

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JULIET EVANCHO; *et al.*,

Plaintiffs,

v.

PINE-RICHLAND SCHOOL DISTRICT; *et al.*,

Defendants.

PITTSBURGH DIVISION

Civil Action No. 2:16-cv-01537-MRH

**PLAINTIFFS' RESPONSE TO NOVEMBER 23, 2016 COURT ORDER
REGARDING THE FILING OF AMICI CURIAE BRIEFS**

Plaintiffs Juliet Evancho, Elissa Ridenour, and A.S., by and through their attorney, hereby respectfully submit their response to the Court's November 23, 2016 Order (Docket No. 52) to file a response to the motions for leave to file *amicus curiae* briefs by: (1) the World Professional Association for Transgender Health (WPATH), et al. (Docket No. 48); (2) School Administrators, et al. (Docket No. 51); and (3) the Pennsylvania Youth Congress and THRIVE of Southwest Pennsylvania (Docket No. 55).

Plaintiffs consent to the filings of the aforementioned *amici* briefs and encourage the Court to consider the arguments presented by proposed *amici*. "Generally, courts have exercised great liberality in permitting an *amicus curiae* to file a brief." *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990); *accord In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991). In exercising this liberality, courts have settled on one criterion that is determinative of whether an *amicus* brief will be accepted: regardless of "who a would-be *amicus curiae* is," "the criterion" for granting leave should be "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices*

for *Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (chambers op.). To be sure, while the decision to permit *amicus* participation is “solely within the broad discretion of the district court,” *Waste Mgmt. of Pa. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995),” a court may grant leave to appear as an *amicus* if the information offered is “timely and useful.”” *Id.* (quoting *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff’d mem.*, 782 F.2d 1033 (3d Cir. 1986)). And “[t]he Third Circuit has said that ‘permitting persons to appear in court . . . as friends of the court . . . may be advisable where third parties can contribute to a court’s understanding.’” *Avellino v. Herron*, 991 F. Supp. 730, 732 (E.D. Pa. 1998) (quoting *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir.1987)).¹

Here, proposed *amici* present a range of arguments that supplement and expand Plaintiffs’ arguments surrounding some of the legal questions before the Court in *both* Plaintiffs’ motion for preliminary injunction *and* Defendants’ motion to dismiss. The question of the scope of the prohibition of discrimination on the basis of sex in Title IX and the meaning of “sex” are central questions that go to the merits of both motions. Proposed *amici* WPATH, Pennsylvania Youth Congress, and THRIVE present arguments that supplement and expand the arguments that have been presented to the Court by the parties in this regard.

Similarly, proposed *amici* School Administrators, the Pennsylvania Youth Congress, and THRIVE present the Court with important arguments about the experiences of school districts, school administrators, and transgender students that have dealt with similar issues as those presented in this case. Their experiences should be of assistance to the Court as it evaluates Defendants’ hypothetical concerns and Plaintiffs’ asserted harms. Indeed, several courts

¹ Other courts in this district have permitted *amicus* participation. See, e.g., Docket Nos. 26 & 27, *EEOC v. Scott Med. Health Ctr.*, Case No. 16-cv-225-CB (W.D. Pa.); Docket No. 28, *Geneva Coll. v. Sebelius*, No. 12-cv-00207-JFC (W.D. Pa.).

confronted with similar cases to this case have already found the school administrators' brief to be particularly helpful in evaluating a school district's purported concerns about transgender students' use of restrooms consistent with their gender identity. *See Carcaño v. McCrory*, -- F. Supp. 3d ---, No. 1:16-cv-236, 2016 WL 4508192, at *4 (M.D.N.C. Aug. 26, 2016), *appeals filed* Aug. 29, 2016; *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, -- F. Supp. 3d ---, No. 2:16-cv-524, 2016 WL 5372349, at *17 (S.D. Ohio Sept. 26, 2016), *appeal filed* Sept. 29, 2016 (finding that a version of school administrators brief in that case "provide[d] further support for the Court's conclusion that Highland cannot show that allowing transgender girl to use the girls' restroom would compromise anyone's privacy interests.").

Further, the arguments and experiences presented by proposed *amici* WPATH, Pennsylvania Youth Congress, and THRIVE provide the Court with additional information that contextualizes Plaintiffs' asserted harms. Proposed *amici* present arguments from different perspectives about how denying transgender students equal access to the sex-designated facilities consistent with their gender identity causes real and irreparable harms to transgender students, such as emotional distress, depression, and loss of educational opportunities, among others. In determining whether to consider the experiences of other transgender youth, the Court should be aware that both the Seventh Circuit and the Supreme Court have found the experiences of *amici* LGBT youth and children of same-sex parents to be particularly helpful in evaluating the harms of laws restricting the right to marry of same-sex couples. *See, e.g., Gabriel Blau, Op-ed: How the Voices of Children Have Helped Turn the Tide on Marriage Equality*, THE ADVOCATE (Oct. 21, 2014), available at <http://www.advocate.com/commentary/2014/10/21/op-ed-how-voices-children-have-helped-turn-tide-marriage-equality> (last accessed Nov. 28, 2016).

Additionally, the experience and competence of party counsel are also irrelevant here; while *amici* may be especially helpful when parties are not represented (or represented well), a court should not conclude that *amici* are *per se* unhelpful where there is competent party counsel. See *Neonatology Assocs., P.A.*, 293 F.3d at 132 (“Even when a party is very well represented, an *amicus* may provide important assistance to the court.”); Linda Sandstrom Simard, Article, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 UNIV. OF TEXAS REV. OF LITIG. 669, 672 (2008) (“Insights offered by *amici curiae* tend to extend beyond the interests of the parties to the litigation – who are presumably adequately represented by their own lawyers – and are generally aimed at protecting the interests of individuals or organizations who are absent from the proceedings....”). Indeed, then-Judge Alito has properly criticized the practice of “requiring a prospective *amicus* to undertake the distasteful task of showing that the attorney for the party that the *amicus* wishes to support is incompetent,” pointing out that such a process could “discourage *amici*” from making “submission[s that] would be valuable to the court.” *Neonatology Assocs., P.A.*, 293 F.3d at 132.

In opposing the filing of the motions for leave, Defendants neglect to acknowledge that the motions for leave were filed both in support of Plaintiffs’ motion for preliminary and in opposition to Defendants’ motion to dismiss. See, e.g., Docket No. 51; Docket No. 55. The proposed briefs were filed before the preliminary injunction hearing and before the completion of briefing regarding Defendants’ motion to dismiss. There should be no question that proposed *amici*’s requests for leave to file have been timely filed. Indeed, Defendants still have a pending opportunity to file a reply brief in support of their motion to dismiss, which is due on or before November 30, 2016, as well as the hearing scheduled for December 1, 2016. As such, Defendants

have ample opportunity to address the merits of any arguments presented by proposed *amici* and would not be in any way prejudiced by the Court's consideration of proposed *amici*'s arguments.

Finally, Plaintiffs would like to point out that the participation of *amici curiae* is particularly appropriate where, as here, a case will have significant implications for civil rights protections beyond the immediate parties before the Court and is important to the general public interest—an interest the Court weighs in determining the propriety of preliminary relief. *See Neonatology Assoc., Inc. v. Comm'r of Internal Rev.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (noting that *amici* may provide “important assistance to the court” when they “explain the impact a potential holding might have on an industry or other group”). Proposed *amici* WPATH, school administrators, Pennsylvania Youth Congress, and THRIVE would “fulfill the classic role of *amicus curiae* by assisting in a case of general public interest, . . . supplementing the efforts of counsel, and drawing the court's attention to law that might otherwise escape consideration.” *Funbus Systems, Inc. v. California Public Utilities Com.*, 801 F.2d 1120, 1125 (9th Cir. 1986). Simply put, “[A]n amicus who makes a strong but responsible presentation in support of a

Of course, the Court makes the final conclusion as to whether the *amici* provide information that is relevant, material, and helpful to the ultimate decisions it must reach—whether the Court does so based solely on Defendant's response urging denial of *amici* participation now or the Court does so after reviewing the tendered briefs on the merits of their content. Pragmatically, the *amici* briefs should be admitted because if the Court doesn't find the briefs helpful, it simply would choose to ignore them or give them little weight. For this task, the Court is well suited.

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the requests of proposed *amici* WPATH et al., school administrators et al., Pennsylvania Youth Congress, and THRIVE for leave to file *amici curiae* briefs in support of Plaintiffs' motion for preliminary injunction and in opposition to Defendants' motion to dismiss, so that the Court may consider the important arguments, facts, and experiences they present.

Dated on this 28th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, I electronically filed the foregoing with the Clerk of the Court for the for the U.S. District Court for the Western District of Pennsylvania using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan

November 28, 2016