UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Privacy Matters, et al. Plaintiffs, vs. United States Department of Education, et al. Defendants.	Case No. 16-CV-3015 (WMW/LIB) **DEFENDANT INDEPENDENT SCHOOL DISTRICT NO. 706'S MEMORANDUM IN PARTIAL OPPOSITION TO PLAINTIFFS' MOTION TO PROCEED PSEUDONYMOUSLY**

INTRODUCTION

After filing a Complaint referring to Plaintiffs and their witnesses using only pseudonyms, Plaintiffs now seek retroactive permission from the Court to conceal their identities from both the public and Defendants. Although Independent School District No. 706 (the "District") does not object to the Plaintiffs' continued use of pseudonyms in public court filings, the District strongly objects to: Plaintiffs' allegations that District staff members will retaliate against individual students if their identities are revealed, Plaintiffs' refusal to identify the Plaintiffs to the District and the other parties to this litigation, and Plaintiffs' continued failure to comply with the Rules of Civil Procedure.

BACKGROUND

Plaintiffs Privacy Matters, a voluntary unincorporated association, and Parent A, as president of Privacy Matters, filed their seventy-three page "Verified" Complaint on September 7, 2016. Doc. 1. The Complaint is accompanied by declarations signed by "Parent A, President [of] Privacy Matters," "Parent A" and "Girl Plaintiff A," "Parent B"

and "Girl Plaintiff B," "Parent D" and "Girl Plaintiff D," "Parent E" and "Girl Plaintiff E," and "Parent F" and "Girl Plaintiff F." *See* Doc. 1 at 68-73. The Complaint also refers to additional groups of Plaintiffs, including "Student Plaintiffs," "Parent Plaintiffs," "Girl Plaintiffs," and "Boy Plaintiffs." *Id*. at ¶ 17. The "Plaintiff" designation is used for these individuals throughout the Complaint and in the Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction. *See id*.; Doc. 14.

In the District's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, the District noted that Plaintiffs only included "Privacy Matters" and "Parent A, president of Privacy Matters" in the caption of their Complaint. *See* Doc. 33 at 14; Doc. 1 at 1. The District noted that Federal Rule of Civil Procedure 10(a) requires a title of a complaint to "name all the parties," and, therefore, the only Plaintiffs are Privacy Matters and Parent A. Doc. 33 at 14. Plaintiffs apparently agree, and in subsequent submissions, Plaintiffs have referred to "Plaintiffs' witnesses" rather than "Girl Plaintiffs" and "Parent Plaintiffs." *E.g.*, Doc. 54 at 32-33 ("Privacy Matters… and Parent A are the two named Plaintiffs in the complaint, joined by a number of Plaintiffs' witnesses and members of Privacy Matters."). Despite this rhetorical shift, Plaintiffs have not sought to amend their Complaint to remove their assertion that individual students and parents are actual parties. *See, e.g.*, Doc. 1 at ¶ 14 ("Parents A, B, D, E and F… are Plaintiffs in their own rights.").

The District also argued that Plaintiffs failed to seek permission from the Court to use a pseudonym for Parent A. Doc. 33 at 14 *citing Larsen v. Larsen*, Civ. No. 10-4728

(JNE/SER), 2012 WL 876786 at *1, n. 1 (requiring a petition for permission to proceed anonymously *prior* to filing a complaint using pseudonyms). In an attempt to retroactively cure this defect, Plaintiffs now move for an order permitting them to use pseudonyms for Parent A and "Plaintiffs' witnesses."

The District does not know the identity of Parent A, nor does it know for certain the identities of any of the other pseudonymously identified parent or student "witnesses." Helmers Decl. at 2. This failure to identify the parties has made it difficult for the District to analyze the factual allegations in the Complaint. *Id*. at 3. The District attempted to negotiate a protective order in which Plaintiffs would disclose the identities of the parties to the District, however, Plaintiffs' insistence on limiting the disclosure to only top-level administrators would clearly have prevented the District from investigating the factual allegations in the Complaint. *Id*. at 4. For example, the District cannot determine whether "Girl Plaintiffs A, B, and E missed instructional class time or athletic practice time" as a result of the District's policy if the District does not know who "Girl Plaintiffs A, B, and E" are. Doc. 1 at ¶ 41. The 386 paragraph complaint is rife with factual allegations about events in classrooms or athletic practices. To investigate these claims in order to properly respond to this lawsuit, the District would have to talk to individual staff members because top-level administrators are not typically involved with ordinary absences from or day-to-day activities in classes or athletics. Without being able to discuss the Plaintiffs' witnesses, the District cannot effectively conduct even a cursory investigation into the specific detailed factual accounts in the Complaint.

Plaintiffs have cited no case law in support of their position that the use of a pseudonym to reference a party permits them to refuse to identify the party in sealed submissions or to a Defendant. Thus, the District objects to this motion to the extent it permits Plaintiffs to shield the true identity of Parents A, B, D, E, and F and "Girl Plaintiffs" A, B, D, E, and F from the District.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THE ANONYMOUS PLEADING.

As a threshold matter, the Court lacks jurisdiction over the Complaint and, by extension, this Motion, because Plaintiffs failed to seek permission to use pseudonyms prior to filing the case. Although the question has not been decided by the Eighth Circuit, the Sixth and Tenth Circuits have held that there is no jurisdiction over unnamed parties who do not first seek permission to file under a pseudonym. *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App'x 630, 637 (6th Cir. 2005) (citing *Nat'l Commodity & Barter Ass'n v. Gibbs*, 866 F.2d 1240, 1245 (10th Cir. 1989)). Federal Rule of Civil Procedure 10(a) requires a complaint to name all the parties; in order to deviate from this Rule, a party must have court permission. Although Plaintiffs now attempt to retroactively cure their procedural defect, they cannot be granted a remedy from the Court in a matter over which the Court did not have jurisdiction in the first place. *Marsh*, 123 Fed. App'x at 637.

II. PLAINTIFFS CITED NO LAW IN SUPPORT OF THEIR POSITION THAT THEY MAY REFRAIN FROM DISCLOSING THEIR IDENTITIES TO DEFENDANTS.

Plaintiffs seek this belated motion to continue using pseudonyms, but unlike other cases in which courts have authorized the use of pseudonyms, they continue to refuse to identify the parties to the Defendants. *See, e.g.*, *Doe v. Stegall*, 653 F.2d 180, 182 (5th Cir. 1981) (noting the plaintiffs "agreed to disclose their identities to the defendants and to the Court"); *id.* at n. 5 ("The plaintiffs urge that this procedure gives both the court and defendants every opportunity to scrutinize their standing to sue and to proceed with any necessary discovery"); *W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001) ("If a court grants permission [to proceed using a pseudonym], it is often with the requirement that the real names of the plaintiffs be disclosed to the defense and the court but kept under seal thereafter.").

Plaintiffs claim that this case is about issues of law rather than facts, and thus Defendants and the Court need not concern themselves with the identity of the Plaintiffs or their witnesses.[1] Such a position is baffling in light of the many factual allegations in the Complaint, as well as the fundamental issue of Plaintiffs' standing to bring this case. Although Plaintiffs' counsel may view this matter as just another case on their nationwide quest to challenge the Federal Defendants' guidance, standing requires a demonstrated relationship between the parties in which a defendant has caused injury to a plaintiff. The District must be granted the ability to defend its actions.

[1] If the facts regarding what took place in the District's school are truly irrelevant, the District would not object to an amended Complaint dismissing the District as a party.

III. PLAINTIFFS DO NOT HAVE A STRONG PRIVACY INTEREST IN KEEPING THE IDENTITY OF PARENT A AND ANY OTHER INDIVIDUAL PLAINTIFFS ANONYMOUS AND, AT A MINIMUM, MUST DISCLOSE THEIR IDENTITIES TO THE PARTIES.

Plaintiffs bear the burden of overcoming the "strong presumption against allowing parties to use a pseudonym." *Luckett v. Beaudet*, 21 F. Supp. 2d 1029, 1029 (D. Minn. 1998) (collecting cases). One of the primary reasons courts reject requests for anonymity is because the public has a First Amendment right to know who is using the court system. *Id.* "When a party invokes the judicial powers of the United States, she invites public scrutiny of the dispute and the proceeding." *Id*. In this case, Plaintiffs invoked the judicial powers of the United States by filing their Complaint.

While the District believes Parent A and any other Plaintiffs have not overcome this strong presumption, the District is not objecting to the continued use of pseudonyms in publicly filed documents. However, Plaintiffs have no legal basis to withhold their identities from the Defendants.

A. There is no legitimate threat of retaliation.

Parent A and Parent F both make vague allegations that they fear retaliation if their identities become known to the District. However, the District has strong protections in place prohibiting retaliation, discrimination, or harassment against students. The District's obligations not to retaliate exist independently from any lawsuit, and are enforced regardless of whether the District knows an individual is involved in this lawsuit. Frankly, the insinuation that District staff would retaliate against these students in their educational opportunities due to their involvement in this lawsuit is offensive.

Although both Parent A and Parent F submitted declarations "under penalty of perjury," neither of the declarations is signed under their real names. A "penalty of perjury" has little deterrent value when not attached to a known individual who could face consequences. Courts have noted "the dangers with permitting a party to proceed anonymously," including witnesses who fail to authenticate sworn affidavits or establish that they are the plaintiffs they purport to be. *Valdez v. Town of Brookhaven*, No. 05-CV-4323 JSARL, 2005 WL 3454708, at *3 (E.D.N.Y. Dec. 15, 2005). Thus, at minimum, the ability of these declarations to establish factual claims is suspect.

Parents A and F have also failed to present any proof of likely harm here beyond conclusory allegations of retaliation. The Sixth Circuit in *Porter* and Fifth Circuit in *Stegall* both granted permission to use a pseudonym after significant offers of proof regarding exposure to harm in the community. In *Porter*, the Court quoted a letter to the editor of a local paper threatening the anonymous plaintiffs and a statement by the principal of the high school at issue who stated he would have advised the anonymous plaintiff challenging school religious observation "[t]his is a rural, conservative place, and very emotional about religion. Attack religion and crusades begin." 370 F.3d at 560-61. Similarly, in *Stegall*, the Court relied on "several documentary exhibits to bolster [plaintiffs'] assertions that they might be subjected to retaliatory harassment or violence if their identities were publicly revealed." 653 F.2d at 182, n. 6. The Court quoted a newspaper article from a recent school board meeting in which a board member asserted that the case was filed because the attorney was Jewish, and included a county resident stating "Christians must beat the evil out of these people." *Id*.

Contrary to the specific and alarming language cited in support of the use of pseudonyms in *Porter* and *Stegall*, Plaintiffs have provided only vague, unsubstantiated fears in anonymously signed declarations. Parent F alleges that if her identity, or Student F's identity, is disclosed, Parent F fears her other child "will face retaliation from students, faculty, and the administration[2] that could negatively impact her educational opportunities or success" and that disclosure of Parent F and Student F's involvement in the lawsuit "could negatively impact the educational opportunities or success of [Parent F's] daughter." Doc. 57 at ¶¶ 6, 7. Parent A expressed similarly vague concerns about retaliation against her son, who currently attends school in the District, including retaliation "from members of the broader community." Doc. 56 at ¶¶ 9, 10. Plaintiffs, who have the burden of proof, have failed to allege *any* evidence in support of their unsworn, generic claims of retaliation. Plaintiffs' fear of retaliation stands in sharp contrast to the detailed allegations provided in the Declaration signed by Sarah Doe with her real name and filed under seal with the Court. *See* Doc. 26 at ¶ 18 (stating that after this lawsuit was filed, the family became "the talk of the town with some community members saying awful, callous comments like 'kill her' and 'get rid of that thing,' as if Jane were some kind of monster instead of a 15 year-old girl.")

[2] Parent F's alleged fear of retaliation by administrators is undermined by the fact that Plaintiffs are willing to disclose her identity to the Superintendent and Principal. Doc. 53 at 10.

B. Parent A and any other individual Plaintiffs are not required to disclose information of the "utmost intimacy."

Plaintiffs significantly overstate their personal privacy interests in this case in an attempt to characterize the information as relating to items of the "utmost intimacy." Plaintiffs assert that this litigation requires "Plaintiffs and their witnesses" to:

> convey information about their personal hygiene practices (changing, showering, and personal restroom needs), their bodily and emotional development, their religious and moral beliefs concerning privacy and sexual modesty, and information about how they are impacted by a policy that allows an opposite-sex student to see them or their children in a state of undress or that places them or their children at risk of seeing an opposite-sex student in a state of undress.

These identified disclosures misrepresent the case and are nowhere near what courts have considered to be information that is of the "utmost intimacy." The Complaint discloses that certain minor students changed in a locker room or used a restroom to which Jane Doe had access. This disclosure, although relevant to "changing" and "personal restroom needs," does not disclose anything intimate about any of the individuals. The fact that teenage girls change in a locker room before athletics or use a restroom at school does not require revealing intimate details—common sense dictates that students change clothes in a locker room and use restrooms during the school day. The Complaint does not include, nor is there any suggestion that this case will require, disclosure of how, when, and for what purpose individual students use restroom or locker room facilities.

Similarly, nothing in the Complaint refers to the "bodily or emotional development" of students using these facilities, and there is no suggestion such facts

would be relevant to this proceeding.[3] It is also not clear what religious doctrine dictates locker room privacy in the manner Plaintiffs allege, nor why Plaintiffs' witnesses' beliefs on sexual modesty are relevant to this matter. Additionally, most of these concerns do not apply to Parent A because there is no claim that Parent A used or will use a restroom or locker room facility in the District.

Tellingly, Plaintiffs cite no case law in support of their position that these types of disclosures are similar to those which courts find to reveal information of the "utmost intimacy." Individuals bringing claims involving abortion or artificial insemination are sometimes permitted to proceed anonymously, *see Luckett*, 21 F.Supp.2d at 1030, but such protection is not automatic, even in such highly charged cases. *See id.* at 1030, n. 1. Anonymity has been deemed appropriate for a young woman who alleged she was coerced to participate in pornography, including a film of a "lengthy and explicit session of homosexual intimacy involving fondling and oral and manual sex with another underage woman." *Plaintiff B v. Francis*, 631 F.3d 1310, 1217 (11th Cir. 2011). The "intensely personal nature of pregnancy" has also been found sufficient. *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. Nov. 3, 1974) (collecting cases and noting birth control, abortion, welfare of children, and homosexuality merited anonymity). There is simply no argument that admitting one's child changes in a locker room or uses

[3] To the extent a party determined such facts were relevant and submitted a discovery request requesting such information, Plaintiffs or their witnesses could seek an order from the Court regarding the propriety of the request before providing the responsive information. Plaintiffs should not be permitted to seek a prospective order requiring anonymity on the remote possibility they might be asked for such information in the future.

a restroom at school falls in line with the intensely personal information divulged in the above cases.

As Judge Rosenbaum noted in *Luckett*, "discussing alleged sexual coercion and discrimination is undoubtedly uncomfortable," but "it is not such an invasion of privacy as to justify reducing the normal publicity of judicial proceedings." *Luckett*, 21 F.Supp.2d at 1030. With respect to Parent A, such interests are completely unavailing. Courts have routinely held that embarrassment or discomfort are not proper reasons to proceed anonymously. *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992).

Additionally, information already known to the District or that is otherwise publicly available suggests that individuals in the community, possibly including Plaintiffs or their witnesses, have already publicly identified their opinions on the issues in this matter. The Complaint establishes that Parent A already contacted the District without using a pseudonym about her opposition to the District's policy. Parent A sent an e-mail to the District's former superintendent stating "[a]s I have stated to other people, my issue is not with any specific person or even the idea of being transgender, nor is my issue with VIRG school district. My issue is with TG use of restroom & locker room facilities." Doc. 1 at ¶ 114; Doc. 1-11 at 2. Although the document submitted to the Court has been redacted, the original e-mail contained the sender's e-mail address.[4] Thus, not only has Parent A contacted the District about her beliefs, she has spoken to "other people" about her feelings on the matter. Such a position eviscerates any claim

[4] Based on this communication, the District believes it may know the identity of Parent A.

that the matters are too highly personal for Parent A to identify herself to the Court and parties.

Several individuals in the District community voiced their concerns about the District policy for transgender students online. One such statement about the District's transgender policy and Jane Doe is detailed in Sarah Doe's Declaration. *See* Doc. 27 (Sarah Doe Decl.) at ¶ 13 ("The statement described my daughter as 'a 15-year-old boy who claims to be a girl' and suggested my daughter was only in the locker room so she could watch other girls get undressed.") Additionally, the District was made aware of several Facebook posts, as well as online petitions about the District's policy, most of which were posted by identifiable individuals, possibly including Plaintiffs. Because Plaintiffs have failed to identify themselves, it is impossible for the District to determine whether Parent A or any of the identified "witnesses" who now claim to have this intense privacy interest in their opinions on this issue signed the public petition. Nonetheless, the willingness of many community members to publicly state their opposition to the District's policy shows that Plaintiffs' concerns about privacy are overstated.

C. Parent A and any individual Plaintiffs do not face the same type of concerns in this "hotly debated and politically charged" case as Jane Doe does.

In granting Jane Doe's motion to file documents under seal, the District Court correctly noted that this matter involves "topics that have stirred controversy both locally and nationally." Doc. 50 at 10. While this may serve as one reason to permit Parent A and any other individual Plaintiffs to avoid public disclosure of their identities, the Order does not speak to circumstances in which the defendants do not know the identity of the

plaintiffs. The Court also identified that this "case involves sensitive and personal issues regarding a minor's gender identity," "threats that Doe and her family have experienced in the short time since this case commenced," and "the limited information that Doe has redacted." *Id*. These additional reasons are simply not present for Parent A or any other individual witnesses.

It is true that the District did not object to the use of a pseudonym by Jane Doe, and the District Court granted Jane Doe's request to use a pseudonym. *See* Doc. 50. However, Plaintiffs' position on this Motion differs significantly from Jane Doe's previous motion. Jane Doe and her mother, Sarah Doe, submitted unredacted copies of declarations and additional exhibits to the parties. These same documents were filed under seal with the Court. Thus, although Jane and Sarah are not publicly identified in any court proceedings, all parties and the Court know their identities. The District can therefore verify and investigate factual allegations about Jane Doe. Jane and Sarah also submitted unredacted declarations that contain their real names and signatures. To date, Plaintiffs have not submitted any document to the Court or parties that contains the real name of Parent A or any individual Plaintiff, even in the documents they submitted in support of this Motion.

CONCLUSION

For all of the foregoing reasons, the Plaintiffs' Motion should be denied to the extent it permits Plaintiffs to conceal their identities from Defendants.

Respectfully Submitted,

Dated: November 9, 2016

s/Trevor S. Helmers
Trevor S. Helmers, Atty No. 387785
Elizabeth J. Vieira, Atty No. 392521
Alice D. Kirkland, Atty No. 396554
Attorneys for Defendant Independent School District No. 706
RUPP, ANDERSON, SQUIRES & WALDSPURGER, P.A.
333 South Seventh Street, Suite 2800
Minneapolis, MN 55402
Telephone: (612) 436-4300
Fax: (612) 436-4340
trevor.helmers@raswlaw.com
liz.vieira@raswlaw.com
alice.kirkland@raswlaw.com

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LOCAL RULE 7.1(f) & 7.1(h) CERTIFICATE OF COMPLIANCE

I, Trevor S. Helmers, certify that the Memorandum titled "Defendant Independent School District No. 706's Memorandum in Opposition to Plaintiff's Motion to Proceed Pseudonymously" complies with Local Rules 7.1(f) and 7.1(h).

I further certify that in preparation of the above documents, I used the following word processing program and version: Microsoft Word 2013 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above documents contain the following number of words: 3,492.

Dated: November 9, 2016

s/Trevor S. Helmers

Trevor S. Helmers, Atty No. 387785
Elizabeth J. Vieira, Atty No. 392521
Alice D. Kirkland, Atty No. 396554
Attorneys for Defendant Independent School District No. 706
RUPP, ANDERSON, SQUIRES & WALDSPURGER, P.A.
333 South Seventh Street, Suite 2800
Minneapolis, MN 55402
Telephone: (612) 436-4300
Fax: (612) 436-4340
trevor.helmers@raswlaw.com
liz.vieira@raswlaw.com
alice.kirkland@raswlaw.com