UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, et al.,

Plaintiff,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.

No. 3:17-cv-00739-TJC-JBT

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR STUDENT AND PARENT WITNESSES TO PROCEED ANONYMOUSLY AND/OR UNDER PSEUDONYM AND SUPPORTING MEMORANDUM OF LAW

Plaintiff Drew Adams ("Drew" or "Plaintiff"), respectfully submits this response to Defendant The School Board of St. Johns County, Florida (hereinafter, the "School Board" or "Defendant"), in opposition to Defendant's Motion for Student and Parent Witnesses to Proceed Anonymously and/or Under Pseudonym (the "Motion"), pursuant to Local Rule 3.01(b).

INTRODUCTION

By their Motion, Defendant seeks to cloak a yet-to-be-determined number of proposed non-party witnesses with anonymity, allowing them to shield their identity, while at the same time providing testimony that presumably is against Plaintiff's right to be free from discrimination and supportive of Defendant's position that Drew, a minor boy, should not be entitled to use the boys' restroom at Nease High School, as all other boys do. This result is in

stark contrast to one of the most fundamental tenets of our judicial system and this Court: an open and public forum, not one that fosters subrosa testimony of those who want to be heard but not seen. These third-party witnesses have indicated a voluntary desire to testify in this action on behalf of the Defendant, but only if provided with absolute anonymity, shielding their testimony even from the minor they seek to testify against. This is a textbook example of why such practices are not simply frowned upon, but universally prohibited absent extreme and extenuating circumstances.

Defendant has not offered any reason for this Court to deviate from the "customary and constitutionally-embedded presumption of openness in judicial proceedings."[1] The court room is not a place for anonymity.[2] On the contrary, the judicial system is premised on a party's right to test a witness's credibility, in order to ensure that the truth reigns and that the motives of those who appear before it are apparent. If these witnesses have concerns regarding the policy at issue here, then they should be required to testify openly just as any other witness would do. Just as Drew and his family will do.

In an effort to quell the burden of having to speak the truth in a forum that judges credibility and validity of one's words, Defendant intimates, without any support, that these witnesses will be subject to harassment, if they testify openly. Notably, Defendant offers no

[1] *See Doe v. St. John's Episcopal Parish Day School, Inc.*, 997 F. Supp. 2d 1279, 1290 (M.D. Fla. 2014) (citing *Plaintiff B v. Francis*, 631 F.3d 1310, 1315–16 (11th Cir. 2011)); *Roe v. Aware Woman Center for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir. 2001); *Gerzon v. IHOP Restaurant Corporation*, No. 8:17-cv-870-T-27TBM, 2017 WL 1957075, at *4 (M.D. Fla. Apr. 19, 2017).

[2] As noted throughout this response, Plaintiff will abide by the protections set forth in Federal Rule of Civil Procedure 5.2 and agrees to extends those protections for minors to all aspects of this case.

affidavit or other evidence to support the notion they have been subject to harassment when they or any other third party has spoken out against Drew's right to be treated equally, including using the boys' restroom, nor has Defendant provided any information to the Court from which the Court could properly conclude that there is even a remote risk that this may occur. The bar cannot be set this low. Conjecture of this magnitude cannot and should not allow witnesses to speak only in the dark. As further described below, the law simply does not support this position. Mere embarrassment is not enough. The Motion should be denied.

ARGUMENT

"Lawsuits are public events." *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992). As such, the public has a legitimate interest in having access to court proceedings and "in knowing all of the facts involved." *Id.* at 322;[3] *see also Cox v. Broad. Corp. v. Cohn*, 420 U.S. 469, 490–92 (1975): *see also M.J. v. Jacksonville Hous. Auth.*, No. 3:11-CV-771-J-37MCR, 2011 WL 4031099, at *1 (M.D. Fla. Sept. 12, 2011) ("Public access to [the identities of parties] is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings." (quoting *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981)).[4]

As a result, "fictitious party-pleading is not permitted in federal court." *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1318 n.4 (11th Cir. 2015). The party or

[3] In this context, "all of the facts" does not include information already prohibited from disclosure by statute, such as medical information or the information protected by Federal Rule of Civil Procedure 5.2.

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

person moving for a protective order must demonstrate "good cause" for the relief requested. Fed. R. Civ. P. 26(c)(1). "Good cause requires the movant to articulate specific facts, as opposed to 'stereotyped and conclusory statements,' which justify the protection sought." *Florida Action Comm., Inc. v. Seminole Cty.*, No. 6:15-CV-1525, 2016 WL 6080988, at *2 (M.D. Fla. Oct. 18, 2016) (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)). To that end, the Eleventh Circuit "has superimposed a 'balancing of interests' approach" to assist courts in determining whether good cause exists. *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (per curiam).

Factors commonly considered when determining whether a party's request to proceed anonymously outweighs the "constitutionally-embedded presumption of openness," *Frank*, 951 F.2d at 323, include whether (1) the party is challenging governmental activity, (2) the party is required to disclose information of the utmost intimacy, and (3) the party is compelled to admit their intention to engage in illegal conduct, thereby risking prosecution. *See id.* (citing *Stegall*, 653 F.2d at 185). Courts have also considered whether (4) the party is a minor, (5) the party will be exposed to physical violence should he or she proceed in their own name, and (6) proceeding anonymously "pose[s] a unique threat of fundamental unfairness to the [other party]." *Florida Action Comm., Inc.*, 2016 WL 6080988, at *2 (quoting *Plaintiff B*, 631 F.3d at 1316).

The ultimate test for allowing a party to proceed anonymously is whether the party has a "substantial privacy right" which outweighs the "constitutionally-embedded presumption of openness." *See Frank*, 951 F.2d at 323 (holding that the denial of plaintiff's request to proceed under fictitious name was not abuse of discretion). As such, a party or witness "should be

permitted to proceed anonymously *only* in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity." *Id.* (emphasis added). The risk that they "may suffer some embarrassment is not enough." *Id.* "Overall, proceeding anonymously is an exceptional circumstance, as there is a heavy presumption favoring openness and transparency in judicial proceedings." *Florida Action Comm., Inc.*, 2016 WL 6080988, at *2 (citing *Frank*, 951 F.2d at 324).

Because most, if not all, of these factors lean in Plaintiff's favor, the Motion should be denied.[5]

A. Defendant Has Failed To Articulate How The Proposed Witnesses Meet The Factors Considered By Courts When Evaluating Requests For Party Anonymity.

First, none of Defendant's proposed witnesses are challenging government activity. *See Florida Action Comm., Inc.*, 2016 WL 6080988, at *2 (finding "that the Does themselves are not challenging government activity because they are not parties to this case"). To the contrary,

[5] Without citing to any authority, Defendant repeatedly asserts that its motion is necessary because of the public attention this case has garnered. *See* Dkt. 69 at 2. However, media coverage of a case is not one of the factors that has been considered by the Eleventh Circuit when evaluating whether the request of a party to proceed anonymously should be granted. Even if it were, to the extent that anyone would be harassed, it would be Drew and his family, as it is irrefutable that those in the transgender persons have throughout history been, and to this day continue to be, the subject of discrimination and harassment. Defendant's argument is a red herring. Moreover, the media attention this case has garnered is not due to the fact that Plaintiff's counsel has a public page about the case or the issuance of a press release on *one* occasion, rather it is a direct result of Defendant's discriminatory actions, which necessitated this suit in the first place. If the policy has a legitimate basis, something Plaintiff vehemently contests, Defendant and its witnesses should be prepared to defend that policy before this Court in an open forum.

they seek to defend discriminatory governmental actions. If they chose to do so, unwavering authority requires them to do so in the sunshine, not under the cover of darkness and where their motives and credibility cannot be truly tested.

Second, none of Defendant's proposed witnesses will be "divulging personal information of the utmost intimacy" or "having to admit an intent to engage in prohibited conduct." *Frank,* 951 F.2d at 324. Third, the potential witnesses have no "substantial privacy right" that could overcome the constitutional presumption of open, public judicial proceedings. *See Frank*, 951 F.2d at 323; *St. John's Episcopal,* 997 F. Supp. 2d at 1290; *R.A. v. Niles,* No. 1:15-CV-01314-ELR, 2015 WL 13424446, at *2 (N.D. Ga. May 21, 2015) (denying motion to proceed pseudonymously and noting the requesting party's failure "to indicate what, if any, information of 'utmost privacy' might be divulged in this suit").[6] As a result, these three factors weigh against a protective order. As explained below, so do the other factors considered by courts in evaluating requests for anonymity.

B. The Proposed Student Witnesses, To The Extent They Are Minors, Are Properly Protected By The Privacy Protections Of Federal Rule Of Civil Procedure 5.2.

Federal Rule of Civil Procedure 5.2(a) already establishes privacy protections for minors in court filings. Under Rule 5.2(a), "[u]nless the court orders otherwise, in an electronic or paper filing with the court that contains . . . the name of an individual known to be a minor, . . . a party or nonparty making the filing may include only . . . the minor's initials." Plaintiff

[6] *See also Plaintiff B,* 631 F.3d at 1316 (noting that "courts have often denied the protection of anonymity in cases where plaintiffs allege sexual assault, even when revealing the plaintiff's identity may cause her to 'suffer some personal embarrassment.'" (quoting *Frank,* 951 F.2d at 324)). If that is the case in such sensitive cases, it is hard to see how the circumstances of this case justify anonymity.

will abide by the privacy protections set forth in Rule 5.2(a), as already is his obligation, and would assent to the extension of such protections for other minors to all aspects of this case, including representations in open court. That said, the proposed student witnesses are not parties to this case, are not compelled to participate in this case, and would be *voluntarily* seeking to perpetuate Defendant's discriminatory treatment towards Plaintiff, a minor himself. Under these circumstances, they should not be afforded *special* protection in order to testify regarding any purported privacy concerns that they may have. If they believe they have legitimate concerns, which Plaintiff contends there are none, then there should be no reason for them to hide in the shadows to make their thoughts and feelings known. To do otherwise would unfairly prejudice Plaintiff and are contrary to the public interest.[7]

C. The Unsubstantiated Fear Of Repercussions Towards The Proposed Witnesses Does Not Justify Defendant's Request For Anonymity.

In their Motion, Defendant asserts in a conclusory manner that the proposed "students (all of whom are minors) and their parents have expressed genuine concerns, including the repercussions that may follow if their identities are revealed." Dkt. 69 at 2. There has been no threat, no intimidation and in reality there is no such risk. Defendant has not offered this Court any evidence, let alone competent evidence, to support its assertions about the proposed witnesses' purported concerns. The Court should not credit such self-serving comments. *See Florida Action Comm., Inc.*, 2016 WL 6080988, at *2 (finding that this factor weighed against

[7] It should further be noted that even when courts have allowed minor children to proceed anonymously, they have simultaneously denied adults the same protection. *See, e.g., Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 651–52 (S.D. Tex. 1996) (refusing to protect the identities of adult plaintiffs "who are simply not as vulnerable as schoolchildren to social and physical intimidation or violence centered around events at public schools").

a protective order when, "although the Does hold sincere fears of facing physical violence for their participation in this litigation, they failed to sufficiently demonstrate that their fears were more than conjectural"). Still, and notwithstanding that Defendant has presented *no facts* to support its conclusory assertions, Defendant's articulated concerns are without merit.

Defendant, on behalf of the potential witnesses, alleges no "danger of physical harm," nor any other concrete harm that may result from their testimony. *Frank*, 951 F.2d at 324. The fact that the proposed witnesses fear they "may suffer some personal embarrassment" for their testimony against a minor seeking to vindicate his civil and constitutional rights "does not require the granting of [the] request to proceed under a pseudonym." *Id.*; *see also Stegall*, 653 F.2d at 186 ("The threat of hostile public reaction to a lawsuit, standing alone, will only with great rarity warrant public anonymity."); *Niles*, 2015 WL 13424446, at *2 ("Plaintiff has briefly argued that proceeding under his legal name would 'further victimize' him by subjecting him to humiliation, ridicule, and physical harm, but the Court finds this argument unpersuasive. To begin, the Plaintiff has not elaborated on how proceeding under his legal name would subject him to humiliation or ridicule, but this is of little importance. The Eleventh Circuit has observed that the risk a plaintiff may suffer some embarrassment is not enough to justify proceeding anonymously.") (alterations, quotations omitted); *Yacovelli v. Moeser*, No. 02-CV-0596, 2004 WL 1144183, at *7 (M.D. N.C. May 20, 2004) (noting that parties requesting anonymity "ha[d] not pointed to any likelihood of physical harm" and that merely facing "social ostracism," "which may upset them[,]" tips in favor of the party opposing anonymity); *Doe v. Beaumont Indep. Sch. Dist.*, 172 F.R.D. 215, 217 (E.D. Tex. 1997) (noting that the "it has happened before, therefore it might happen here" argument was insufficient).

Moreover, "[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance." *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring). "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Id.* To allow witnesses to testify out their own volition and under a shroud of anonymity against a minor child's right be treated with equal dignity and respect "does not resemble the Home of the Brave." *Id.*

Thus, because the burden of showing the necessity of a protective order can be met only by a specific demonstration of fact, as distinguished from stereotyped and conclusory statements, Defendant's conclusory and general statements in support of their request are vastly insufficient to justify anonymity for the proposed witnesses. *Cf. United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978). Here, there is no legitimate reason to believe that these witnesses will be subjected to harm or threats and, accordingly, there is no basis to afford the relief requested by Defendant.

D. The Terms Of The Protective Order Sought By Defendant Would Unfairly Prejudice Plaintiff.

Finally, the last factor this Court must consider is whether Defendant's request would unfairly prejudice Plaintiff. By its very terms, the protective order sought by Defendant would substantially and unfairly prejudice Plaintiff. For one, under the terms of the proposed protective order, counsel for Plaintiff would be unable to share the identities of the proposed witnesses with Plaintiff or his parents. *See* Dkt. 69 at 3, para. (c). Such a condition would clearly and unfairly burden Plaintiff's ability to prosecute his case, including effective investigation and cross-examination of the proposed witnesses.

For another, Defendant's request that the proposed witnesses be allowed, "at their choosing," to perpetuate their testimony in lieu of personally appearing at trial would cause unfair prejudice to Plaintiff in several ways. Dkt. 69 at 3, para. (b).[8] First, the perpetuation of the proposed witnesses' testimony would deprive Plaintiff from the opportunity to prosecute his case challenging Defendant's discriminatory actions in a cohesive manner, where Plaintiff would be able to cross-examine said testimony in light of other witnesses' testimony and developments at trial. Second, the perpetuation of the proposed witnesses' testimony through preservation depositions would unfairly prejudice Plaintiff by needlessly necessitating the expenditure of additional resources in what is already a truncated calendar. Indeed, Defendant's request would require Plaintiff to take *two* depositions for each of the proposed witnesses, if Plaintiff decides to depose them, and even at this stage it is unclear how many witnesses Defendant seeks to shroud in anonymity.

Lastly, Defendant's request for anonymity for the proposed witnesses is wholly unnecessary. The proposed student witnesses are already covered by the privacy protections of Federal Rule of Civil Procedure 5.2(a) and Plaintiff is agreeable to the extension of such protections for other minors to all aspects of this case. In addition, Defendant has already identified five (5) parent witnesses in their initial disclosures that are willing to testify against Plaintiff's rights to equal protection and education opportunity *without* the need for a cloak of anonymity. As such, while granting the request for anonymity for Defendant's proposed

[8] Defendant does not assert that the perpetuation of testimony by the proposed witnesses is necessary because they are "unavailable during the week of December 11, 2017." *See* Case Mgmt. and Scheduling Order, Dkt. 59 at 1, para. 2.

witnesses (particularly, under the extreme terms requested) would unfairly prejudice Plaintiff, the denial of such request would not prevent Defendant's ability to present parent witnesses or having minor student witnesses' identities be protected from disclosure.

Furthermore, in addition to the lateness with which Defendant is making this request, Defendant has refused to provide Plaintiff's counsel with the names and identities of the proposed witnesses, even under an attorney's eyes only agreement, notwithstanding Federal Rule of Civil Procedure 26(a)(1)(A)(i)'s clear text that "a party *must*, without awaiting a discovery request, provide to the other parties . . . the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party *may* use to support its claims or defenses" (emphasis added). As such, the granting of Defendant's request at this late hour would unfairly prejudice Plaintiff.[9]

Defendant's request for anonymity for the proposed witnesses severely and unfairly prejudices Plaintiff, particularly under the extreme terms proposed by Defendant. Accordingly, this factor weighs in Plaintiff's favor and the Court should deny Defendant's motion.

[9] Defendant has already identified in their initial disclosures fifteen (15) witnesses they may call at trial, including the five (5) parent witnesses willing to testify without anonymity. The lateness of this request and Defendant's refusal to identify the proposed witnesses, even under an attorneys' eyes only agreement, is already prejudicing Plaintiff by inhibiting his ability to decide which depositions to take, as well as disadvantaging Plaintiff's ability to prepare for trial. The granting of Defendant's request at this late stage would severely and unfairly compound these disadvantages.

CONCLUSION

Defendant's proposed witnesses are not plaintiffs seeking to vindicate their legal rights in daunting circumstances, nor are they defendants who have been unwillingly brought into judicial proceedings. They seek to testify of their own volition, without the burden of standing by their testimony publicly. If they seek to testify against a minor Plaintiff's rights to equal protection, dignity, and educational opportunity, they should have the courage of their convictions and do so openly in court, not the in darkness of anonymity.

For the foregoing reasons, Plaintiff respectfully requests that Defendant's motion be denied.

Dated on this 19th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2017, I electronically filed the foregoing and all attachments with the Clerk of the Court by using the CM/ECF system, causing a copy of the foregoing and all attachments to be served on all counsel of record.

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