

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

ORLANDO DIVISION

JOHN DOE, a minor, by his parents
and next friends, SUSAN AND JACK
DOE,

Plaintiff,

Civ. Action No. 6:18-cv-00102-RBD-GJK

v.

VOLUSIA COUNTY SCHOOL BOARD,

Defendant.

MOTION FOR ENTRY OF PROTECTIVE ORDER

Plaintiff, JOHN DOE, a minor, by and through his parents and next friends SUSAN AND JACK DOE (“Plaintiff”), by and through his undersigned counsel and pursuant to Fed. R. Civ. P. 26(c) and Local Rule 3.01, hereby moves this Court for the entry of the attached proposed Protective Order¹ that governs certain confidential information and documents related to this case. The proposed Protective Order specifies the conditions under which private, sensitive, and/or legally confidential documents and information in the possession of the parties must be exchanged, used, and protected in this litigation, and authorizes the parties to disclose that information in furtherance of this litigation. The proposed Protective Order is justified by Rule 26(c) of the Federal Rules of Civil Procedure and is necessary for the parties to timely proceed with discovery.

¹ A copy of the proposed Protective Order is attached as Exhibit A.

Memorandum of Law

Plaintiff John Doe is a fifteen-year-old transgender boy who has brought a discrimination lawsuit against the Volusia County School Board. This case involves, among other things, issues related to Plaintiff's medical and psychological history, and given the highly sensitive and private nature of the facts involved, this Court entered an Order granting Plaintiff's Motion to Proceed Under Pseudonyms (Dkt. 8). During the course of this case, the parties will need to obtain and disclose intimate and confidential information relating to Plaintiff. Given that Plaintiff is a minor child and that this information is sensitive, Plaintiff seeks the entry of his proposed Protective Order, which accompanies this Motion, to provide a procedure for handling and disclosing such information.

District courts "may agree to enter a protective order when it is necessary to expedite the flow of discovery material, promote prompt resolution of disputes over confidentiality, and facilitate the preservation of material arguably worthy of protection." *Parsons v. Anheuser-Busch Co., Inc.*, No. 09-cv-584-J-25MCR, 2010 WL 996520, *2 (M.D. Fla. March 17, 2010). Pursuant to Federal Rule of Civil Procedure 26(c), a Court may, for good cause, protect a party from annoyance, embarrassment, oppression, or undue burden or expense by requiring that discovery be conducted confidentially. *See* Fed. R. Civ. P. 26(c); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) ("In order to preserve the confidentiality of sensitive materials, a district court may regulate access to the information by issuing a protective order pursuant to Rule 26(c).").

The proposed Protective Order sets forth a procedure for designating as confidential certain information that will be disclosed during the course of this litigation, including information that "may lead to the identification of the names or identities of the Plaintiff or the

Plaintiff's immediate family" and "other information regarding the health, personal relationships or other personal issues regarding the Plaintiff or his immediate family," as well as social security numbers, personal financial data, and protected health information. Ex. A, § I(a). Consistent with Rule 26(c), good cause exists for the Court to enter this Protective Order because Plaintiff could suffer significant harm if his confidential and sensitive information is disseminated or his community learns he is transgender – the same risk of threats or harassment that Plaintiff would have faced if not permitted to proceed under a pseudonym. Not only is Plaintiff a minor, meaning that he has a "special status and vulnerability" that entitles him to "heightened privacy protections," but his transgender identity places him at a heightened risk of stigmatization or retaliation if any potentially identifying information about him is not kept confidential. *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981); *D.L. ex rel. Phan L. v. Bateman*, No. 3:12-cv-208-J-32JBT, 2012 WL 1565419, at *2 (M.D. Fla. May 2, 2012); *see also Doe v. Blue Cross & Blue Shield of R.I.*, 794 F. Supp. 72, 74 (D.R.I. 1992) (noting that the "social stigma" associated with having a transgender identity makes a transgender litigant's "privacy interest . . . both precious and fragile.") (internal quotations omitted).

Although the Court will enforce confidentiality agreements between the parties, Defendant Volusia County School Board ("Defendant") has been unwilling to agree to a confidentiality agreement. A protective order is warranted here in light of Plaintiff's significant privacy interests and the harm that would result from disclosure of confidential information. In addition, because Defendant is a public entity, the proposed order creates a notice process if records designated as confidential are requested by a third party.

Defendant will not suffer any prejudice or undue burden if Plaintiff's proposed Protective Order is entered. The type of information that Plaintiff seeks to safeguard is similar to the

information that Defendant is already legally obligated to keep confidential, thus placing, at best, a minimal burden on Defendant, and its agents, to comply with the terms of protective order.

The importance of protecting Plaintiff's identity and privacy, both as a minor and as a transgender boy, outweighs the minimal burden the Defendant may face in implementing the requirements of the proposed Protective Order. *See Powell v. Schriver*, 175 F.3d 107, 111 (2d. Cir. 1999) (“[T]ranssexualism² is the unusual condition that is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others. . . . The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.”). Plaintiff's proposed Protective Order will allow the parties to efficiently proceed with discovery and protect Plaintiff's confidential information.

WHEREFORE, Plaintiff respectfully requests that this Court approve and enter the accompanying proposed Protective Order, together with any other relief that the Court deems just and proper.

Rule 3.01(g) Certification

Pursuant to Local Rule 3.01(g), the parties have engaged in a good faith effort to resolve the issues raised by this Motion. On April 6, 2018, counsel Lauren Valiente, counsel for Plaintiff, conferred by telephone with Nathan Paulich, counsel for Defendant. On May 1, 2018 and May 9, 2018, Asaf Orr, counsel for Plaintiff, conferred by telephone with Mr. Paulich. The parties were unable to reach a resolution or agreement to the granting of the relief requested in this Motion.

² The terms “transsexual” and “transsexuality” have fallen out of favor, but were used to describe a status synonymous with being transgender: having a gender identity different from the sex assigned at birth.

Dated: May 10, 2018

Respectfully submitted,

/s/ Asaf Orr

Amy Whelan, admitted *pro hac vice*

awhelan@nclrights.org

Asaf Orr, admitted *pro hac vice*

aorr@nclrights.org

NATIONAL CENTER FOR LESBIAN RIGHTS

870 Market Street, Suite 370

San Francisco, CA 94102

Telephone: 415.392.6257

Facsimile: 415.392.8442

Lauren L. Valiente, Trial Counsel

Florida Bar No. 034775

Email: lvaliente@foley.com

FOLEY & LARDNER LLP

100 N. Tampa St., Suite 2700

Tampa, FL 33602

Telephone: 813.229.2300

Facsimile: 813.221.4210

Christina M. Kennedy

Florida Bar No. 58242

Email: ckennedy@foley.com

Jessica E. Joseph

Florida Bar No. 99483

Email: jjoseph@foley.com

FOLEY & LARDNER LLP

111 North Orange Avenue, Suite 1800

Orlando, FL 32801-2386

Telephone: 407.423.7656

Facsimile: 407.648.1743

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send an electronic notice to all counsel of record.

/s/ Asaf Orr _____

Exhibit A

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

ORLANDO DIVISION

JOHN DOE, a minor, by his parents
and next friends, SUSAN AND JACK
DOE,

Plaintiff,

Civ. Action No. 6:18-cv-00102-RBD-GJK

v.

VOLUSIA COUNTY SCHOOL BOARD,

Defendant.

PROTECTIVE ORDER

WHEREAS, during the course of this litigation, various documents and information will be exchanged between Plaintiff JOHN DOE, a minor, by and through his parents and next friends, SUSAN AND JACK DOE (“Plaintiff”), and Defendant Volusia County School Board (“Defendant”), and whereas such documents and information may contain confidential, sensitive, or identifying information of the Plaintiff or his family members, as well as other confidential information, the Court finds good cause for a protective order under Rule 26(c) of the Federal Rules of Civil Procedure and hereby orders as follows:

I. Confidential Information.

- (a) As used in this Protective Order, “CONFIDENTIAL” or “CONFIDENTIAL INFORMATION” shall mean the following information that any party or third party (the “Designating Party”) in good faith designates as CONFIDENTIAL INFORMATION pursuant to Sections I (b) to (c) below. Any party to this

litigation shall have the right to designate information as “CONFIDENTIAL” pursuant to this Protective Order:

- (i) information, which either on its own, or together with other information, may lead to the identification of the names or identities of the Plaintiff or the Plaintiff’s immediate family, including, without limitation, their names, home address, e-mail addresses, telephone numbers, information that explicitly identifies the school (or schools) as one (or ones) Plaintiff has attended or is currently attending;
 - (ii) social security numbers;
 - (iii) protected health information (“PHI”);
 - (iv) other information regarding the health, personal relationships or other personal issues regarding the Plaintiff or his immediate family, including, without limitation, notes from meetings between the Plaintiff or his immediate family and his school counselors or other school administrators in which such issues were discussed;
 - (v) personal financial data; and
 - (vi) information related to the criminal history or sexual history of any witness or party.
- (b) Any Designating Party covered by this Protective Order, who produces or discloses any material designated as “CONFIDENTIAL,” including, without limitation, any information, document, thing, interrogatory answer, admission, pleading, or testimony, shall mark the same with the foregoing or similar legend: “CONFIDENTIAL” upon each page of the document, taking care to avoid

obscuring any text, before providing it to the opposing party. Information marked CONFIDENTIAL shall not be utilized or disclosed by a receiving party (the “Recipient Party”), its agents, or its employees, except in accordance with the terms of this Protective Order.

- (c) If another party produces any information, document, transcript, or thing that contains CONFIDENTIAL INFORMATION concerning one or more parties to this action, including employees of Defendant, any party may designate such material as CONFIDENTIAL INFORMATION by serving written notice on all parties within five (5) days of receipt of such information. The notice shall identify the CONFIDENTIAL portions of the information by Bates number, page (and if applicable, line number), or equivalent means.
- (d) All CONFIDENTIAL INFORMATION shall be used by the Recipient Party solely for matters reasonably connected with this case, shall not be used by the Recipient Party for any business, commercial, competitive, personal, or other purpose, and shall not be disclosed by the Recipient Party to anyone other than as set forth in subparagraph (f) below and Section X, unless and until the restrictions herein are removed either by the Designating Party or by order of the Court.
- (e) Inadvertent or mistaken production of any information, document, transcript, or thing without a designation of CONFIDENTIAL shall not, in and of itself, be deemed a waiver of any party’s claim of confidentiality as to such matter. If any information, document, transcript, or thing claimed to be CONFIDENTIAL is inadvertently produced without that designation, the producing party shall notify the Recipient Party within a reasonable time. All parties shall use their best

efforts to protect the confidentiality of that information. Upon receipt of notice that CONFIDENTIAL INFORMATION was produced inadvertently without an appropriate initial designation of confidentiality, the Recipient Party shall thereafter (1) treat such information as CONFIDENTIAL INFORMATION pursuant to the terms of this Protective Order, and (2) shall use its best efforts to retrieve such materials or correct the effects of any use or disclosure of such CONFIDENTIAL INFORMATION based on the earlier mistaken view that such materials were not confidential. However, nothing herein restricts the right of the Recipient Party to challenge the producing party's claim of confidentiality, as set forth in Section VI of this Protective Order, after receiving notice of the inadvertent or mistaken disclosure.

(f) CONFIDENTIAL INFORMATION shall not be disclosed to any persons other than:

- (i) the parties (including Defendant's Superintendent, officers, members, employees, representatives, and agents);
- (ii) copy service companies;
- (iii) the attorneys for the Recipient Party and the attorneys' firms in this litigation, including paralegals, law clerks, and clerical staff (whether employees or independent contractors) who are assisting in the litigation, as well as the Defendant's general counsel and paralegals, law clerks, and clerical staff (whether employees or independent contractors);
- (iv) agents or employees of the Recipient Party who have direct responsibility for assisting such counsel in the preparation and trial of the action;

- (v) the Court, including any Court personnel assisting the Court, secretarial or other clerical personnel, and stenographers or other persons involved in taking, transcribing, or videotaping testimony in this action;
- (vi) experts, consultants, and investigators, and their staff, who communicate with or who are retained by a party for purposes relating to this litigation and who have executed a Non-Party Confidentiality Agreement (attached hereto as Exhibit 1) (the “Non-Party Confidentiality Agreement”) in conformity with this Protective Order; and
- (vii) any other non-party witnesses or non-party deponents who have executed a Non-Party Confidentiality Agreement in conformity with this Protective Order, or deponents who agree on the record to maintain the confidentiality of the material. If a deponent declines to execute the Non-Party Confidentiality Agreement or otherwise maintain the confidentiality of the material on the record, the party seeking to disclose CONFIDENTIAL INFORMATION to a non-party deponent must obtain leave from the Court or written consent from the opposing party to disclose such information. The parties may not unreasonably withhold consent. If leave of Court is sought, the moving party shall request that the Court require the witness or deponent to maintain the confidentiality of the information.
- (viii) CONFIDENTIAL INFORMATION received by any of the persons in the categories listed above shall be used only for purposes of this litigation and for no other purposes, including for any other litigation, whether on

the same issues in this case or others, or for any business or personal purposes. Nothing in this Protective Order shall prevent the Designating Party from any use of its own confidential documents any differently than they would on a routine basis.

- (ix) CONFIDENTIAL INFORMATION may not be disclosed to the persons described in subparagraphs (vi) and (vii), above, unless the disclosure is for purposes relating to this litigation and the disclosing party determines in good faith that the disclosure is necessary for the purpose of developing testimony of such witness, for the prosecution or defense of any claim in the litigation, or if reasonably calculated to lead to the discovery of admissible evidence.
- (x) CONFIDENTIAL INFORMATION provided to a receiving party shall be securely maintained in the offices of that party's outside counsel unless otherwise disclosed in accordance with this document. Any recipient of CONFIDENTIAL INFORMATION shall maintain such information in a secure and safe manner, and the recipient shall exercise due and proper care with respect to the storage, custody, access and use of all such information. In addition, any summary or copy of CONFIDENTIAL INFORMATION shall be subject to the terms of this Protective Order to the same extent as the information or document of which summary or copy is made, and must be clearly labeled as containing CONFIDENTIAL INFORMATION.

- (g) CONFIDENTIAL INFORMATION may be copied or reproduced only to the extent reasonably necessary for the conduct of this lawsuit. All such copies or reproductions shall be subject to the terms of this Protective Order.
- (h) If the Court orders that access to or dissemination of CONFIDENTIAL INFORMATION shall be made to persons not included in Section I(f) above, such CONFIDENTIAL INFORMATION shall only be accessible to, or disseminated to, such persons after they have executed a Non-Party Confidentiality Agreement in conformity with this Protective Order, unless the Court rules otherwise.
- (i) The parties have no control over the conduct of third-parties who receive CONFIDENTIAL INFORMATION and nothing in this document shall place any responsibility on the parties for the actions of third-parties.
- (j) If a party is served with a subpoena or court order issued in other litigation, or any other request from a third party, that compels disclosure or any information or items designated in this action as CONFIDENTIAL INFORMATION, that party must:
- (i) Promptly notify in writing the Designating Party, including a copy of the subpoena, court order, or request;
 - (ii) Promptly notify in writing the party who caused the subpoena or order to issue (or the party who made the request) that some or all of the material covered by the subpoena, order, or request is subject to this Protective Order; and

(iii) Cooperate with all reasonable procedures sought to be pursued by the Designating Party whose CONFIDENTIAL INFORMATION may be affected. If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL” before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

II. No Waiver.

The disclosure of CONFIDENTIAL INFORMATION pursuant to discovery or the procedures set forth in this Protective Order shall not constitute a waiver of any trade secret or any intellectual property, proprietary, or other rights to or in such information.

III. Use in Depositions.

Material designated as CONFIDENTIAL may be used at a deposition if (a) the counsel for the party using such material advises the witness of the terms of this Protective Order and the witness agrees on the record to maintain the confidentiality of the material; or (b) the witness, if a non-party, executes a Non-Party Confidentiality Agreement in conformity with this Protective Order. If a witness who is not a party declines to execute the Non-Party Confidentiality Agreement or

otherwise maintain the confidentiality of the material, the party seeking to use such CONFIDENTIAL INFORMATION must obtain leave from the Court or consent from the opposing party before disclosing the material to the witness. Consent shall not be unreasonably withheld. With respect to any depositions that involve a disclosure of CONFIDENTIAL INFORMATION of a party to this action, such party shall have until five (5) days after receipt of the deposition transcript within which to inform all other parties that portions of the transcript are to be designated CONFIDENTIAL, which period may be extended by agreement of the parties. Upon being informed that certain portions of a deposition are to be designated as CONFIDENTIAL, all parties shall immediately cause each copy of the transcript in its custody or control to be appropriately marked and limit disclosure of that transcript in accordance with this Protective Order.

IV. Use in Briefs and as Exhibits.

Any request to restrict access must comply with the applicable Federal rules and the governing rules of the Middle District of Florida. Documents filed with the Court that contain CONFIDENTIAL INFORMATION should be redacted when possible. If redaction is not feasible, such documents should be filed under restricted access pursuant to the applicable rules of court. The parties also must abide by Section X herein with respect to the filing of Plaintiff's PHI obtained from covered entities.

V. Application of the Protective Order.

(a) With respect to documents containing CONFIDENTIAL INFORMATION, the parties must redact the CONFIDENTIAL INFORMATION or file any such documents under seal if they are used as an exhibit to a pleading or other filing in

this proceeding. However, no party shall file a document under seal without first having obtained an order granting leave to file under seal on a showing of particularized need.

- (b) Nothing in this Protective Order shall affect the admissibility into evidence of CONFIDENTIAL INFORMATION, or abridge the rights of any party to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Court concerning the status of CONFIDENTIAL INFORMATION. This Protective Order does not prejudice a party's right to request that the Court rescind, modify, alter, or amend this Order with respect to specific documents or information.

VI. Confidentiality Challenge.

Any party may object to the designation of particular CONFIDENTIAL INFORMATION by giving written notice to the party designating the disputed information. The written notice shall identify the information to which the objection is made. If the parties cannot resolve the objection within five (5) business days after the time the notice is received, it shall be the obligation of the party seeking the designation of the information as CONFIDENTIAL to file an appropriate motion requesting that the Court determine whether the disputed information should be subject to the terms of this Protective Order. The disputed information shall be treated as CONFIDENTIAL under the terms of this Protective Order until the Court rules on the motion.

VII. Confidential Information at Trial.

Nothing in this Protective Order shall preclude any party from seeking confidential treatment from the Court with respect to CONFIDENTIAL INFORMATION or from raising any available objections, including, without limitation, objections concerning admissibility, materiality, and privilege. This Protective Order expressly reserves the right for the parties to obtain a determination as to the manner in which CONFIDENTIAL INFORMATION may be used in an evidentiary hearing or at trial. Special procedures or *in camera* treatment, if any, shall be determined in the future.

VIII. Modification.

This Protective Order may be modified only by Order of the Court.

IX. Return or Destruction of Confidential Information.

After final disposition of this case, whether by judgment, including appeals, settlement, or otherwise, counsel of record for each of the parties shall either return or destroy all CONFIDENTIAL INFORMATION the parties produced during the case, and all copies of such CONFIDENTIAL INFORMATION, unless such information must be maintained in accordance with any applicable Federal or Florida law, or is required to be maintained by counsel for purposes of professional liability insurance.

X. Information Protected By the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).

(a) The parties will not disclose Plaintiff’s protected health information (“PHI”) for any purpose other than this litigation. To the extent that the parties desire to show any PHI to an expert retained in this litigation, such party must show this Protective Order to such expert and have him or her execute a Non-Party Confidentiality Agreement.

- (b) At the end of this litigation (which shall be defined as the point at which an order disposing of the entire case has been entered, or the time at which all proceedings hereunder have been completed, including any appeals), if any party is in possession of Plaintiff's PHI (including all copies made), such party shall destroy any and all copies of Plaintiff's PHI or return that information to the covered entity that provided the information and ensure that any third party expert likewise has confirmed that they have destroyed any and all copies of Plaintiff's PHI.
- (c) All parties, attorneys, employees, agents, and designees of the parties are hereby authorized through discovery to receive, subpoena, and transmit PHI pertaining to Plaintiff to the extent that such information is reasonably calculated to lead to the discovery of admissible evidence provided that such parties, attorneys, employees, agents, and designees abide by the terms of this Protective Order. Nothing in this Protective Order is intended to waive the parties' or any third parties' right to assert any objections that they may have to the discovery.
- (d) The parties and their attorneys shall be permitted to use Plaintiff's PHI solely for matters reasonably connected with this case. This includes, but is not limited to, disclosures to the presiding judge and his or her support staff, the parties, their attorneys of record, the attorneys' firms (i.e., attorneys, support staff, and consultants), the parties' insurers, experts, consultants, court reporters and copy services. The recipients of Plaintiff's PHI shall maintain it as confidential and are prohibited from using or disclosing same for any purpose other than this case.

- (e) With respect to documents containing PHI, whether obtained from the parties or any third party in accordance with Section X(c) herein, the parties must file any such documents under seal if they are used as an exhibit to a pleading or other filing in this proceeding. However, no party shall file a document under seal without first having obtained an order granting leave to file under seal on a showing of particularized need.
- (f) Plaintiff and/or Defendant may seek additional protection from the disclosure and use of any documents and information for which they believe this Protective Order does not provide adequate protection or with respect to documents and information which they believe are not subject to disclosure pursuant to applicable statutes, rules, regulations, or other applicable law.

Dated: _____, 2018

DONE and ORDERED this ____ day of _____, 2018, in chambers, Orlando, Florida.

Roy B. Dalton, Jr.
United States District Judge

Copies Furnished to:

Lauren L. Valiente, Foley & Lardner LLP, 100 N. Tampa St. Suite 2700, Tampa, Florida 33602;
lvaliente@foley.com

Christina M. Kennedy and Jessica E. Joseph, Foley & Lardner LLP, 111 N. Orange Ave. Suite 1800, Orlando, Florida 32801; ckennedy@foley.com; jjoseph@foley.com

Amy Whelan and Asaf Orr, National Center for Lesbian Rights, 870 Market Street, Suite 370, San Francisco, California 94102; awhelan@nclrights.org; aorr@nclrights.org

Thomas M. Gonzalez and Nathan J. Paulich, Thompson, Sizemore, Gonzalez & Hearing, P.A.,
P.O. Box 639, Tampa, Florida 33601; tgonzalez@tsghlaw.com; npaulich@tsghlaw.com

Exhibit 1

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

ORLANDO DIVISION

JOHN DOE, a minor, by his parents
and next friends, SUSAN AND JACK
DOE,

Plaintiff,

Civ. Action No. 6:18-cv-00102-RBD-GJK

v.

VOLUSIA COUNTY SCHOOL BOARD,

Defendant.

NON-PARTY CONFIDENTIALITY AGREEMENT

I, _____, have read the Protective Order entered in the above-captioned action. I understand the terms of the Protective Order, agree to comply with the Protective Order in all respects, and hereby submit and waive any objection to the jurisdiction of the United States District Court for the Middle District of Florida, Orlando Division, for the adjudication of any dispute concerning or related to my compliance with the Protective Order.

Print or type the following:

Name: _____

Title and Affiliation: _____

Address: _____

Telephone: _____

Executed this ____ day of _____, 201__.