

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

STATE OF TEXAS, et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:16-cv-00054-O
	§	
UNITED STATES OF AMERICA, et al.	§	
	§	
Defendants.	§	

PLAINTIFFS’ NOTICE OF PENDING LITIGATION

In accordance with the Court’s orders (ECF No. 58 at 37; ECF No. 62), and in response to Defendants’ Notice of Pending Litigation (ECF No. 61), Plaintiffs file this notice to address cases and matters impacted by the Court’s injunction (hereinafter “the injunction”). Defendants listed seventeen pending cases (ECF No. 61), each of which they contend fall outside the scope of the injunction. Plaintiffs agree in part, and disagree in part, with Defendants, and also bring to the Court’s attention additional matters and considerations.

As Plaintiffs read the injunction, there are four general categories of consideration that impact whether matters fall within its scope.

(1) “This subject”

The first filter or parameter of the injunction pertains to whether litigation or disputes involve “this subject.” ECF No. 58 at 37. Plaintiffs aver that “this subject” refers precisely to whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities. Plaintiffs address whether certain matters

involve “this subject” on a case-by-case basis, *infra*.

(2) Whether Defendants are involved

The injunction extends to Defendants and, thus, does not generally extend to litigation involving private parties. *See* n.2, *infra*. However, Plaintiffs contend that the injunction generally precludes Defendants from involving themselves in private party litigation in any capacity, including participation as *amicus curiae* or the filing of a Statement of Interest. Plaintiffs address this argument more thoroughly, *infra*.

(3) Whether Plaintiffs or their schools are involved

As the Court made clear, the injunction applies to “Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions.” (ECF No. 58 at 37). This category of application does not appear to be temporally limited. In other words, while the Court concerns itself with when certain litigation was initiated in other matters, Plaintiffs read the injunction to apply fully to cases involving “Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions,” irrespective of when the litigation commenced.

The following cases involve “Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions,” or surround disputes within the borders of Plaintiffs, to wit:

- *Broussard v. First Tower Loan, LLC*, No. 2:15-cv-1161 (E.D. La.) (filed Apr. 13, 2015)

In *Broussard*, Plaintiff, a female who identifies as male, alleged that Defendant terminated her in violation of Title VII. *Id.* (No. 2:15-cv-1161, ECF No. 1 ¶ 1). Plaintiff asserts that Defendant indicated that she could continue working at the company only if she agreed to be treated as a female. *Id.* (No. 2:15-cv-1161, ECF No. 1 ¶ 4).

Plaintiff further alleges that Defendant terminated her when she refused to agree to those conditions. *Id.* (No. 2:15-cv-1161, ECF No. 1 ¶ 4). EEOC intervened in the case and claims that Defendant violated Title VII based on the same facts that Plaintiff alleges. *Id.* (No. 2:15-cv-1161, ECF No. 71 ¶¶ 32–41). Because this dispute does not appear to involve “this subject,” the injunction does not appear to apply to this case.

- *U.S. Equal Employment Opportunity Comm’n v. Help at Home, Inc.*, No. 2:16-mc-1188 (N.D. Ala.) (filed July 20, 2016)

In *Help at Home*, EEOC is seeking to enforce a subpoena in connection with its investigation into Defendant’s termination of a male nursing assistant who identifies as female. *Id.* (No. 2:16-mc-1188, ECF No. 1-2; ECF No. 1-4). Defendant contends that substandard work performance was the sole cause of the firing, while the former employee asserts that he was let go for refusing to inform his patients that he identified as the opposite sex. *Id.* (No. 2:16-mc-1188, ECF No. 1-4; ECF No. 3). The district court has not ruled on the subpoena. Because this dispute does appear to not involve “this subject,” the injunction does not appear to apply to this case.

- *United States v. Southeastern Okla. State Univ.*, No. 5:15-cv-324 (W.D. Okla.) (filed Mar. 30, 2015)

Plaintiffs disagree, in part, with Defendants’ assessment that the injunction does not affect this case—a case with allegations brought by both DOJ and a private party. While the injunction impacts DOJ’s ability to continue the case in the W.D. Okla., it does not preclude the private party from continuing in their claim.

Because Oklahoma is a Plaintiff in the case *sub judice*, the case in W.D. Okla. clearly involves “Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions.” ECF No. 58 at 37. And because “this subject” appears to be at the forefront, the injunction applies to the case in W.D. Okla.

even though it was filed in 2015.

The case was brought by DOJ against a public university in Oklahoma for allegedly failing to promote a professor for identifying as the opposite sex. No. 5:15-cv-324, ECF No. 1. And while DOJ's complaint doesn't make "this subject" a feature of the litigation, the employee at issue, Professor Rachel Tudor, filed a complaint in intervention and alleged that the university improperly denied Dr. Tudor access to restrooms designated for the opposite sex. *Id.* (No. 5:15-cv-324, ECF No. 24 at ¶¶ 43–63). Since that time, DOJ has deposed no less than thirteen current and former university employees about "this subject."¹ The following are examples DOJ's foray into "this subject":

- During the deposition of the former Associate Vice President for Academic Affairs, DOJ asked: "Were any of those conversations regarding the restroom that Dr. Tudor was using?" "Did you have any conversations at any point with anybody at Southeastern about which restroom Dr. Tudor had been using?" "Did you personally have an opinion about which restroom Dr. Tudor should use after her transition to female?" Clark Deposition, attached hereto as Exhibit 1, p. 89, ln. 18–19, p. 89, ln. 22–24, p. 90, ln. 24 – p. 91, ln. 1.
- Deposing former professor and Assistant Vice President, DOJ asked: "Did you ever speak with anybody about the issue of what restroom Dr. Tudor would use after her gender transition?" "Do you remember what these female professors were concerned about with respect to Dr. Tudor using the women's restroom?" "Were you involved in a discussion with somebody about asking Dr. Tudor to use the unisex restroom?" Weiner Deposition, attached hereto as Exhibit 2, p. 39, ln. 2–4, p. 40, ln. 2–4, p. 42, ln. 3–5.
- In questioning the former Vice President for Academic Affairs, DOJ asked: "Did you talk to Ms. Conway about Dr. Tudor's use of rest rooms?" "Do you know whether Dr. Tudor ever used the woman's rest room at Southeastern?" "Did someone express a concern that some people might be uncomfortable using the rest room with Dr. Tudor?" "Was there ever a discussion of Dr. Tudor after her gender transition using the men's rest room?" "Do you think transgender people should be able to use the rest rooms consistent with the gender they identify with?" McMillan Deposition, attached hereto as Exhibit 3, p. 54, ln. 1–2, p. 62, ln. 19–20, p. 63, ln. 9–11, p. 65, ln. 15–16, p. 66, ln. 4–6.

¹ Rule 15(b) of the Federal Rules of Civil Procedure ("FRCP") permits that issues not pled can nonetheless be tried by consent. This can occur particularly when "parties actually recognize the issue to have been litigated." *Trinity Carton Co. v. Falstaff Brewing Corp.*, 767 F.2d 184, 192 (5th Cir. 1985).

- Deposing the former HR Director, DOJ asked: “Do you know what restroom Dr. Tudor used after this June 1st conversation that you had with her?” “Why was the fact that Dr. Tudor was preoperative relevant to the conversation about restroom facilities?” “Was there anyone else other than you, that you know of, who was concerned that female students and female employees who knew Dr. Tudor as a male may be uncomfortable with or threatened by male preoperative Dr. Tudor in the female restroom while presenting as female?” Conway Deposition, attached hereto as Exhibit 4, p. 56, ln. 21–23, p. 91, ln. 2–4, p. 94, ln. 2–7.
- During the deposition of the former Director of the Office of Diversity, DOJ asked: “Have you ever spoken to anybody about the issue of what restroom Dr. Tudor used after she started presenting as a woman at work?” “So had Ms. Conway, at that point, made a decision about what she thought was appropriate with respect to Dr. Tudor’s restroom use when you had this conversation with her?” “I think you referred to the – the restroom issue as one of the biggest issues in dealing with the gender transition. Did Ms. Conway explain why? Stubblefield Deposition, attached hereto as Exhibit 5, p. 86, ln. 21–23, p. 88, ln. 13–16, p. 92 ln. 8–10.

Under the injunction, Defendants are prohibited from action regarding “this subject” in Oklahoma, a Plaintiff State, and “their respective schools, school boards, and other public, educationally-based institutions.” Accordingly, Defendants must cease requesting information through interrogatories, deposition testimony, or any other means. Further, they should cease seeking relief in the Oklahoma case based on “this subject” as long as the injunction remains in place.

At the same time, however, the injunction does not prevent Professor Tudor’s case and claims from moving forward. While the injunction restrains the Defendants, it will generally not apply to private parties.² Dr. Tudor moved to intervene as of right under FRCP 24(a), and the Court granted the motion. No. 5:15-cv-324, ECF No. 7; ECF No. 23. This procedural avenue was open to Dr. Tudor because Title VII provides a statutory right to intervene to aggrieved parties. 42 U.S.C. § 2000e5(f)(1). Dr. Tudor, who is named throughout the main complaint, meets that definition. No. 5:15-

² Injunctive relief will generally extend to those that are in privity with (or controlled by) those enjoined. *See, e.g., Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981) (quoting *In Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1944)) (citations omitted).

cv-324, ECF No. 1. Dr. Tudor asserts several claims that are not part of DOJ's complaint, including the specific allegation that the university improperly restricted access to intimate areas. No. 5:15-cv-324, ECF No. 24 at ¶¶ 43–63. In addition to granting the intervention, the W.D. Okla. also joined Dr. Tudor's claims to the case. (No. 5:15-cv-324, ECF No. 23). Thus, there are no jurisdictional or other hurdles preventing Dr. Tudor from proceeding against the university.

- *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 2:16-cv-00943 (E.D. Wisc.) (filed July 19, 2016)

This case is pending in a Plaintiff State, Wisconsin. In *Whitaker*, a female student, who identifies as male, alleged that school officials discriminated against her by, among other things, denying her access to the intimate areas designated for boys. *Whitaker*, ECF No. 12 ¶¶ 27–68. However, while *Whitaker* generally involves “this subject,” Defendants are not parties. For that reason, the injunction does not necessarily extend to *Whitaker*.

However, in that *Whitaker* involves a dispute between a student and a school district, it is postured like the Fourth Circuit case arising out of Gloucester County, VA. In that litigation, DOJ filed a Statement of Interest and argued that the school board's policy of designating restrooms on the basis of sex violates Title IX. *G.G. v. Gloucester Cnty. Sch. Bd.*, 4:15-cv-00054-RGD-DEM (E.D. Va.) (ECF No. 28). Therefore, while the injunction does not prevent the current parties in *Whitaker* from moving forward, it should preclude Defendants' prospective participation, via a Statement of Interest, brief as *amicus curiae*, or other involvement, either before the district court of the Seventh Circuit Court of Appeals.

- *U.S. Dep't of Educ. v. Sumner Cnty. Sch. Dist., Tenn.*, Complaint # 04-16-1526 (filed June 15, 2016)

As the Court may recall, after the briefing and argument on Plaintiffs' motion

for preliminary injunction was completed, but before this Court's ruling was issued, Plaintiffs received notice of a new investigation by DOE into a public school in Sumner County, Tennessee (one of the Plaintiff States).³ This investigation is squarely within the portion of the injunction precluding the Defendants from commencing new investigations, or pursuing ongoing ones, on the matter of access to intimate areas in public educational facilities.

As in many of the cases/investigations already documented by Plaintiffs, ECF No. 52 at 2–8, the investigation represented by the proposed Exhibit W was triggered by a claim that a school prohibited a student from accessing an intimate area belonging to the opposite sex. ECF No. 57-1 at 10. Accordingly, DOE demanded that the Sumner County School District turn over, *inter alia*, copies of all correspondence regarding “the Student’s access to bathrooms and locker rooms” and “[a]ll complaints . . . regarding the Student using the girls’ bathroom or locker room.” *Id.* at 12.

Through counsel, the Sumner County School Board informed DOE that it will not produce any information or otherwise cooperate with the investigation as long as the injunction remains in place, and that the Board considers the investigation closed in light of the injunction. *See* Exhibit 6, attached hereto. Indeed, the Sumner County investigation is squarely within the scope of the Court’s order. Thus, the Sumner County investigation should cease immediately, and Defendants should desist from continuing or commencing any similar efforts.

³ Plaintiffs promptly moved the Court for leave to file a new exhibit pertaining to the investigation. ECF No. 57. The proposed Exhibit W (ECF No. 57-1) details a new investigation by Defendants that, Plaintiffs aver, is now enjoined by the Court’s order. Although Plaintiffs reference this proposed exhibit herein, Plaintiffs note that their motion to admit Exhibit W to the evidentiary record supporting their motion for preliminary injunction remains pending and respectfully renew our request that the Court admit Exhibit W to the record.

(4) “Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order.”

This restriction speaks for itself and applies to the entirety of Defendants’ “Guidelines” notwithstanding the circumstances presented in any given litigation, or whether that litigation involves “this subject.” Under the APA, successful challenges impact the *entirety* of an agency initiative. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890 n.2 (1990).

(A) Cases within the injunction

- *Privacy Matters v. United States*, No. 16-cv-03015 (D. Minn.) (filed Sept. 7, 2016).

The Plaintiffs in *Privacy Matters* assert that Defendants exceeded their authority by promulgating a new rule that forces them to share intimate areas in public schools with the opposite sex in violation of fundamental dignity and personal privacy rights. *Id.* (No. 16-cv-03015, ECF No. 1). As the suit was filed after the injunction, Defendants “are enjoined from using the Guidelines or asserting the Guidelines carry any weight” in *Privacy Matters*. ECF No. 58 at 37.

- *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb.) (filed July 8, 2016).

Though this case was instituted on July 8, 2016, it appears that the Court’s overriding concern regarding when litigation was initiated was so that the injunction “should not unnecessarily interfere with litigation currently pending before other federal courts on this subject” ECF No. 58 at 37. Whether the injunction will “unnecessarily interfere” with other litigation, Plaintiffs respectfully suggest, should not turn on when a case was filed, but the depth and stage of the litigation at issue.

The lawsuit in D. Neb., brought by multiple States, is nearly substantively identical to this matter. As here, the Plaintiff States in D. Neb. claim that Defendants’ “Guidelines” violated the APA’s “notice and comment” requirement and prohibition

against agency action in excess of statutory authority. *Id.* (No 4:16-cv-3117, ECF. No. 1 at ¶¶ 62–92). They base these claims on an understanding of the controlling federal laws and regulations—and the reasons why the new obligations imposed by Defendants are invalid under them—which is identical to that which the Plaintiffs set forth in this case. *Id.* (No 4:16-cv-3117, ECF. No. 1 at ¶¶ 23–47).⁴

More importantly, nothing has happened on the case in D. Neb. since its filing. Because the Plaintiffs in D. Neb. have not moved for injunctive relief, and no responsive pleading has been filed, extending the injunction to that litigation will not unnecessarily interfere with those proceedings, or otherwise harm the Plaintiffs in those proceedings from seeking relief. Rather, since the Plaintiffs in D. Neb. seek the same result as the Plaintiffs herein, principles of judicial economy suggest that enjoining Defendants as to that case is proper.

- *U.S. Equal Employment Opportunity Commission v. Bojangles Restaurants, Inc.*, No. 5:16-cv-654 (E.D.N.C.) (filed July 6, 2016)

This case, filed shortly before the injunction, is in nearly the same posture as D. Neb.—nothing happened until after the injunction. On Sept. 6, 2016, Bojangles filed an answer in response to Defendant’s lawsuit. Thus, enjoining Defendants as to these cases will not unnecessarily interfere with that litigation.

- *Women’s Liberation Front v. U.S. Department of Justice*, 1:16-cv-915 (D.N.M.) (filed Aug. 11, 2016)

This case, filed shortly before the injunction, is in the exact same posture as D. Neb.—nothing substantive has happened since the case was filed. Thus, enjoining Defendants as to this case will not unnecessarily interfere with that litigation.

⁴ Because of the nearly identical nature of the Nebraska lawsuit, and the relief sought by the Plaintiffs in that case, the complaint in that matter should functionally serve as a brief in support of Plaintiffs herein.

(B) Additional matters within the injunction

Since the institution of investigations, complaints, and litigation involving Titles VII and IX is virtually a daily occurrence, there are likely myriad cases that commenced at or around the time of the injunction. While matters instituted after the injunction certainly fall within the ambit of the injunction, Plaintiffs respectfully ask the Court to extend the injunction to matters instituted before the injunction but on which no responsive pleading has yet been filed. Where no responsive pleading exists, there can be no unnecessary interference, and justice should not be inhibited just because something has been filed, though no responsive pleadings have been filed, or substantive rulings issued.

(C) Known matters that may fall outside the injunction

The following matters, Plaintiffs aver, may fall outside of the injunction in light of when they were filed, the identity of the parties, what has happened in the case since the filing, and/or whether they involve “this subject.”

- *McCrorry v. United States*, 5:16-cv-238 (E.D.N.C.) (filed May 9, 2016)
- *North Carolinians for Privacy v. U.S. Department of Justice*, No. 1:16-cv-845 (M.D.N.C.) (filed May 10, 2016)
- *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C.) (filed May 9, 2016)
- *Carcaño v. McCrorry*, No. 1:16-cv-236 (M.D.N.C.) (filed Mar. 28, 2016)
- *Berger v. United States Dep’t of Justice*, No. 1:16-cv-844 (M.D.N.C.) (filed June 29, 2016)
- *Board of Education of the Highland Local School District v. U.S. Department of Education*, No. 2:16-cv-524 (S.D. Ohio) (filed June 10, 2016)
- *Doe v. Anoka-Hennepin School District No. 11*, No. 11-cv-1999 (D. Minn.) (filed July 21, 2011) (Intervenor-Complaint filed by DOJ on Mar. 6, 2012)

- *Students and Parents for Privacy v. U.S. Department of Education*, No. 1:16-cv-4945 (N.D. Ill.) (filed May 4, 2016)

These matters (a) all involve “this subject,” (b) all involve Defendants as parties, and (c) have all seen extensive substantive action since their filings, all of which were before the injunction.

- *Robinson v. Dignity Health*, No. 4:16-cv-3035 (N.D. Cal.) (filed June 6, 2016)

The pleadings in this matter (a) do *not* involve “this subject,” and (b) do *not* involve Defendants as parties. However, since Defendants filed their Notice of Pending Litigation in this matter (ECF No. 61), the Court in *Robinson* granted EEOC’s motion (dated Aug. 22, 2016) to file an *amicus curiae* brief. No. 4:16-cv-3035, ECF No. 48. Thus, Plaintiffs request that the Court’s treatment of this, and other like matters as to Defendants should be like *Whitaker, supra*—that the injunction does not prevent the current parties from moving forward, but it does preclude Defendants’ participation, via a Statement of Interest, brief as *amicus curiae*, or other participation as to “this subject.” Since EEOC’s motion to participate as *amicus curiae* was filed after the injunction, EEOC should be required to withdraw the motion.

- *U.S. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710 (E.D. Mich.) (filed Sept. 25, 2014)
- *U.S. Equal Employment Opportunity Commission v. Rent-A-Center East, Inc.*, No. 2:16-cv-2222 (C.D. Ill.) (filed July 18, 2016)

Defendants are parties in these matters. However, the pleadings do *not* involve “this subject.” Thus, Plaintiffs believe that the injunction does not prevent the current parties from moving forward, but it does preclude Defendants from raising, as new or litigated issues in these matters, “this subject.”

- *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich.) (filed Sept. 5, 2014)

Defendants are not parties to this matter. However, the center of the dispute in this case does involve “this subject.” Moreover, Defendants did file a Statement of Interest in this matter on Feb. 20, 2015, in the same way that they did in the Gloucester County, VA case. Like an *amicus curiae* brief, a Statement of Interest does not carry any binding effect, see *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 951 n.14 (5th Cir. 2011), or enduring right to participate in litigation. Rather, such a filing is tantamount to a one-time “suggestion.” *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 867 n.55 (5th Cir. 1975). Thus, while the injunction does not prevent the current parties in *Tooley* from moving forward, it should preclude Defendants’ future participation in the case, both before the district court and the Sixth Circuit Court of Appeals.

(5) The Gloucester County, VA case

- *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 4:15-cv-54 (E.D. Va.) (initially filed June 11, 2015), *rev’d on appeal*, 822 F.3d 709 (4th Cir. 2016), *stayed and mandate recalled pending disposition of petition for certiorari*, 136 S. Ct. 2442 (U.S. Aug. 3, 2016) (No. 16A52), *petition for cert. filed*, (U.S. Aug. 29, 2016) (No. 16-273).

With a petition for certiorari presently pending before the Supreme Court, this case is in somewhat of a unique status. As the Court may recall, Defendants participated in it by filing a Statement of Interest under 28 U.S.C § 517 when the case was in the district court. Defendants also filed a brief as *amicus curiae* before the Fourth Circuit. 2015 WL 6585237. While the injunction could be reasonably construed to preclude Defendants from further participation in this matter, Rule 37(4) of the Supreme Court Rules expressly contemplates the participation of the Solicitor General’s Office (part of DOJ) in any Supreme Court proceeding at the will

of the Solicitor General. Sup. Ct. R. 37(4) (“No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General . . .”). Thus, Plaintiffs do not contend that the injunction should operate to impede upon the Supreme Court’s perpetual invitation to the Solicitor General to participate in matters pending before it.

Respectfully submitted this the 9th day of September, 2016,

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CERTIFICATE OF SERVICE

I, Austin R. Nimocks, hereby certify that on this the 9th day of September, 2016, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Austin R. Nimocks
Austin R. Nimocks

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,) Case No:
) 5:15-CV-00324-C
RACHEL TUDOR,)
Plaintiff-Intervenor)
)
v.)
)
SOUTHEASTERN OKLAHOMA STATE)
UNIVERSITY, and)
THE REGIONAL UNIVERSITY SYSTEM)
OF OKLAHOMA,)
Defendants.)

ORAL DEPOSITION OF

BRYON K. CLARK

MAY 4, 2016

ORAL DEPOSITION OF BRYON K. CLARK, produced as a witness at the instance of the Plaintiff United States, and duly sworn, was taken in the above-styled and -numbered cause on the 4th day of May, 2016, from 8:30 a.m. to 5:01 p.m., before Cheryl K. Perlich, CSR in and for the State of Texas, reported by machine shorthand, at the Office of the United States Attorney, located at 600 East Taylor Street, Suite 2000, Sherman, Texas 75090 pursuant to the Federal Rules of Civil Procedure.

1 **Dr. Tudor was transitioning to female?**

2 A. Instead of a conversation, I'd like -- it would
3 be more that I was listening, not conversing back.

4 **Q. Did you have any other conversations with**
5 **anyone else about Dr. Tudor's transition?**

6 MR. JOSEPH: Object to the form.

7 A. Not that I recall specifically about that. I'm
8 sure there's -- but I don't remember a specific point in
9 time or anything or individuals.

10 **Q. But you believe you had additional**
11 **conversations at Southeastern about Dr. Tudor's**
12 **transition?**

13 A. I'm not sure I'd classify it as a
14 conversations. Again, more that individuals may have
15 been talking and maybe I was then injected, but I don't
16 specifically remember the details of any of those
17 conversations.

18 **Q. Were any of those conversations regarding the**
19 **restroom that Dr. Tudor was using?**

20 MR. JOSEPH: Object to the form.

21 A. I don't recall.

22 **Q. Did you have any conversations at any point**
23 **with anybody at Southeastern about which restroom**
24 **Dr. Tudor had been using?**

25 MR. JOSEPH: Object to the form.

1 A. I don't recall any specific details about that.

2 Q. Do you recall anything generally?

3 A. No, I don't.

4 Q. Did you ever hear that anybody at Southeastern
5 had expressed concern about Dr. Tudor's use of the
6 women's restroom?

7 A. No, I don't recall that.

8 Q. At any time, did you become aware of a change
9 in the first name that Dr. Tudor was using?

10 A. Rephrase it.

11 Q. At any point, did you become aware that
12 Dr. Tudor was using a different first name?

13 A. I don't have a recollection of -- I don't think
14 I had any interaction with Dr. Tudor before the
15 transition. I don't recall that at all so I couldn't
16 tell you what other name may have been used.

17 Q. To your knowledge, has anyone else at
18 Southeastern, and that includes students, faculty
19 members, administration, transitioned to female?

20 A. Not that I'm aware of, but I don't ask people.

21 Q. To your knowledge, has anyone else at
22 Southeastern transitioned to male?

23 A. I have no knowledge.

24 Q. Did you personally have an opinion about which
25 restroom Dr. Tudor should use after her transition to

1 **female?**

2 MR. JOSEPH: Object to the form.

3 A. No.

4 Q. To your knowledge, are there any other
5 transgender people at Southeastern?

6 A. Not to my knowledge.

7 Q. Are you familiar with the Faculty Senate's
8 Recognition Award for Teaching?

9 A. Yes.

10 Q. How often is that award given out?

11 A. I believe annually.

12 Q. Do you know how many of those awards are given
13 out each year?

14 A. I believe four awards are given for teaching,
15 one from each of the former schools.

16 Q. Were you ever responsible in any way for
17 determining who would receive those teaching awards?

18 A. As a member of the Faculty Senate, yes, I play
19 the role in voting for, but the ultimate determination
20 was determined by vote, not an individual.

21 Q. At the time that you participated in the
22 process, was it a vote of the entire Faculty Senate that
23 determined the recipients?

24 A. I don't recall.

25 Q. Does nomination for the Faculty Senate Award

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
et al.)
Plaintiff)
)
vs.) CASE NO. 5:15-CV-00324-C
)
SOUTHEASTERN OKLAHOMA)
STATE UNIVERSITY et al.)
Defendant)

ORAL DEPOSITION
DR. CHARLES WEINER
March 11, 2016

ORAL DEPOSITION OF DR. CHARLES WEINER, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 11th day of March, 2016, from 8:38 a.m. to 2:27 p.m., before Cheryl Duncan, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of U.S. Attorney's Office, 600 E. Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

EXHIBIT 2

1 A. No.

2 Q. Did you ever speak with anybody about the
3 issue of what restroom Dr. Tudor would use after her
4 gender transition?

5 A. Yes.

6 Q. Who is that?

7 A. I, I cannot recall.

8 Q. What was discussed?

9 A. That there were people -- there were female
10 professors who were concerned about her using the
11 female bathroom on the third floor.

12 Q. And when did you hear those -- about those
13 concerns?

14 A. I don't remember.

15 Q. Do you remember who raised those concerns?

16 A. No.

17 Q. Did these female professors work in the
18 same building as Dr. Tudor?

19 A. Yes.

20 Q. Do you remember what department they worked
21 in?

22 A. The department she was in.

23 Q. Do you remember if they were tenured
24 professors?

25 A. I don't remember.

1 (Brief interruption)

2 Q. Do you remember what these female
3 professors were concerned about with respect to
4 Dr. Tudor using the women's restroom?

5 A. They didn't -- they did not believe at the
6 time that she had made the conversion.

7 Q. By "conversion," do you mean sex
8 reassignment surgery?

9 A. Yes.

10 Q. And did you have an understanding of why
11 that was important to them?

12 A. Yes.

13 Q. Why was it?

14 A. Because they were concerned.

15 Q. Right. But do you have any understanding
16 of why they were concerned about using a restroom
17 with Dr. Tudor before she had had sex reassignment
18 surgery?

19 A. They thought she was still a man.

20 Q. Was anything done to address those
21 professors' concerns?

22 A. Yes.

23 Q. What was that?

24 A. To ask Dr. Tudor to use the bathroom on the
25 second floor, unisex bathroom on the second floor.

1 it?

2 A. I don't know.

3 Q. Were you involved in a discussion with
4 somebody about asking Dr. Tudor to use the unisex
5 restroom?

6 A. I'm sure I was.

7 Q. Do you remember who that conversation was
8 with?

9 A. It had to be with Cathy Conway, but I can't
10 remember specifically.

11 Q. Would that have been around the same time
12 that you learned about Dr. Tudor's name change?

13 A. A little bit later.

14 Q. Which was later, the conversation about the
15 restroom or the information about the name change?

16 MR. JOSEPH: Object to the form.

17 A. The conversation about the restroom.

18 Q. Was anybody else around when Cathy Conway
19 was talking to you about Dr. Tudor using the unisex
20 restroom?

21 A. No.

22 Q. Do you remember anything else about what
23 Cathy Conway told you regarding Dr. Tudor using the
24 unisex restroom?

25 A. Other than what's already -- what I already

EXHIBIT 3

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
RACHEL TUDOR,)	
)	
Plaintiff Intervenor,)	
)	
vs.)	No. 5:15-CV-00324-C
)	
SOUTHEASTERN OKLAHOMA STATE)	
UNIVERSITY, and)	
)	
THE REGIONAL UNIVERSITY)	
SYSTEM OF OKLAHOMA,)	
)	
Defendants.)	

DEPOSITION OF DOUGLAS MCMILLAN

TAKEN ON BEHALF OF THE PLAINTIFF

IN OKLAHOMA CITY, OKLAHOMA

ON AUGUST 10, 2016

REPORTED BY: ROSIE STANDRIDGE, CSR

Douglas McMillan

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09:46 1 Q. Did you talk to Ms. Conway about Dr. Tudor's
09:46 2 use of rest rooms?

09:46 3 A. Yes.

09:46 4 Q. And when was that?

09:46 5 A. It was at the time -- it may have been
09:47 6 during that conversation. I'm not sure.

09:47 7 Q. What was discussed about Dr. Tudor's use of
09:47 8 rest rooms?

09:47 9 A. Dr. -- I mean Ms. Conway asked me what rest
09:47 10 room Dr. Tudor should use.

09:47 11 Q. What did you tell her?

09:47 12 A. I didn't know why she was asking me that.

09:47 13 Q. Did you tell her that?

09:47 14 A. I said, why are you asking me that?

09:47 15 Q. Okay. And what did she say?

09:47 16 A. She said -- I don't even remember her
09:47 17 response to it, to be honest with you. I thought -- I
09:47 18 can tell -- well --

09:47 19 Q. Well, let me ask another question.

09:47 20 A. Okay.

09:47 21 Q. What did you think the reason was for her
09:47 22 asking you?

09:47 23 A. I thought that perhaps Dr. Tudor had a need
09:47 24 for privacy and may have issues with medical issues
09:48 25 related to the transition, that she might need a

Douglas McMillan

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09:56 1 Ms. Robinson about Dr. Tudor's gender transition?

09:56 2 A. I don't recall. All summer '07 is what --

09:57 3 Q. Yes.

09:57 4 A. -- you're asking?

09:57 5 Q. Yes.

09:57 6 A. Yeah, I don't recall.

09:57 7 Q. Did you have any conversations with
09:57 8 Dr. Snowden during that time period about Dr. Tudor's
09:57 9 gender transition?

09:57 10 A. I don't recall.

09:57 11 Q. Did you have any other conversations
09:57 12 involving Dr. Mangrum other than that one meeting you
09:57 13 referenced about Dr. Tudor's gender transition?

09:57 14 A. I don't recall.

09:57 15 Q. Did you have any conversations with
09:57 16 Dr. Mischo apart from that meeting that you mentioned
09:57 17 about Dr. Tudor's gender transition?

09:57 18 A. I don't recall.

09:57 19 **Q. Do you know whether Dr. Tudor ever used the**
09:57 20 **woman's rest room at Southeastern?**

09:57 21 A. I do not.

09:57 22 Q. Did you ever hear about anyone having any
09:57 23 concerns that people would be uncomfortable using the
09:57 24 women's rest room while Dr. Tudor was in there?

09:57 25 A. I did not. Can I ask for a clarification of

Douglas McMillan

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09:58 1 that last question?

09:58 2 Q. Sure. What do you need to clarify?

09:58 3 A. Are you asking me did someone express a
09:58 4 concern about that?

09:58 5 Q. That was -- that would have been responsive
09:58 6 to my question, yes. Did someone express a concern
09:58 7 about using the rest room with Dr. Tudor?

09:58 8 A. Not -- not that I remember.

09:58 9 Q. Did someone express a concern that some
09:58 10 people might be uncomfortable using the rest room with
09:58 11 Dr. Tudor?

09:58 12 A. I only remember one. No one on campus, no.

09:58 13 Q. What are you remembering?

09:58 14 A. The -- and I'm in a conversation with
09:58 15 Charlie Babb. I don't know if I can talk about that
09:58 16 or not, but --

09:58 17 Q. Well, go ahead.

09:58 18 A. Okay.

09:58 19 MR. JOSEPH: Wait. Just for clarification,
09:58 20 what's the question?

09:58 21 MR. TOWNSEND: The question was, did you
09:59 22 ever hear that people were concerned that some people
09:59 23 might be uncomfortable using the same rest room as
09:59 24 Dr. Tudor?

09:59 25 MR. JOSEPH: Okay. Thank you.

Douglas McMillan

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10:00 1 concern was valid?

10:00 2 A. No.

10:00 3 Q. Or words to that -- let me strike that.

10:00 4 A. I just --

10:00 5 Q. Did you --

10:00 6 A. -- listened.

10:00 7 MR. JOSEPH: Object to the form.

10:00 8 Q. (By Mr. Townsend) So did you say anything
10:00 9 that you remember on that conversation with Mr. Babb?

10:00 10 A. No.

10:00 11 Q. Did anybody other than Mr. Babb have a
10:00 12 concern that people might be uncomfortable using the
10:00 13 same rest room as Dr. Tudor?

10:00 14 A. Not that I recall.

10:00 15 Q. Was there ever a discussion of Dr. Tudor
10:00 16 after her gender transition using the men's rest room?

10:01 17 A. No, not that I recall.

10:01 18 Q. When you had that discussion with Mr. Babb
10:01 19 on the phone, how did that come about? Did he call
10:01 20 you, or did you call him?

10:01 21 A. I don't remember.

10:01 22 MR. JOSEPH: Object to the form.

10:01 23 Q. (By Mr. Townsend) Was there anything else
10:01 24 discussed on that call?

10:01 25 A. I don't remember.

Douglas McMillan

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10:01 1 Q. Was that call in the summer 2007 time
10:01 2 period?

10:01 3 A. I don't know.

10:01 4 Q. Do you think transgender people should be
10:01 5 able to use the rest rooms consistent with the gender
10:02 6 they identify with?

10:02 7 A. I don't have an opinion.

10:02 8 Q. Are you aware that that's an issue that has
10:02 9 received a lot of media attention?

10:02 10 A. I am now.

10:02 11 MR. JOSEPH: Object to the form.

10:02 12 Q. (By Mr. Townsend) What do you mean by you
10:02 13 are now?

10:02 14 A. Well, this whole case has made me very aware
10:02 15 of it.

10:02 16 Q. So you haven't thought more about your views
10:02 17 on the issue since a lot of people have been talking
10:02 18 about it?

10:02 19 A. I -- they're nonsettled, the most
10:02 20 accurate --

10:02 21 THE REPORTER: I'm sorry. Could you --

10:02 22 THE WITNESS: Nonsettled. I don't have a
10:02 23 final opinion about it.

10:02 24 Q. (By Mr. Townsend) What's -- are there
10:02 25 certain reasons why you haven't come to the view that

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
et al.)	
)	
Plaintiff,)	
)	
VS.)	Civil Action No.
)	5:15-CV-00324-C
)	
SOUTHEASTERN OKLAHOMA STATE)	
UNIVERSITY, et al.)	
)	
Defendant.)	

ORAL DEPOSITION OF
CATHY CONWAY
MARCH 10, 2016

ORAL DEPOSITION OF CATHY CONWAY, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and -numbered cause on the 10th day of March, 2016, from 8:58 a.m. to 4:52 p.m., before Chrissa K. Mansfield-Hollingsworth, CSR in and for the State of Texas, reported by machine shorthand, at the offices of U.S. Attorney's Office, located at 600 East Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure.

1 A. I don't know about their views. They said
2 nothing about their views to me.

3 Q. (By Mr. Townsend) Do you know whether any of
4 the people that you talked to about Dr. Tudor's gender
5 transition have any moral objection to transgender
6 people?

7 MS. COFFEY: Object to form.

8 A. Could you repeat the question?

9 Q. (By Mr. Townsend) Do you know whether any of
10 the people that you spoke to about Dr. Tudor's gender
11 transition have any moral objection to transgender
12 people?

13 A. No.

14 MS. COFFEY: Object to form.

15 Q. (By Mr. Townsend) Do you know whether any of
16 the people that you spoke to about Dr. Tudor's gender
17 transition have any religious objection to transgender
18 people?

19 A. No.

20 MS. COFFEY: Object to form.

21 Q. (By Mr. Townsend) Do you know what restroom
22 Dr. Tudor used after this June 1st conversation that you
23 had with her?

24 MS. COFFEY: Object to form.

25 A. No.

1 A. Yes.

2 Q. Why was the fact that Dr. Tudor was
3 preoperative relevant to the conversation about restroom
4 facilities?

5 MS. COFFEY: Object to form.

6 A. This was new to all of us.

7 Q. (By Mr. Townsend) Is that the only reason?

8 A. Dr. Tudor had changed her name and presented
9 herself as a female.

10 Q. The term preoperative used in that sentence
11 that I read, what operation is that referring to?

12 MS. COFFEY: Object to form.

13 A. Well, as stated, male to female.

14 Q. (By Mr. Townsend) So is that referring to sex
15 reassignment surgery?

16 A. Yes.

17 MS. COFFEY: Object to form.

18 Q. (By Mr. Townsend) So why was the fact that
19 Dr. Tudor had not had sex reassignment surgery relevant
20 to the conversation about the use of restroom
21 facilities?

22 MS. COFFEY: Object to form. Asked and
23 answered.

24 A. She was beginning her year of transition. She
25 changed her name.

1 A. Yes.

2 Q. Was there anyone else other than you, that you
3 know of, who was concerned that female students and
4 female employees who knew Dr. Tudor as a male may be
5 uncomfortable with or threatened by male preoperative
6 Dr. Tudor in the female restroom while presenting as
7 female?

8 MS. COFFEY: Object to form.

9 A. I've explained before. Threatened was not a
10 concern I had.

11 Q. (By Mr. Townsend) Did anyone else have that
12 concern?

13 A. I don't know.

14 Q. In the first sentence -- oh, no. Strike that.
15 In the third paragraph, last sentence on -- the third
16 paragraph on Page 3 of this exhibit, Exhibit 30, it
17 says, It was recommended that Cathy Conway, HR director,
18 contact Dr. Tudor and suggest that he may want to use
19 this private restroom during the transition period of
20 time. In that -- did I read that sentence correctly?

21 A. Yes.

22 Q. In that sentence, Dr. Tudor's referred to by
23 the pronoun he, correct?

24 A. Yes.

25 Q. Do you have an understanding as to why

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff(s),)	
)	
RACHEL TUDOR,)	
)	
Plaintiff Intervenor,)	
)	
-vs-)	No. 5:15-CV-00324-C
)	
SOUTHEASTERN OKLAHOMA STATE)	
UNIVERSITY, and)	
)	
THE REGIONAL UNIVERSITY)	
SYSTEM OF OKLAHOMA,)	
)	
Defendant(s).)	

DEPOSITION OF CLAIRE STUBBLEFIELD, PhD

TAKEN ON BEHALF OF THE PLAINTIFF(S)

IN OKLAHOMA CITY, OKLAHOMA

ON MAY 17, 2016

REPORTED BY: LESLIE A. FOSTER, CSR

Claire Stubblefield

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1 there, but --

2 Q (BY MR. TOWNSEND) I'm just trying to nail down
3 the timeframe here.

4 A I didn't know her prior -- if that's what
5 you're asking me. I didn't know Dr. Tudor or had --
6 hadn't come in contact with Dr. Tudor other than the
7 first time it was communicated, either her call or
8 e-mail. I'm not sure just -- I don't know if she called
9 and asked for an appointment or if she wanted to talk to
10 me. I'm not sure about that.

11 Q So did you hear anything when Dr. Tudor
12 switched from presenting as a man at work to a woman at
13 work about that transition? At the time that it
14 happened?

15 A No. I didn't know Dr. Tudor.

16 Q But did you hear anything about her gender
17 transition --

18 A No.

19 Q -- at the time?

20 A Did not know of her.

21 Q Have you ever spoken to anybody about the issue
22 of what restroom Dr. Tudor used after she started
23 presenting as a woman at work?

24 MR. JOSEPH: Object to the form.

25 A Ask that once again, please.

Claire Stubblefield

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1 transition from AAO to AAO. And she just wanted to talk
2 about doing the best for Dr. Tudor, and we just -- it was
3 not an official sit-down, pencil-and-paper communication.
4 It was, "How best can we serve her?"

5 What -- she says, "I've never, you know, been
6 involved in this before. In your training have you
7 picked up anything that would make this an easier
8 transition for -- for Dr. Tudor on our campus or anywhere
9 she is?"

10 And so we talked about the bathroom issue. She
11 said that's probably the biggest one as far as how she
12 feels, you know, in the transition.

13 **Q** So had Ms. Conway, at that point, made a
14 decision about what she thought was appropriate with
15 respect to Dr. Tudor's restroom use when you had this
16 conversation with her?

17 A Restate what you asked.

18 MR. TOWNSEND: Go ahead and repeat it.

19 THE COURT REPORTER: "Question: So had
20 Ms. Conway, at that point, made a decision about what she
21 thought was appropriate with respect to Dr. Tudor's
22 restroom use when you had this conversation with her?"

23 A I don't understand what you're -- how you're
24 asking that.

25 Q (BY MR. TOWNSEND) Well, you said --

Claire Stubblefield

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1 a unisex restroom when you talked to Ms. Conway?

2 MR. JOSEPH: Object to the form.

3 A I don't know. There would -- there are a
4 number -- that's the one I like to use when I was in that
5 building.

6 Q (BY MR. TOWNSEND) Did Ms. Conway -- let me
7 strike that.

8 I think you referred to the -- the restroom
9 issue as one of the biggest issues in dealing with the
10 gender transition. Did Ms. Conway explain why?

11 A I did not say that.

12 Q Okay. I thought I heard you say that, but
13 let's -- let's strike that question, then.

14 All right. Was there anybody else involved in
15 this conversation with you and Ms. Conway about Dr. Tudor
16 that we've been discussing?

17 A Regarding the -- that bathroom issue? Is that
18 what we're talking about?

19 Q Regarding -- well, did you have more than one
20 conversation with Ms. Conway around this same time about
21 Dr. Tudor?

22 A Not that I recall.

23 Q So during this one conversation, was there
24 anyone else present?

25 A No.

EXHIBIT 6

E. Todd Presnell
Partner
Direct: 615.252.2355
Fax: 615.252.6355
tpresnell@bradley.com



August 24, 2016

G. Anthony Brown, Esq.
Acting Team Leader
United States Department of Education
Office for Civil Rights
61 Forsyth St., Southwest
Suite 19T10
Atlanta, Georgia 30303-8927

Re: Complaint #04-16-1526

Dear Mr. Brown:

I represent the Sumner County (Tennessee) Board of Education (Board). The Board's Director of Schools, Dr. Phillips, forwarded me your letter—dated August 9, 2016 but received by Dr. Phillips on August 15, 2016—notifying him that the Office for Civil Rights (OCR) is investigating allegations that the Board discriminated against a transgender student on the basis of sex in violation of Title IX and demanding production of eleven categories of information within fifteen calendar days of August 9, 2016.

On August 21, 2016, the United States District Court for the Northern District of Texas issued a nationwide preliminary injunction prohibiting the Office for Civil Rights from “initiating, continuing, or concluding any investigation based on [its] interpretation that the definition of sex includes gender identity in Title IX’s prohibition against discrimination on the basis of sex.” Prelim. Inj. Order, 37, ECF No. 58, *Texas v. United States*, No. 7:16-cv-00054-O. The State of Tennessee is a party–plaintiff in this case, and the injunction covers OCR investigations of Tennessee’s “schools, school boards, and other public, educationally-based institutions.” *Id.* I attach a copy of the injunction order for your review.

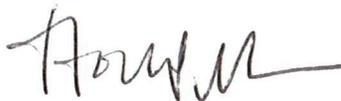
On August 22, 2016, Herbert H. Slatery III, Tennessee’s Attorney General and Reporter, and André S. Blumstein, Tennessee’s Solicitor General, informed me, as the Board’s attorney, that the injunction bars OCR from proceeding with its investigation and that the Board should not produce any information to OCR or otherwise cooperate with the investigation as long as the injunction remains in place. General Slatery and General Blumstein recommended that the Board inform OCR that, based on the injunction, it considers the investigation closed and will not produce the requested information.

Anthony Brown
August 24, 2016
Page 2

Based on the Court's Preliminary Injunction Order and the recommendation of Tennessee's Attorney General and Reporter and Solicitor General, the Board respectfully declines to produce the requested information and considers this investigation closed.

Yours very truly,

BRADLEY ARANT BOULT CUMMINGS LLP

By: 

E. Todd Presnell

ETP/rc
Enclosures