UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA, *Plaintiff,* v. MAINE DEPARTMENT OF EDUCATION, *Defendant.*	)))))))))	CASE NO. 1:25-cv-00173-SDN

MOTION OF PORTLAND PUBLIC SCHOOLS TO INTERVENE WITH INCORPORATED MEMORANDUM OF LAW

MOTION

Pursuant to Fed. R. Civ. P. 24(a)(2) and 24(b)(1)(B), Portland Public Schools ("PPS") moves to intervene in this matter for the limited purpose of moving to quash a third-party subpoena that Plaintiff United States of America served on the Maine Principal's Association ("MPA"). As set forth in more detail below, PPS's interest in protecting the confidential education records of its students is directly affected by the Plaintiff's third-party subpoena to the MPA, which seeks, among other things, confidential education records of PPS's former and current students. In accordance with Fed. R. Civ. P. 24(c), a motion to quash the third-party subpoena to the MPA accompanies this motion as **Exhibit A**.[1]

INCORPORATED MEMORANDUM OF LAW

I. BACKGROUND

[1] Alternatively, PPS should be permitted to participate in this case on an *amicus curiae* plus basis. *See, e.g., Alliance of Auto. Mfrs. v. Gwadowsky*, 297 F.Supp.2d 305 (D. Me. 2003) (granting *amicus curiae* plus status to automobile dealers' association because the court concluded it could benefit from the association's specialized expertise).

Plaintiff filed a lawsuit against Defendant Maine Department of Education ("MDOE") alleging that the State of Maine, through MDOE, is violating Title IX by following the Maine Human Rights Act and allowing transgender girls to compete in girls' sports. (ECF No. 1). On or about August 14, 2025, Plaintiff served a third-party subpoena for documents on the MPA, seeking, among other things, confidential education records that the MPA received from Maine school districts, which is defined in the subpoena as "any public K-12 educational administrative district or unit in the State of Maine." (ECF No. 28-1 at 4). More specifically, to the extent that the MPA has any responsive documents for requests numbered 4, 5, 6, 7, 8, 9, 11, 18, and 19, at least some of the documents would have come directly from schools, including Portland Public Schools. Because PPS has a responsibility and interest in protecting the privacy interests of its students under the Family Educational Rights and Privacy Act ("FERPA")—independent of the MPA's responsibility and interest—PPS respectfully requests the opportunity to move to quash the subpoena to the extent it seeks confidential education records that would have come from the School Department.

II. ARGUMENT

There is First Circuit precedent that a third-party has the right to intervene for the limited purpose of moving to quash a subpoena when the subpoena implicates a cognizable interest of the third-party. *In re Grand Jury Subpoena*, 274 F.3d 563, 570 (1st Cir. 2001) (citing Fed. R. Civ. P. 24(a)(2)). In *In re Grand Jury Subpoena*, the court held that the third-parties had the right to intervene after asserting the attorney-client privilege and work product doctrine for documents requested in the subpoena. *Id.* In support of that holding, the court cited *In re Grand Jury Proceedings (Diamante)*, 814 F.2d 61, 66 (1st Cir. 1987) for the implied proposition that "the

existence of a privileged relationship or of a legitimate property or privacy interest in the documents possessed by the third party" establishes standing to intervene. *Id.*

Here, PPS has an interest in protecting the confidential education records of its students under FERPA. And, as set forth below, PPS meets the standard for intervention as of right under Rule 24(a), as well as the standard for permissive intervention under Rule 24(b). The Court must, and alternatively should exercise its discretion, to permit PPS to intervene in support of third-party MPA's opposition to Plaintiff's subpoena because "the subject matter of the lawsuit is of great public interest, the intervenor has a real stake in the outcome and the intervention may well assist the court in its decision through the production of relevant evidence and the framing of the issues." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 116-117 (1st Cir. 1999) (Lynch, J., concurring).

A. The Court Must Grant Intervention under Fed. R. Civ. P. 24(a)(2)

Rule 24(a)(2) governs intervention as of right and provides:

> On timely motion, the court must permit anyone to intervene who … claims an interest relating to the property of transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impeded the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Thus, under the Rule, a party seeking intervention as of right must demonstrate that: (i) the motion to intervene is timely; (ii) it has an interest relating to the property or transaction at issue; (iii) the disposition of the action threatens to impair or impede its ability to protect this interest; and (iv) no existing party adequately represents its interest. *Ungar v. Arafat*, 634 F.3d 46, 50 (1st Cir. 2011).

i. The Motion is Timely

The determination of the timeliness of a motion to intervene lies within the discretion of the trial court. *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 64 (1st Cir. 2008). The principal factor for consideration is the stage the litigation has reached at the time of the motion to intervene. *Id.* at 64-65. The Court may also consider other factors, including "1) the length of time the intervenor knew her interest was imperiled; 2) the foreseeable prejudice to the existing parties if intervention is granted, or to the intervenor if it is denied; and 3) any 'idiosyncratic circumstances' which weigh for or against intervention." *Id.* at 65 (internal citation omitted).

This litigation is not at an "advanced stage." Plaintiff filed their complaint (ECF No. 1) on April 16, 2025, and MDOE filed an answer on May 8, 2025 (ECF No. 12), and a motion to amend its answer on August 20, 2025 (ECF No. 26), which Plaintiff opposed on September 10, 2025 (ECF No. 39). Most relevant to the instant motion to intervene, Plaintiff served the third-party subpoena at issue to the MPA on or about August 14, 2025. The MPA filed a motion to quash the subpoena on August 29, 2025 (ECF No. 28), Plaintiff filed an opposition to the motion to quash on September 3, 2025 (ECF No. 34), and the MPA filed a reply on September 4, 2025 (ECF No. 37). The Court has scheduled a hearing on the MPA's motion to quash for September 19, 2025. In addition not the litigation being at its early stages, the issues relating to the Plaintiff's third-party subpoena to the MPA have only recently been briefed and have not yet been decided by the Court.

As for the other factors enumerated in *Geiger*, PPS has acted quickly to coordinate and authorize the filing of this motion to intervene. Additionally, there would be no prejudice to the existing parties if intervention were granted. Plaintiff's third-party subpoena to the MPA seeks documents that, to the extent the MPA has such documents in its possession, came from PPS (*i.e.* requests numbered 4, 5, 6, 7, 8, 9, 11, 18, and 19). Plaintiff is already aware of arguments in

opposition to the subpoena and planning to address such opposition to the Court at the scheduled hearing on September 19, 2025. By allowing PPS to also oppose the subpoena, the Court would simply be ensuring that all relevant information and legal authority supporting such opposition was considered prior to ruling on whether the subpoena, or portions of the subpoena, should be quashed. Finally, PPS is not aware of any "idiosyncratic circumstances" that weigh against intervention.

ii. The School Department has the Requisite Interest in the Subject Matter of this Action

Plaintiff's subpoena requests confidential education records from the MPA that, to the extent the MPA has such records its possession, the MPA would have received from the School Department. When PPS provides confidential education records to the MPA, it does so for the sole purpose of facilitating student participation in youth sports. This is because PPS has a responsibility and an interest in protecting the confidentiality of all education records under FERPA, including those records that it provides to the MPA. Indeed, students and families expect that PPS will act in accordance with this responsibility and interest. As the First Circuit has explained, "Congress enacted FERPA 'to assure parents of students ... access to their educational records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent.'" *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67–68 (1st Cir. 2002) (citing 120 Cong. Rec. 39,862 (1974) (joint statement of Sens. Pell and Buckley explaining major amendments to FERPA)). At bottom, PPS has a direct interest in what happens to the confidential education records that originated with the School Department.

iii. Disposition of the Third-Party Subpoena Will Directly Affect the School Department's Interests in Protecting the Confidentiality of the Education Records it Provides to the MPA

The Court's decision on third-party MPA's motion to quash Plaintiff's subpoena may very well impair or impede PPS's ability to protect its interests in preserving the confidentiality of the education records it provides to the MPA. For example, if the Court denies the motion to quash, and the MPA provides Plaintiff with confidential education records from PPS's students, then records that students and families thought were being transferred to facilitate participation in youth sports would be transferred for entirely different purposes. The practical consequences of this include that students and families may be deterred from participating in sports for fear of having confidential education records transferred beyond the MPA, and PPS loses the trust and confidence of its students and families in its ability to protect the integrity of confidential education records.

iv. Neither the MDOE nor the MPA Adequately Represents the School Department's Interests

The MDOE did not file a motion to quash the Plaintiff's subpoena to third-party MPA and, thus, does not adequately represent PPS's interests in opposing the subpoena. While the MPA did file a motion to quash, the MPA does not adequately represent the interests of any particular school district such as the School Department, which has its own responsibility, interest, and expertise under FERPA. Put differently, the MPA is a state-wide, private, nonprofit corporation that, among other things, promotes and administers interscholastic activities; whereas, PPS is a public school district, committed to cultivating a welcoming, inclusive and safe space for all students and staff and delivering a quality educational experience for all students. PPS has direct relationships with students and families whose confidential education records would be caught up in the Plaintiff's subpoena for records and PPS has a responsibility to those students and families to take all reasonable steps to protect the confidentiality of its specific students' records.

Accordingly, PPS has met its minimal burden of showing that its interests are not adequately represented in opposing the Plaintiff's subpoena. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472, 475 (1st Cir. 2015) ("we begin with a recognition that Students' burden of establishing inadequate representation 'should be treated as minimal' and can be satisfied by showing 'that representation of [the] interest '*may* be' inadequate.'" (quoting *Trbovich v. United Mine Workers of Am.,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)).

B. Alternatively, the Court Should Exercise its Discretion to Grant Permissive Intervention under Fed. R. Civ. P. 24(b)

Even in the absence of strict satisfaction of the four factor test for intervention as of right under Rule 24(a)(2), the Court may grant permissive intervention under Rule 24(b) where the putative intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Here, PPS's opposition to Plaintiff's subpoena turns on whether the federal government is entitled to PPS's confidential education records for use in this litigation. Thus, PPS's opposition to the subpoena shares a common question of law and fact that PPS wishes to share its specialized knowledge about with the Court prior to the Court deciding the MPA's motion to quash Plaintiff's subpoena.

Further, when deciding whether to grant permissive intervention, "the district court can consider almost any factor rationally relevant" and enjoys broad discretion in deciding the motion. *Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 113 (1st Cir. 1999). Here, the case would not be unduly delayed or complicated by allowing PPS to move to quash the subpoena to the extent it seeks records that originated with the School Department, and PPS's involvement would be helpful in fully developing the case.

CONCLUSION

For the forgoing reasons, Portland Public Schools respectfully requests that this Court grant its motion to intervene for the limited purpose of moving to quash Plaintiff's third-party subpoena to the MPA.

Dated: September 17, 2025

/s/ Melissa A. Hewey

Melissa A. Hewey
Attorney for Proposed Intervenor
Portland Public Schools

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480
(207) 772-1941
mhewey@dwmlaw.com

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA, *Plaintiff,* v. MAINE DEPARTMENT OF EDUCATION, *Defendant.*	)))))))))	CASE NO. 1:25-cv-00173-SDN

MOTION TO QUASH WITH INCORPORATED MEMORANDUM OF LAW

In accordance with Federal Rules of Civil Procedure 24(c) and 45(d), Proposed Intervenor Portland Public Schools ("PPS") moves to quash that portion of Plaintiff United States of America's third-party subpoena for records to the Maine Principal's Association ("MPA") that requires production of student records (requests numbered 4, 5, 6, 7, 8, 9, 11, 18, and 19) (ECF Doc. 28-1 at 5-7). As set forth in more detail below, the third-party subpoena to the MPA must be quashed pursuant to Federal Rule of Civil Procedure 45(d)(3)(A)(iii) because it seeks confidential education records, including records that the MPA would have received from PPS, and no exception or waiver applies. In support of this motion, PPS states as follows.

For students who wish to participate in youth sports administered by the MPA, PPS provides education records to the MPA for the sole purpose of facilitating student participation in youth sports. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA") protects the privacy of student education records, which are broadly defined as any "records, files, documents and other materials" that "contain information directly related to a student." 20 U.S.C. § 1232g(a)(4). PPS has adopted a Board policy affirming its privacy obligations. *See* PPS Board Policy JRA (available at Policy - Portland Public Schools). As the First Circuit has

explained, "Congress enacted FERPA 'to assure parents of students ... access to their educational records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent.'" *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67–68 (1st Cir. 2002) (citing 120 Cong. Rec. 39,862 (1974) (joint statement of Sens. Pell and Buckley explaining major amendments to FERPA)); *see also Doe v. Massachusetts Institute of Technology,* 46 F.4th 61 (1st Cir. 2022) ("By enacting the Family Educational Rights and Privacy Act of 1974 (FERPA), 88 Stat. 571, 20 U.S.C. § 1232g, Congress sought to prevent educational institutions from unilaterally disclosing 'sensitive information about students'….")

The importance of this requirement of confidentiality, both to schools and to the students and families they serve, cannot be overstated. On a daily basis, public schools are responsible for the social and emotional wellbeing of hundreds of students and to meet this responsibility, they need to obtain and collect information on a host of issues. Were it not for the obligation of schools to keep student records confidential, students and their parents and guardians would likely be unwilling to share information with the school, making it impossible to fulfill its obligation to protect its students and help them thrive.

Subpoena requests numbered 4, 5, 6, 7, 8, 9, 11, 18, and 19 request documents that plainly constitute education records including, but not limited to, documents that contain information about students' dates of birth, gender, extracurricular activities, as well as parent, staff, and community statements about students. Federal Rule of Civil Procedure 45(d)(3)(A)(iii) provides that the Court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies…." Therefore, unless those records fall within an exception to the confidentiality requirements, the portion of the subpoena requesting student records must be quashed.

The general rule under FERPA is that a school must have written permission from the parent or eligible student in order to release any information from a student's education records. 20 U.S.C. § 1232g(b). The sole exception to this general rule relied upon by Plaintiff is the provision in FERPA that a school may provide a student's education records to "authorized representatives of the Attorney General for law enforcement purposes…." *Id.* § 1232g(b)(1)(C). FERPA does not preclude authorized representatives "from having access to student or other records which *may be necessary* … in connection with the enforcement of the Federal legal requirements which relate to such programs…." *Id.* § 1232g(b)(3) (emphasis added). Plaintiff erroneously concludes that this exception ends the inquiry. (ECF No. 35 at 10). Plaintiff cannot, however, establish that the confidential education records that third-party MPA received from the schools, including PPS, for the purpose of facilitating student participation in youth sports, are necessary to Plaintiff's efforts to enforce Title IX. Put differently, the gender, date of birth, extracurriculars activities, and statements about students from PPS have no bearing on the fundamental legal issue in Plaintiff's complaint—whether the MDOE is violating Title IX by following the Maine Human Rights Act and allowing transgender girls to participate in girls' sports.

Nor does Plaintiff's one sentence reference to a likely confidentiality order carry the day. (ECF No. 35 at 10). FERPA protects the confidentiality of student records and unless the Plaintiff's request falls within an exception, the possible entry of a confidentiality order is beside the point. Even if a confidentiality order is adopted by the parties to the case, the Plaintiff will still have highly sensitive information relating to the gender of PPS's students in violation of the law and contrary to the protections PPS has assured its families they will have under Board

Policy JRA. While FERPA provides that "any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such … enforcement of Federal legal requirements," 20 U.S.C. § 1232g(b)(3), PPS is deeply concerned that during the pendency of this action, private information about its students may be used in a manner that adversely affects the well-being of any students and families who may be the target of the Plaintiff's requests for documents.

In Alig-Mielcarek v. Jackson, 286 F.R.D. 521, 527 (N.D. Ga. 2012), the court emphasized "the significant privacy interests of nonparty students which underlie FERPA," and those interests are what are at stake here. *See also*, *id.*, (noting heavy burden party seeking disclosure must meet to show need for records outweighs significant privacy interests). What makes this issue particularly important is that the target of the Plaintiff's requests appears to be one of the most vulnerable segments of the PPS community. The literature overwhelmingly suggests that transgender youth have a high risk of engaging in suicidal behaviors, particularly when they are placed under a microscope like the one Plaintiff is trying to set up in this case. At the end of the day, the Court is going to decide the legal issue of whether MDOE is violating Title IX by following the Maine Human Rights Act, and it does not need to know the biological sex of Students A, B, and C, at PPS to make that decision. However the Court decides the legal issue in the case, PPS will be committed to cultivating a welcoming, inclusive, and safe space for all students and staff. To do so effectively, students and their families must have trust and faith that PPS's confidential education records will not be used in violation of the law.

For the foregoing reasons, PPS respectfully requests that the Court quash Plaintiff's third-party subpoena to the MPA seeking confidential education records of PPS students.

Dated: September 17, 2025

/s/ Melissa A. Hewey

Melissa A. Hewey
Attorney for Proposed Intervenor
Portland Public Schools

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480
(207) 772-1941
mhewey@dwmlaw.com