that

it operates in its respective district." Ohio Rev. Code § 3313.47. *See also id.* § 3313.20 ("The board of education of a school district [. . .] shall make any rules that are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises"). As a result of the preliminary injunction, Highland has been forced to abandon its policy of preserving privacy for members of each sex in their respective communal restrooms. This change threatens students' privacy rights and presents a risk of litigation that Highland has attempted to mitigate by fashioning a new policy allowing students to request access to single-user facilities. The preliminary injunction has thus stripped Highland of its statutory authority to enact policies that it determines will best safeguard and promote the privacy and safety of all students. Just as enjoining the enforcement of a duly enacted state statute constitutes irreparable harm, so too does the abrogation of Highland's statutory discretion. *See Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., Thomas, J., and Alito, J., concurring) ("'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'") (quoting *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers)).

Doe contends that this argument "proves too much" because "any injunction against a public entity necessarily overrides some decision previously made by its governing body," and thus "a preliminary injunction [could] never be granted against a public entity." Jane Doe's Mem. of Law in Opp. to Mot. to Stay Prelim. Inj., RE 26-1

at Page ID 12 (emphasis removed). Doe's conclusion is incorrect: even if irreparable harm is presumed whenever a preliminary injunction seeks to override a public entity's policy determination, the party seeking the injunction will prevail when it demonstrates irreparable harm outweighing that of the public entity and satisfies the other factors. *See Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

Moreover, in the instant matter, the irreparable harm to Highland arises because Highland is a particular kind of public entity that has a special status in our constitutional system: Highland is a political subdivision of a sovereign state. When a federal court order strips a state of its ability to control local education policy by means of an elected school board, the school board and its constituents sustain the loss of their delegated authority while the state suffers a diminishment of its sovereign power. *See Planned Parenthood of Greater Texas Surgical Health Services*, 134 S. Ct. at 507 (denying application to vacate Fifth Circuit's stay of district court order enjoining state statute; holding that postponing a state law without a showing that the law is "even *probably* unconstitutional" "would flout core principles of federalism"). By its nature, this harm is irreparable and ongoing so long as the injunction remains in place. *See id.* at 506.

Doe further argues that "Highland's authority to set school policy is not unbounded" because "Highland cannot enact unlawful policies." RE 26-1 at Page ID 11. But Highland's facilities-access policy does not unlawfully discriminate. Title IX's implementing regulations expressly allow schools to separate communal restrooms,

locker rooms, and other facilities based on sex. 34 C.F.R. § 106.33. And, as discussed below, persons who identify as transgender are not a protected class.

The continuing abrogation of Highland's statutorily delegated authority to control and make policy for its schools is also causing practical harms. *See* O'Ban Decl., RE 23, Ex. E ¶¶ 3, 5 (testifying that on the first day operating under the preliminary injunction, the elementary school received over 20 inquiries from parents concerned for students' privacy rights and accommodated requests for more than 20 students to use single-user restrooms). Doe's contention that Highland itself caused this harm by notifying parents by telephone of the preliminary injunction, *see* RE 26-1 at Page ID 12, ignores the fact that one of Doe's own lawyers issued a press release on the preliminary injunction, [1] all but guaranteeing Highland parents would learn that the District Court ordered Highland to open its girls' restrooms to Doe. Highland had a duty to notify parents so they would not learn about the preliminary injunction from the media and to safeguard the privacy rights of all of its students, which included communicating with parents about potential privacy risks. But for the District Court's injunction, no such communication would have been necessary, and no disruption would have occurred.

B. Issuance of a Stay Would Not Irreparably Harm Doe.

As an initial matter, Doe argues that Highland has "offered no new evidence to

[1] National Center for Lesbian Rights, *Federal Court Issues Order Prohibiting Ohio School District From Discriminating Against Transgender Student* (Sept. 26.2016), available at http://bit.ly/2d5a7QG (last visited Nov.18, 2016).

rebut" the District Court's findings of the threat of irreparable harm to Doe in the absence of the preliminary injunction. RE 26-1 at Page ID 15-16. But Doe's reliance on the District Court's factual determinations is misplaced. The parties dispute the facts concerning the threat of harm to Doe, and the District Court based its findings on a slim set of affidavits without adjudging the credibility of witnesses. Accordingly, it would be inappropriate to afford any deference to the District Court's factual determinations. *See Chrysler Corp. v. Franklin Mint Corp.*, 32 F.3d 569 (6th Cir. 1994) (per curiam) (when "submitted affidavits" demonstrate "a conflict in the facts relevant to a request for interlocutory injunctive relief, a district court should conduct an evidentiary hearing designed to elicit evidence that will facilitate the resolution of the factual disputes."); *see also In re Prof'l Sales Corp.*, 56 B.R. 753, 758 (N.D. Ill. 1985) ("Where the affidavits reveal conflicting issues of material fact, entry of a preliminary injunction without an evidentiary hearing is an abuse of discretion.") (citing *SEC v. G. Weeks Securities,* 678 F.2d 649, 651 (6th Cir. 1982); *Visual Sciences, Inc. v. Integrated Communications, Inc.,* 660 F.2d 56, 58 (2d Cir. 1981)).

Reviewing the facts *de novo*, the evidence does not support a conclusion that Doe's inability to access communal girls' restrooms caused psychological trauma. To support Doe's allegations of harm, Doe relies almost entirely on a declaration from Doe's counselor, Ms. Hill (who only began seeing Doe for mental health services in January 2016 and did not diagnose Doe's gender dysphoria). O'Ban Decl. Ex. K ¶ 4. Moreover, Ms. Hill's declaration documents numerous likely contributors to Doe's

psychological issues and suicidal ideation that are independent from the school's accommodation of Doe. O'Ban Decl. Ex. F ¶ 30. Ms. Hill's declaration outlines a history of childhood trauma and parental abuse as well as a number of conditions co-morbid with Doe's gender dysphoria that almost certainly contribute to Doe's state of mind. O'Ban Decl. Ex. K ¶¶ 8-10; O'Ban Decl. Ex. F ¶ 30.

This is reinforced by evidence showing that Doe's psychological condition was improving *before* the issuance of the preliminary injunction—during the time Doe was using individual facilities. In particular, on August 15, 2016, Doe's legal guardian reported to the school that Doe's suicide risk had been downgraded from high to moderate. O'Ban Decl. Ex. D ¶ 22. Doe's guardian also reported that there was no longer any need to accompany Doe to the restroom—part of the safety plan Highland had implemented for Doe. *Id.* ¶ 18. This evidence contradicts Doe's contention that Doe was suffering increasingly debilitating psychological harm as a result of purported isolation and stigma at school prior to the issuance of the preliminary injunction.

Third, there is no credible evidence that a stay would cause additional psychological trauma or increase Doe's suicide risk. The new declaration supplied by Doe's legal guardian in connection with Doe's opposition to this motion should not be given significant weight. The opinions of Joyce Doe regarding the cause of Doe's psychological trauma and the likely impact of a stay amount to a layperson's speculation.

Finally, Doe's argument ignores the fact that, if a stay is issued, Highland would provide Doe the same accommodation that it provided prior to the preliminary

injunction—the use, along with Doe's entire special-education class, of a single-user bathroom near their classroom. Because all students in Doe's class are given this accommodation, it risks no additional harm to Doe and it has no impact on Doe's subjective perception of gender identity. O'Ban Decl. Ex. D ¶¶ 18-19.

The abrogation of Highland's statutory authority to control its schools and promote the privacy of its students is a certain, continuing, and irreparable harm. It "decidedly outweighs" the unsupported, speculative contention that Doe will suffer additional psychological trauma if Doe is required to use a single-user restroom along with all of Doe's special-education classmates. *Baker*, 310 F.3d at 928.

II. Doe is Unlikely to Succeed on the Merits of Doe's Title IX Claim.

Doe argues that the Department of Education's interpretation of 34 C.F.R. § 106.33, which allows sex-separated facilities, is entitled to deference because the regulation is purportedly ambiguous as to the meaning of "sex" and how to determine the sex of a student who professes a transgender identity. But it is evident from the plain language of Title IX and its implementing regulations that the statute's use of the term "sex" refers to a binary trait defined by physiology and reproductive role. *See* RE 22-2 at Page ID 8-10. The Department's interpretation replaces sex with the concept of gender identity, which is not binary and has no relationship to physiology or reproductive role, contradicting Title IX's plain meaning *See id.* at Page ID 10-11.

Moreover, the Department's interpretation is not entitled to deference because, contrary to Doe's contention, *see* RE 26-1 at Page ID 10-11, Section 106.33 is not

ambiguous concerning how to determine whether persons identifying as transgender are male or female for purposes of sex-separated facilities. Persons who profess a transgender identity are necessarily biologically male or female; Doe's subjective misperception of being female does not alter biological reality.[2]

Doe also argues that *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), rejected the understanding that the statutory term "sex" is defined in terms of physiology and reproductive role. *See* RE 26-1 at Page ID 19-21. Doe is incorrect. This Circuit merely held that a person's status as transgender "is not fatal to a sex discrimination claim." 378 F.3d at 575. A sex-stereotyping claim asserts adverse treatment for failing to act in a manner stereotypically associated with *the claimant's sex*. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (holding that an employer engages in impermissible sex stereotyping when it "acts on the basis of a belief that a woman cannot be aggressive, or that she must not be"). Such a claim is unintelligible without identifying the basis for the offending stereotypes—the claimant's biological sex. *Smith* did not alter this analysis.

Here, unlike *Smith*, Doe has not suffered discrimination for failing to conform to sex stereotypes associated with biological males. Indeed, Doe has not been singled out at all. Prior to the preliminary injunction, Doe's access to communal restrooms was limited in precisely the same manner as that of all other biological boys. Providing

[2] If anything, the position taken by Doe reveals the incoherence of gender-identity theory: by deeming it "inappropriate to label any part of [Doe's] body as male," O'Ban Decl. Ex B, Doe's counsel denies that there is any objective determinant of sex, and the categories of male and female cease to have any meaning.

access to communal restrooms based on the user's biological sex is not sex stereotyping—it is merely the recognition of objective physiological realities.

III. Doe is Unlikely to Prevail on Doe's Equal Protection Claim.

Doe argues that Highland's sex-separated-facilities policy violates the 14th Amendment's equal-protection guarantee because Doe "is the only student at Highland Elementary who is not allowed to use the restrooms that align with [Doe's] gender identity." RE 26-1 at Page ID at 24. Doe thus argues that the Equal Protection Clause requires that persons identifying as transgender be permitted to use communal facilities reserved for members of the opposite biological sex, whereas all others may be limited to restrooms that align with their biological sex. Accepting Doe's argument would thus afford more protection to people who profess a transgender identity, elevating those persons to protected-class status. But that is precisely what this Circuit refused to do in *Smith*. Indeed, this Circuit amended its initial *Smith* opinion to delete a paragraph that would have extended Title VII and equal protection sex-discrimination jurisprudence to cover transgender status. *Smith v. City of Salem*, 369 F.3d 912, 921-22 (6th Cir. 2004), *amended and superseded*, 378 F.3d 566.

Moreover, because transgender status is not immutable, persons identifying as transgender are not a discrete class—let alone one that is politically powerless. *See* Mem of Law in Supp. of Third-Party-Defendants Appellants' Mot. to Stay Prelim. Inj., RE 22-2 at Page ID 19-22. Consequently, this Circuit should continue to refrain from making transgender status a suspect or quasi-suspect classification under the Equal

Protection Clause. Thus, rational-basis review governs Doe's equal-protection claim.

Doe contends that Highland's policy cannot survive rational-basis review because there is no evidence that Doe's use of the girls' restroom would infringe on other students' privacy rights. RE 26-1 at Page ID 27-28. But the likelihood of Doe's ultimate success on the merits of Doe's claim for relief—and the constitutional legitimacy of Highland's sex-separated-facilities policy—does not hinge on whether *Doe's* restroom use threatens other students' privacy rights.[3] Highland has a legitimate interest in protecting the privacy of all of its students, and its policy of separating locker rooms, restrooms, and overnight accommodations based on sex, not gender identity, is rationally related to that purpose. *See United States v. Virginia*, 518 U.S. 515, 533, 550 n. 19 (1996) (acknowledging physical differences between the sexes and stating that the "[a]dmi[ssion of] women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.").

CONCLUSION

For the foregoing reasons, Highland Defendants respectfully request that this Court grant their Motion to Stay Preliminary Injunction.

[3] Indeed, Doe's complaint seeks an injunction requiring Highland to allow access based on gender-identity to sex-separated restrooms and locker rooms district-wide. O'Ban Decl. Ex. L, Request for Relief ¶ B(vi) (seeking an injunction requiring Highland to "retain[] a consultant to develop protocols for affirming and supporting transgender students, including ensuring use of the proper facilities. . . .").

Date: November 21, 2016

Respectfully submitted,

s/ Steven O'Ban

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, I filed the foregoing document, entitled Reply Memorandum of Law in Support of Third-Party-Defendants Appellants' Motion to Stay Preliminary Injunction, through the Court's ECF system which will effectuate service on all parties.

s/ Steven O'Ban
Steven O'Ban