David C. Potts, Bar #030550
Ashley E. Caballero-Daltrey, Bar #036449
JONES, SKELTON & HOCHULI P.L.C.
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004
Telephone: (602) 263-4547
Fax: (602) 200-7829
dpotts@jshfirm.com
adaltrey@jshfirm.com

Lisa Anne Smith, Bar #016762
DECONCINI MCDONALD YETWIN & LACY, P.C.
2525 East Broadway Boulevard, Suite 200
Tucson, Arizona 85716
Telephone: (520) 322-5000
Fax: (520) 322-5585
lasmith@dmyl.com

Attorneys for Defendant The Gregory School

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jane Doe, by her next friends and parents Helen Doe and James Doe; and Megan Roe, by her next friends and parents, Kate Roe and Robert Roe,

Plaintiff,

v.

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

Defendants.

No. 4:23-cv-00185-JGZ

Defendant The Gregory School's Response to Plaintiffs' Motion for a Preliminary Injunction

Defendant The Gregory School ("TGS") hereby responds in opposition to Plaintiffs' Motion for Preliminary Injunction.

Strictly speaking, Plaintiffs' Motion for a Preliminary Injunction is not actually targeted at TGS: the language in the proposed order asks that Defendants be

"preliminary ENJOINED from enforcing Ariz. Rev. Stat. § 15-120.02 as to Plaintiffs," and TGS is itself not enforcing A.R.S. § 15-120.02 at all. *See* Proposed Order, Doc. 3-1, at pg. 2, lns 10 – 12. In fact, as Plaintiffs allege, "but for the Ban, The Gregory School would permit Megan to play on the girls' volleyball team." *See* Complaint, Doc. 1, at ¶ 64.

However, the Motion itself alleges that TGS "receive[s] federal financial assistance" and is thus subject to Title IX, then groups all defendants together in seeking a preliminary injunction. *See* Plaintiffs' Motion for a Preliminary Injunction, Doc. 3, at pg. 6, lns 7 – 10. The problem with this is that TGS is not like the other defendants: it does not receive federal financial assistance and is thus not subject to Title IX. As a result, to the extent that Plaintiffs' Motion is directed at TGS, they are not likely to succeed on the merits and the Motion must be denied.[1]

I. RELEVANT FACTUAL BACKGROUND

A. The Gregory School

TGS is an independent, coeducational school in Tucson, Arizona, organized as a 501(c)(3) non-profit. *See* Declaration of Dr. Julie Sherrill, attached as **Exhibit 1**, at ¶¶ 2 – 3. As a general rule, TGS does not accept any federal funds or grants. However, during the COVID-19 pandemic, TGS applied for and received a loan from the Small Business Administration pursuant to the Paycheck Protection Program. The loan was forgiven by the end of that year, before any conduct giving rise to this action. *See* Declaration of Dr. Julie Sherrill, attached as **Exhibit 1**, at ¶ 4. Aside from this, TGS has not received any kind of federal funds.

[1] TGS takes no position on whether an injunction is appropriate against any other defendant, and, if an injunction is entered on behalf of Plaintiffs against Superintendent Tom Horne or the Arizona Interscholastic Association enjoining the enforcement of A.R.S. § 15-120.02, TGS will abide by that injunction and permit Megan Roe to participate in interscholastic athletics.

B. Megan Roe

Plaintiff Megan Roe is a transgender female student at TGS. TGS is supportive of Megan and her identity, and, because Megan plays volleyball, welcomes her as a member of the girls' volleyball team. However, A.R.S. § 15-120.02(A) provides that "[e]ach interscholastic or intramural athletic team or sport that is sponsored by a public school or a private school whose students or teams compete against a public school" shall be expressly designated as one "based on the biological sex of the students who participate on the team." As a result, TGS does not allow Megan to participate in interscholastic competition.[2] If it did so, it would, under the statute, subject itself to liability from "[a]ny student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a school knowingly violating this section" and "[a]ny school that suffers any direct or indirect harm as a result of a violation of this section." A.R.S. § 15-120.02(E), (G).

Because she is not permitted to participate in interscholastic competition, Megan has filed a Complaint against TGS alleging violations of Title IX, the Rehabilitation Act, and the ADA and against the AIA and Superintendent Horne alleging violations of the Equal Protection Clause, Title IX, the Rehabilitation Act, and the ADA. *See generally* Complaint, Doc. 1. She (along with her co-plaintiff, Jane Doe) then moved for a preliminary injunction on her Title IX and Equal Protection claims to stop enforcement of A.R.S. § 15-120.02.

II. TITLE IX IS INAPPLICABLE TO TGS.

In order to obtain a preliminary injunction against TGS, Plaintiff Megan Roe must establish that she is likely to succeed on the merits. *See All. For the Wild Rockies v.*

[2] Contrary to the allegations of Plaintiffs' Complaint, TGS does, in fact, allow Megan to practice and participate as a member of the team to the extent possible without running afoul of A.R.S. § 15-120.02. *See* Declaration of Dr. Julie Sherrill, attached as **Exhibit 1**, at ¶ 5.

Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). The only claim at issue as part of Plaintiffs' Motion for Preliminary Injunction – at least with respect to Megan and TGS – is the Title IX claim.

Title IX applies only to those education programs or activities "receiving Federal financial assistance." 20 U.S.C. § 1681(a). Megan Roe alleges this in her Complaint without any explanation or argument. *See* Complaint, Doc. 1, at ¶ 13. However, in conferring regarding TGS's expected motion to dismiss about this issue specifically, Plaintiffs' counsel told counsel for TGS that they would argue: (1) TGS's PPP loan from 2020 constitutes federal financial assistance and (2) TGS's 501(c)(3) status constitutes federal financial assistance.

Neither is the case. First, though TGS received a PPP loan, that loan was forgiven prior to the events giving rise to this action. Second, its tax-exempt status is not "federal financial assistance" for the purposes of Title IX. As a result, Megan is not likely to succeed on the merits against TGS on her Title IX claim, so she cannot obtain a preliminary injunction against it.[3]

A. <u>TGS's PPP Loan Was Forgiven Prior To The Events Giving Rise To This Action.</u>

Although a private educational entity might be subject to nondiscrimination obligations during the pendency of the loan, *see, e.g.*, *Beverly R. on behalf of E.R. v. Mt. Carmel Acad. of New Orleans, Inc.*, 528 F. Supp. 3d 451, 461–62 (E.D. La. 2021), that obligation ends once the loan is forgiven. The Small Business Administration itself acknowledges that: "Receipt of a loan through any SBA program constitutes Federal financial assistance and carries with it the application of certain nondiscrimination obligations. Any legal obligations that you incur through your receipt of this loan are not

[3] As noted, should the Court enter a preliminary injunction against Supervisor Horne and/or the AIA, TGS will abide by that injunction regardless of whether injunctive relief is entered against it.

permanent, and once the loan is paid or forgiven, those nondiscrimination obligations will no longer apply."[4]

TGS's PPP loan was forgiven by the end of 2020. Thus, even if the PPP loan constituted federal financial assistance, TGS's obligations to abide by Title IX ended at the time the loan was forgiven. This case involves a statute that was not in effect until September 24, 2022 and prospective relief based on conduct that might occur in the future, not any conduct that occurred when TGS still had a PPP loan. Thus, TGS's forgiven PPP loan cannot constitute federal financial assistance for Plaintiff Megan Roe's claims.

B. TGS's Tax-Exempt Status Is Not Federal Financial Assistance.

TGS's tax-exempt status is, standing alone, not "federal financial assistance" for purposes of Title IX, either. The Ninth Circuit has not yet addressed this issue head on, *see E.H. v. Valley Christian Acad.*, 616 F. Supp. 3d 1040, 1050 (C.D. Cal. 2022), but this Court should decline to hold that tax-exempt status is federal financial assistance because tax-exempt status is not the "receipt" of funds as contemplated by Title IX.

As the Supreme Court has explained, "[u]nder the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.,* 477 U.S. 597, 605, 106 S. Ct. 2705, 2711, 91 L. Ed. 2d 494 (1986).

Courts have extended that logic to hold that tax-exempt status is not federal financial assistance. For example, one district court explained that Title IX and the Rehabilitation Act are based in the Spending Clause, and thus, the intent is that the recipient has the choice of whether to accept the assistance and the obligations that come along with

[4] U.S. Small Business Administration, Faith-Based Organizations FAQ at 2, https://www.sba.gov/sites/sbagov/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf. The Court can take judicial notice the SBA's FAQ because the facts "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b).

it. *See Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n Illinois, Inc.*, 134 F. Supp. 2d 965, 972 (N.D. Ill. 2001). The court went on to contrast that power with taxation, explaining that Congress can condition tax-exempt status on an organization conforming to specific categories in Section 501(c)(3), but "that was not the power that Congress invoked to subject entities to the nondiscrimination requirements of Title IX." *Id.* (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 585–92 (1983) to discuss 501(c)(3) conditions).

In fact, while Title IX itself does not define federal financial assistance, the Department of Education defines "federal financial assistance" for purposes of Title IX in 34 C.F.R. § 106.2(g). The definition includes grants or loans of "Federal financial assistance"; grants of real or personal property; provision of personal services; sale or lease of property at a nominal or reduced promise; or "any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity." *Id.* Tax exemption does not fit into *any* of these categories, which all involve an offer of funds which the recipient has the choice to accept or decline.

TGS's tax-exempt status is not federal financial assistance. TGS did not accept a grant of money, property, or services. It did not enter into an arrangement with an agency like the Department of Education for the provision of assistance. Its tax status is not the kind of affirmative assistance contemplated by the legislature or the departments which implement Title IX and the Rehabilitation Act. Furthermore, holding that tax-exempt status is the same as federal financial assistance would constitutionalize vast swaths of activity and subject TGS (and any other private or independent school) to a host of new requirements and liabilities that it was not subject to because of its conscious decision to forgo federal financial assistance.

Plaintiffs' request for preliminary injunction should be denied as to TGS because TGS does not receive federal financial assistance and, as a result, Plaintiff Megan Roe is unlikely to succeed on the merits of her Title IX claim against it.

III. CONCLUSION

Because TGS does not receive federal financial assistance for purposes of Title IX, Plaintiff Megan Roe is unlikely to succeed on the merits against TGS, so the Motion for a Preliminary Injunction should be denied as to TGS. As noted, should Plaintiffs obtain relief against AIA or Superintendent Horne (and enjoin the enforcement of A.R.S. § 15-120.02 as to Plaintiffs), TGS will permit Megan Roe to participate in interscholastic competition.

DATED this 18th day of May, 2023.

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

By /s/David C. Potts
David C. Potts
Ashley E. Caballero-Daltrey
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004
Attorneys for Defendant The Gregory School

DECONCINI MCDONALD YETWIN & LACY, P.C.

By /s/Lisa Anne Smith (with permission)
Lisa Anne Smith
2525 East Broadway Boulevard, Suite 200
Tucson, Arizona 85716
Attorney for Defendant The Gregory School

CERTIFICATE OF SERVICE

I hereby certify that on this 18th 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/D. Potts

DECLARATION OF DR. JULIE SHERRILL

STATE OF ARIZONA)
) ss.
County of Pima)

I, Dr. Julie Sherrill, declare as follows:

1. I am over the age of 18 years and competent to testify to the matters set forth in this Declaration.

2. I am the Head of School at The Gregory School, a private, independent school in Tucson, Arizona. I have held that position since 2013.

3. The Gregory School is organized as a non-profit corporation. It has 501(c)(3) tax-exempt status.

4. The Gregory School does not, as a general rule, accept any federal funding, loans, or grants. It did, during the COVID-19 pandemic, apply for and receive a loan from the Small Business Administration pursuant to the Paycheck Protection Program. That PPP loan was forgiven as of December 31, 2020.

5. With respect to Megan Roe, while The Gregory School permits Megan to participate and practice with the girls' volleyball team, she is not currently able to participate in interscholastic competition due to A.R.S. § 15-120.02.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: 5/18/23

Julie Sherrill
Dr. Julie Sherrill