

**EGS**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

JOEL DOE, a minor; by and through his  
Guardians JOHN DOE and JANE DOE,

Plaintiff,

vs.

BOYERTOWN AREA SCHOOL  
DISTRICT; DR. RICHARD FAIDLEY,  
in his official capacity as  
Superintendent of the Boyertown Area  
School District; DR. BRETT COOPER,  
in his official capacity as Principal; and  
DR. E. WAYNE FOLEY, in his official  
capacity as Assistant Principal.

Defendants.

Case No. 17 1249

**PLAINTIFF'S BRIEF IN SUPPORT  
OF MOTION TO PROCEED  
PSEUDONYMOUSLY**

**FILED**

**MAR 21 2017**

**KATE BARKMAN, Clerk  
By \_\_\_\_\_ Dep. Clerk**

**PLAINTIFF'S BRIEF IN SUPPORT OF  
MOTION TO PROCEED PSEUDONYMOUSLY**

**INTRODUCTION**

Plaintiff Joel Doe, a minor, by and through his Guardians John Doe and Jane Doe, seeks leave to proceed in this case using the pseudonyms ascribed to him and his Guardians in Plaintiff's Complaint. Plaintiff makes this request to protect them from publicly revealing their identities so that they and minor family members may avoid embarrassment and harassment from peers and the public. *See* Dec. ¶¶ 5-6.

The need for anonymity from the public is particularly acute given the contentious and politically charged nature of this case and the highly sensitive subject matter of the events experienced by Joel Doe. Accusations and unkindness towards those seeking to protect bodily privacy are legion. Therefore, Joel Doe seeks

protection for him, his Guardians, and his minor family members. *See id.* ¶¶ 4-6. The Defendants are not burdened by protecting the names from public disclosure since he is not requesting anonymity from Defendants, and Defendants are already aware of Joel Doe and his Guardians. Plaintiff only seeks public anonymity.

### ARGUMENT

Courts will allow plaintiffs to proceed anonymously where they can show “both (1) a fear of severe harm, and (2) that the fear of severe harm is reasonable.” *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir., 2011) (quoting *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1043 (9th Cir. 2010)). Such a showing has been made in cases involving controversial social issues like the one here. *See id.* (citing *Doe v. Borough of Morrisville*, 130 F.R.D. 612, 614 (E.D. Pa. 1990) (stating that motions to proceed with pseudonyms were granted in cases involving “abortion, birth control, transexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality”).

In order to “determine whether a litigant has a reasonable fear of severe harm that outweighs the public's interest in open litigation” courts must balance multiple factors. *Id.* at 409. Courts consistently permit litigants to proceed pseudonymously when the litigants’ privacy interests outweigh the public’s interest in disclosure of the litigants’ identities and any prejudice to the defendants. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).<sup>1</sup> District

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<sup>1</sup> *See also Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979) (discussing interests of defendants and holding that “identifying a plaintiff only by a

courts are given discretion to perform this analysis by looking at “the circumstances of [a] particular case[],” and considering several guiding factors. *James*, 6 F.3d at 238; *see also Frank*, 951 F.2d at 323.

While each circuit sets forth different factors, there is no “conflict as a result of the different factors” because “each court has agreed that their list of factors is not exhaustive. *Megless*, 654 F.3d at 409. Among the factors most relevant here are 1) Plaintiff and his minor family members face a substantial risk of harm if their privacy is jeopardized, 2) Plaintiff’s identity has been kept confidential, 3) the public interest is that confidentiality be maintained so that cases like this one are litigated, 4) the issues are largely legal and apply to the community at large, 5) the proceedings are against the government, not persons in their individual capacities, and 6) there is no risk of prejudice to Defendants. Here, the circumstances strongly favor permitting Plaintiff to proceed pseudonymously because balancing the factors demonstrates that the significant privacy interests of Plaintiff and the minor family

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pseudonym is . . . to be allowed only where there is an important privacy interest to be recognized”); *c.f. Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992) (explaining “[t]he ultimate test” balances a plaintiff’s “substantial privacy right” against the “presumption of openness in judicial proceedings.”); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (same); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (recognizing “that privacy or confidentiality concerns are sometimes sufficiently critical that parties or witnesses should be allowed” anonymity); *see also Roe v. Wade*, 410 U.S. 113 (1973) (permitting suit to be prosecuted under pseudonym); *R.K.N. v. Holder*, 701 F.3d 535, 537 n.2 (8th Cir. 2012) (granting motion to proceed pseudonymously without analysis where government did not oppose motion and appellant was seeking asylum based on his membership in a political group and being HIV positive); *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997) (recognizing “exceptions” to “the principle that” [i]dentifying the parties . . . is an important dimension” of public proceedings, including “protect[ing] the privacy of children.”).

members in a case involving embarrassing facts and highly charged social issues outweigh the public benefit in disclosure. Besides, there is no risk of prejudice to the Defendants because Defendants are familiar with Joel Doe and his Guardians.

**I. Plaintiff and his minor family members face a substantial risk of harm if their privacy is jeopardized.**

Courts routinely recognize that litigants have a substantial risk of harm if their privacy is not maintained through use of pseudonyms. Factors that are relevant to Plaintiff's privacy interests here include the following: 1) Plaintiff and his family members are minors attending the same school district, 2) the case involves highly charged social issues, and 3) the issues involving locker rooms and restrooms are matters of utmost intimacy.

**A. Plaintiff is particularly vulnerable as a child-litigant as are his minor family members attending the same school district.**

Courts heavily weigh the privacy interests of children when assessing whether to provide anonymity. *Stegall*, 653 F.2d at 186 (finding “*especially persuasive . . . the fact that plaintiffs are children*” and noting “the special status and vulnerability of the child-litigants.”) (emphasis added). This is appropriate because the Federal Rules of Civil Procedure themselves expressly recognize that unique privacy interests are at stake in cases involving child-litigants. *See* Fed. R. Civ. P. 5.2(a) (requiring as a “privacy protection” that “a party or nonparty making [an electronic or paper filing with the court] may include only: . . . the minor’s initials.”). The Second Circuit has held that “this rule [requiring only the use of initials] extends to the child’s parents.” *S.F. v. Archer Daniels Midland Co.*, 594 F.

App'x 11, 12 n.1 (2d Cir. 2014) (citing with approval *P.M. v. Evans–Brant Cent. Sch. Dist.*, No. 08–CV–168A, 2008 WL 4379490, at \*3 (W.D.N.Y. Sept. 22, 2008)); *see also Boyce v. Moberly Pub. Sch. Dist.*, No. 2:06CV00044ERW, 2007 WL 1378427, at \*1–2 (E.D. Mo. May 7, 2007) (sealing record where “counsel claims that even if the children’s names are substituted with initials, the names would still remain easily identifiable”).

Plaintiff is a minor with minor family members and fears that use of initials will identify them because Boyertown Area School District is a small community. Plaintiff fears retaliation from some peers and from some members of the public if their identities are discovered. *See* Dec. ¶ 6. Given the vulnerability of the child-litigant and family members and that identification of the Guardians would likely lead to the disclosure of the children’s identities, this Court should approve the use of pseudonyms.<sup>2</sup>

**B. Access to private facilities and personal privacy from persons of the opposite sex is a hotly debated and politically charged issue.**

Litigating a “highly charged subject[]” often provides a justification for permitting litigants to use pseudonyms. *Luckett v. Beaudet*, 21 F. Supp. 2d 1029, 1030 (D. Minn. 1998) (noting that courts have allowed pseudonyms in matters involving abortion or artificial insemination); *Doe v. Poelker*, 515 F.2d 541, 542 n.1

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<sup>2</sup> Providing Plaintiff with a pseudonym will benefit all students, and Plaintiff would not object to any other potential intervening student from proceeding in a similar fashion. Other courts have granted such protections. In *Bd. of Educ. v. Highland Local Sch. Dist.*, No. 2:16-cv-00524 (S.D. Ohio), the court granted an intervening transgender student’s unopposed motion to proceed pseudonymously. *See Order*, ECF No. 28 (Aug. 15, 2016).

(8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977) (“‘Jane Doe’ is a pseudonym . . . utilized throughout this litigation . . . due to the controversial nature of . . . this action[,]” which involved abortion); *Stegall*, 653 F.2d at 186 (permitting pseudonyms in “suit to vindicate establishment clause rights” in part because of the risk of “serious social ostracization based upon militant religious attitudes.”). *See also Megless*, 654 F.3d at 408 (quoting *Borough of Morrisville*, 130 F.R.D. at 614) (recognizing that pseudonyms were allowed in cases involving “abortion, birth control, transexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality”).

Courts have recognized that “whether identification poses a risk of retaliat[ion]” is a factor that should be considered. *James*, 6 F.3d at 238–39; *Sealed Plaintiff*, 537 F.3d at 190. Plaintiff and his minor family members here fear harassment and retaliation from some peers and from the public, *see* Dec. ¶ 6, due to the contentious and politically charged nature of this case, which intensifies the need to protect the privacy interests of Plaintiff, his Guardians, and family members through disguising his and his Guardians’ identities from public disclosure.

**C. Issues involving locker rooms and restrooms are matters of “utmost intimacy.”**

Courts similarly give substantial weight to suits that require litigants to “divulge[] personal information of the utmost intimacy.” *S. Methodist Univ. Ass’n of Women Law Students*, 599 F.2d at 713; *Milavetz, Gallop & Milavetz P.A.*, 355 B.R. at 762–63 (D. Minn. 2006); *Luckett*, 21 F. Supp. 2d at 1029. Involvement in this

litigation forces Joel Doe, a minor, to convey information about his personal hygiene practices (changing and personal restroom needs), his bodily and emotional development, his personal beliefs concerning bodily privacy and sexual modesty, and information about how he was impacted by a policy that allows an opposite-sex student to see him in a state of undress. Clearly this information is of a highly personal nature and deserving of privacy protection.

**II. Plaintiff's identity has been kept confidential.**

Though Plaintiff has been hurt by Defendants' policy, Plaintiff and his Guardians have been careful to keep out of the public eye. Since Plaintiff and those affected have exercised care to protect their anonymity, the court should maintain that protection. *See Megless*, 654 F.3d at 409 (listing "the extent to which the identity of the litigant has been kept confidential" as a factor in whether to allow a pseudonym).

**III. The public interest is in maintaining confidentiality.**

Because this is an issue of public concern, confidentiality should be maintained so that cases like this one are encouraged. *See id.* (recognizing that "the magnitude of the public interest in maintaining the confidentiality of the litigant's identity" should be considered in a motion like this one). This case is one of public concern affecting everyone in the school district, and similar issues are being raised nationally. Allowing pseudonyms to be used here will encourage others to raise and vindicate their rights through the courts.

**IV. The public interest in disclosure is weak since the issues are largely legal ones affecting everyone in the school district.**

This case involves issues common to all persons in the school district because they turn on the legality of the school's policy as to private facilities like locker rooms and restrooms. The public interest in disclosure is particularly weak given that the overriding issues are largely legal, *Sealed Plaintiff*, 537 F.3d at 189–90, and “the public[] interest” is best served by “enabling [the lawsuit] to go forward” through the use of pseudonyms, *Advanced Textile Corp.*, 214 F.3d at 1073.

The public interest in knowing litigants' identities is not served where legal issues predominate because “disguising plaintiffs' identities” does not “obstruct public scrutiny of the important issues in this case.” *Id.* at 1072. The issues here involve constitutional, statutory, and common law rights to bodily privacy, and the the public interest is not advanced through public knowledge of the identity of this minor litigant or his family.

**V. Plaintiff's claims are asserted against governmental entities not persons in their individual capacities.**

Courts give “considerable weight,” *Stegall*, 653 F.2d at 186, to whether the litigants are “challeng[ing] governmental activity.” *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 762–63 (D. Minn. 2006); *Luckett*, 21 F. Supp. 2d at 1029. This is because challenges to the “constitutional, statutory or regulatory validity of government activity . . . involve no injury to the Government's ‘reputation,’” whereas suits against private parties may create reputational injury or economic hardship, such that “[b]asic fairness” will often require “the defendants'

accusers” to use their real names. *S. Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979). Here, Plaintiff is challenging the propriety of government activity as he seeks to vindicate constitutional and statutory rights. Thus this factor weighs substantially in favor of permitting use of pseudonyms. Where the only anonymity requested is from the public, as opposed to Defendants themselves, those factors weigh even more in favor of permitting Plaintiff to proceed using a pseudonym.

**VI. Defendants will not be prejudiced by this Court granting relief.**

In this case, there is no risk of prejudice to Defendants by allowing Plaintiff and his Guardians to proceed pseudonymously. To be clear, Plaintiff and his Guardians are seeking to protect their identities and those of their family members from harassment that may arise from some fellow students and from the public at large, *see* Dec. ¶ 6. They are not seeking protection from Defendants since they are already familiar with Plaintiff, his Guardians, and their concerns about the school’s policy and the facts surrounding the implementation of the policy.

**CONCLUSION**

The privacy interests of Plaintiff and his Guardians and family members demonstrably outweigh any countervailing consideration favoring public disclosure of their identities. For all the foregoing reasons, Plaintiff asks this Court to enter an order permitting Plaintiff and his Guardians to proceed in this case using the pseudonyms ascribed to them in Plaintiff’s Complaint.

Respectfully submitted this 21st day of March, 2017.

By: /s/ Randall L. Wenger

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on Wednesday, March 21, 2017, the foregoing  
was filed with the Clerk of Court and will be delivered to Defendants  
simultaneously with the Complaint.

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