UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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
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.	

JANE DOE'S MEMORANDUM OF LAW IN REPLY TO HIGHLAND'S OPPOSITION TO HER MOTION TO STRIKE

Jane Doe respectfully submits this reply memorandum of law in further support of her motion to strike certain defenses asserted by Plaintiff/Third-Party Defendant Board of Education of the Highland Local School District and Third-Party Defendants Highland Local School District, William Dodds, and Shawn Winkelfoos (collectively, "Highland").

PRELIMINARY STATEMENT

Highland has not demonstrated that any of the defenses identified in Jane's Motion to Strike survive the Rule 12(f) analysis. Instead, Highland improperly seeks to rely upon new factual allegations and legal analysis introduced for the first time in its Memorandum of Law in Opposition to the motion to strike, Dkt. 121 (the "Response"), and allusions to the hypothetical possibility of uncovering unspecified new evidence during discovery. When Highland filed its Answer on October 31, 2016, Dkt. 115, it included a catalogue of boilerplate defenses that have no bearing on this case, given the claims at issue and the history of this litigation. Far from "dilatory and harassing," Jane's Motion to Strike seeks to *avoid* unreasonable delay in the future by limiting the scope of these proceedings to only those defenses that are legally and factually sufficient and provide Jane fair notice. Dkt. 121 at 1-2. "Boilerplate defenses can lead to the same costly effect on litigation as inadequate complaints," thus striking such defenses only serves to streamline the proceedings. *Nixson v. The Health All.*, No. 1:10-CV-00338, 2010 WL 5230867, at *2 (S.D. Ohio Dec. 16, 2010) (striking all defenses raised in Defendant's answer).

ARGUMENT

It is well within this Court's "sound discretion" to strike pleadings that have "no possible relation to the controversy," are "clearly insufficient," "raise[] no factual issues," or "will not impact the outcome of the case." Dkt. 119-1 at 1- 2 (collecting cases). Contrary to Highland's assertions, Jane accurately presented, through the above-quoted language, the rigorous standard

under which a court will grant a motion to strike.[1] In fact, the language Highland quotes demonstrates that where a movant *does* meet the bar for a motion to strike, the motion should be granted. In the case of the defenses Jane moves to strike, this criterion is met.

Additionally, the Response ignores this Court's previous rulings that affirmative defenses must satisfy the heightened pleading standard articulated by *Iqbal* and *Twombly*. Under this standard, Jane need only show that Highland's defenses fail to provide "enough facts" to show that each defense is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Many of Highland's defenses fail to satisfy this heightened standard and should be struck from Highland's Answer.

I. Defenses Insufficient as a Matter of Law

Highland's Response cannot cure the legal deficiencies in several of the defenses pled in its Answer. Each of the arguments made in the Response fails to provide a sufficient legal basis for the challenged affirmative defenses. As explained below, and in Jane Doe's Motion to Strike, Dkt. 119-1 at 3-7, the Court should strike these defenses with prejudice, because they fail as a matter of law.

[1] The fact that Rule 12(f) motions are '"infrequently granted' because they are often 'sought by the movant simply as a dilatory or harassing tactic'" does not mean that *Jane's* Motion to Strike was brought for that reason—and it was not. Dkt. 121 at 2-3.

1. *Defense **Two** (Subject Matter Jurisdiction)*

Highland's Response fails to provide any support for its assertion that this Court lacks subject matter jurisdiction. All of Jane's claims are federal questions. Therefore, Highland's Defense **Two** is insufficient as a matter of law and should be struck.

2. *Process Defenses*

Highland's response with regard to Defenses **Three**, **Four**, and **Five** fails because the Sixth Circuit has consistently held that a defendant waives personal jurisdiction and process-based defenses when it gives "a reasonable expectation that [Defendants] will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking." *Gerber v. Riordan*, 649 F.3d 514, 519 (6th Cir. 2011). Highland has "[p]articipat[ed] in the litigation prior to asserting [its] defense[s]," through its opposition to Jane's intervention, the filing of multiple extensive submissions on Jane's motion for a preliminary injunction, a motion to stay the proceedings pending appeal, and an interlocutory appeal to the Sixth Circuit. *Zeigler v. Beers*, 412 F. Supp. 2d 746, 751 (N.D. Ohio 2005) (citations omitted). By doing so, all without previously raising any of these process-based defenses, Highland has waived Defenses **Three** through **Five**.[2]

Each of the cases Highland cites is unavailing and simply stands for the proposition that district courts have discretion to determine whether a defendant has waived process-related defenses. *See Fisher v. Merryman*, 32 F. App'x 721, 722-23 (6th Cir. 2002) (holding district

[2] It is incorrect to state that Jane insisted upon service. Dkt. 121 at 3 n.1. Highland's representation regarding a declination of waiver or stipulation to service suggests that there may have been a misunderstanding among the parties. Jane understood that Highland was insisting that the entity defendants be served. In any event, on November 23, 2016 and on November 21, 2016, Jane completed service on Plaintiff/Third-Party Defendant Board of Education of the Highland Local School District and Third-Party Defendant Highland Local School District respectively. *See* Dkt. 122, 123. As such, this defense should be withdrawn or struck as moot.

court did not abuse discretion by finding defendant had not waived service defense after merely seeking an extension of time to file an answer); *Meadows v. Uniglobe*, No. 5:08-CV-2530, 2009 WL 2340192 (N.D. Ohio July 28, 2009) (dismissing defendant without prejudice for failure to complete service within 120 days of filing the complaint). None of these cases "preclude a finding of waiver or estoppel when a party has delayed in raising the issue and has substantively participated in the litigation." *Smiley v. Nguyen*, No. 1:09-CV-1857, 2011 WL 13115554, at *7 (N.D. Ohio, Mar. 28, 2011) (finding defendants waived service defense due to "substantial and extended involvement" in the litigation). Reference to the Ohio Supreme Court on this question of federal procedure is similarly unavailing.

Unlike the defendants in the cases Highland cites, Highland has extensively participated in this litigation for over four months without any indication of its intent to challenge service of process. Moreover, given the substantial nature of the litigation over that time, dismissing any Defendant without prejudice at this stage would result in a waste of judicial resources and unnecessary delay in the litigation, especially given that the Defendants have now all been properly served. Therefore, this Court should strike Defenses **Three** through **Five.**

3. *Defense **Seven** (Administrative Exhaustion)*

Highland's affirmative Defense Seven—explained for the first time in its Response—fails as a matter of law. The Individuals with Disabilities Education Improvement Act ("IDEA") (*see* Dkt. 121 at 5) does not require exhaustion of administrative remedies when a student with a disability brings claims, like those brought by Jane Doe here, that allege non-educational injuries that cannot be remedied under IDEA. Congress has limited the reach of the exhaustion requirement so that it applies only to a "civil action under such laws [the Constitution, the ADA, and certain other disability discrimination laws] seeking relief that is also available under [the

IDEA]." 20 U.S.C. § 1415(*l*). Jane is not challenging the sufficiency of her Individual Education Plan or Highland's provision of a "free and appropriate public education." Nor do any of the remedies she seeks approximate remedies available under the IDEA. Interpreting the IDEA otherwise would "create an additional administrative barrier not present for non-disabled children," *F.H. ex rel. Hall v. Memphis City Sch.*, 764 F.3d 638, 644 (6th Cir. 2014), hindering the ability of this vulnerable group from vindicating their legal rights and vastly expanding the scope of the IDEA's exhaustion requirement such that no school-related claims could be brought without exhaustion. That was not Congress's intention in enacting the IDEA and it is not the law.

Here, Jane seeks monetary damages and equitable relief to remedy non-educational harm caused by her school. She alleges discriminatory conduct and violations of her rights, allegations that courts routinely recognize do not require administrative exhaustion. *See F.H.*, 764 F.3d at 644 ("These injuries are non-educational in nature and cannot be remedied through the administrative process."); *see also Sagan v. Sumner Cty. Bd. of Educ.*, 726 F. Supp. 2d 868, 882-83 (M.D. Tenn. 2010) ("The Court construes these claims as arising from non-educational injuries, irrespective of the fact they occurred in an educational setting and were allegedly perpetrated by educators against a student. If Jane Doe were *not* a disabled student, there would be no administrative barrier to her pursuit of these claims."); *M.P.T.C. v. Nelson Cty. Sch. Dist.*, No. 3:14-CV-00041-JHM, 2016 WL 3264200, at *3 (W.D. Ky. June 13, 2016) ("Plaintiff is not required to exhaust his § 1983 claims related to non-educational injuries."); *Griffin v. Sanders*, No. 11-CV-12289, 2013 WL 3788826, at *7 (E.D. Mich. July 19, 2013) (holding plaintiff's federal sex discrimination claims are not subject to administrative exhaustion). Defense Seven has no merit and should be stricken.

4. *Defenses **Eight** (Failure to Join Indispensable Party), **Thirty-Six** (Attorney Fees), **Thirty-Seven** (Punitive Damages), **Thirty-Eight** (Costs), and **Forty** (Reservation of Defenses)*

Instead of demonstrating the legal sufficiency of these defenses, Highland admits that all of these defenses either depend upon discovery to state a cognizable defense or are merely included to preserve the defense. Neither justification warrants permitting Highland to continue asserting these defenses because they are precluded by law.

Defense Eight fails because Highland's Response merely speculates that some unspecified party "may declare an interest in this action." That conjecture provides no basis for the Court to apply Fed. R. Civ. P. 19 to Jane Doe's claims. At best, the allegedly indispensable parties alluded to in the Response would be joint tortfeasors, a class of potential defendants the Supreme Court has held are not indispensable under Fed. R. Civ. P. 19(a). *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990). Because Highland cannot satisfy the threshold inquiry of Fed. R. Civ. P. 19(a), "no inquiry under Rule 19(b) is necessary." *Id*. at 8.

Defenses **Thirty-Six** and **Thirty-Eight** fail because they rely on state rather than federal law. Federal law explicitly provides that a prevailing plaintiff may receive attorneys' fees and costs for claims brought pursuant to Section 1983 and Title IX. 42 U.S.C. § 1988(b). Highland's citation to Ohio statutes that purport to insulate political subdivisions from being required to pay attorneys' fees offers no safe harbor for Defenses **Thirty-Six** and **Thirty-Eight**. Jane Doe's complaint, Dkt. 32, asserts no causes of action under Ohio law and those provisions of state law must yield to causes of action brought pursuant to federal law. Finally, Defense **Thirty-Seven** fails because it is a defense to a claim that Jane has not raised.

The purely hypothetical possibility that this group of defenses may become viable at a future point in this litigation does not make those defenses legally sufficient, nor does it permit a

boilerplate "reservation of defenses" like that asserted in Defense **Forty**. As Jane noted in her motion and as Highland failed to address, this Court and many others have found that preservation of defenses is a "legal nullity" that must be stricken. Dkt. 119-1 at 5-6 (citing *Peters v. Credit Prot. Ass'n LP*, No. 2:13-CV-0767, 2015 WL 1022031, at *4 (S.D. Ohio Feb. 19, 2015); *Tamarkin v. Valu Mgmt. Co.*, No. 4:13-cv-2652, 2014 WL 4354388, at *3 (N.D. Ohio Sept. 2, 2014); *Wells v. Farmers All. Mut. Ins. Co.*, No. 2:07-CV-00036 ERW, 2009 WL 1259977, at *7 (E.D. Mo. May 4, 2009); *United States v. Global Mortg. Funding, Inc.*, No. SACV 07-1275 DOC (PJWx), 2008 WL 5264986, at *5 (C.D. Cal. May 15, 2008); *Messick v. Patrol Helicopters, Inc.*, No. CV 07–039–BU–CSO, 2007 WL 2484957, at *4 (D. Mont. Aug. 29, 2007)). Such restraints on affirmative defenses hone the issues in dispute and focus subsequent phases of the litigation (e.g. discovery), conserving the Court's resources as well as those of the litigants. Therefore, this Court should strike Defenses **Eight, Thirty-Six, Thirty-Seven, Thirty-Eight,** and **Forty**.

5. *Defense **Ten** (Prima Facie Case)*

This Court has *twice* found that Jane's Section 1983 Fourteenth Amendment claim is likely to succeed on the merits. *See* Dkt. 95, Dkt. 109. Those decisions make clear that Jane has established a prima facie equal protection case under Section 1983.[3]

6. *Defense **Twenty-Six** (Official Capacity)*

The cases that Highland cites in its Response do not show that Defendants have a legally cognizable defense in Defense **Twenty-Six**. *See* Dkt. 121 at 7-8. Although Highland correctly

[3] Although this Court has not yet ruled on Jane's Section 1983 privacy claim, Highland has provided no factual basis whatsoever for its defense, and relies exclusively upon a bare-bones legal conclusion. Dkt. 115 ¶ 123. As such, Highland's asserted defense is insufficient under the applicable pleading standard discussed in Section II below.

observes that Superintendent Dodds and Principal Winkelfoos were sued in their official capacities, that fact has no bearing on the merits of Jane Doe's claim. In *Kentucky v. Graham*, the Supreme Court distinguished between personal-capacity and official-capacity actions to identify the entity that was liable for the fee award, not as a defense to the merits of a claim. 473 U.S. 159, 165-167 (1985). Similarly, the Sixth Circuit's decision in *Doe v. Claiborne County*, did not uphold the dismissal of the official-capacity claims against the individual defendants because they lacked merit, but because those claims were redundant as the plaintiff had also named the entity as a defendant. *Doe v. Claiborne Cty.*, 103 F.3d 495, 509 (6th Cir. 1996). Neither Highland's Answer, nor its Response, identify any such redundant claims and therefore, Defense **Twenty-Six** fails as a matter of law.

7. *Defense **Thirty** (Laches)*

Highland seeks to claim that four years in a minor's life, all of which have been fraught with dispute, are long enough to claim a defense of laches. This defense is not legally cognizable, as it is long-established that laches does not apply to a minor, even where the suit is brought by a guardian. *See, e.g.*, *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 48 (D.C. Cir. 2005) (citing *Wetzel v. Minn. Ry. Transfer Co.*, 169 U.S. 237, 240 (1898) (acknowledging "that the minors were not affected by laches until they became of age")).

In any event, these are not "long-neglected rights," but rather rights Joyce and John Doe have been continuously defending since Jane first transitioned in first grade, filing a complaint with the U.S. Department of Education's Office for Civil Rights ("OCR") as early as December 2013. Dkt. 32 ¶ 72. Highland's reference to "incidents and events that date back to ... perhaps earlier" than Jane's transition does not provide a basis for this defense. Dkt. 121 at 8. Jane's causes of action are based on violations of rights that occurred *because of* her transition; allusion

to undescribed "incidents and events" prior to her transition as a basis for laches is irrelevant. It was entirely reasonable for Jane to seek to vindicate her rights by first complaining to OCR, which she did. Once it was clear from Highland's conduct that such an approach would not succeed, Jane timely brought suit. This defense should be struck with prejudice.

8. *Defense **Thirty-Two** (Comparative Negligence)*

Highland's defense of contributory negligence has no legal basis under the circumstances of this case. As a matter of law, Highland cannot raise a defense of contributory negligence where Jane alleges intentional discrimination, not negligence. Contributory negligence is not a defense to such claims. Dkt. 119-1 at 4-5. *See also McHugh v. Olympia Entm't, Inc.*, 37 F. App'x 730, 736 (6th Cir. 2002) ("Comparative negligence, however, does not apply to damages for federal constitutional rights violations.").

Even if that were not the case, contributory negligence is a defense based on conduct *by the plaintiff*, not by the plaintiff's guardians. RESTATEMENT (SECOND) OF TORTS § 463 ("Contributory negligence is conduct on the part of the *plaintiff*."); *id.* § 492 ("Where the person entitled to the damages which are recoverable in an action against a negligent defendant is required to bring an action in the name of or in conjunction with another, the contributory negligence of such other is not a bar to recovery."); *id.* § 488(1) ("A child who suffers physical harm is not barred from recovery by the negligence of his parent, either in the parent's custody of the child or otherwise."). Contrary to Highland's assertions, actions by Joyce and John Doe have no effect on Jane's recovery. Thus, this Court should strike Defense **Thirty-Two** with prejudice.

9. *Defense **Thirty-Nine** (Proper Verification of Complaint)*

Highland has not rebutted Jane's showing that Highland's defense is insufficient as a matter of law. If it is not necessary for a Complaint to be verified, it cannot be a defense that an

unnecessary verification was improper (though Jane does not concede that it was), and Highland has presented nothing to demonstrate otherwise. This defense should be stricken.

II. Affirmative Defenses Must Meet the *Iqbal*/*Twombly* Pleading Standard

As recently as 2015, this Court explained that the Sixth Circuit had not yet ruled on whether a heightened pleading standard applies to affirmative defenses. *Peters*, 2015 WL 1022031, at *3. Contrary to Highland's Response, and as explained by this Court, the Sixth Circuit's decisions have not "directly address[ed] the applicability of *Iqbal*/*Twombly* to affirmative defenses" and depend on a case that "is no longer good law." *Peters*, 2015 WL 1022031, at *2-3 (citing *Montgomery v. Wyeth*, 580 F.3d 455, 468 (6th Cir. 2009)). In contrast to the Sixth Circuit, which has not yet addressed the issue, this Court has twice now held that *Iqbal* and *Twombly* do apply to affirmative defenses. *See id.* at *4; *Edizer v. Muskingum Univ.*, No. 2:11-CV-799, 2012 WL 4499030, at *11 (S.D. Ohio Sept. 28, 2012). Despite the existence of disagreement by other district courts, in the absence of a ruling by the Sixth Circuit, there is no reason to deviate from these prior holdings.

Under *Iqbal* and *Twombly*, defenses **Two** through **Five, Seven** through **Ten, Twenty-Six, Twenty-Seven, Twenty-Nine, Thirty, Thirty-Two, and Thirty-Five** through **Forty** lack sufficient factual support and should be struck. Instead of supporting these defenses with new facts, Highland advances additional legal conclusions and citations[4] and asserts that discovery may provide some unspecified (but concededly necessary) factual support.

The appeal to future discovery to justify an estoppel defense (Defense **Twenty-Nine**)—without a hint as to the type of estoppel that might be claimed—is precisely the type of fishing

[4] For example, the statements that "a school district is not a body corporate and politic" and "the Board is a political subdivision and the individual Defendants are political subdivision employees," Dkt. 121 at 14-15, are legal conclusions, not facts.

expedition a heightened pleading standard is meant to avoid. *Iqbal* and *Twombly* hold that a sufficient pleading is a prerequisite to discovery, not the other way around. *See Twombly*, 550 U.S. at 556 ("Asking for plausible grounds . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [of the allegation]."). Highland should not be permitted to fish through all of Jane's young life in the futile hope for some fact that might justify a naked pleading that gave no notice to Jane in the first instance. "*Iqbal* and *Twombly* were meant to eliminate the potential high costs of discovery associated with implausible claims." *Nixson*, 2010 WL 5230867, at *2. A consideration of the equities similarly favors limitation of a large entity's request for harassing discovery of a young individual, where that discovery request has no factual foundation.

The defenses discussed in Section I, *supra*, are similarly unaccompanied by sufficient factual basis to withstand *Iqbal*/*Twombly*. Accordingly, in addition to being insufficient as a matter of law, they should be struck under the heightened pleading standard. Even though Highland has attempted to use its Response to plead additional factual and legal detail missing from its Answer, Highland has still not identified any facts to give Jane fair notice of the factual bases for its defenses. Thus, each of the defenses named in Jane's Motion to Strike fail, and should be struck.

CONCLUSION

For the foregoing reasons, Jane Doe respectfully requests that this Court strike all of the defenses identified in her Motion to Strike, Dkt. 119.

Respectfully submitted,

Dated: December 27, 2016

By: _s/ John Harrison_____

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 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