

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

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

Plaintiffs,

vs.

Case No.: 6:18-cv-00102-RBD-GJK

VOLUSIA COUNTY SCHOOL BOARD,

Defendant.

**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFF’S
MOTION FOR ENTRY OF PROTECTIVE ORDER**

The Defendant, The School Board of Volusia County, Florida,¹ (“School Board” or “Defendant”), responds in opposition to the Plaintiff’s “motion for entry of protective order,” (“Motion”), (Dkt. 49). The protective order sought by the Plaintiff is unnecessary and will unduly burden the Defendant.² Much of what the Plaintiff, a transgender high school student in the Defendant’s school district, seeks to keep confidential is already protected from disclosure by law, including, among others, the Family Education Rights and Privacy Act (“FERPA”), the Health Insurance Portability and Accountability Act (“HIPAA”), and Florida’s Public Records Act. Moreover, the undersigned counsel for Defendant has agreed that, to the extent possible, it will not file any document in the public CM/ECF record containing the “Confidential Information” the Plaintiff has identified in Section I.(a) of the

¹ The correct name for the Defendant is The School Board of Volusia County, Florida. § 1001.40, Fla. Stat. (2017).

² The Defendant operates, controls, and supervises all public schools in Volusia County. Art. IX, § 4(b), Fla. Const.

proposed “protective order,” (Dkt. 49-1), and to the extent any such information is necessary for the Court’s consideration the Defendant will seek leave to file the information under seal. The Defendant, however, does not agree to the broad nature of the proposed protective order which seeks to make confidential, and impose obligations on the Defendant related to, information such as “information, which either on its own, or together with other information, may lead to the identification of . . . the [public] school (or schools) as one (or ones) Plaintiff has attended or is currently attending.” As a public entity, the Defendant is required by Florida law to conduct government in the sunshine and is subject to broad public records laws. The broad scope of the proposed protective order, however, encompasses information that is not confidential in nature. Therefore, the Court should deny the Motion.

MEMORANDUM OF LAW

I. Protective order standard

“Rule 26(c) [of the Federal Rules of Civil Procedure] provides that a protective order shall issue only upon a showing of ‘good cause.’” *United States v. Garrett*, 571 F.2d 1323, 1326 n. 3 (5th Cir. 1978).³ The grounds upon which good cause exists for a protective order include “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1). “The burden is on the movant to show the necessity of the protective order, and the movant must meet this burden with a ‘particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.’” *Ekokotu v. FedEx Corp.*, 408 F. App’x 331, 336 (11th Cir. 2011) (citing *Garrett*, 571 F.2d at

³ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as precedent all rulings of the former Fifth Circuit issued prior to October 1, 1981.

1326 n. 3). In addition to requiring good cause, the Eleventh Circuit has “superimposed a somewhat more demanding balancing of interests approach to the Rule.” *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).

There are “four factors for ascertaining the existence of good cause which include: [1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order.” *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (citation omitted). The Court’s good cause “determination must also include a consideration of relative hardship to [the Defendant] should the protective order be granted.” *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974) (citing *United States v. Kordel*, 397 U.S. 1, 4-5 (1970)). A showing of specific harm alone does not demonstrate a need for a protective order, and the “availability of a less onerous alternative” may negate a showing of good cause. *See Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007).

Therefore, in order for the Court to issue a protective order without the Defendant’s consent, the Plaintiff must show particular and specific facts that demonstrate consequential harm without said order, and that which also outweighs the burden placed on the Defendant to comply with the order. The Court should deny the Motion.

II. The Plaintiff has failed to show the necessity of a protective order

Much of the information that the Plaintiff seeks to keep confidential is already protected by law and may not be disclosed without the Plaintiff’s consent. Moreover, the Defendant has agreed that, to the extent possible, it will not file any document in the public CM/ECF record

containing the “Confidential Information” the Plaintiff has identified in Section I.(a) of the proposed “protective order,” and that if such information is necessary for the Court’s consideration, the Defendant will seek leave to file the information under seal. But the Defendant is a public entity that, as a matter of Florida law, must conduct governance in the sunshine and is subject to broad public records act obligations. *See* Ch. 119, Fla. Stat. (2017); Chs. 1000-1013, Fla. Stat. (2017). The Defendant therefore does not agree to the broad nature of the proposed confidentiality agreement to the extent it seeks to impose obligations on the Defendant outside of filing matters in this litigation to protect against information that is not confidential in nature.

The Plaintiff contends that “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.”⁴ (Dkt. 49 at 3). But the Plaintiff has not demonstrated the requisite need for the Court to enter a protective order. In his proposed protective order, the Plaintiff seeks the Court to provide protection for information that is already protected from disclosure by law, such as: social security numbers; protected health information (“PHI”); and other information regarding the health, personal relationships, or other personal issues regarding the Plaintiff or his immediate family. (Dkt. 49-1, at 2).

Indeed, the Plaintiff’s student records are subject to protections against disclosure under FERPA and Florida law. 20 U.S.C. § 1232g; §§ 1002.22-1002.222, Fla. Stat. (2017). Any information and/or records obtained from medical providers regarding the Plaintiff’s

⁴ Neither the Plaintiff’s complaint nor his Motion allege that the Plaintiff has been subject to “threats or harassment” or “retaliation” for his transgender status by any student or personnel of the Defendant. Moreover, the Defendant has a policy in effect that prohibits such behavior from occurring at its schools. *See* (Dkt. 31-1).

“medical and psychological history,” or the “health, personal relationships or other personal issues regarding the Plaintiff or his immediate family” are subject to the protections against disclosure afforded by HIPAA.⁵ 42 U.S.C. § 1320d. Moreover, Florida public records laws preclude the disclosure of certain personal information—such as the Plaintiff’s social security number. *See* § 119.07(5), Fla. Stat. (2017). The law therefore already provides protections for much of the information that the Plaintiff seeks to keep confidential in his Motion.

Further, the Plaintiff’s proposed protective order would broadly apply to information beyond filings with the court. This is impractical because it seeks to protect information such as “information, which either on its own, or together with other information, may lead to the identification of . . . the [public] school (or schools) as one (or ones) Plaintiff has attended or is currently attending.” (Dkt. 49-1, at 2); *see also* (Dkt. 49, at 2). The identity of the name and position of some administrators and faculty at the public high school the Plaintiff attends are not confidential, and in fact are already in the public record. *See, e.g.*, (Dkt. 47 at 3 n. 4). However, under the broad scope of the Plaintiff’s proposed protective order, such information could “on its own, or together with other information, . . . lead to the identification of . . . the school” which the Plaintiff attends. *See* (Dkt. 49-1 at 3). Attempting to keep private information that already exists in the public sphere negates the necessary showing of good cause that Rule 26(c) demands.⁶ Moreover, it highlights the difficulty in mandating the

⁵ HIPAA precludes the sharing of personal health information obtained from third party medical providers, and it sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization. *See* 45 C.F.R. Part 160; 45 C.F.R. Part 164(A), (E).

⁶ In the past, the Plaintiff’s mother has been identified by name in a local news article, providing statements regarding transgender students and bathrooms and locker rooms, and stating that her transgender child is a student in the Defendant’s school district. The Plaintiff’s mother has also spoken at public school board meetings regarding the same type of issues. Thus, some of the information which the Plaintiff seeks to make confidential by the protective order is already in the public domain by virtue of the Plaintiff’s mother.

Defendant, which must as a matter of law conduct governance in the sunshine, to comply with such a broad protective order.

The Defendant's proposed agreement related to public filings in CM/ECF is equitable in light of the Plaintiff's privacy interests and the hardship that the Defendant will experience if it must comply with a protective order of such breadth. The "less onerous alternative" that the Defendant has provided suffices to protect the Plaintiff's privacy interest and further negates the Plaintiff's argument for a protective order. *See Romero*, 480 F.3d at 1246.

The Plaintiff has failed to demonstrate particular and specific harm that would result absent his proposed protective order. Such an order would cause unnecessary hardship by requiring much information—beyond what is protected by law, and outside the discovery process—to be marked as "confidential." There is thus no need to issue an order of such breadth to which the Defendant is unaware how it would ensure compliance. The Motion should be denied.

CONCLUSION

For the foregoing reasons the Defendant respectfully requests that the Court deny the Plaintiff's motion for entry of protective order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 24th day of May, 2018, by CM/ECF electronic filing to the Clerk of Court and to the following:

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