

1 David C. Potts, Bar #030550
2 Ashley E. Caballero-Daltrey, Bar #036449
3 JONES, SKELTON & HOCHULI P.L.C.
4 40 N. Central Avenue, Suite 2700
5 Phoenix, Arizona 85004
6 Telephone: (602) 263-4547
7 Fax: (602) 200-7829
8 dpotts@jshfirm.com
9 adaltrey@jshfirm.com

10 Lisa Anne Smith, Bar #016762
11 DECONCINI MCDONALD YETWIN & LACY, P.C.
12 2525 East Broadway Boulevard, Suite 200
13 Tucson, Arizona 85716
14 Telephone: (520) 322-5000
15 Fax: (520) 322-5585
16 lasmith@dmyl.com

17 Attorneys for Defendant The Gregory School

18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF ARIZONA**

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

24 Plaintiff,

25 v.

26 Thomas C. Horne, in his official capacity
27 as State Superintendent of Public
28 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
Motion to Dismiss**

Defendant The Gregory School ("TGS") hereby moves to dismiss Plaintiff
Megan Roe's claims against it.

This case arises from the Arizona's ban on allowing transgender girls to play
on girls' interscholastic sports teams. Plaintiffs Jane Doe and Megan Roe are transgender

1 girls who desire to play school sports in the fall. They filed suit for declaratory and
2 injunctive relief based on the Equal Protection Clause, Title IX, the Americans With
3 Disabilities Act, and Section 504 of the Rehabilitation Act. Only the Title IX, ADA, and
4 Rehabilitation Act claims are pled against TGS, the private school one of the Plaintiffs
5 attends.

6 None of these statutes actually apply to TGS. Title IX and the Rehabilitation
7 Act only applies to private entities that receive “federal financial assistance,” and TGS has
8 consciously chosen to forgo federal financial assistance. Meanwhile, the section of the
9 ADA cited by Plaintiffs – 42 U.S.C. § 12132 – applies only to public entities, not private
10 entities. Accordingly, TGS, pursuant to Fed. R. Civ. P. 12(b)(6), moves to dismiss
11 Plaintiffs’ claims against it.¹
12

13 **I. RELEVANT FACTUAL BACKGROUND**

14 **A. The Gregory School**

15 TGS is an independent, coeducational school in Tucson, Arizona, organized
16 as a 501(c)(3) non-profit. *See* Declaration of Dr. Julie Sherrill, attached as **Exhibit 1**, at ¶¶
17 2 – 3.² As a general rule, TGS does not accept any federal funds or grants. However, during
18 the COVID-19 pandemic, TGS applied for and received a loan from the Small Business
19 Administration pursuant to the Paycheck Protection Program. The loan was forgiven by
20 the end of that year, before any conduct giving rise to this action. *See* Declaration of Dr.
21

22 ¹ Before filing this motion, counsel for The Gregory School certifies that it met and
23 conferred with Plaintiffs’ counsel regarding this motion to dismiss, and the parties were
24 unable to agree that the pleading was curable by a permissible amendment offered by the
pleading party.

25 ² For ease of streamlining the issues in this Motion to Dismiss, TGS has provided a
26 Declaration from Dr. Julie Sherrill, the Head of School at TGS. This Declaration was
27 previously provided as an exhibit to TGS’s Response to the Motion for a Preliminary
28 Judgment, the Court may take judicial notice of TGS’s status as a 501(c)(3) non-profit and
the salient details of TGS’s PPP loan, since each of these facts “can be accurately and
readily determined from sources whose accuracy cannot reasonably be questioned.” *See*
Fed. R. Evid. 201(b).

1 Julie Sherrill, attached as **Exhibit 1**, at ¶ 4. Aside from this, TGS has not received any kind
2 of federal funds.

3 **B. Megan Roe**

4 Plaintiff Megan Roe is a transgender female student at TGS. TGS is
5 supportive of Megan and her identity, and, because Megan plays volleyball, welcomes her
6 as a member of the girls' volleyball team. However, A.R.S. § 15-120.02(A) provides that
7 "[e]ach interscholastic or intramural athletic team or sport that is sponsored by a public
8 school or a private school whose students or teams compete against a public school" shall
9 be expressly designated as one "based on the biological sex of the students who participate
10 on the team." As a result, TGS does not allow Megan to participate in interscholastic
11 competition.³ As alleged, it would do so in the absence of A.R.S. § 15-120.02.

12
13 Because she is not permitted to participate in interscholastic competition,
14 Megan has filed a Complaint against TGS alleging violations of Title IX, the Rehabilitation
15 Act, and the ADA and against the AIA and Superintendent Horne alleging violations of
16 the Equal Protection Clause, Title IX, the Rehabilitation Act, and the ADA. *See generally*
17 *Complaint, Doc. 1.*

18 **II. TITLE IX AND THE REHABILITATION ACT ARE INAPPLICABLE TO**
19 **TGS.**

20 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim
21 if the complaint fails to state either a cognizable legal theory or sufficient facts under a
22 cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
23 1990). To survive a motion to dismiss, a complaint must contain sufficient facts to "state
24

25
26
27 ³ For purposes of a Rule 12(b)(6) motion to dismiss, the allegations in the Complaint
28 are taken as true, so this Motion assumes that Megan is not permitted to be a member of
the girls' volleyball team. However, as a matter of correcting the public record, 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.

1 a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
2 (citation omitted).

3 Plaintiff Megan Roe’s⁴ Title IX and Rehabilitation Act claims against TGS
4 are only cognizable if TGS receives “federal financial assistance.” *See* 20 U.S.C. § 1681(a)
5 (Title IX applies to “any education program or activity receiving Federal financial
6 assistance”); 29 U.S.C. § 794(a) (Section 504 of the Rehabilitation Act applies to “any
7 program or activity receiving federal financial assistance”). Megan Roe alleges this in her
8 Complaint without any explanation or argument. *See* Complaint, Doc. 1, at ¶ 13. However,
9 in conferring regarding TGS’s expected motion to dismiss about this issue specifically,
10 Plaintiffs’ counsel told counsel for TGS that they would argue: (1) TGS’s PPP loan from
11 2020 constitutes federal financial assistance and (2) TGS’s 501(c)(3) status constitutes
12 federal financial assistance. Neither is the case, as TGS’s PPP loan was forgiven prior to
13 the events giving rise to this action and tax-exempt status is not “federal financial
14 assistance” for the purposes of Title IX or the Rehabilitation Act.
15

16 **A. TGS’s PPP Loan Was Forgiven Prior To The Events Giving Rise To**
17 **This Action.**

18 Although a private educational entity might be subject to nondiscrimination
19 obligations during the pendency of the loan, *see, e.g., Beverly R. on behalf of E.R. v. Mt.*
20 *Carmel Acad. of New Orleans, Inc.*, 528 F. Supp. 3d 451, 461–62 (E.D. La. 2021), that
21 obligation ends once the loan is forgiven. The Small Business Administration itself
22 acknowledged that: “Receipt of a loan through any SBA program constitutes Federal
23 financial assistance and carries with it the application of certain nondiscrimination
24 obligations. Any legal obligations that you incur through your receipt of this loan are not
25
26
27
28

⁴ Plaintiff Jane Doe does not make any claims against TGS.

1 permanent, and once the loan is paid or forgiven, those nondiscrimination obligations will
2 no longer apply.”⁵

3 TGS’s PPP loan was forgiven by the end of 2020. Thus, even if the PPP loan
4 constituted federal financial assistance, TGS’s obligations to abide by Title IX ended at the
5 time the loan was forgiven. This case involves a statute that was not in effect until
6 September 24, 2022 and prospective relief based on conduct that might occur in the future,
7 not any conduct that occurred when TGS still had a PPP loan. Thus, TGS’s forgiven PPP
8 loan cannot constitute federal financial assistance for Plaintiff Megan Roe’s claims.
9

10 **B. TGS’s Tax-Exempt Status Is Not Federal Financial Assistance.**

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

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

21 Courts have extended that logic to hold that tax-exempt status is not federal
22 financial assistance. For example, one district court explained that Title IX and the
23 Rehabilitation Act are based in the Spending Clause, and thus, the intent is that the recipient
24 has the choice of whether to accept the assistance and the obligations that come along with
25

26 ⁵ U.S. Small Business Administration, Faith-Based Organizations FAQ at 2,
27 <https://www.sba.gov/sites/sbagov/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf>.
28 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).

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

7
8 In fact, while Title IX itself does not define federal financial assistance, the
9 Department of Education defines “federal financial assistance” for purposes of Title IX in
10 34 C.F.R. § 106.2(g). The definition includes grants or loans of “Federal financial
11 assistance”; grants of real or personal property; provision of personal services; sale or lease
12 of property at a nominal or reduced promise; or “any other contract, agreement, or
13 arrangement which has as one of its purposes the provision of assistance to any education
14 program or activity.” *Id.* Tax exemption does not fit into *any* of these categories, which all
15 involve an offer of funds which the recipient has the choice to accept or decline.

16 Although neither Title IX nor the Rehabilitation Act defines federal financial
17 assistance, many agencies define the term in regulations. The Department of Education
18 defines “federal financial assistance” for purposes of Title IX and others “law[s]
19 administered by the Department” in 34 C.F.R. § 106.2(g). The definition includes grants
20 or loans of “Federal financial assistance”; grants of real or personal property; provision of
21 personal services; sale or lease of property at a nominal or reduced promise; or “any other
22 contract, agreement, or arrangement which has as one of its purposes the provision of
23 assistance to any education program or activity.” *Id.* Tax exemption does not fit into *any*
24 of these categories, which all involve an offer of funds which the recipient has the choice
25 to accept or decline.
26

27 TGS’s tax-exempt status is not federal financial assistance. TGS did not
28 accept a grant of money, property, or services. It did not enter into an arrangement with an

1 agency like the Department of Education for the provision of assistance. Its tax status is
2 not the kind of affirmative assistance contemplated by the legislature or the departments
3 which implement Title IX and the Rehabilitation Act.

4 Furthermore, holding that tax-exempt status is the same as federal financial
5 assistance would federalize vast swaths of activity and subject TGS (and any other private
6 school, independent school, or non-profit) to a host of new requirements and liabilities that
7 it was not previously subject to because of its conscious decision to forgo federal financial
8 assistance.

9
10 TGS does not receive federal financial assistance, so neither Title IX nor the
11 Rehabilitation Act apply to it. As a result, Plaintiff Megan Roe's Title IX and
12 Rehabilitation Act claims against TGS should be dismissed.

13 **III. PLAINTIFF MEGAN ROE DOES NOT STATE A VALID ADA CLAIM**
14 **AGAINST TGS.**

15 To the extent that Plaintiffs' Complaint is interpreted to contain an ADA
16 claim separate and apart from the Rehabilitation Act claim, Plaintiff Megan Roe does not
17 state an ADA claim against TGS. The section of the ADA cited in Plaintiffs' Complaint is
18 Title II, which applies to public entities, not private ones. *See* Complaint, Doc. 1, at ¶ 82;
19 42 U.S.C. § 12132 ("Subject to the provisions of this subchapter, no qualified individual
20 with a disability shall, by reason of such disability, be excluded from participation in or be
21 denied the benefits of the services, programs, or activities of a *public entity*, or be subjected
22 to discrimination by any such entity.") (emphasis added).

23 TGS is a private school, not a public entity. *See* Complaint, Doc. 1, at ¶ 12
24 ("Defendant The Gregory School is a private middle and high school located in Tucson.")
25 As a result, to the extent that Plaintiff purports to state a separate ADA claim against TGS,
26 that claim should be dismissed.

1 **IV. CONCLUSION**

2 Because TGS does not receive federal financial assistance for purposes of
3 Title IX or the Rehabilitation Act, and because Megan has not stated an ADA claim against
4 TGS, Megan's claims against TGS must be dismissed.

5
6 DATED this 18th day of May, 2023.

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

8
9 By /s/David C. Potts

10 David C. Potts
11 Ashley E. Caballero-Daltrey
12 40 N. Central Avenue, Suite 2700
13 Phoenix, Arizona 85004
14 Attorneys for Defendant The Gregory
15 School

16 DECONCINI MCDONALD YETWIN &
17 LACY, P.C.

18 By /s/Lisa Anne Smith (with permission)

19 Lisa Anne Smith
20 2525 East Broadway Boulevard, Suite 200
21 Tucson, Arizona 85716
22 Attorney for Defendant The Gregory
23 School
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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.

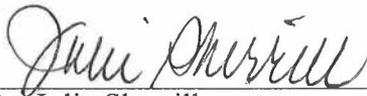
3. The Gregory School is organized as a non-profit corporation. It has 501(c)(3) tax-exempt status.

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



Dr. Julie Sherrill