UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KAREN MEYERS, et al.,	)	
	)	
Plaintiffs	)	**Case No. 1:17-cv-00521**
	)	
	)	**Judge Timothy S. Black**
vs.	)	
	)	**Defendants' Motion for Leave to Appeal**
CINCINNATI BOARD OF EDUCATION, et al.,	)	**and Motion for Stay Pending Appeal**
	)	
	)	
Defendants.	)	

On September 24, 2018, this Court entered an Order Granting in Part and Denying in Part Defendants Cincinnati Board of Education, Mary Ronan, Ruthenia Jackson, and Jeffery McKenzie's (collectively, "Defendants") Motion to Dismiss Plaintiffs' Complaint, and granting Plaintiffs' Motion for Leave to Amend the Complaint. D.E. 26.

Defendants have appealed as of right the denial of Defendants' statutory immunity from suit. D.E. 28. Defendants will ask the Sixth Circuit to take pendent jurisdiction of all of the grounds on which the Court denied the motion to dismiss. In the first instance, however, Defendants ask this Court to certify the denial of the motion to dismiss for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). This entire case should be heard by the Sixth Circuit in one appeal.

Pursuant to Federal Rule of Civil Procedure 62, Defendants also move this Court for an order staying proceedings pending appeal. These motions are supported by the accompanying memorandum.

Respectfully submitted,

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Plaintiffs	)	**Case No. 1:17-cv-00521**
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	)	**Judge Timothy S. Black**
vs.	)	
	)	**Memorandum in Support of**
CINCINNATI BOARD OF EDUCATION, et al.,	)	**Defendants' Motion for Leave to Appeal and Motion for Stay Pending Appeal**
	)	
	)	
Defendants.	)	

INTRODUCTION

On September 24, 2018, the Court entered an Order Granting Plaintiffs' Motion to Amend the Complaint and Granting in Part and Denying in Part Defendants' Motion to Dismiss. D.E. 26. The Court rejected Defendants' claim to statutory immunity under Ohio Revised Code § 2744.03. That portion of the Court's Order is immediately appealable as of right. O.R.C. § 2744.02(C); *Hidden Village, LLC v. City of Lakewood, Ohio*, 734 F.3d 519, 524 (6th Cir. 2013).

Defendants intend to ask the Sixth Circuit to take pendent jurisdiction over the remaining grounds on which the Court denied the motion to dismiss. *See, e.g., Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir. 1998) (confirming the court of appeals' ability to exercise jurisdiction over issues that are not independently appealable, if those issues are "inextricably intertwined with matters over which the court properly and independently has jurisdiction). Here, the Court's Order rationale with respect to Plaintiffs' § 1983 claim for a state-created danger was tied to the Court's conclusion that the Defendants were not entitled to immunity. D.E. 26 at 11-12, 23.

As a matter of judicial efficiency, Defendants move the Court to certify all of the grounds on which it denied the motion to dismiss for immediate appeal under 28 U.S.C. § 1292(b). The Sixth Circuit can deal with the entire case at once to avoid piecemeal litigation in two different courts. Courts of appeals have endorsed precisely this approach before. *See, e.g.*, *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 388-89 (2d Cir. 2011) (combining an interlocutory appeal as of right from denial of immunity with a permissive appeal under § 1292(b)).

Defendants also move the Court under Fed. R. Civ. P. 62 to stay proceedings during the appeal. Defendants may be immune from suit, which includes the right to be free from the burdens of discovery.

I. Defendants respectfully request the Court to certify the remaining grounds on which it denied Defendants' motion to dismiss for immediate interlocutory appeal.

Plaintiffs' claims fall into two categories: State law claims and Section 1983 claims for alleged deprivations of constitutional rights. The Court allowed the majority of those claims to proceed. As relevant here, the Court rejected Defendants' claim to statutory immunity under Ohio Revised Code § 2744.03. That portion of the Court's Order is immediately appealable. *Hidden Village, LLC v. City of Lakewood, Ohio*, 734 F.3d 519, 524 (6th Cir. 2013). The portion of the Court's Order relating to Plaintiffs' § 1983 claim for a state-created danger is inextricably tied to the Court's holding denying Defendants' statutory immunity. Specifically, the Court concluded that Plaintiffs' sufficiently alleged that Defendants were reckless (one of three elements of the state-created danger claim), and relied on that finding to deny Defendants' immunity. D.E. 26 at 11-12, 23. Where the analysis of claims that are immediately appealable is inextricably intertwined with claims that are not immediately appealable, the court of appeals can

exercise pendant jurisdiction to hear all the claims together. *See Chambers*, 145 F.3d at 797. Defendants have filed a notice of appeal on those issues. D.E. 28.

As a matter of judicial economy, the Court of Appeals should consider all of the Plaintiffs' claims on appeal. *See Nat'l R.R. Passenger Corp. v. ExpressTrak, LLC*, 330 F.3d 523, 527 (D.C. Cir. 2003). But to avoid any dispute on this issue and to ensure that judicial economy is served by avoiding piecemeal litigation, Defendants move the Court to certify those claims for immediate interlocutory appeal under 28 U.S.C. § 1292(b).

If the Court issues an order that is not immediately appealable, it may nonetheless certify the order for interlocutory appeal if the Court concludes 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." 28 U.S.C. § 1292(b). A question of law is controlling where it "could materially affect the outcome of the case." *In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017) (granting leave to appeal under 28 U.S.C. § 1292(b)). And courts traditionally will find that a substantial ground for difference of opinion exists where novel and difficult questions of first impression are presented." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (internal quotations and alterations omitted). *See also In re Trump*, 874 F.3d at 952 (citing *Reese* with approval).

Plaintiffs' claims raise important questions not just for Defendants, but for school districts generally. School liability for peer-to-peer harassment and related student suicides is a hotly contested topic (the Southern District of Ohio has issued opinions in two such cases in the last month alone). Plaintiffs' claims, if allowed to proceed, would dramatically increase school liability for student conduct that may not be in their control. Even one significant, open question

of law is appropriate for §1292(b) certification. *See Bailey v. Johnson*, 48 F.3d 965, 966 (6th Cir. 1995). As explained below, this case features several such questions.

A. The Order involves controlling questions of law that have not yet been addressed by the Sixth Circuit, and reasonable minds could disagree on the appropriate resolution of those questions.

The Court should certify the entire denial of the motion to dismiss for appeal now. The Court acknowledged several key areas in which it was required to make a decision without the benefit of controlling case law, which demonstrates the need for this case to reach the Sixth Circuit now. *See Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015) ("Recognizing that it had taken sides on an important and debatable issue that is open in the Seventh Circuit, the district court certified its order for interlocutory review.").

1. The state-created danger claim

In order to make out a state-created danger claim, Plaintiffs must plead (1) that Defendants committed an affirmative act that created or increased the risk of danger to Taye, (2) a special danger to Taye as distinguished from the public at large, and (3) "the requisite degree of state culpability." *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 464 (6th Cir. 2006). The Court found that Plaintiffs met each element, but it did so on what the Court acknowledged was unsettled ground.

Plaintiffs claim that Defendants' affirmative acts included what the Court characterized as "affirmative misrepresentations and concealment." D.E. 26 at 10. The Court recognized that "omissions or failures to act are not affirmative acts" under Sixth Circuit law, but found that "the Sixth Circuit has not specifically ruled on whether affirmative misrepresentations and concealment are affirmative acts." *Id.* Indeed, it appears that no circuit court has concluded that they are. *See, e.g., Ye v. United States*, 484 F.3d 634, 640 (3d Cir. 2007) (holding that false assurances of safety are not "affirmative acts" that give rise to a state-created danger claim). The

Sixth Circuit should be given an opportunity to rule on that threshold question. *See Bailey*, 48 F.3d at 966 ("The district court denied the defendants' motion, but, recognizing the importance of this threshold issue, it certified the case for immediate appeal under 28 U.S.C. § 1292(b).").

2. The shocks-the-conscience claim

The Sixth Circuit has not (as far as Defendants' counsel can determine) considered a shocks-the-conscience claim in the context of bullying or student-school relationships. Whether Plaintiffs' actions constitute "brutal and offensive" conduct or were "arbitrary and capricious" abuses of government power are matters of reasonable debate. For example, it is an open question whether any of Defendants' alleged misrepresentations give rise to a state-created danger; it is similarly unclear whether misrepresentations can be conscience-shocking as a matter of law. This is precisely the kind of "novel issue" that merits certification under § 1292. *See Reese*, 643 F.3d at 688.

3. The Equal Protection claim

The Court determined that Plaintiffs adequately pled a disparate treatment claim under the Equal Protection Clause—students injured by bullies (the disfavored class) were treated differently from students injured in other ways (the favored class). D.E. 26 at 16. The Court recognized that Plaintiffs identified only one student in the favored class, but it overlooked the critical fact that the one student is Taye. D.E. 21-1 ¶ 140. The Sixth Circuit has not opined on whether a Plaintiff can bring an Equal Protection claim where he is a member of both the favored and disfavored classes—much less where he is the *only* identifiable member of the favored class. Like the other constitutional claims, this is a novel question of first impression in the Sixth Circuit, which justifies an immediate appeal.

B. Certifying the Order for interlocutory appeal will advance the ultimate termination of the litigation.

More than half of Plaintiffs' claims are already on appeal as of right. D.E. 28. It makes sense for the Sixth Circuit to hear the entire case at once, rather than in piecemeal parts as this litigation continues. The Sixth Circuit could terminate this litigation—or at least the parts of it affecting the original CPS defendants—altogether if the entire case is on appeal. *See Reese,* 643 F.3d at 688 (holding that an appeal may materially advance the litigation because reversal "may" remove one of the defendants from the case).

Allowing parts of the case to proceed without review from the Sixth Circuit will not advance the case toward termination. Rather, it will delay the case in the immediate term because the appeal on the immunity question will stay proceedings here. *See English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994) (noting that while the trial court or appellate court considers a defendant's claim of qualified immunity, "the trial court should stay discovery"). And it will protract the case in the long term because the claims may be subject to two separate, costly appeals at different times.

Even if the Sixth Circuit does not dispense with the entire case, its decision will clarify the issues for the parties going forward, and allow the parties to focus discovery and future motions on the claims remaining in the case.

II. The Court should issue a stay of proceedings pending appeal.

Although Defendants' view is that the Court is divested of jurisdiction now that the case is on appeal, out of an abundance of caution, Defendants request the Court to issue a formal stay of proceedings pending appeal.

Courts must balance four familiar factors when determining whether to grant a stay pending appeal: "(1) the likelihood that the party seeking the stay will prevail on the merits of

the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 661 (6th Cir. 2016).

A. Defendants can demonstrate a substantial likelihood of success on the merits.

A party seeking a stay pending appeal must show—as the Sixth Circuit has said—that there are serious questions going to the merits. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991).[1] As explained in Section I.A, *supra*, there are serious questions here. As the Court acknowledged in its Order, Plaintiffs' Complaint raises several theories of liability in school bullying cases that have not previously been recognized by the Court of Appeals.

B. Defendants face irreparable harm if this case is not stayed pending appeal.

Defendants' statutory immunity under Ohio Revised Code § 2744.03 is an immunity from suit. *Hidden Vill., LLC v. City of Lakewood, Ohio*, 734 F.3d 519, 524 (6th Cir. 2013). The benefits of that immunity would be destroyed if Defendants are forced to continue litigating (especially in conducting discovery) while the question of their immunity is on appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). *See Rondigo LLC v. Twp. of Richmond, Michigan*, No. 08-10432, 2009 WL 10681186, at *3 (E.D. Mich. Dec. 9, 2009) (finding that a potentially immune defendant will be irreparably harmed if required to engage in discovery pending appeal).

For that reason, denial of immunity is immediately appealable, *id.*, and courts routinely stay proceedings during the pendency of an interlocutory appeal on immunity from suit. *See*

[1] Other courts in this district have applied this standard, mindful that no court will be inclined to find that its judgment is likely to be reversed on appeal. *Abercrombie & Fitch, Co. v. ACE European Grp. Ltd.*, Nos. 2:11-cv-1114, 2:12-cv-1214, 2014 WL 4915269, at *9 (S.D. Ohio Sept. 30, 2014), *aff'd*, 621 F. App'x 338 (6th Cir. 2015).

English, 23 F.3d at 1089 (6th Cir. 1994) ("While the issue [of qualified immunity] is before the trial court or the case is on appeal, the trial court should stay discovery."); *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986) ("*Mitchell* [472 U.S. at 526] necessarily holds that the court is further obligated, upon application, not only to refrain from proceeding to trial but to stay discovery until that issue is decided."); *see also Bays v. Cty of Montmorency*, No. 15-10534, 2017 WL 510696, at *1 (E.D. Mich. Feb. 8, 2017) ("trial courts are obliged to stay proceedings when Defendants properly appeal the trial court's denial of qualified immunity").

C. The balance of harms favors Defendants.

The balance of harms also favors a stay. As explained above, Defendants face the irreparable harm of being forced to conduct litigation from which they are immune. By contrast, any harm to Plaintiffs will be slight. Plaintiffs filed their operative Amended Complaint just two weeks ago, adding a new defendant and new claims. Because of the new complaint and new defendant (who has not yet been served), the parties (consistent with Court chamber's direction) have not completed the Fed. R. Civ. P. 26(f) report, which must precede a case scheduling conference or discovery.

D. A stay serves the public interest.

The public interest favors a stay while Defendants' immunity is pending on appeal. *See Rondigo*, 2009 WL 10681186 at *3. As explained above, vindicating an individual's statutory immunity is typically in the public interest; the State of Ohio concluded as much when it extended political subdivision immunity to government employees in the first place. Moreover, the cost of litigation comes out of the pockets of CPS taxpayers. It is in their interest to stay expensive proceedings that may prove to be unnecessary.

CONCLUSION

All sides will be best served if this action proceeds as one case and in one case. Defendants respectfully request an order to that effect, granting the motion for leave to appeal and the motion for stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically on October 9, 2018, using the Court's CM/ECF system, which will serve notice of this filing on all counsel of record.

/s/ Aaron M. Herzig