

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DOE AND JANE DOE, AS THE	)	CASE NO.: 2:08 CV 575
NATURAL PARENTS AND NEXT)	
FRIENDS OF THEIR MINOR CHILD,	)	JUDGE GREGORY L. FROST
JAMES DOE,)	
	)	MAGISTRATE JUDGE NORAH MCCANN KING
Plaintiffs,)	
	)	<u>MEMORANDUM IN OPPOSITION OF</u>
vs.	)	<u>DEFENDANT JOHN FRESHWATER TO</u>
	)	<u>THE EMERGENCY MOTION FOR</u>
MOUNT VERNON CITY SCHOOL	)	<u>PROTECTIVE ORDER AND GAG</u>
DISTRICT BOARD OF EDUCATION, ET	)	<u>ORDER BY PLAINTIFFS AND MOUNT</u>
AL.,	)	<u>VERNON CITY SCHOOL DISTRICT</u>
	)	<u>DEFENDANTS</u>
Defendants.)	

NOW COMES Defendant, John Freshwater, by and through his trial attorney, Robert H. Stoffers of the law firm of Mazanec, Raskin, Ryder & Keller Co., L.P.A., and hereby respectfully submits the within Memorandum in Opposition to the Emergency Motion for Protective Order and Gag Order by Plaintiffs and by Mount Vernon City School District Defendants. For the reasons set forth herein, Defendant Freshwater asserts that the Emergency Motion is without merit and should be overruled and denied.

Respectfully submitted,

MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.

s/ Robert H. Stoffers

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Trial Attorney for Defendant John Freshwater

I. Statement of the Case

Plaintiffs' First Amended Complaint asserts claims against Defendant Mount Vernon City School District Board of Education, Superintendent Stephen Short, Principal William White and John Freshwater (an eighth grade science teacher). The claims are based upon alleged violations of the Establishment Clause of the First Amendment of the United States Constitution and are brought pursuant to 42 U.S.C. Section 1983. (See Document No. 11.)

At the time that Plaintiffs filed their original Complaint in the within case, they also filed a Motion for Protective Order, requesting to pursue this action under pseudonyms. The Court granted that Motion. (See Document No. 4.)

II. State Statutory Administrative Proceeding

Defendant Mount Vernon City School District Board of Education and Defendant John Freshwater are also involved in a separate State Statutory Administrative Proceeding. Specifically, the Board of Education has adopted a Resolution to consider the termination of Mr. Freshwater's teaching contract. Mr. Freshwater has requested a Hearing before a Referee pursuant to O.R.C. Section 3319.16. The Hearing is scheduled to begin on October 1, 2008. The School District filed a Motion with the Referee, requesting that the Section 3319.16 Hearing for Mr. Freshwater be held in closed session. (See attached Exhibit 1.) The Referee denied the School District's Motion, stating that a teacher is entitled to a public hearing as requested by Mr. Freshwater. (See attached Exhibit 2.)

The School District then filed a Motion requesting that student witnesses and family members be permitted to testify in camera at the Section 3319.16 Hearing. That Motion is pending before the Referee. (See attached Exhibit 3.)

It is noteworthy that the Plaintiffs in the within case are not parties to the Section 3319.16 Hearing involving the teaching contract of Mr. Freshwater.

III. Relief Sought in Emergency Motion for Protective Order and Gag Order

The Emergency Motion for Protective Order and Gag Order filed by Plaintiffs and the Mount Vernon City School District Defendants requests that this Court order Defendant John Freshwater to join the School Board's pending Motion in the Section 3319.16 Hearing, and further requests that students and their family members be permitted to testify in camera. Specifically, Plaintiffs and the Mount Vernon City School District Defendants are requesting that this Court issue an order in the Section 3319.16 Hearing "protecting Plaintiffs and testifying minor children such that they shall appear and testify at Defendant Freshwater's termination hearing, but their testimony should be held privately and references throughout the proceedings to their identities be made with pseudonyms." (See Document No. 22, pp. 8 and 9).

In the pending Motion for Protective Order and Gag Order, Plaintiffs and Mount Vernon City School District Defendants have restated many of the same arguments presented to the Referee in the Section 3319.16 Proceeding (see the School District's Motions to hold a closed hearing and to have student witnesses and family members testify in camera). As referenced above, the School District's Motion to close the Section 3319.16 Hearing has already been denied by the Referee. Further, the School District's Motion to allow student witnesses and family members to testify in camera at the Section 3319.16 Hearing has not yet been ruled on by the Referee.

Just as it is noteworthy that Plaintiffs are not parties to the Section 3319.16 Hearing, it is also noteworthy that the Referee, R. Lee Shepherd, is not a party to the within case.

IV. Law and Argument

A. Lack of Jurisdiction

The Emergency Motion for Protective Order and Gag Order does not set forth a basis for the Court having jurisdiction over the Section 3319.16 Hearing and, specifically, the Referee assigned to the Hearing. The Motion for Protective Order and Gag Order does not assert federal question or constitutional jurisdiction, diversity jurisdiction or ancillary jurisdiction for pendant state law claims. See 28 U.S.C. §§ 1331, 1332 and 1367.

Noticeably absent from the Motion is any allegation as to a violation of the constitutional rights of the Plaintiffs or the Mount Vernon City School District Board of Education Defendants in regard to the Section 3319.16 Hearing. In fact, as referenced above, Plaintiff is not even a party to the Section 3319.16 Hearing.

Accordingly, this Court lacks jurisdiction to consider the Emergency Motion for Protective Order and Gag Order.

B. The Rules of Civil Procedure are inapplicable to a Section 3319.16 Hearing

In the Emergency Motion for Protective Order and Gag Order, Plaintiffs and the Mount Vernon City School District Defendants are seeking relief pursuant to Federal Rule of Civil Procedure 26. However, it is not explained in the Motion as to how the Federal Rules of Civil Procedure apply to a State Administrative Hearing. Further, the civil rules regarding discovery are inapplicable to a hearing under Section 3319.16, which is considered to be a special statutory proceeding. *Wheeler v. Mariemont Dist. Bd. Of Educ.*, 12 Ohio App.3d 102 (1983); *See also, Morgan v. Mariemont District Board of Education*, 1983 WL 5204 (Ohio App. 1983).

Therefore, even assuming there is a constitutional violation or right at issue, over which this Court may have jurisdiction regarding the subject 3319.16 Hearing, the civil rules regarding

discovery are inapplicable at such a Hearing and, therefore, the Emergency Motion for Protective Order and Gag Order must be denied.

C. The *Younger* Abstention Doctrine bars the relief sought in the Emergency Motion

This Court has held:

Generally, abstention is appropriate under *Younger*¹ if: 1) state judicial proceedings are ongoing; 2) the state proceedings implicate important state interests; and 3) the state proceedings afford an adequate opportunity to raise federal questions.²

BB & T Insurance Services, Inc. v. Ohio Department of Insurance, 2006 WL 314495 (S.D. Ohio)(Attached Exhibit 4); (citing *Middlesex County v. Garden State Bar Assoc.*, 457 U.S. 423 (1982)).

Further, this Court specifically held that federal courts should not interfere in pending state administrative proceedings. See the following:

The Supreme Court requires federal courts to abstain from interfering in pending state administrative proceedings that are “judicial in nature.” *New Orleans Public Service, Inc., v. City of New Orleans*, 491 U.S. 350, 370, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). When determining whether an administrative proceeding is judicial in nature for purposes of *Younger* abstention, a court must examine the “nature of the final act.” *Id.* at 371. According to the Supreme Court, a judicial inquiry “investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.” *Id.* at 370.

BB&T at page 3.

In applying *Younger* to the within case, there currently is a state administrative proceeding which is judicial in nature, the proceedings implicate important state interests in regard to determining the rights of public teachers, and the state proceedings afford an adequate

¹ *Younger v. Harris*, 401 U.S. 37 (1971).

² The mere presence of the preemption issue does not modify the classic *Younger* analysis because state courts have concurrent jurisdiction to decide the preemption question. *CSXT, Inc. v. Pitz*, 883 F.2d 468, 471 (6th Cir. 1989) *cert. Denied*, 494 U.S. 1030 (1990). “State Courts are as capable as federal courts of deciding preemption claims.” *Dyck v. McReynolds*, No. 90-5581, 1991 U.S.App. LEXIS 4167, at *6 (6th Cir. Mar. 7, 1991) (citing *CSXT*, 883 F.2d at 473).

opportunity to raise any federal questions by the Mount Vernon City School District Board of Education and Mr. Freshwater in the Section 3319.16 Hearing. Therefore, this Court should deny the Emergency Motion for Protective Order and Gag Order based upon the Abstention Doctrine.

D. Law cited by Plaintiffs and Mount Vernon City School District Defendants

1. *Ohio Assoc. of Public Sch. Employees, AFSCME, AFL-CIO v. Lakewood City Sch. Dist. Bd. of Educ.*, (1994) 68 Ohio St.3d 175. This is a state court case that involved a post-termination grievance arbitration hearing. The case involved a determination by a state court, in regard to an administrative hearing, as to whether a teacher's procedural due process rights were violated when a witness was not subject to face-to-face cross examination. *Lakewood* does not stand for the proposition that witnesses in a Section 3319.16 Hearing can testify privately, as proposed in the Emergency Motion for Protective Order and Gag Order. Even more significant is the fact that *Lakewood* highlights the ability of parties to raise federal questions, such as constitutional due process issues, in a state administrative hearing, so as to meet the requirements of the *Younger* Abstention Doctrine.

2. *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004). In this case, at issue was whether it is permissible for the plaintiffs to proceed using pseudonyms. That issue has already been addressed by this Court wherein it has allowed the Plaintiffs in the within case to proceed using pseudonyms. Contrary to what is being argued by the Plaintiffs and the Mount Vernon City School District Defendants, the Emergency Motion for Protective Order and Gag Order does not involve an extension of the Protective Order allowing the Plaintiffs to proceed using pseudonyms. The Emergency Motion for Protection Order and Gag Order is asking this Court to accept jurisdiction over the pending 3319.16 Hearing and set forth certain procedures as to how

that Hearing should proceed. However, as set forth above, this Court does not have jurisdiction over the Section 3319.16 Hearing and, even assuming it does have jurisdiction, the Rules of Civil Procedure concerning discovery do not apply. Finally, the *Younger* Abstention Doctrine does not allow this Court to address issues for the Section 3319.16 Hearing.

WHEREFORE, Defendant John Freshwater respectfully requests the Court to overrule and deny the Emergency Motion for Protective Order and Gag Order by Plaintiffs and by Mount Vernon City School District Defendants.

Respectfully submitted,

MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.

s/ Robert H. Stoffers

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Trial Attorney for Defendant John Freshwater

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2008, a copy of the foregoing *Memorandum in Opposition of Defendant John Freshwater to the Emergency Motion for Protective Order and Gag Order by Plaintiffs and Mount Vernon City School District Defendants* was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Robert H. Stoffers

ROBERT H. STOFFERS (0024419)

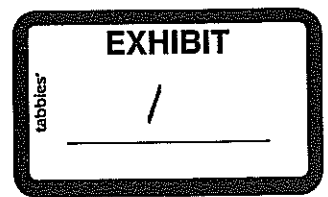
Trial Attorney for Defendant John Freshwater

IN THE MATTER OF TERMINATION OF THE
EMPLOYMENT OF JOHN FRESHWATER

The Mount Vernon City School)	
District Board of Education,)	
)	
Employer)	
)	
and	)	R. Lee Shepherd, Esq.,
	)	Referee
John Freshwater,)	
)	
Teacher)	

**MOTION OF MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF
EDUCATION TO HOLD CLOSED HEARING**

NOW COMES the Mount Vernon City School District Board of Education by and through its undersigned counsel and respectfully moves the Referee to order the Hearing in the Matter of the Termination of the Employment of John Freshwater to be held in closed session and to have the identity of any students or parents of students maintained as pseudonyms and to order the parties and all witnesses not to disclose the identity of student witnesses or students named and involved with the proceedings outside of the hearing. The purpose of this Order is to protect the safety and security of students, to protect them from intimidation, potential retaliation and inappropriate local and national exposure that would be a risk to such students and to insure that a fair and complete hearing can be held for Mr. Freshwater, all as is more fully set forth in the Brief in Support of this Motion, attached hereto and incorporated by reference herein.



Respectfully Submitted,

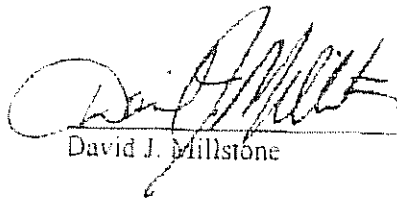


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Attorney for Mount Vernon City
School District

CERTIFICATE OF SERVICE

A copy of the foregoing Motion and Brief in Support of Mount Vernon city School District Board of Education To Hold Closed Hearing was sent by facsimile and first class mail to R Kelly Hamilton, The Law Office of R. Kelly Hamilton LLC, P. O. Box 824, Grove City, Ohio 43123, this 31st day of July, 2008.



David J. Millstone

IN THE MATTER OF TERMINATION OF THE
EMPLOYMENT OF JOHN FRESHWATER

The Mount Vernon City School)	
District Board of Education,)	
)	
Employer)	
)	
and	)	R. Lee Shepherd, Esq.,
	)	Referee
John Freshwater,)	
)	
Teacher)	

**BRIEF IN SUPPORT OF MOTION OF MOUNT VERNON CITY
SCHOOL DISTRICT BOARD OF EDUCATION TO HOLD CLOSED
HEARING**

This matter involves a highly publicized case intersecting religion and education, student rights, teacher rights and public school obligations. Unfortunately, before an investigation was completed into charges against Mr. Freshwater, the teacher chose to exercise his Free Speech rights to take a small piece of the issue into the public square in an attempt to frame the issues around that one small piece – whether or not he had the right to display his personal Bible on his desktop. This publicity focused the local news media on the issue and raised conflicting debate within the community. As a result, when the investigation into allegations against Mr. Freshwater was concluded there was a rush by the news media to obtain a copy and portions of the report were converted into national news stories.

Mr. Freshwater and supporters of Mr. Freshwater have appeared on national network news programs to talk about the case. Various internet websites have picked up the story and display it prominently. One community member posted a large yard sign that stated

**THE STUDENT GOES
WE SUPPORT MR. FRESHWATER!
THE BIBLE STAYS!**

(See Attachment 1).

When the Board of Education adopted its resolution to consider the termination of Mr. Freshwater under Ohio Revised Code Section 3319.17, he requested a public hearing.

Unfortunately, much of this case is going to involve testimony by and about young teenage students and what goes on in Mr. Freshwater's classroom. The case is going to be followed by the national media. The Board of Education is concerned about the exposure of students in the national media on a sensitive issue where religion and personal religious views may intersect with education. The Board is concerned about the adverse impact on students who testify that may occur within the schools and within the community if their names are placed in public. As can be seen from the posted sign referenced above – the feelings in the community are strong enough that a student or his or her family could be at risk, whether from physical harm, emotional harm or economic harm, if publicly named. Further, the pressure of being presented on national television for students in the 8th and 9th grade can lead to intimidation and limiting may result in their testimony or exaggerating it. No one wants to see that happen.

There has already been a judicial determination that one proceeding involving the facts that will be the subject of this hearing should be held using pseudonyms to protect one student and the student's family. A lawsuit was filed shortly before the Board resolution against the Board, the Superintendent, the Middle School Principal and Mr. Freshwater as a John Doe action

alleging the teacher's religion in his classroom and he used an electrostatic static device to burn a mark on a student's arm.¹

The Referee may properly hold the hearing in closed session

While this matter started off as a single teacher termination case, it has subsequently grown into a national debate on the intersection of school and religion. Indeed, a quick internet search provides *hundreds* of websites and stories dedicated to a discussion of Mr. Freshwater's actions and the turbulent community response to the allegations levied against him.² The massive press coverage has created a significant divide within the community with some individuals turning on the complaining students as a target.

The enormous publicity and tumultuous community response surrounding Mr. Freshwater's possible termination creates significant concern with allowing students or their parents to be identified and to testify in an open public session. These twelve, thirteen and fourteen-year-old middle school students will be put in an extremely vulnerable position when asked to discuss their experiences in his classroom, including issues related to Mr. Freshwater's

¹ A copy of the Order granting the action under pseudonym from United States Magistrate Judge Norah King in *Doe v. Mount Vernon City School Board of Education, et al.*, Civil Action 2:08-CV-575 is attached as Attachment 2.

² For example, search using google.com on July 30, 2008 included the following results:

- At <http://www.gopetition.com/petitions/support-john-freshwater.html> -- an online petition to "Support John Freshwater," provides John Freshwater, a two-time "Teacher of the Year," including in 2007, is under investigation by Mount Vernon City Schools for refusing to remove a Bible from his desk, where it has been sitting for 22 years. Other charges were made by school administrators that John expressed his personal faith on other occasions, after a torrent of public reaction to their censorship of the Bible. John should have the right to express his faith at school to the fullest extent of the law. And we are confident that the law is on his side."
- At http://en.wikipedia.org/wiki/John_Freshwater -- "The local school board voted to dismiss Freshwater in June because "Freshwater preached his Christian beliefs about how the world began, discredited evolution and didn't teach the required science curriculum, the board says. He was told to stop teaching creationism and intelligent design, but he continued to do so, an investigation found." Freshwater's lawyer described the complaints as "fabrications." Dave Daubenmire, a friend of Freshwater who lost a lawsuit for praying with his football team told a newspaper, "With the exception of the cross-burning episode...I believe John Freshwater is teaching the values of the parents in the Mount Vernon school district." Originally on April 18th, some students held a rally on his behalf when he was told to remove all religious symbols from his class, but he refused to remove a Bible off his desk.

stances on religion, homosexuality, and creationism/intelligent design versus evolution. If the hearing is open to community members and media or their names are disclosed, these minor children are at risk of being ostracized in their school and in their community. They may naturally be intimidated and deterred from providing full and truthful testimony related to Mr. Freshwater's activities in the classroom. Indeed, these students may be dissuaded from testifying *at all* when faced with the idea of speaking before such a judgment-ready audience. Closing this hearing is the only viable way to protect the students.

Moreover, Mr. Freshwater's due process rights will not be violated if this Referee closes the hearing. Pursuant to R.C. 3319.16, a pre-termination hearing for a teacher is to be conducted as a private session unless a public hearing is requested. OHIO REV. CODE ANN. 3319.16. Ohio courts have held that the intent of this statute was not to provide a teacher with a public forum to challenge his termination, but to protect the teacher's privacy. *See Matheny, et al. v. Frontier Local Bd. of Edn.*, 62 Ohio St. 2d. 362, 367 (1980) (holding that "[i]t is evident that R.C. 3319.16 is aimed at protecting the privacy of a teacher against whom charges of misconduct have been preferred"); *see also Coburn v. Greenfield Local Bd. of Edn.*, 1980 Ohio App. LEXIS 70094 at *5 (September 30, 1980). Critically, the law is silent as to whether a public hearing must be granted *in all situations* upon request. There is nothing to prevent the Referee from closing the hearing where appropriate, as in the instant situation.

By closing the hearing, requiring the use of pseudonyms for students and their parents and placing a gag order on the parties, the Referee may best protect Mr. Freshwater's procedural due process rights. He will have the opportunity to confront and cross examine witnesses and avoid reliance upon hearsay testimony. The United States Supreme Court has held that due process is a fluid concept and its requirements at any given proceeding depend on the applicable

circumstances and facts. *Mathews v. Eldridge* (1976), 424 U.S. 319, 334 ("due process is flexible and calls for such procedural protections as the particular situation demands"), quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 481; see also *Ohio v. Hochhauser* (1996), 76 Ohio St. 3d. 455, 459.

In the context of employee termination hearings, the Ohio Supreme Court has held that in certain cases employees do not even have an absolute right to confront witnesses face-to-face at a post-termination hearing. *Ohio Assoc. of Public Sch. Employees, AFSCME AFL-CIO v. Lakewood City Sch. Dist. Bd. of Educ.* (1994), 68 Ohio St. 3d. 175, ¶ 2 of the syllabus. In *Lakewood*, the Court upheld an arbitrator's use of a closed-circuit television which allowed a student witness, who had leveled drug dealing accusations against a public school employee, to testify live in another room in order to separate her from the accused. *Id.* at 180. The arbitrator allowed such action because the student witness feared the employee, in part because he had contacted her earlier and told her to deny that he had helped her obtain drugs. *Id.* In sustaining the Arbitrator's decision to separate the witness, the Ohio Supreme Court recognized "[t]he purpose of due process is to protect substantial rights. *It does not mandate particular procedures in every case.* The controlling question in this case is whether the arbitrator appropriately balanced the conflicting interests involved without depriving appellee of a meaningful opportunity to challenge adverse evidence." *Id.* (emphasis added).³

The *Lakewood* Court properly determined that the compelling interests of the school district in both securing full and truthful testimony about allegations against an employee, while

³ The Ohio Supreme Court further noted that because the *Lakewood* case involved a *post*-termination hearing, the employee must be provided "a more thorough opportunity to present their evidence and to challenge adverse evidence than is promised at a pre-termination hearing." *Lakewood* at 178. Here, there is no risk of substantial deprivation of Mr. Freshwater's rights by holding a portion of the hearing in closed session. Moreover, should Mr. Freshwater disagree with any portion of this Referee's decision, he will be afforded an opportunity to appeal the adverse decision to court and have access to another public forum.

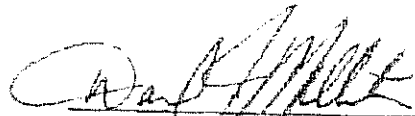
preventing unnecessary anxiety to a student, permitted video testimony by the student witness while fully complying with the employee's due process rights.

The Board does not ask the Referee to go as far as the Arbitrator did in *Lakewood*. All the Board asks is that the hearing be closed to public and that the record reflect student and parent names by pseudonyms and that a gag order be placed on the parties. Mr. Freshwater is aware of the charges against him, has been made aware of the student and student's family who have brought the accusations against him, and if the Board's motion is granted will have the full opportunity to confront and cross examine all of the Board witnesses. Simply put, closing the hearing and granting the Board's motion in no way violates Mr. Freshwater's due process rights under the plain language of the statute.

III. CONCLUSION

For the foregoing reasons, the District respectfully requests Mr. Freshwater's pre-termination hearing be held in closed session

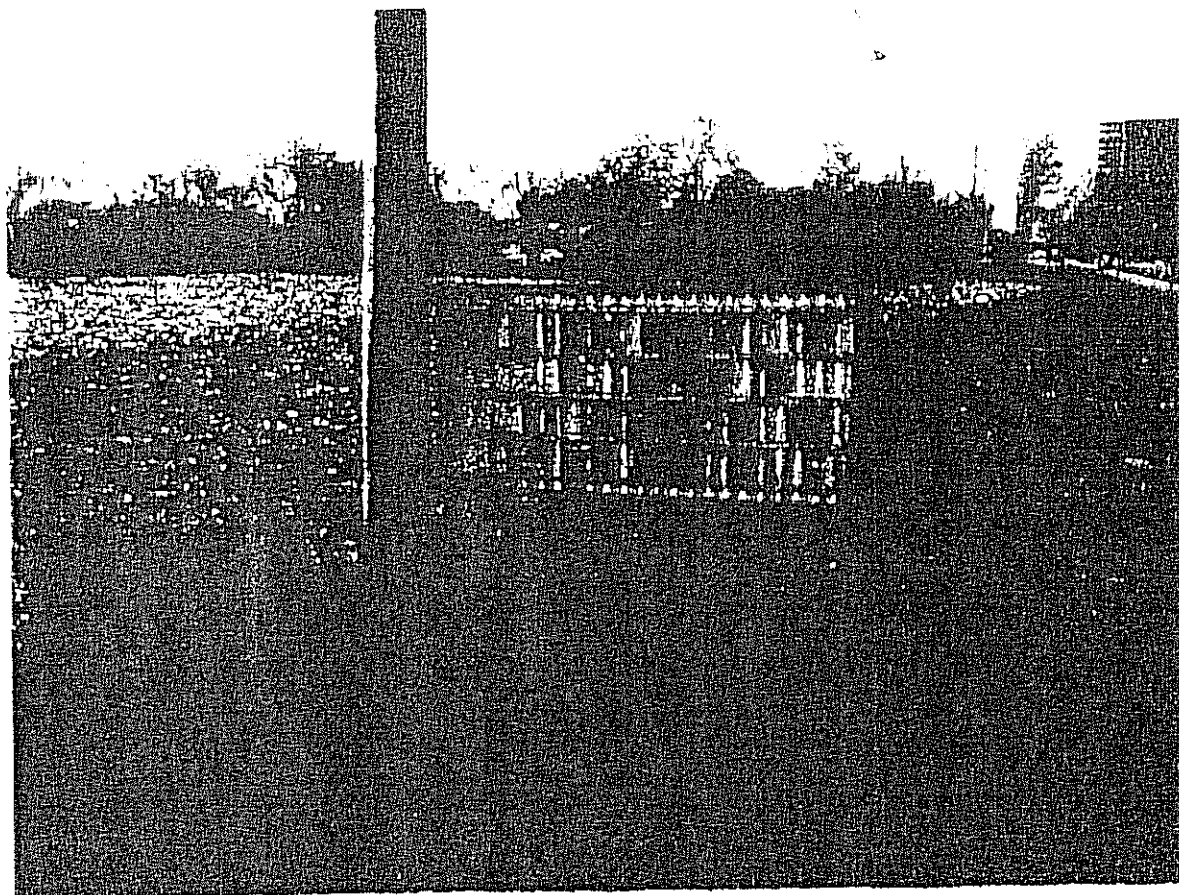
Respectfully submitted,



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Attorney for Mount Vernon City
School District

Attachment 1



IN THE MATTR OF TERMINATION OF THE
EMPLOYMENT OF JOHN FRESHWATER

The Mount Vernon City School
District Board of Education,

Employer
and

R. Lee Shepherd, Esq.
Referee

John Freshwater

DECISION

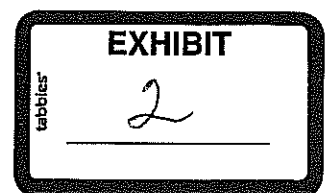
Teacher

The Mount Vernon City School District Board of Education has filed a Motion requesting that the hearing in the matter of the termination of the employment of John Freshwater be held in closed session. This motion has been opposed by Mr. Freshwater. Legal counsel for both the Board of Education and Mr. Freshwater have filed briefs/memorandums.

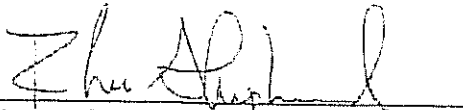
Ohio Revised Code §3319.16 (Termination of Contract by Board of Education) provides, *inter alia*:

“the hearing shall be private unless the teacher requests a public hearing”

In this matter, by written request of his legal counsel, the teacher has requested a public hearing. This statutory provision is plain and unequivocal. It is subject to one and only one interpretation. The hearing must be public if the teacher so requests. Ohio case law interpreting Ohio Revised Code §3319.16 in no way modifies this mandate.



Everyone involved in this proceeding must endeavor to preserve the order and formality expected within any administrative hearing. The rights of all persons involved, most notably the teacher, must be protected at all costs. Every measure as permitted within the bounds of the Revised Code will be invoked, if necessary, to ensure the sanctity of the proceedings.


R. Lee Shepherd

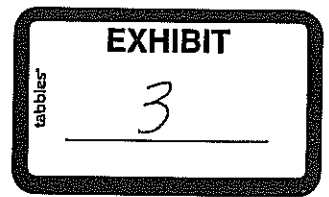
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IN THE MATTER OF TERMINATION OF THE
EMPLOYMENT OF JOHN FRESHWATER

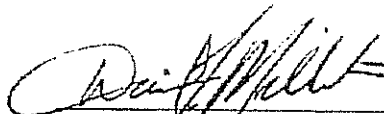
The Mount Vernon City School)	
District Board of Education,)	
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Employer)	
)	
and)	R. Lee Shepherd, Esq.,
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)	
Teacher)	

**MOTION OF MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF
EDUCATION TO HAVE STUDENT WITNESSES AND FAMILY
MEMBERS TESTIFY *IN CAMERA* AND TO PROTECT THEIR
IDENTITY**

NOW COMES the Mount Vernon City School District Board of Education by and through its undersigned counsel and respectfully moves the Referee to order the testimony of student witnesses and their family members be held *in camera* and to have the identity of any students or their family members maintained as pseudonyms and to order the parties not to disclose the identity of student witnesses or students named and involved with the proceedings outside of the hearing. The purpose of this Order is to protect the safety and security of students, to protect them from intimidation, potential retaliation and inappropriate local and national exposure that would be a risk to such students and to insure that a fair and complete hearing can be held for Mr. Freshwater, all as is more fully set forth in the Brief in Support of this Motion, attached hereto and incorporated by reference herein.



Respectfully Submitted,



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Attorney for Mount Vernon City
School District

IN THE MATTER OF TERMINATION OF THE
EMPLOYMENT OF JOHN FRESHWATER

The Mount Vernon City School)	
District Board of Education,)	
)	
Employer)	
)	
and	)	R. Lee Shepherd, Esq.,
	)	Referee
John Freshwater,)	
)	
Teacher)	

**BRIEF IN SUPPORT OF MOTION OF TO HAVE STUDENT WITNESSES
AND FAMILY MEMBERS TESTIFY *IN CAMERA* AND TO PROTECT
THEIR IDENTITY**

For the reasons set forth in the Board of Education’s motion, the Board respectfully requests the testimony of student witnesses and their families be done *in camera* and that the Referee require pseudonyms be used for students to protect their identities and that all parties and their counsel be ordered not to disclose the names of student witnesses and their families. The Referee has already denied a request for a closed hearing and granting this motion does not interfere with the teacher’s right to public hearing, but will protect the students’ rights of privacy as recognized through the Family Education Rights and Privacy Act and Ohio’s Student Records Privacy Act and protect the students against intimidation, retaliation and threats.

The United States Supreme Court has held that due process is a fluid concept and its requirements at any given proceeding depend on the applicable circumstances and facts. *Mathews v. Eldridge* (1976), 424 U.S. 319, 334 (“due process is flexible and calls for such procedural protections as the particular situation demands”), quoting *Morrissey v Brewer*

(1972), 408 U.S. 471, 481; *see also Ohio v. Hochhausler* (1996), 76 Ohio St. 3d. 455, 459. In the context of employee termination hearings, the Ohio Supreme Court has held that in certain cases employees do not have an absolute right to confront witnesses face-to-face at a post-termination hearing. *Ohio Assoc. of Public Sch. Employees, AFSCME AFL-CIO v. Lakewood City Sch. Dist. Bd. of Educ.* (1994), 68 Ohio St. 3d. 175, ¶ 2 of the syllabus. In *Lakewood*, the Court upheld an arbitrator's use of a closed-circuit television which allowed a student witness, who had leveled drug dealing accusations against a public school employee, to testify live in another room in order to separate her from the accused. *Id.* at 180. The arbitrator allowed such action because the student witness feared the employee, in part because he had contacted her earlier and told her to deny that he had helped her obtain drugs. *Id.*

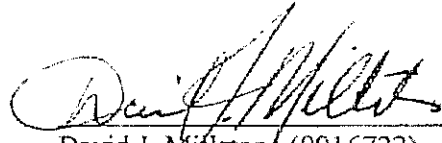
The Ohio Supreme Court held this procedure satisfied due process, providing that “[t]he purpose of due process is to protect substantial rights. *It does not mandate particular procedures in every case.* The controlling question in this case is whether the arbitrator appropriately balanced the conflicting interests involved without depriving appellee of a meaningful opportunity to challenge adverse evidence. Because we hold that he did, we reverse the judgment of the court of appeals.” *Id.* (emphasis added).¹

Here there are interests of young students that need to be protected. The Board is not requesting that former students who are no longer in the schools be included in this protection. Both the United States and the State of Ohio have as part of public policy the need to protect students and keep student records from being part of the public domain. See, 20 U.S.C.A.

¹ The Ohio Supreme Court further noted that because the *Lakewood* case involved a *post*-termination hearing, the employee must be provided “a more thorough opportunity to present their evidence and to challenge adverse evidence than is promised at a pre-termination hearing.” *Lakewood* at 178. Here, there is no risk of substantial deprivation of Mr. Freshwater's rights by holding a portion of the hearing in closed session. Moreover, should Mr. Freshwater disagree with any portion of this Hearing Officer's decision, he will be afforded an opportunity to appeal the adverse decision to court and have access to another public forum.

§1232g; and O.R.C. §3319.321. While student testimony is not a “record” as contemplated by those statutes, the public policy behind the protection of students is evident in those statutes. By permitting the students and their family members to testify *in camera* and by issuing a protective order so their identities cannot be disclosed, Mr. Freshwater’s due process rights and public hearing rights are not diminished one iota.

Respectfully submitted,

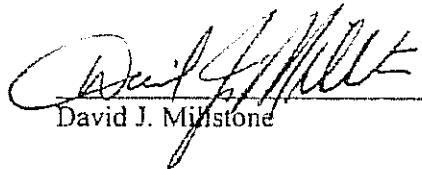


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CERTIFICATE OF SERVICE

A copy of the foregoing Motion and Brief in Support was sent by facsimile and first class mail to R. Kelly Hamilton, The Law Office of R. Kelly Hamilton LLC, P. O. Box 824, Grove City, Ohio 43123, this 17th day of September, 2008.



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Westlaw

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio, Eastern Division.
BB & T INSURANCE SERVICES, INC., Plaintiff,
v.
OHIO DEPARTMENT OF INSURANCE, et al.
Defendants.
No. Civ.A. 2:06-CV-09.

Feb. 9, 2006.

John Ryan Gall, Philomena M. Dane, Squire Sanders & Dempsey, Columbus, OH, Emily Elizabeth Root, Squire Sanders & Dempsey, Worthington, OH, for Plaintiff.

William Scott Myers, Kevin Michael McIver, Lawrence Dwight Pratt, Melissa Ann Warheit, Columbus, OH, for Defendants.

ORDER

FROST, J.

*1 Defendants Ohio Department of Insurance ("ODI" or "Department") and Ann Womer Benjamin [FN1] ("Benjamin"), ODI's Superintendent of Insurance, move to dismiss Plaintiff BB & T Insurance Services, Inc.'s ("BB & T") Complaint pursuant to Fed. Rs. Civ. P. 12(b)(1) & 12(b)(6). (Doc. # 8). After reading the parties' briefs (Docs. # 8, 9, 10), the Court is convinced that it should abstain from exercising jurisdiction in this matter under Younger v. Harris, 401 U.S. 37 (1971). Accordingly, the Court GRANTS the Defendants' motion to dismiss. (Doc. # 8).

[FN1] BB & T sues Benjamin in her official capacity only. (Doc. # 1).

BACKGROUND

BB & T, a North Carolina corporation, engages in the sale of title insurance. (Doc. # 1 ¶ 7). Ohio Revised Code § 3901.01 establishes that ODI "shall have all powers and perform all duties formerly vested in and imposed upon the department of commerce and the superintendent of insurance."

Benjamin, as ODI's Superintendent, is the chief executive officer and director of the Department and retains "all the powers [to] perform all the duties vested in and imposed upon the department of insurance." R.C. § 3901.011.

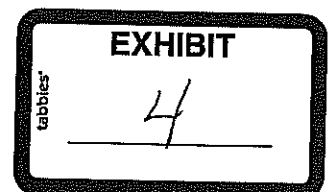
On June 3, 2004, BB & T submitted an application to ODI for a license to operate in Ohio as a non-resident title insurance agent. (Doc. # 1 ¶ 11). BB & T's application was based on Ohio Revised Code § 3905.07, which provides:

The superintendent of insurance shall issue a nonresident insurance agent license to an applicant that is a nonresident person if the superintendent finds all of the following:

- (1) The applicant is currently licensed as a resident and is in good standing in the applicant's home state.
- (2) The applicant has submitted the request for licensure prescribed by the superintendent.
- (3) The applicant has submitted or has had transmitted to the superintendent the application for licensure that the applicant submitted to the applicant's home state or a completed uniform application or uniform business entity application, as applicable.
- (4) The applicant has not committed any act that is a ground for the denial, suspension, or revocation of a license under section 3905.14 of the Revised Code.
- (5) The applicant is of good reputation and character, is honest and trustworthy, and is otherwise suitable to be licensed.
- (6) The applicant's home state issues nonresident insurance agent licenses to residents of this state on the same basis as set forth in division (A) of this section.

BB & T attached several documents to its application indicating that it satisfied the statute's requirements. (Doc. # 1 Ex. 2). Thereafter, the parties engaged in extensive discussions about BB & T's application. (Doc. # 1 Exs. 5, 6). [FN2]

[FN2] " 'In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case,



and exhibits attached to the complaint, also may be taken into account." ' *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (6th Cir.1997) (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed.1990)).

On December 9, 2005, ODI sent BB & T a "Notice of Opportunity for Hearing" ("Notice") indicating that Benjamin "intends to refuse to issue [BB & T] a nonresident business entity title insurance agent license." (Doc. # 1 Ex. 3) (emphasis added). The Notice indicated that the Department had conducted an investigation of BB & T and found that the corporation "is prohibited by the laws and/or regulations of this state from being licensed as a business entity title insurance agent." *Id.* Specifically, the Notice stated:

*2 BB & T ... is a subsidiary of Branch Banking and Trust Company, a state bank. Pursuant to section 3953.21(B) of the Revised Code, "No bank, trust company, bank and trust company, or other lending institution, mortgage service, brokerage, mortgage guaranty company, escrow company, real estate company or any subsidiaries thereof or any individuals so engaged shall be permitted to act as an agent for a title insurance company."

The Notice further informed BB & T of its right to a hearing pursuant to Ohio Rev.Code Chapter 119. *Id.*

BB & T filed its request for a hearing with ODI on January 6, 2006. That same day, BB & T filed the instant action. (Doc. # 1). In essence, BB & T's Complaint asserts that the Graham-Leach-Bliley Financial Modernization Act ("GLBA"), 15 U.S.C. § 6701 *et seq.*, preempts Ohio Rev.Code § 3953.21(B) pursuant to the Supremacy Clause of the United States Constitution. (Doc. # 1). BB & T seeks a declaration to that effect, as well as an injunction "to preclude Defendants from holding its administrative hearing ... and to preclude Defendants from applying Ohio Rev.Code § 3953.21(B) to deny BB & T a license to sell title insurance in Ohio." *Id.* at ¶¶ 60, 62.

Two motions are currently pending before the Court- BB & T's motion for a temporary restraining order and Defendants' motion to dismiss for lack of jurisdiction. (Docs.# # 5, 8). Jurisdiction, of course, is a threshold issue in every case. However, BB & T's motion for a temporary restraining order presents

time constraints. (Doc. # 6). Accordingly, the Court has established an expedited briefing schedule on the jurisdictional issue. Because the Court holds below that it should abstain from exercising jurisdiction in this matter, the Court will not address BB & T's motion for a temporary restraining order and injunctive relief. (Doc. # 5).

DISCUSSION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § § 1331, 1332, and 1343. Defendants assert multiple grounds in support of their motion to dismiss. (Doc. # 8). Because the Court concludes that Defendants' reliance on *Younger* is dispositive, the Court need not address Defendants' alternative grounds for dismissal. [FN3]

[FN3] *Younger* is at issue here because plaintiff seeks injunctive relief. *Younger*, 401 U.S. at 41-44; Doc. # 1.

In *Younger*, the United States Supreme Court held that absent unusual circumstances, federal courts could not interfere with a pending state criminal proceeding. *Younger*, 401 U.S. at 37. The Court later expanded that holding to include civil administrative matters. *Ohio Civil Rights Commission, et al., v. Dayton Christian Schools, Inc., et al.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986); *Middlesex County v. Garden State Bar Assoc.*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982).

Abstention is designed to promote "federal-state comity, [and] is required when to render a decision would disrupt the establishment of coherent state policy." *Akenbrandt v. Richards*, 504 U.S. 689, 704-05, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). The exercise of abstention is the exception, not the rule. Abstention should rarely be invoked because federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). However, "[w]here vital state interests are involved, a federal court should abstain unless state law clearly bars the interposition of the constitutional claims." *Middlesex County*, 457 U.S. at 432; *Moore v. Sims*, 442 U.S. 415, 425-426, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979).

*3 Generally, abstention is appropriate under

Younger if: 1) state judicial proceedings are ongoing; 2) the state proceedings implicate important state interests; and 3) the state proceedings afford an adequate opportunity to raise federal questions. [FN4] Middlesex, 457 U.S. at 432.

[FN4]. The mere presence of the preemption issue does not modify the classic *Younger* analysis because state courts have concurrent jurisdiction to decide the preemption question. CSXT, Inc. v. Pitz, 883 F.2d 468, 471 (6th Cir.1989) cert. denied, 494 U.S. 1030, 110 S.Ct. 1480, 108 L.Ed.2d 616 (1990). "State Courts are as capable as federal courts of deciding preemption claims." Dyck v. McReynolds, No. 90-5581, 1991 U.S.App. LEXIS 4167, at *6 (6th Cir. Mar. 7, 1991) (citing CSXT, 883 F.2d at 473).

A. THE ONGOING STATE PROCEEDINGS ARE JUDICIAL IN NATURE

Plaintiff asserts that *Younger* is inapplicable because the state proceeding highlighted here is not "judicial" in nature, but is rather executive and legislative in nature. (Doc. # 9 at 7-11). In so arguing, Plaintiff neglects to inform the Court as to *how* or *why* the state administrative proceeding is either legislative or executive in nature, and the Court will not form Plaintiff's argument for it. [FN5] Defendants counter that the state proceeding is, in fact, judicial in nature. (Doc. # 8 at 7-11; Doc. # 10 at 5-8).

[FN5]. Plaintiff apparently relies upon Women's Medical Professional Corp. v. Baird, No. C2-03-162, 2003 U.S. Dist. LEXIS 15873 at *9-10 (S.D. Ohio 2003), for the proposition that the state administrative licensing proceeding at issue here is "an exercise of the state's executive power." (Doc. # 9 at 8). However, that citation refers to a portion of the opinion that dealt only with Defendant's order to stop operating an abortion clinic--the citation does not pertain to a licensing application. *Id.* ("Plaintiffs ask the Court to enjoin Defendant's order to stop operating an abortion clinic. Not only is there no pending state proceeding regarding this order, Defendant's issuance of this order was an executive action, not a judicial

proceeding"). As such, Plaintiff's citation to *Baird* fails to aid its cause.

The Supreme Court requires federal courts to abstain from interfering in pending state administrative proceedings that are "judicial in nature." New Orleans Public Service, Inc. v. City of New Orleans, 491 U.S. 350, 370, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). When determining whether an administrative proceeding is judicial in nature for purposes of *Younger* abstention, a court must examine the "nature of the final act." *Id.* at 371. According to the Supreme Court, a judicial inquiry "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Id.* at 370.

There can be no question that the administrative proceeding at issue here is judicial in nature. This case involves an application for a license. Once the application and supporting materials have been submitted to the Department, the Department, on behalf of the Superintendent, investigates the application. (Doc. # 1 Ex. 1). Specifically, the Department looks into past and present facts to determine whether the applicant should receive the desired license under Ohio's existing laws. *See id.*

In this instance, the Department concluded its investigation and *alleged* that "BB & T is prohibited by the laws and/or regulations of this state from being licensed as a business entity title insurance agent." (Doc. # 1 Ex. 1) (Emphasis added). The Department notified BB & T that it had a right to request a hearing under Chapter 119 of the Ohio Revised Code, and further stated:

At the hearing, BB & T may appear in person, by its attorney, or by such other representative as is permitted to practice before the agency, or it may present its position, arguments or contentions in writing and, at the hearing, it may present evidence and examine witnesses appearing for and against it. *Id.*

BB & T did request a hearing and it is currently scheduled for April 25, 2006. (Doc. # 9 at 7). Pursuant to O.R.C. § 119.09, a licensed attorney will be appointed to serve as a hearing examiner at that hearing. The hearing examiner will conduct the hearing, at which time each side may present its arguments and evidence. After the hearing, the

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hearing examiner will examine the record and prepare a Report and Recommendation ("R & R") detailing the examiner's recommendation to the Superintendent. Parties have the option of filing objections to the R & R. The Superintendent is then required to review the entire record, including the R & R and any objections thereto, before issuing an adjudication order addressing the disposition of the license application.

*4 It is hard to imagine a proceeding that could be more judicial in nature than the procedure described above. The Department reviews the application, makes a preliminary determination about whether past and present facts support granting the application under existing laws, and affords the applicant an opportunity to present evidence and witnesses at a hearing. Should the applicant exercise its right to a hearing, the parties may file objections to the hearing examiner's R & R. Moreover, the Superintendent is required to consider the entire record before rendering her decision on the license application. During this entire process, the Department operates under laws that already exist and does not create new rules. Because the Department investigates past and present facts and applies its finding to laws already existing, the Court concludes that the state administrative proceeding being examined here is judicial in nature. See Sun Refining & Marketing Co. v. Bremian, 921 F.2d 635, 640 (6th Cir.1990); see also Citizens for a Strong Ohio, et al. v. Marsh, et al., 123 Fed. Appx. 630, 634 (6th Cir.2005) (concluding that proceedings before the Ohio Elections Commission ("OEC") were judicial in nature because "OEC hearings are initiated by a complaint, parties may present and cross-examine evidence, and a decision or opinion is issued, often with an explanation. Furthermore, unsuccessful parties may appeal the OEC's decision in the Franklin County Court of Common Pleas, and if unsuccessful there, may seek further review in Ohio appellate courts." Plaintiff in the case *sub judice* have the same appeal rights under O.R.C. § 119.12).

The second prong of *Younger's* first requirement is also satisfied here. That is, the state administrative proceeding is ongoing. In Zalman v. Armstrong, 802 F.2d 199, 204 (6th Cir.1986), the Sixth Circuit stated that the "proper time of reference for determining the applicability of *Younger* abstention is the time that the federal complaint is filed." Under this rule, if a

state proceeding is pending at the time the action is filed in federal court, the second aspect of the first criteria for *Younger* abstention is satisfied.

As previously noted, the Department sent BB & T a Notice of Opportunity for hearing on December 9, 2005. (Doc. # 1 Ex. 3). Thus, the state proceeding commenced on that day. State ex rel. Ohio Dep't of Health v. Sowald, et al., 65 Ohio St.3d 338, 603 N.E.2d 1017, 1020 (Ohio 1992). This case was filed on January 6, 2006. (Doc. # 1). Consequently, the Court concludes that the state proceeding was ongoing at the time the instant action commenced.

In addition, BB & T requested a hearing pursuant to O.R.C. § 119.12 on January 6, 2006, and that hearing is currently scheduled for April 25, 2006. (Doc. # 9 at 7). The state administrative proceeding is therefore pending. In fact, BB & T fails to argue with any enthusiasm that the administrative action is not ongoing as of the time of this action because BB & T seeks an injunction to stop that hearing. (Doc. # 1 ¶ 62). The Court therefore holds that the administrative proceeding is currently pending.

B. THE STATE ADMINISTRATIVE PROCEEDINGS INVOLVE IMPORTANT STATE INTERESTS.

*5 The state administrative proceeding pertains to licensing title insurance. (Doc. # 1 Ex. 2). The Sixth Circuit has held that the regulation of insurance is "clearly" an important state interest. Dyck, 1991 U.S.App. LEXIS 4167 at *7; see also Blue Cross & Blue Shield v. Baerwaldt, 726 F.2d 296, 299 (6th Cir.1984) (holding that the "regulation of insurance companies clearly involves important state interests"); see also 15 U.S.C. § 1012(a) (2005) (stating "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business").

C. THE STATE PROCEEDINGS OFFER AN ADEQUATE OPPORTUNITY TO RAISE FEDERAL QUESTIONS.

Plaintiff asserts that the state proceedings are inadequate because it cannot raise constitutional issues at the Department's hearing. (Doc. # 9 at 12). Despite Plaintiff's argument, the Court joins the

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United States Supreme Court in concluding that the state proceedings afford Plaintiff an adequate opportunity to raise federal questions.

It is true that Plaintiff is unable to raise constitutional issues before the Department. However, the Supreme Court held in *Dayton Christian Schools* that the mere fact that the state agency cannot consider constitutional claims does not prevent the application of the *Younger* abstention doctrine as long as the constitutional claims could be presented on review in state court. *Dayton Christian Schools*, 477 U.S. at 629; *Middlesex*, 457 U.S. at 436; see *Watts v. Burkhardt*, 854 F.2d 839, 847-848 (6th Cir.1988).

Ohio's statutory scheme provides for such a review. Should the Superintendent ultimately decide to deny BB & T's application, Ohio Revised Code § 119.12 allows Plaintiff to file an appeal in the Franklin County Court of Common Pleas. [FN6] Constitutional issues may be raised at that juncture. Should BB & T's efforts prove unsuccessful there, it may seek further review in Ohio appellate courts. As such, the Court holds that the state proceedings afford Plaintiff an adequate opportunity to raise federal questions under *Dayton Christian Schools* and *Middlesex*.

FN6. Ohio Rev.Code § 119.12 provides in pertinent part:

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 [4301.25.2] of the Revised Code, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, except that appeals from decisions of the liquor control commission, the state medical board, state chiropractic board, and board of nursing shall be to the court of common pleas of Franklin county. If any such party is not a resident of and has no place of business in this state, the party may appeal to the court of common pleas of

Franklin county.

D. NO EXCEPTIONS APPLY TO PROHIBIT THE APPLICATION OF THE *YOUNGER* DOCTRINE.

Having determined that each of the *Younger* requirements is satisfied, the Court turns next to the issue of whether any exceptions to the doctrine should apply to prevent the Court from abstaining under the doctrine. The three exceptional circumstances under which *Younger* becomes inapplicable include whether the state proceeding is pursued with an intent to harass, is conducted in bad faith, or where the challenged state statute or authority is flagrantly and patently unconstitutional. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603- 613, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

Plaintiff fails to argue that any exceptions are present here. (Doc. # 9). In addition, the record is devoid of evidence of harassment and bad faith by ODI and the Superintendent. Moreover, Ohio Rev.Code § 3953.21(B) does not appear to be flagrantly and patently unconstitutional. Therefore, the Court shall abstain from exercising jurisdiction over this matter pursuant to the *Younger* abstention doctrine.

CONCLUSION

*6 Defendants' motion to dismiss is GRANTED. (Doc. # 8). The Court will not address Plaintiff's motion for a temporary restraining order. (Doc. # 5). This case is DISMISSED and the Clerk shall terminate the case upon the docket records of the United States District Court for the Southern District of Ohio, Eastern Division at Columbus.

IT IS SO ORDERED.

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