

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

Civil No. 4:15-cv-54

ORDER

Currently pending before this Court are Defendant Gloucester County School Board's Consent Motion to Certify an Interlocutory Appeal to the United States Court of Appeals for the Fourth Circuit (ECF No. 149) and parties' Joint Motion to Stay All Proceedings in this Case Pending Appeal and for an Extension of Time for the School Board to File an Answer to Plaintiff's Amended Complaint (ECF No. 151). For the reasons set forth herein, the Motions are GRANTED.

I. MOTION TO CERTIFY AN INTERLOCUTORY APPEAL

On May 22, 2018, this Court entered an Order (ECF No. 148) denying Defendant's Motion to Dismiss Plaintiff Gavin Grimm's Amended Complaint (ECF No. 135). Because the Order was not a final order, parties now request that the Court certify this matter for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See* ECF No. 149.

a. Legal Standard

28 U.S.C. § 1292(b) provides that when a district court, "in making in a civil action an order not otherwise appealable under this section," is of the opinion that (1) "such order involves

a controlling question of law,” as to which there is (2) a “substantial ground for difference of opinion concerning the legal question,” and that (3) “an immediate appeal from the order may materially advance the ultimate termination of the litigation,” the court may certify an immediate interlocutory appeal. The Fourth Circuit has recognized that “the kind of question best adapted to discretionary interlocutory review is a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes.” *Fannin v. CSX Transp., Inc.*, 873 F.2d 1438, 1989 WL 42583, at *5 (4th Cir. 1989) (unpublished).

Should a district court certify an immediate interlocutory appeal, the Fourth Circuit’s jurisdiction applies to the “order certified to the court of appeals, and is not tied to the particular question formulated by the district court.” *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). The Fourth Circuit’s jurisdiction accordingly extends over “any issue fairly included within the certified order.” *Smith v. Murphy*, 634 Fed. App’x 914, 915 (4th Cir. 2015) (citing *Yamaha Motor Corp.*, 516 U.S. at 205).

b. Analysis

The Court finds that all three requirements of 28 U.S.C. 1292(b) are satisfied. First, the Court concludes that the May 22, 2018 Order involves a controlling question of law—specifically, the question of whether Title IX and the Equal Protection Clause prohibit discrimination on the basis of gender identity.

Title IX prohibits discrimination “on the basis of sex,” 20 U.S.C. § 1681(a), while its implementing regulation, 34 C.F.R. § 106.33 permits separate toilets, locker rooms, and shower facilities on the basis of sex. Furthermore, the Equal Protection Clause also prohibits discrimination on the basis of sex. Accordingly, this Court agrees that the proper interpretation

of “on the basis of sex” under Title IX, 34 C.F.R. § 106.33, and the Equal Protection Clause is a controlling question of law. In addition, given that this question of law can be resolved “without having to delve beyond the surface of the record in order to determine the facts,” interlocutory appellate review of this question is particularly appropriate. *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 340–41 (4th Cir. 2017).

Second, the Court finds that there is substantial ground for difference of opinion as to whether Title IX and the Equal Protection Clause prohibit discrimination on the basis of gender identity. A substantial ground for difference of opinion arises if the disagreement on controlling law exists between courts, not merely parties. Such a difference of opinion arises if there is “a novel and difficult issue of first impression,” or if “the controlling circuit has made no comment on conflicting opinions among the various circuits.” *Cooke-Bates v. Bayer Corp.*, No. 3:10cv261, 2010 WL 4789838, at *2 (E.D. Va. Nov. 16, 2010) (internal citations omitted).

The question of law presented here meets these requirements. Neither the Fourth Circuit nor the Supreme Court has addressed whether a gender stereotyping theory would apply to a gender identity case under Title VII, or whether transgender classifications are sex-based for the purposes of an Equal Protection Clause claim. *See* ECF No. 148 at 18, 25. Accordingly, these difficult issues of first impression present questions appropriate for interlocutory appellate review. Furthermore, courts remain divided on these issues, and the Fourth Circuit has not conclusively addressed them. *Compare* ECF No. 136 at 19, 28 *with* ECF No. 148 at 18, 25 (citing various authorities to support differing interpretations of “on the basis of sex” under Title IX and the Equal Protection Clause).

Third, the Court concludes that an immediate appeal of the May 22, 2018 Order would materially advance the ultimate termination of the litigation. In determining whether an

interlocutory appeal would materially advance the ultimate termination of the litigation, a district court should consider whether the appeal would (1) eliminate the need for trial; (2) eliminate complex issues so as to simplify the trial; or (3) eliminate issues to make discovery easier and less costly. *In re Health Diagnostic Lab. Inc.*, No. 3:17cv297, 2017 WL 2129849, at *5 (E.D. Va. May 16, 2017) (internal citations omitted).

As the parties recognize, the question of whether Title IX and its regulations require schools to permit transgender students to use facilities that align with their gender identity is a purely legal question that can be decided without further factual development. Similarly, the question of whether Title IX and/or the Equal Protection Clause prohibit discrimination on the basis of gender identity—whether under a gender stereotyping theory or otherwise—can also be decided without further factual development. A final decision on these questions could be “dispositive of the litigation,” *Fannin*, 1989 WL 42583, at *5, in the sense that it could eliminate complex issues so as to simplify trial. Accordingly, such an interlocutory appeal would materially advance the ultimate termination of this case. *See also In re Health Diagnostic Lab. Inc.*, 2017 WL 2129849, at *5. In addition, the parties recognize that although additional facts may need to be developed with respect to the Equal Protection Claim, such an interlocutory appeal would eliminate the need for extensive additional discovery. *See* ECF No. 150 at 6 n.2. This Court agrees. Accordingly, the Court finds that all three requirements of 28 U.S.C. 1292(b) are satisfied.

II. MOTION TO STAY ALL PROCEEDINGS

Parties also ask the Court to stay all proceedings in this case pending the Fourth Circuit’s ruling on the interlocutory appeal. ECF No. 151. In addition, parties ask the Court to grant

Defendant an extension of time in filing a response to Plaintiff's Amended Complaint (ECF No. 113). *Id.*

a. Legal Standard

A district court's power to stay proceedings is derived "from the court's inherent power 'under its general equity powers and in the efficient management of their dockets.'" *Sierra Club v. VEPCO*, No. 2:15cv112, 2016 WL 5349081, at *2 (E.D. Va. Feb. 4, 2016) (quoting *PMB Nutritionals, LLC v. Dornoch Ltd.*, 667 F. Supp. 2d 621, 631 (E.D. Va. 2009)). Courts consider three factors when deciding whether to stay proceedings: (1) the interests of judicial economy; (2) the hardship to the moving party if the action is not stayed; and (3) any potential prejudice to the nonmoving party. *Clinton v. Gov't Employees Ins. Co.*, No. 2:16cv430, WL 9308421, at *2 (E.D. Va. Nov. 23, 2016).

b. Analysis

The Court finds that all three factors for a stay are met. As to the first factor, staying proceedings pending a ruling from the Fourth Circuit would be in the interests of judicial economy. A final determination of the legal question that would be reviewed by the Fourth Circuit on interlocutory appeal—whether Title IX and the Equal Protection Clause prohibit discrimination on the basis of gender identity—would, as discussed previously, facilitate the ultimate termination of this litigation. Accordingly, this Court finds that a stay would promote the efficient use of judicial resources.

As to the second and third factors, "both parties agree that a stay is warranted" and that "both parties will suffer irreparable injury" if the stay is not granted because a final ruling on these legal questions on interlocutory appellate review "will likely obviate the need for discovery or significantly reduce that discovery's scope." ECF No. 152 at 2. This Court agrees.

Accordingly, the Court finds that there would be a hardship to both Defendant and Plaintiff if the action is not stayed, and that any potential prejudice to either party is insufficient to deny the granting of a stay.

Finally, both parties ask the Court to extend, pursuant to Federal Rule of Civil Procedure 6(b)(1)(A), the time period by which Defendant must file an Answer to Plaintiff's Amended Complaint (ECF No. 113). Federal Rule of Civil Procedure 6(b)(1)(A) provides that "[w]hen an act must be done within a specified time, the court may, for good cause, extend the time . . . with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires" Given the interlocutory appeal and the stay of proceedings in this Court, the Court finds that an extension of time for the filing of Defendant's Answer is warranted.

III. CONCLUSION

For the reasons set forth herein, Defendant's Consent Motion to Certify an Interlocutory Appeal to the United States Court of Appeals for the Fourth Circuit is GRANTED. ECF No. 149. The Court's May 22, 2018 Order (ECF No. 148) is AMENDED as follows: pursuant to 28 U.S.C. § 1292(b), the Court finds that the Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

Furthermore, for the reasons stated herein, parties' Joint Motion to Stay All Proceedings in this Case Pending Appeal and for an Extension of Time for the School Board to File an Answer to Plaintiff's Amended Complaint is GRANTED. ECF No. 151. It is ORDERED that all proceedings in this case are stayed pending a ruling by the Fourth Circuit on intermediate interlocutory appeal, and that Defendant's deadline to file an Answer to Plaintiff's Amended

Complaint (ECF No. 113) is extended to ten days after the entry of a ruling by the Fourth Circuit related to Defendant's interlocutory appeal.

IT IS SO ORDERED.

June 5th, 2018
Norfolk, Virginia



Arenda L. Wright Allen
United States District Judge