

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
TERRE HAUTE DIVISION

B.E. and S.E., minor children by their )  
mother, legal guardian, and next friend, L.E., )

Plaintiffs, )

v. )

No. 2:21-cv-415-JRS-MG

VIGO COUNTY SCHOOL CORPORATION; )  
PRINCIPAL, TERRE HAUTE NORTH VIGO )  
HIGH SCHOOL, in his official capacity, )

Defendants. )

**Plaintiffs’ Memorandum in Support of Motion to Allow Mother, Legal Guardian and  
Next Friend, to Proceed by Pseudonym**

This is an action brought by two brothers who are transgender high school students and who are seeking to force their school system to treat them consistent with their male gender, even though their birth certificates note that they were assigned female at birth. They wish to be allowed to use male restrooms and to be referred to by their male first names and by male pronouns. Inasmuch as they are minors, they are required to be referred to in this litigation by their initials. Fed. R. Civ. P. 5.2(a). They are proceeding by their mother as their legal guardian and next friend. She is also asking to proceed anonymously by her initials to preserve the anonymity of her sons, although she

will disclose her name to defendants' counsel when appearances are entered pursuant to Local Rule 10-1. The motion should be granted.

To address the privacy concerns resulting from public access to electronic case files, Rule 5.2(a)(3) provides that in any electronic or paper-filing minors are to be referred to only by their initials. Rule 5.2, Federal Rules of Civil Procedure, Advisory Committee Notes. This is entirely consistent with the Seventh Circuit's understanding of the circumstances under which persons should be allowed to proceed as parties by an anonymous name. Although, as noted by the court, "the use of fictitious names is disfavored, and the judge has an independent duty to determine whether exceptional circumstances justify such a departure from the normal method of proceeding in federal courts," *Doe v. Blue Cross and Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997), such exceptional circumstances are present "when necessary to protect the privacy of children, rape victims, and other particularly vulnerable parties or witnesses." *Id.*

Rule 17(c)(2) of the Federal Rules of Civil Procedure allows a minor, or other incompetent person, to sue by a guardian or next friend and therefore B.E. and S.E. are represented by their mother as their next friend and legal guardian. This Court can certainly take notice of the fact that the issue of allowing transgender students access to restrooms consistent with their gender identities is one that has roiled communities.<sup>1</sup> It is

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<sup>1</sup> See e.g., Lily Wakefield, PINK NEWS, *Dehumanising high school survey asks if "queers" should use the bathroom with "normal people"*, Nov. 1, 2021, <https://www.pinknews.co.uk/2021/11/01/illinois-anna-jonesboro-high-school-trans-queer->

therefore not surprising that the boys' mother expresses concern in her declaration about potential hostile reactions to this litigation. (Dkt. QQ-1 ¶ 5). She understandably desires to protect her sons to the greatest extent possible. (*Id.* ¶¶ 4, 6). If her last name, which is the same as her sons, is used in this litigation it will be easy to determine their identities. (*Id.* ¶ 7). To protect her children, she therefore wishes to use her initials in the public filings in this case. (*Id.* ¶ 8).

In *R.N. ex rel. R.T. v. Franklin Community School Corporation*, 2019 WL 4305748 (S.D. Ind. Sept. 11, 2019), this Court allowed a parent suing a school corporation on behalf of their minor child to proceed by their initials, even though the parent and child did not share the same last name. *Id.* at \*4. The Court noted that factors articulated in *EW v. New York Blood Center*, 213 F.R.D. 108 (E.D.N.Y. 2003) are useful in determining whether an anonymous name motion should be granted. *Id.* at \*1-\*2. In *EW*, the court, analyzing a number of cases stated that these factors:

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bathroom/ (last visited Nov. 1, 2021); Wilson Criscione, INLANDER, *For some transgender students, a return to school brings back anxiety over bathroom access*, Oct. 21, 2021, <https://www.inlander.com/spokane/for-some-transgender-students-a-return-to-school-brings-back-anxiety-over-bathroom-access/Content?oid=22556545> (last visited Nov. 1, 2021); David Mastio, USA TODAY, *Trans bathroom policy is ripping my community apart. Parents should do better for our kids*, Oct. 29, 2021, <https://www.usatoday.com/story/opinion/voices/2021/10/29/trans-bathroom-policy-sexual-assault/8568005002/> (last visited Nov. 1, 2021); CUMBERLAND TIMES-NEWS, *School board addresses transgender students' use of restrooms*, Oct. 7, 2021, [https://www.times-news.com/news/local\\_news/school-board-addresses-transgender-students-use-of-restrooms/article\\_6af775d2-2619-11ec-afc4-77e7c62dc28a.html](https://www.times-news.com/news/local_news/school-board-addresses-transgender-students-use-of-restrooms/article_6af775d2-2619-11ec-afc4-77e7c62dc28a.html) (last visited Nov. 1, 2021); ASSOCIATED PRESS, *Tennessee gov signs transgender "bathroom bill" for schools*, May 18, 2021, <https://www.nbcnews.com/nbc-out/out-news/tennessee-gov-signs-transgender-bathroom-bill-schools-rcna953> (last visited Nov. 1, 2021).

include: (1) whether the plaintiff is challenging governmental activity or an individual's actions; (2) whether the plaintiff's action requires disclosure of information of the utmost intimacy; (3) whether the action requires disclosure of the plaintiff's intention to engage in illegal conduct; (4) whether identification would put the plaintiff at risk of suffering physical or mental injury; (5) whether the defendant would be prejudiced by allowing the plaintiff to proceed anonymously; and (6) the public interest in guaranteeing open access to proceedings without denying litigants access to the justice system.

*EW*, 213 F.R.D. at 111 (internal citations omitted).

Of course, this case does not involve an intention to engage in unlawful conduct. But all the other factors point to the need for allowing the mother of the plaintiffs to proceed anonymously. The plaintiffs are attacking governmental action and, in this situation, "the plaintiff's interest in proceeding anonymously is considered particularly strong" as there is a public interest in vindication of minority rights and the government has less of an interest than a private defendant in protecting its reputation from damaging allegation." *Id.*, see also *Doe v. City of Indianapolis, Ind.*, 2006 WL 2290187, at \*2 (S.D. Ind. Aug. 7, 2006) (citing *EW*). And this case certainly involves matters of the utmost intimacy and disclosure of the plaintiffs' identity, which would occur if their mother's name was known, could put them at risk of injury.

In *Doe ex rel. Doe v. Elmbrook School Dist.*, 658 F.3d 710 (7th Cir. 2011), *opinion vacated on rehearing en banc*, 687 F.3d 840 (7th Cir. 2012), a case concerning the propriety under the First Amendment of public school graduation ceremonies held in a church, the court found that the district court had not erred in approving anonymous name status for the

plaintiffs. *Id.* at 724. The court noted that “Does 2, 4, and 9 currently have minor children attending [the defendant’s] schools. Identifying these adult plaintiffs also would expose the identities of their children.” *Id.* The court therefore concluded that “[b]ecause the subject matter of the suit frequently has a tendency to inflame unreasonably some individuals and is intimately tied to District schools, such a risk to children is particularly compelling.” *Id.*<sup>2</sup> The same is true here.

The school system will not be prejudiced if the mother is allowed to proceed anonymously. Pursuant to Local Rule 10-1 the mother’s name will be disclosed to defendant’s counsel. And “[t]he actual identities of Plaintiffs are of minimal value to the public. Allowing [plaintiffs’ and their mother] to remain anonymous will not interfere with the ability of the public to ascertain the status of this case.” *R.N.*, 29019 WL 4305748, at \*3.

This case falls into the recognized exceptions to the general requirement that litigants proceed by their actual names. To protect the privacy interests of the children, an interest recognized by the Federal Rules of Civil Procedure, the children’s mother and next friend must also be allowed to proceed publicly by anonymous name.

For the foregoing reasons, the motion of L.E. to proceed by a pseudonym in this action should be granted.

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<sup>2</sup> The conclusions reached by the panel decision concerning the plaintiffs’ anonymous name status were not criticized by the en banc decision and the en banc decision did not comment on the trial court’s decision to allow the plaintiffs to proceed by anonymous name.

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### **Certificate of Service**

I certify that on this 8th day of November 2021, a copy of the foregoing was filed electronically with the Clerk of this Court and was served on the below-named parties by first class U.S. Postage, pre-paid.

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