

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

JOEL DOE, a minor; by and through his
Guardians JOHN DOE and JANE DOE;
MARY SMITH; JACK JONES, a minor;
by and through his Parents JOHN
JONES and JANE JONES; and MACY
ROE,

Plaintiffs,

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-EGS

**PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF REQUEST
TO PRESENT TESTIMONY OF
PLAINTIFFS JOEL DOE AND
MARY SMITH *IN CAMERA***

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF REQUEST TO PRESENT TESTIMONY OF
PLAINTIFFS JOEL DOE AND MARY SMITH *IN CAMERA***

INTRODUCTION

The anonymity of Plaintiffs has been preserved thus far and is of the utmost importance to maintain given the highly charged public debate and extremely sensitive nature of the issues in this case. To preserve that anonymity, Plaintiffs request that the in-court testimony of Mary Smith and minor-Plaintiff, Joel Doe, be presented to the Court in chambers. This request is made to protect the physical and mental well-being of Plaintiffs and their family members from being endangered as a result of their identities being revealed. Such a revealing could result in

harassment or retaliation from both peers and members of the public. Counsel for Defendants and Intervenor have been consulted and do not oppose the Plaintiffs' request to testify *in camera*.

DISCUSSION OF RELEVANT LAW

The United States Court of Appeals for the Third Circuit has recognized that the public's common law and first amendment rights of access to civil court proceedings are not absolute and may be limited upon a "showing that the denial serves an important governmental interest and that there is no less restrictive way to serve the governmental interest." *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066–67, 1070 (3d Cir. 1984). A party seeking the closure of a hearing "bears the burden of showing that the material is the kind of information that courts will protect and that there is good cause for the order to issue." *Id.* at 1071. Good cause will be established upon a showing that the disclosure will protect against "a clearly defined and serious injury to the party seeking closure." *Id.*

The unique interests of minor children have been routinely acknowledged by courts when considering the issues of restricting public access to courts or the identities of those minors.¹ *See Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 607-608 (1982) (analyzing the propriety of closing a criminal proceeding and noting that "safeguarding the physical and psychological well-being of a minor," was a "compelling" interest); *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1374–76 (8th Cir. 1990) (recognizing that the unique privacy interests of minors are protected by courts and legislatures throughout the nation and affirming the closure of a hearing involving a disable minor); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (noting the "special vulnerability" of minor litigants as a significant factor in the consideration of protecting their anonymity). In addition, Rule 5.2(a) of the Federal

¹ Plaintiff Mary Smith was a minor when the first violation of her privacy occurred while a student at Boyertown Area High School.

Rules of Civil Procedure expressly recognizes the unique interests of minor litigants in its requirement that a party or non-party filing a document in a case involving a minor must include only the minor's initials. F.R.C.P. 5.2(a).

The Third Circuit has addressed the procedural and substantive requirements that must be addressed by a trial court before the right of access to civil proceedings may be limited. *Id.* at 1071. As for the procedural requirement, the trial court must articulate the countervailing interest to be protected and make sufficiently specific findings such that a reviewing court can determine whether closure was proper. *Publiker*, 733 F.2d at 1071. With regard to the substantive requirements, the record must demonstrate “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 1071 (quoting *Press Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 509 (1989)).

Under *Publiker*, the trial court must first articulate the countervailing interest to be protected and make sufficient findings to support the closure of the proceedings. *Publiker*, 733 F.2d at 1071. In the instant matter, the “physical and psychological well-being” of Mary Smith and Joel Doe is one of the countervailing interests. *See Globe*, 457 U.S. at 607-608. Given the highly charged issues in this matter as well as the sensitive nature of the expected testimony of Plaintiffs Mary Smith and Joel Doe regarding their experiences in locker room and restroom facilities at their school, *in camera* presentation of their testimony is warranted. Plaintiffs fear that their identification during in-court testimony may subject them to ridicule and retaliation in their community as well as on a national level via the anticipated presence of news media. Additionally, Plaintiffs fear that they will suffer embarrassment if required to reveal their feelings and experiences regarding intimate and personal concerns in public. Their physical and

psychological well-being is a countervailing interest sufficient to overcome the presumption of open civil proceedings. *See Publicker*, 733 F.2d at 1071 (stating the procedural requirement that a countervailing interest must be articulated in order to deny access to civil proceeding).

As for the substantive requirement set forth by the Third Circuit in *Publicker*, the trial court must point to “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 1071. The overriding interest may involve the nature of the controversy or the content of the information at issue. *Id.* at 1073. The nature of the controversy in this matter is the issue of access to private facilities and personal privacy from persons of the opposite sex. It invokes concerns of bodily privacy and physical and emotional development. Thus, the nature of this controversy is highly sensitive. As for the content of the information, the testimony of Plaintiffs, Mary Smith and Joel Doe, concerns their experiences and personal feelings regarding bodily privacy and sexual modesty. The disclosure of their identities during open court testimony will adversely affect their wellbeing by subjecting these intimate concerns to public disclosure, ridicule, and possible retaliation. In addition, it is anticipated that questioning of the Plaintiffs will elicit the names and personal information of minors who are not parties to the litigation but whose privacy must be protected pursuant to the terms of the parties’ Stipulate Protective Order. By taking Plaintiffs’ testimony *in camera*, the Court prevents the inadvertent disclosure of such information and the potentially irreparable harm that may be incurred by minors identified in open court proceedings.

Considering the foregoing, the *in camera* testimony of Mary Smith and Joel Doe, is narrowly tailored to serve this overriding interest to protect the “physical and psychological well-being” of the Plaintiffs and other minors. *See Globe*, 457 U.S. at 607-608.

Plaintiffs do not request that this Court seal the transcripts of the testimony of Mary Smith or Joel Doe. Nor do Plaintiffs request that the entirety of the hearing be closed. Plaintiffs request only that the testimony of Mary Smith and Joel Doe be offered outside the presence of the public or media. Plaintiffs are prepared to secure, at their own expense, a private court reporter charged with the responsibility to transcribe the Plaintiffs' testimony and produce expedited transcripts that would then be read into the record in open court before the close of the hearing. In *Publicker*, the Third Circuit acknowledged that the subsequent disclosure of transcripts may, in some instances, serve as an adequate substitution for a public hearing. *Id.* at 1072.

Should this Court decide that the interests at stake are not sufficient to overcome the presumption of open court proceedings, Plaintiffs ask that they be permitted to testify behind a screen, or in a room separate from the public, in order to preserve their anonymity. Two of the four minor-Plaintiffs testified via trial preservation deposition. Their identities will remain anonymous and their testimony will become part of the record without them being forced to testify in front of the public and media in open court. Joel Doe and Mary Smith wish to offer their testimony in this matter as well but prefer to do so before Judge Smith. Their desire to testify before Judge Smith should not result in them being deprived of the anonymity that has been carefully preserved thus far in this litigation.

CONCLUSION

The protection of the physical and mental well-being of Plaintiffs Joel Doe and Mary Smith, and of minor non-parties, is a compelling governmental interest and the requested *in camera* testimony is narrowly tailored to serve that interest. Further, the reading of the *in*

camera transcripts into the record in open court will satisfy the public's right of access to civil court proceedings.

By: /s/ Cathy R. Gordon
Admitted Pro Hac Vice

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 13, 2017, the foregoing was filed electronically and served on the other parties via the court's ECF system.

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