

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)

**THIRD-PARTY DEFENDANTS APPELLANTS' MEMORANDUM IN
OPPOSITION TO JANE DOE'S MOTION FOR LEAVE TO FILE
SURREPLY**

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Third-Party Plaintiff-Appellee Jane Doe's motion for leave to file a surreply is without merit and should be denied.

Doe argues that "Highland raised for the first time in its reply brief on its motion for a stay before this Court that the District Court erred in failing to hold an evidentiary hearing on the issue of whether Jane Doe suffered irreparable harm." RE 29-1 at Page ID 3. But Doe has misstated Highland's argument. Highland did not argue in its reply brief that the District Court erred in failing to hold an evidentiary hearing. Rather, Highland argued that "it would be inappropriate to afford any deference to the District Court's factual determinations" regarding the threat of harm to Doe because the determinations were based only on affidavits. RE 28 at Page ID 10.

Doe also mischaracterizes Highland's briefing to the District Court regarding the need for an evidentiary hearing. Highland never "affirmed that an evidentiary hearing was unnecessary to resolve Jane Doe's claims of irreparable harm." RE 29-1 at Page ID 3. Rather, Highland submitted briefing prior to oral argument on the motion for preliminary injunction in which Highland asserted that if Doe were to succeed on the merits of Doe's equal-protection claim, then irreparable harm would be presumed. Similarly, Highland asserted that if Doe were to succeed on the merits of Doe's Title IX claim, then irreparable harm in the form of denial of access to facilities would exist. Consequently, Highland agreed with Doe that "[t]here are many avenues [the District Court] can take to resolve [Doe's] motion solely on the law and without resorting to an evidentiary hearing." Third-Party Defendants' Response to Jane Doe's Memorandum

in Opposition to an Evidentiary Hearing, Doc. 79 at Page ID 1448. But far from asserting that an evidentiary hearing was unnecessary, Highland contended that a “hearing may or may not be necessary, depending on the Court’s view of some of the purely legal issues presented by the motion” and “that no evidentiary hearing should be scheduled until the [District] Court has ruled on those foundational legal issues.” *Id.* at Page ID 1451. Highland further “request[ed] that the Court inform the parties of any factual questions it may have” in the event the District Court determined that an evidentiary hearing was necessary so that “the parties may tailor the hearing accordingly.” *Id.*

While the District Court opted not to hold an evidentiary hearing, it did not rely solely on presumed irreparable harm when it ruled in favor of Doe on Doe’s motion for a preliminary injunction. The District Court also included factual determinations about the threat of harm to Doe in its opinion and order. *See* Opinion and Order, Doc. 95 at Page ID 1758-59 and 1770.

In its opposition to Highland’s motion to stay the preliminary injunction pending appeal, Doe argued that the District Court’s factual determinations should be afforded deference. *See* Jane Doe’s Memorandum of Law in Opposition to Motion to Stay Preliminary Injunction, RE 26-1 at Page ID 15-16 (arguing that Highland’s argument with respect to irreparable harm should be rejected because “Highland has offered no new evidence to rebut [the District Court’s] detailed findings of irreparable harm to Jane as a result of [Highland’s] discriminatory practices.”). It was therefore entirely

proper for Highland to argue in reply that the District Court's factual determinations should not be given any weight in this appeal. Highland was merely responding to an argument made for the first time in Doe's opposition.

Because Highland did not raise a new issue for the first time in its reply brief, the Court should deny Doe's motion for leave to file a surreply.

Date: November 28, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, I filed the foregoing document, entitled Third-Party-Defendants Appellants' Memorandum of Law in Opposition to Jane Doe's Motion for Leave to File Surreply, via the Court's ECF system which will effectuate service on all parties.

s/ Steven O'Ban _____
Steven O'Ban