

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

J.A.W.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:18-cv-37-WTL-MPB
	)	
EVANSVILLE VANDERBURGH	)	
SCHOOL CORPORATION,	)	
	)	
Defendant.	)	

**Memorandum in Support of Plaintiff’s Motion for Leave to File and  
Maintain Documents Under Seal**

**Introduction**

On today’s date, the plaintiff has requested leave to file and maintain four documents under seal: (a) select counseling records of the plaintiff from Within Sight (Exhibit 3 to his deposition); (b) an additional counseling record from Within Sight (Exhibit 4 to his deposition); (c) the plaintiff’s medical records from ECHO Community Health Care (Exhibit 5 to his deposition); and (d) the plaintiff’s photograph (Exhibit 6 to his deposition as well as Exhibit 6 to the deposition of David Smith). The first three of these documents are medical and mental health records that raise clear privacy concerns and are protected from disclosure pursuant to the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). The fourth document is a photograph that, if filed publicly, would easily allow for the identification of the minor plaintiff. While sealed filings are, of course, disfavored,

the hefty standard allowing for such favors is met in this case, and the aforementioned documents should be filed and maintained under seal.

### **Argument**

1. As noted, the first three of the documents that the plaintiff seeks leave to file under seal are medical and mental health records that qualify as “individually identifiable health information” protected from disclosure pursuant HIPAA. *See* 45 C.F.R. § 160.103. This Court accordingly entered a protective order prohibiting the disclosure of this information. (Dkt. 32). Regulations promulgated pursuant to HIPAA provide that protected health information may only be disclosed during the course of a judicial or administrative proceeding if, as is pertinent here, the parties make reasonable efforts to secure a qualified protective order that prohibits the disclosure of the information beyond the bounds of litigation and that requires “the return . . . or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.” 45 C.F.R. § 164.512(e)(1)(ii), 164.512(e)(1)(v). That promise would clearly ring hollow were such information filed in the public record.

The plaintiff acknowledges, of course, that “[d]ocuments that affect the disposition of federal litigation are presumptively open to public view.” *Goessel v. Boley Int’l (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (quotation and citations omitted); *see also, e.g., In re Assoc. Press*, 162 F.3d 503, 509-10 (7th Cir. 1998). This presumption, however, “can be overridden by competing interests.” *GEA Group AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 420 (7th Cir. 2014). Applying these standards,

courts have regularly recognized that protecting individuals' medical privacy is an interest sufficient to overcome the general presumption in favor of public access. *See, e.g., Alston v. Sharpe*, No. 3:13-cv-00001, 2015 WL 6395937, at \*1 (D. Conn. Oct. 22, 2015) (“[D]espite this strong presumption, federal law treats medical records as confidential, and therefore, plaintiff’s medical records should be sealed.”) (internal quotation, citations, and alterations omitted); *Bureau of Nat. Affairs v. Chase*, No. ELH-11-1641, 2012 WL 3065352, at \*2 (D. Md. July 25, 2012) (“[S]ensitive medical or personal information may be sealed, so long as the request is not overbroad.”) (internal quotation and citation omitted); *San Ramon Reg’l Med. Ctr., Inc. v. Principal Life Ins. Co.*, No. C-10-02258-SBA, 2011 WL 89931, at \*1 n.1 (N.D. Cal. Jan. 10, 2011) (“Although there is a presumption in favor of maintaining public access to court records, the Court notes that medical records are deemed confidential under [HIPAA]. In view of these considerations, the Court finds that the need to protect the Patient’s confidential medical information outweighs any necessity for disclosure.”) (internal citations omitted); *Stokes v. Gramham*, No. 5:10-CV-296-F, 2010 WL 3834543, at \*1 (E.D.N.C. Sept. 30, 2010) (“The court finds that Plaintiff’s interest in his privacy overcomes both the common law and First Amendment presumption to access, and that there is no alternative to sealing the entirety of the medical records exhibits.”).

The plaintiff’s medical and mental health records, relevant to these proceedings, should accordingly be maintained under seal.

2. The fourth document filed under seal—a photograph of the plaintiff—should also be maintained under seal. Given the nature of this case, the plaintiff’s visual appearance is relevant to these proceedings. However, the plaintiff is a minor who is proceedings pursuant to his initials in accordance with Rule 5.2(a) of the Federal Rules of Civil Procedure. Requiring the plaintiff’s photograph to be filed in the public record would, of course, allow for the identification of the plaintiff and would defeat the purpose of Rule 5.2.

Like individuals’ medical and mental health records, the appropriateness of sealing documents that could be used to identify minors is well-recognized. As one court ordered in another case concerning the use of school restrooms by a transgender student,

[t]he unredacted declarations and exhibits that Doe seeks to file under seal contain the non-pseudonymous names and signatures of Doe and her mother and two recent photographs of Doe. Doe is undisputedly a minor. This case involves sensitive and personal issues regarding a minor’s gender identity and topics that have stirred controversy both locally and nationally. Indeed, in her declaration, Doe’s mother describes threats that Doe and her family have experienced in the short time since this case commenced. The Court concludes that the limited information that Doe has redacted from these documents would, if filed publicly, result in Doe being easily identified in public court filings and would adversely affect her privacy and security interests.

*Privacy Matters v. U.S. Dep’t of Educ.*, No. 16-cv-3015 (WMW/LIB), 2016 WL 6436658, at \*4 (D. Minn. Oct. 27, 2016). Other courts have reached similar conclusions. *See, e.g., Lindiment v. Jones*, No. 1:17cv501, 2017 WL 4119644, at \*9 (M.D.N.C. Sept. 15, 2017) (“Plaintiff’s filings also contain . . . identifying and/or explicit photographs of the minors. To protect the privacy of the non-party minors,

the Court orally directed the Clerk's Office to place those materials under seal. The Court now reaffirms that order."); *Neves v. Neves*, No. 3:09cv159, 2009 WL 1289865, at \*3 (W.D.N.C. May 6, 2009) ("To the extent that the parties must refer to the minor children by name or other identifying information in any future filing, such filing should be placed under seal in order to protect the identities of the minor children involved.").

Consistent with this precedent, the plaintiff should be permitted to file and maintain his photograph under seal as well.

### **Conclusion**

For the foregoing reasons, the plaintiff should be permitted to file and maintain the aforementioned four documents, relevant to these proceedings, under seal.

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### Certificate of Service

I hereby certify that on this 16th day of July, 2018, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's system on:

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