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11 Attorneys for Defendant The Gregory School

12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

14 Jane Doe, by her next friends and parents
15 Helen Doe and James Doe; and Megan
16 Roe, by her next friends and parents, Kate
17 Roe and Robert Roe,
Plaintiff,

18 v.

19 Thomas C. Horne, in his official capacity
20 as State Superintendent of Public
21 Instruction; Laura Toenjes, in her official
22 capacity as Superintendent of the Kyrene
23 School District; Kyrene School District;
The Gregory School; and Arizona
Interscholastic Association, Inc.,
24 Defendants.

No. 4:23-cv-00185-JGZ

**Defendant The Gregory School’s
Response in Opposition to Defendant
Thomas C. Horne’s Motion to
Transfer Venue**

25 Defendant The Gregory School (“TGS”) hereby responds in opposition to
26 Defendant Thomas C. Horne’s Motion to Transfer Venue. TGS and two of its attorneys are
27 physically located in Tucson, as are Plaintiffs Megan Roe, Kate Roe, and Robert Roe. And
28 while Superintendent Horne characterizes TGS as a “nominal defendant,” TGS has legal

1 defenses to Plaintiffs' claims (related to the inapplicability of Title IX and the
2 Rehabilitation Act to TGS due to its lack of federal financial assistance) that it intends to
3 make. This, coupled with Plaintiffs' choice of forum, tips the scales against transfer, and
4 TGS respectfully requests that Superintendent Horne's Motion to Transfer Venue be
5 denied.

6 **I. RELEVANT FACTUAL BACKGROUND**

7 Defendant TGS is a private school located in Tucson, Arizona. *See*
8 Complaint (Doc. 1) at ¶ 12. Plaintiff Megan Roe is a student at TGS. *See* Complaint (Doc.
9 1) at ¶ 56. Megan alleges that TGS violated Title IX, the Rehabilitation Act, and the
10 Americans With Disabilities Act by not permitting her to participate in interscholastic
11 sports. *See* Complaint (Doc. 1) at ¶¶ 74 – 85.

12 Megan alleges – and TGS agrees – that “Megan's teammates, coaches, and
13 The Gregory School have been highly supportive of her transgender identity and would
14 welcome her participation on the girls' volleyball team” and that “[b]ut for the Ban, The
15 Gregory School would permit Megan to play on the girls' volleyball team.” *See* Complaint
16 (Doc. 1) at ¶¶ 61, 64.

17
18 However, while making Title IX and Rehabilitation Act claims against TGS,
19 Megan alleged that TGS “receives federal financial assistance.” *See* Complaint (Doc. 1) at
20 ¶ 13. This is not true – TGS has consciously chosen to forgo federal financial assistance –
21 and a contrary ruling would materially harm TGS by opening it up to a host of new
22 requirements and liabilities. As a result, while TGS will not defend the constitutionality of
23 A.R.S. § 15-120.02, it will defend the claims against it on the basis that it does not receive
24 federal financial assistance. It is not, per Supervisor Horne's characterization, a “nominal
25 defendant.”
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1 **II. LEGAL ARGUMENT**

2 The reason why this case should not be transferred is simple: Phoenix isn't
3 more convenient than Tucson.

4 **A. Relevant Legal Standard**

5 Under 28 U.S.C. § 1404(a), “[f]or the convenience of parties and witnesses,
6 in the interest of justice, a district court may transfer any civil action to any other district
7 or division where it might have been brought or to any district or division to which all
8 parties have consented.” Similarly, under § 1404(b), “[u]pon motion, consent or stipulation
9 of all parties, any action, suit or proceeding of a civil nature or any motion or hearing
10 thereof, may be transferred, in the discretion of the court, from the division in which
11 pending to any other division in the same district.”
12

13 “Intradistrict transfers pursuant to 28 U.S.C. § 1404(b) are discretionary
14 transfers subject to the same analysis as under 28 U.S.C. § 1404(a) but are judged by a less
15 rigorous standard.” *Cheval Farm LLC v. Chalon*, Case No. CV-10-01327-PHX-ROS, 2011
16 WL 13047301, at *2 (D. Ariz. Jan. 19, 2011) (quoting *Edwards v. Sanyo Mfg. Corp.*, Case
17 No. 3:05CV00293–WRW, 2007 WL 641412, at *1 (E.D.Ark. Feb. 27, 2007)).

18 Whether under § 1404(a) or § 1404(b), then, in considering whether to
19 transfer this case, the court may consider “(1) the location where the relevant agreements
20 were negotiated and executed, (2) the state that is most familiar with the governing law,
21 (3) the plaintiff’s choice of forum, (4) the respective parties’ contacts with the forum, (5)
22 the contacts relating to the plaintiff’s cause of action in the chosen forum, (6) the differences
23 in the costs of litigation in the two forums, (7) the availability of compulsory process to
24 compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources
25 of proof.” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (D. Ariz. 2000).
26 However, in determining whether to transfer a case, there is a “strong presumption in favor
27
28

1 of plaintiff's choice of forums." *Gherebi v. Bush*, 352 F.3d 1278, 1303 (9th Cir. 2003),
2 *vacated on other grounds*, 542 U.S. 952 (2004).

3 **B. These factors weigh evenly between the two venues, and, as a result,**
4 **Plaintiffs' choice of venue (Tucson) should be honored.**

5 These factors weigh pretty evenly between Phoenix and Tucson. The first
6 factor – “where the relevant agreements were negotiated and executed” – does not have
7 any relevance outside of the contractual context.

8 The second factor is a wash, as the Phoenix and Tucson Districts are equally
9 familiar with the governing law.

10 The third factor significantly favors Tucson, as it is Plaintiffs' chosen forum.

11 The fourth factor slightly favors Tucson. This case has two plaintiffs – Jane
12 Doe, who resides in Maricopa County and attends the Kyrene School District, and Megan
13 Roe, who resides in Pima County and attends TGS.

14 Superintendent Horne asserts that TGS is a “nominal defendant.” This is not
15 so – as explained above, while TGS would, but for A.R.S. § 15-120.02, permit Megan to
16 play on the girls' volleyball team, it does not receive federal financial assistance as alleged
17 in ¶ 12 of the Complaint. As a result, it is not subject to Title IX or the Rehabilitation Act,
18 and intends to move to dismiss the claims against it. In the event that motion is
19 unsuccessful, discovery will be necessary on the federal financial assistance issue. TGS,
20 then, is not a nominal defendant – it is a defendant that intends to actively defend the claims
21 against it on that basis. The same does not appear to be true of Kyrene School District,
22 which would, under Supervisor Horne's characterization, be a “nominal defendant.” Given
23 that the school actively defending the claims against it is located in Tucson, the ties to
24 Tucson are necessarily stronger than the ties to Phoenix, though the participation of
25 Supervisor Horne and the AIA at least makes it close.

26
27 The fifth factor is even. Plaintiff Megan Roe is a Pima County resident who
28 asserts claims against a Pima County school. Those contacts arise entirely in Pima County.

1 And while Supervisor Horne and the AIA may reside in Maricopa County, the threatened
2 enforcement A.R.S. § 15-120.02 against a Pima County school is, by definition, a contact
3 with Pima County. Admittedly, there are similar contacts with Maricopa County (related
4 to Jane Doe’s claims against Kyrene School District), but that only brings the two venues
5 level.

6 The sixth factor favors Tucson. Realistically: there is very little difference in
7 the cost of litigation between these two venues in 2023. TGS expects that every attorney
8 in this matter has, for the past three years, become accustomed to litigating remotely,
9 conducting depositions and arguing motions through Zoom or Teams. To the extent that
10 discovery is conducted in-person, the venue for the case makes no difference – Phoenix
11 witnesses will be deposed in Phoenix and Tucson witnesses will be deposed in Tucson, just
12 as they would in any other case. Even if there is in-person oral argument on some of the
13 motions in this case, that will be a relatively limited excursion for Phoenix attorneys, and
14 out-of-state counsel will have to travel regardless.

15
16 From TGS’s perspective, though, its discovery (if necessary) will occur in
17 Tucson, it is located in Tucson, and two of its three attorneys reside in Tucson.¹ As a result,
18 to TGS, Tucson is the more efficient venue.

19 The seventh factor is even. TGS does not expect a significant number of
20 “unwilling non-party witnesses” – it cannot envision who that might be – and a subpoena
21 issued by an Arizona District Judge in Tucson is valid in Phoenix anyway, so long as the
22 place of compliance is within 100 miles of where the person resides, is employed, or
23 regularly transacts business. Fed. R. Civ. P. 45(c).

24
25 The eighth factor slightly favors Tucson. With respect to TGS, its discovery,
26 should it prove necessary, will be in Tucson, so the “ease of access” is better in that venue.

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¹ Though Jones, Skelton & Hochuli’s office is in Phoenix, one of the attorneys
working on this matter resides in Tucson.

1 It does not know what other discovery is contemplated, so, from its perspective, Tucson is
2 the better venue.

3 In short: most of these factors are relatively even. TGS believes that the
4 discovery relevant to the claims against it (should those claims survive a motion to dismiss)
5 will be in Pima County, as will any other discovery relevant to Megan Roe’s specific claim.
6 Still, the venue for the case only really matters for oral argument and trial, and, for those
7 purposes, Tucson is a more convenient venue for TGS. Given that it is also Plaintiffs’
8 choice of venue – and there is a “strong presumption in favor of plaintiff’s choice of forum”
9 – TGS believes this case should remain in Tucson.

10
11 **III. CONCLUSION**

12 For the reasons stated above, TGS requests that Defendant Thomas C.
13 Horne’s Motion to Transfer Venue be denied.

14
15 DATED this 8th day of May, 2023.

16 JONES, SKELTON & HOCHULI, P.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2023, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing; and served on counsel of record via the Court’s CM/ECF system.

s/ S. Coffey _____