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April 24, 2020

VIA ECF ONLY

Judge Robert N. Chatigny
Abraham Ribicoff Federal Building
United States District Court
450 Main Street
Hartford, CT 06103

Re: *Soule, et al. v. CIAC, et al.*
Docket No. 3:20-cv-00201
Request for Prefiling Conference

Dear Judge Chatigny:

The Connecticut Association of Schools, Inc., d/b/a, Connecticut Interscholastic Athletic Conference (“CIAC”), Bloomfield Board of Education, Cromwell Board of Education, Glastonbury Board of Education, Canton Board of Education, and Danbury Board of Education (the “School Board Defendants”), Andraya Yearwood, T.M. and the Connecticut Commission on Human Rights and Opportunities (“CHRO”) (hereinafter collectively “Defendants”), through their attorneys request a pre-filing conference in anticipation of filing motion(s) pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6); 12(e) and/or 12(f)(2), currently due by order of this Court on May 5, 2020. Counsel for the Defendants certify that before filing this request for pre-filing conference, the parties conducted a meet and confer via email on Wednesday April 14, 2020, and conference call on Tuesday, April 21, 2020. The Defendants are prepared to discuss the following deficiencies with the operative Complaint, and the following motions during the pre-filing conference.

A. Motions on Behalf of All Defendants

1. The Proposed Amended Complaint

The following proposed motions address both the original complaint and the “amended complaint” that was filed on April 17, 2020. As an initial matter the proposed amended complaint was not filed as of right or by motion. The Defendants contend that this filing should be withdrawn by the Plaintiffs or dismissed by the Court without further motion. Pursuant to Fed. R. Civ. P. 15, Plaintiffs were outside of the time frame to file an amended complaint as of right. Therefore, in accordance with Local R. Civ. P. 8, they should have provided Defendants with a redlined copy of the proposed Amended Complaint and sought consent for this filing. For

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the reasons expressed herein, the Defendants would not have consented. Counsel for the Defendants addressed this issue with Plaintiffs' counsel at the meet and confer but the parties did not reach an agreement. However, the issues raised below address defects in both the complaint and the proposed amended complaint.

2. Neither Version of the Complaint Complies with Fed. R. Civ. P 10(b)

Unless the Plaintiffs agree to file an amended complaint as requested at the meet and confer, the Defendants intend to file a motion to strike and/or for more definite statement. Neither the current complaint nor the proposed amended complaint comply with the plain intent of Fed. R. Civ. P 10(b) that requires each claim founded on a separate claim or occurrence to be set forth in a separate count. In this case, as written, all plaintiffs are making the same claims against each defendant. However, it has become apparent from discussions among counsel that this is not the case. The parties have attempted to clarify in discussions what claims for liability and relief are being made against which defendants by which plaintiffs, and have been unable to do so. Amendment of the complaint is necessary to provide sufficient clarity so that the Defendants can file responsive pleadings. Such clarification also may eliminate the need for the Defendants to address several of the issues set forth below. For example, the Plaintiffs appear to be asserting claims against schools where they do not attend. If this is not the case, Plaintiffs need to file an amended complaint that identifies clearly in separate counts what claims by what plaintiff are being made against each individual defendant. This issue also is significant with regard to the requested addition of an additional plaintiff through the proposed amended complaint. This amended complaint adds a plaintiff who attends a non-public school. The proposed amended complaint needs to identify what claims she is making against what defendants and the jurisdictional basis for the same. In the absence of such clarification, the Defendants may be forced to prepare motions to dismiss to address claims that are not even being made. Moreover, Defendants contend that this concern is not properly addressed merely through correspondence between the parties. This issue was discussed during the meet-and-confer, and Plaintiffs' counsel indicated that they would consider the Defendants' request. However, Defendants have not received a response at this time.

3. The Complaint Should be Amended to Comply with the Court Rulings of April 16, 2020 Regarding References to Transgender Athletes

Defendants also request that the Court order the Plaintiffs to amend the complaint to comply with the court order of April 16, 2020. During the parties' call with the Court on Thursday, April 16, 2020, the Court specifically instructed the Plaintiffs to refrain from referring to transgender females as "male." The very next day, however, Plaintiffs filed an Amended Complaint that continued in multiple places to refer to Ms. Yearwood, T.M. and other transgender females as being "male," "boys," having "male bodies" or similar language. (*See Am. Compl.*, footnote 1; ¶¶ 3,-4, 15-16, 45, 56, 58-60, 63-65, 67-70, 73, 75-77, 80, 82, 98, 103-106, 111, 113, 115-117, 119, 121-123, 134, 147, 150-151, 156, 165 and 175; Prayer for Relief (C), (D) and (E)). Not only does this violate this Court's order, but it constitutes "scandalous matter" that must be stricken pursuant to Fed. R. Civ. P. 12(f). Although the Plaintiffs stated

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during the meet and confer that the amended complaint was modified to address the court's ruling, the Defendants disagree that proposed modifications are sufficient.

4. The Complaint Should be Amended to Remove Allegations Concerning Third Parties and Matters Outside the Scope of Plaintiffs' Knowledge.

This case is brought by individual plaintiffs. Plaintiffs all participate in specific events during the Winter Indoor and/or Spring Outdoor Track and Field seasons. More specifically, Plaintiffs seek relief based on their prior participation in the 55m and 300m events during the indoor season, and the 100m and 200m events during the outdoor season., Despite the narrow number of events that serve as the basis of Plaintiff's request for relief, the Complaint contains factual allegations regarding races and events in which none of them participated, including races from across the country and at different levels of competition that do not involve any of the Defendants. The plaintiffs have no personal knowledge about those races or events, and such events cannot serve as the basis for any relief sought in this lawsuit as this is not a class action. (See Am. Compl., ¶¶ 2-5, 30-32, 44-70, 81-86, 89-90, 92, 94, 99, 100, 102-105, 107-113, 117-118, 120-124, 157, 165, 172, 172-175; Tables 1-6, 16). These allegations are "redundant, immaterial, important or scandalous" that must be stricken pursuant to Fed. R. Civ. P. 12(f). At this time, Plaintiffs have refused to remove such allegations.

In addition, Plaintiffs have no personal knowledge of the allegations contained in ¶¶ 43-56, which go well beyond "a short and plain statement of the claim showing that the pleader is entitled to relief" and constitute improper argument and factual allegations. Defendants have requested that those allegations be removed, but Plaintiffs have refused. Therefore, they must be stricken pursuant to Fed. R. Civ. P. 12(f).

B. Bloomfield and Cromwell intend to file a motion to dismiss on the following grounds:

Plaintiffs lack standing under Title IX to raise claims against Bloomfield and Cromwell. None of the four (4) Plaintiffs attend school in either Bloomfield or Cromwell and, therefore, neither Bloomfield nor Cromwell owe the Plaintiffs any legal duty or obligation under Title IX. There is no legal authority to support this Court's jurisdiction.

C. Canton, Glastonbury, and Danbury intend to file a motion to dismiss on the following grounds:

Plaintiffs lack standing to raise claims against Canton, Glastonbury and Danbury because Plaintiffs make no allegations as to those schools offering transgender athletes the opportunity to participate in a track and field event in which any of the Plaintiffs participate. To the extent Plaintiffs do have standing, the claims asserted against Canton, Glastonbury, and Danbury fail to state a claim upon which relief can be granted for the same reason.

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D. CIAC and the School Board Defendants intend to file a motion to dismiss on the following grounds:

(1) Plaintiffs lack standing, in whole or in part, under Article III to raise issues related to sports and track and field events in which none of the Plaintiffs participate and regarding hypothetical transgender athletes that may participate in girls' athletics in the future because they cannot establish an injury in fact.

(2) The Amended Complaint fails to state a claim upon which relief can be granted because “sex” as used by Title IX includes gender identity and transgender status. Thus, Plaintiff’s allegations fail on the face of the Amended Complaint as a matter of law.

(3) The Amended Complaint fails to state a claim under Pennhurst because Title IX, the regulations, and OCR policy guidance do not provide unambiguous notice to funding recipients that transgender students cannot participate on sex-separated teams that align with their gender identity.

(4) The Amended Complaint fails to state a claim upon which relief can be granted because the injuries Plaintiffs allege to have suffered – lost opportunity to win the 55m and 300m races in indoor track and 100m and 200m races in outdoor track and corresponding loss of publicity – do not constitute a denial of equal athletic opportunity under Title IX and its regulations.

(5) Plaintiffs have failed to state a claim for discrimination under Title IX because they do not allege that the boys and girls teams are treated differently. The CIAC’s policy is applied equally to both the boys’ and girls’ teams. Thus, transgender boys are as eligible to compete on the boys’ team as are transgender girls on the girls’ team.

E. CIAC, the School Board Defendants, and Andraya Yearwood and T.M. intend to file a motion to dismiss on the following grounds:

(1) Plaintiffs’ requested relief would violate Title IX.

(2) All of the allegations in the Amended Complaint concerning the alleged “athletic advantage” of girls who are transgender are based on testosterone produced and processed by the body during typically male puberty. The Amended Complaint does not contain any allegations that a person’s chromosomes, genitals, internal reproductive anatomy or any other physiological characteristics confer any athletic advantage. The Amended Complaint must be dismissed to the extent that it seeks any requested relief based on physiological characteristics of girls who are transgender other than endogenous puberty or levels of circulating testosterone.

(3) The Amended Complaint fails to state a claim because, Plaintiffs have not plausibly alleged that they are unable to actively compete on a track-and-field team in their chosen events with girls who are transgender in light of the publicly available track-and-field

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records showing that several of the Plaintiffs have repeatedly outperformed both Andraya Yearwood and T.M.

(4) The Complaint fails to state a claim because, even if Plaintiffs' definition of "sex" is correct, which Defendants do not concede, the regulations implementing Title IX do not prohibit boys and girls from competing on a team of the opposite sex.

G. All Defendants intend to file a motion to dismiss on the following grounds:

Plaintiffs have failed to state a claim upon which relief can be granted because there is no legal basis for the proposition that sex-separated teams authorized by Title IX must be defined solely by a person's sex assigned at birth or because they have "male bodies" or are "physiologically and genetically male" as claimed by Plaintiffs. Indeed, the terms "male bodies" and "physiologically and genetically male" are so vague that this alone requires that the Amended Complaint, in whole or in part, be dismissed.

H. CIAC, the School Board Defendants, and CHRO intend to file a motion to dismiss on the following grounds:

(1) The Amended Complaint fails to state a claim under Title IX because transgender status and gender identity are protected by state law and the definition of "sex" for purposes of sex-separated team under Title IX is ambiguous.

(2) Plaintiffs' requested relief would violate state law.

I. Andraya Yearwood and T.M. intend to file a motion to dismiss on the following grounds:

Plaintiffs' requested relief would violate the Equal Protection Clause.

Wherefore, for all of these reasons, the Defendants request that a pre-filing conference be held.

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Sincerely,

Johanna G. Zelman

JOHANNA G. ZELMAN (ct26966) (for
Bloomfield and Cromwell Boards of Education)

Peter Murphy

Linda Yoder

PETER MURPHY/LINDA YODER (for CIAC
and Danbury Board of Education)

David Monastersky

DAVID MONASTERSKY (for Glastonbury
and Canton Boards of Education)

Dan Barret

Joshua Block

Chase Strangio

DAN BARRETT/JOSHUA BLOCK/CHASE
STRANGIO (for Andraya Yearwood and T.M.)

Michael Roberts

MICHAEL ROBERTS (for CHRO)

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