

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>JOHN DOE and JANE DOE,</b>	:	
individually and as the Natural Parents	:	
and Next Friends of Their Minor Child,	:	<b>CASE NO. 08-CV-575</b>
<b>JAMES DOE,</b>	:	
	:	<b>JUDGE FROST</b>
Plaintiffs,	:	<b>MAGISTRATE JUDGE KING</b>
v.	:	
<b>MOUNT VERNON CITY SCHOOL</b>	:	
<b>DISTRICT BOARD OF</b>	:	
<b>EDUCATION, ET AL.</b>	:	
	:	
Defendants.	:	

---

**EMERGENCY MOTION FOR PROTECTIVE ORDER AND GAG ORDER BY  
PLAINTIFFS AND BY MOUNT VERNON CITY SCHOOL DISTRICT DEFENDANTS**

---

Plaintiffs, John Doe and Jane Doe, individually and as natural parents and next friends of their minor child, James Doe, respectfully move this Court pursuant to Rule 26 of the Federal Rules of Civil Procedure to issue a protective order and gag order regarding a termination hearing related to this case which is set to take place on October 1, 2008. This request would involve an extension of the protective order this Court previously issued on June 23, 2008. (Doc. 4).

Counsel for Defendants Mount Vernon City School District Board of Education, Stephen Short and William White join Plaintiffs in this motion.

A memorandum in support is attached hereto.

Respectfully submitted,

/s/ Jessica K. Philemond

**Jessica K. Philemond (0076761)**

Email: jkp@isaacbrant.com

Isaac, Brant, Ledman & Teetor, LLP

250 East Broad Street

Columbus, Ohio 43215

Tele: (614) 221-2121; Fax (614) 365-9516

*Attorney for Plaintiffs*

/s/ David K. Smith

David K. Smith (0016208)

Krista Keim (0067144)

Elise C. Keating (0079456)

Sarah J. Moore (0065381)

Britton, Smith, Peters and Kalail Co., LPA

3 Summit Park Drive

Cleveland, Ohio 44131

(216) 503-5055; F: (216) 503-5065

E-Mail: dsmith@ohioedlaw.com

kkeim@ohioedlaw.com

ekeating@ohioedlaw.com

smoore@ohioedlaw.com

*Attorneys for Defendants Mount Vernon City School  
District Board of Education, Stephen Short, and  
William White*

## **MEMORANDUM IN SUPPORT OF PLAINTIFFS' PROTECTIVE ORDER**

### **I. Introduction**

As a brief history, Plaintiffs John Doe, Jane Doe, and James Doe previously sought, and were granted by this Court, a Protective Order protecting their identities in this matter. (See, Doc. 4). Since this Court granted the protective order, members of the community have continued to threaten and harass the "Doe Plaintiffs" through community news postings, front yard signs, and in other forms. One community member posted a large yard sign that stated:

**THE STUDENT GOES  
WE SUPPORT MR. FRESHWATER!  
THE BIBLE STAYS!**

The need for the protective order continues.

This motion is filed in response to a hearing which has been set for October 1, 2008, to be held at the Mount Vernon City School District. When the Mount Vernon City School District Board of Education adopted its resolution to consider the termination of Defendant Freshwater under Ohio Revised Code Section 3319.17, Defendant Freshwater requested a public hearing.

In preparation for the public hearing, which is set for October 1, 2008, Defendant Freshwater has submitted a request to the Mount Vernon City School District that Plaintiffs in this case, including their minor son who is in the ninth grade, be subpoenaed to appear and testify at a public hearing in Mount Vernon. (See Freshwater Subpoena Request, attached hereto as Exhibit 1).

Plaintiffs respectfully ask this Court to issue a Protective Order so that Plaintiffs may appear at the hearing as requested, but that their testimony be held in private session at a protected location chosen by the parties. Defendant Freshwater and his legal counsel are free to attend and cross examine Plaintiffs, but the hearing should not be public. Further, Plaintiffs ask this Court to Order that Defendant Freshwater and all school employees be ordered to refer to Plaintiffs throughout the termination hearing with pseudonyms so as to protect their anonymity.

All counsel, including counsel for Defendant Freshwater, have conferred pursuant to the Court's requirements under Fed. Civ. R. 26(f). In that conference, the parties agreed that there is a continuing need to protect the identities of the minor children involved in this matter. All parties have discussed and agreed the need for the parties to have a standing order within this

litigation to offer that protection. That need is equally important for the termination proceedings which will begin October 1, 2008.

A proposed Order will be provided separately by electronic mail to chambers for the Court's consideration.

## **II. The Need For a Protective Order**

The very same conditions set forth in *Doe v. Porter*, 370 F.3d 558 (6<sup>th</sup> Cir. 2004) which allow a plaintiff to file pseudonymously are present concerns for the October 1, 2008 hearing. Plaintiffs have anonymously brought a legal claim which challenges governmental activity and have in response received threats from their community. Defendant Freshwater's request that Plaintiffs now appear and testify at a public hearing in their local community would only serve to cause Plaintiffs and their minor son to be subjected to the verbal and physical harassment threatened by their community.

Unfortunately, much of this case is going to involve testimony by and about young teenage students and what goes on in Mr. Freshwater's classroom. The case is going to be followed by the national media. Plaintiffs and the Board of Education are concerned about the exposure of students in the national media on a sensitive issue where religion and personal religious views may intersect with education. Plaintiffs and the Board are concerned about the adverse impact of students who testify within the schools and within the community if their names are placed in the public. As can be seen from the posted sign referenced above – the feelings in the community are strong enough that Plaintiffs could be at risk, whether from physical harm, emotional harm or economic harm. Further, the pressure of being presented on national television for students in the 8<sup>th</sup> and 9<sup>th</sup> grade can lead to both intimidation and limiting of their testimony or exaggeration and lack of candid testimony. No one wants to see that happen.

While this matter started off in the Mount Vernon City School District as a potential teacher termination, it has subsequently grown into a national debate on the intersection of school and religion. Indeed, a simple internet search of this case provides *hundreds* of websites and stories dedicated to a discussion of Mr. Freshwater's actions and the turbulent community response to the allegations levied against him.<sup>1</sup> News articles have appeared at foxnews.com, msn.com, yahoo.com, and on the Associated Press, among others. The massive press coverage has created a significant divide within the community with individuals turning on the complaining minor students as a target.

The enormous publicity and tumultuous community response surrounding Mr. Freshwater's possible termination creates significant concern with allowing Plaintiffs and their minor child to be identified and to testify in an open public session. Plaintiffs' minor child will be put in an extremely vulnerable position when asked to discuss his experiences in Mr. Freshwater's classroom, including issues related to Mr. Freshwater's stances on religion, homosexuality, and creationism/intelligent design versus evolution. If Plaintiffs' testimony is open to community members and media or their names are disclosed, they are at risk of being ostracized in their school and in their community. They may naturally be intimidated and

---

<sup>1</sup> For example, a search using google.com on July 30, 2008 included the following results:

- At <http://www.gopetition.com/petitions/support-john-freshwater.html> -- an online petition to "Support John Freshwater," provides John Freshwater, a two-time "Teacher of the Year," including in 2007, is under investigation by Mount Vernon City Schools for refusing to remove a Bible from his desk, where it has been sitting for 22 years. Other charges were made by school administrators that John expressed his personal faith on other occasions, after a torrent of public reaction to their censorship of the Bible. John should have the right to express his faith at school to the fullest extent of the law. And we are confident that the law is on his side."
- At [http://en.wikipedia.org/wiki/John\\_Freshwater](http://en.wikipedia.org/wiki/John_Freshwater) -- The local school board voted to dismiss Freshwater in June because "Freshwater preached his Christian beliefs about how the world began, discredited evolution and didn't teach the required science curriculum, the board says. He was told to stop teaching creationism and intelligent design, but he continued to do so, an investigation found." Freshwater's lawyer described the complaints as "fabrications." Dave Daubenmire, a friend of Freshwater who lost a lawsuit for praying with his football team told a newspaper, "With the exception of the cross-burning episode....I believe John Freshwater is teaching the values of the parents in the Mount Vernon school district." Originally on April 18th, some students held a rally on his behalf when he was told to remove all religious symbols from his class, but he refused to remove a Bible off his desk.

deterred from providing full and truthful testimony related to Mr. Freshwater's activities in the classroom. Indeed, Plaintiffs may be dissuaded from testifying *at all* when faced with the idea of speaking before such a judgment-ready audience. Allowing Plaintiffs and their minor child to testify at a closed session of this public hearing is the only viable way to protect their minor child.

This Court has already made a judicial determination that Plaintiffs should be protected. We ask that the Court's earlier protective order be extended to protect Plaintiffs in the October 1, 2008 hearing.

### **III. Law and Argument**

Defendant Freshwater's due process rights to be heard will not be violated if this Court orders Plaintiffs to appear and testify at a closed session of the School Board's hearing. The School Board joins Plaintiffs in this request.

Pursuant to R.C. 3319.16, a pre-termination hearing for a teacher is to be conducted as a private session unless a public hearing is requested. OHIO REV. CODE ANN. 3319.16. Ohio courts have held that the intent of this statute was not to provide a teacher with a public forum to challenge his termination, but to protect the teacher's privacy. *See Matheny, et al. v. Frontier Local Bd. of Edn.*, 62 Ohio St. 2d. 362, 367 (1980) (holding that "[i]t is evident that R.C. 3319.16 is aimed at protecting the privacy of a teacher against whom charges of misconduct have been preferred"); *see also Coburn v. Greenfield Local Bd. of Edn.*, 1980 Ohio App. LEXIS 10094 at \*5 (September 30, 1980). Critically, the law is silent as to whether a public hearing must be granted *in all situations* upon request. There is nothing to prevent the Court from closing the hearing where appropriate, as in the instant situation.

By closing the portion of the hearing involving Plaintiffs' testimony, requiring the use of pseudonyms for Plaintiffs and placing a gag order on the parties, the Referee may best protect

Mr. Freshwater's procedural due process rights and the rights of Plaintiffs. Mr. Freshwater will still have the opportunity to confront and cross examine Plaintiffs and avoid reliance upon hearsay testimony. The United States Supreme Court has held that due process is a fluid concept and its requirements at any given proceeding depend on the applicable circumstances and facts. *Mathews v. Eldridge* (1976), 424 U.S. 319, 334 ("due process is flexible and calls for such procedural protections as the particular situation demands"), quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 481; see also *Ohio v. Hochhausler* (1996), 76 Ohio St. 3d. 455, 459.

In the context of employee termination hearings, the Ohio Supreme Court has held that in certain cases employees do not have an absolute right to confront witnesses face-to-face at a post-termination hearing. *Ohio Assoc. of Public Sch. Employees, AFSCME AFL-CIO v. Lakewood City Sch. Dist. Bd. of Educ.* (1994), 68 Ohio St. 3d. 175, ¶ 2 of the syllabus. In *Lakewood*, the Court upheld an arbitrator's use of a closed-circuit television which allowed a student witness, who had leveled drug dealing accusations against a public school employee, to testify live in another room in order to separate her from the accused. *Id.* at 180. The arbitrator allowed such action because the student witness feared the employee, in part because he had contacted her earlier and told her to deny that he had helped her obtain drugs. *Id.* In sustaining the Arbitrator's decision to separate the witness, the Ohio Supreme Court recognized "[t]he purpose of due process is to protect substantial rights. ***It does not mandate particular procedures in every case.*** The controlling question in this case is whether the arbitrator appropriately balanced the conflicting interests involved without depriving appellee of a meaningful opportunity to challenge adverse evidence." *Id.* (emphasis added).<sup>2</sup>

---

<sup>2</sup> The Ohio Supreme Court further noted that because the *Lakewood* case involved a ***post***-termination hearing, the employee must be provided "a more thorough opportunity to present their evidence and to challenge adverse evidence than is promised at a pre-termination hearing." *Lakewood* at 178. Here, there is no risk of substantial deprivation of Mr. Freshwater's rights by holding a portion of the hearing in closed session.

The *Lakewood* Court properly determined that the compelling interests of the school district in both securing full and truthful testimony about allegations against an employee, while preventing unnecessary anxiety to a student, permitted video testimony by the student witness while fully complying with the employee's due process rights.

Plaintiffs and the School Board do not ask this Court to go as far as the Arbitrator did in *Lakewood*. Plaintiffs and the Board ask that the portions of the hearing involving Plaintiffs' testimony be closed to public and that the record reflect Plaintiffs' names by pseudonyms and that a gag order be placed on the parties. Further, the Board asks that the Court also Order that similarly, the other minors participating in the hearing do so by private session at a private location. Plaintiffs do not oppose and concur with this request. Mr. Freshwater is aware of the charges against him, has been made aware of the student and student's family who have brought the accusations against him, and if this motion is granted he will have the full opportunity to confront and cross examine Plaintiffs. Closing the portion of the hearing involving Plaintiffs' testimony and other minor children in no way violates Mr. Freshwater's due process rights under the plain language of the statute.

#### **IV. The Pending Motion Before The Hearing Referee**

It should be noted to the Court that the Mount Vernon City School District Board of Education currently has pending a motion before the Hearing Referee which asks that all testimony of school students be held privately. Defendant Freshwater has not joined the school in that motion.

It certainly is within this Court's jurisdiction to Order Defendant Freshwater to join the school board in this motion pending before the Hearing Referee. Doing so would protect Plaintiffs and their minor son from the real threats that they face from their very own community. Further, joining in the motion would guarantee Defendant Freshwater that his

hearing is entirely public but for the minor children whose identities he should have an interest in protecting.

**V. Conclusion**

Religion is perhaps the quintessentially private matter. *Doe v. Stegall*, 653 F.2d 180 (5<sup>th</sup> Cir. 1981). Plaintiffs seek to serve the request of Defendant Freshwater that they appear and testify at his termination hearing, but they should not be forced to do so at the sacrifice of their legal right to anonymity. Plaintiffs should not be forced to suffer harassment, intimidation, embarrassment, or worse from their community.

Plaintiffs and the Mount Vernon City School District respectfully ask that this Court issue an Order protecting Plaintiffs and testifying minor children such that they shall appear and testify at Defendant Freshwater's termination hearing, but their testimony shall be held privately and references throughout the proceedings to their identities be made with pseudonyms.

Respectfully submitted,

/s/ Jessica K. Philemond  
**Jessica K. Philemond (0076761)**  
Email: jkp@isaacbrant.com  
Isaac, Brant, Ledman & Teetor, LLP  
250 East Broad Street  
Columbus, Ohio 43215  
Tele: (614) 221-2121; Fax (614) 365-9516  
*Attorney for Plaintiffs*

/s/ David K. Smith  
David K. Smith (0016208)  
Krista Keim (0067144)  
Elise C. Keating (0079456)  
Sarah J. Moore (0065381)  
Britton, Smith, Peters and Kalail Co., LPA  
3 Summit Park Drive  
Cleveland, Ohio 44131  
(216) 503-5055; F: (216) 503-5065  
E-Mail: [dsmith@ohioedlaw.com](mailto:dsmith@ohioedlaw.com)  
[kkeim@ohioedlaw.com](mailto:kkeim@ohioedlaw.com)  
[ekeating@ohioedlaw.com](mailto:ekeating@ohioedlaw.com)  
[sjmoore@ohioedlaw.com](mailto:sjmoore@ohioedlaw.com)

*Attorneys for Defendants Mount Vernon City School  
District Board of Education, Stephen Short, and  
William White*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 19, 2008 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Jessica K. Philemond  
Isaac, Brant, Ledman, & Teetor LLP

---

**THE LAW OFFICE OF R. KELLY HAMILTON, LLC**

---

September 15, 2008

David J. Millstone  
Squire, Sanders & Dempsey L.L.P.  
4900 Key Tower  
Cleveland, OH 44114

Facsimile Transmission 216.479.8795

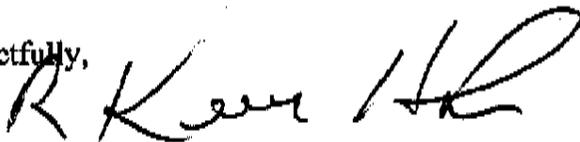
RE: John Freshwater

Dear David J. Millstone:

Please see the attached request for the issuance of subpoenas.

Due to power outages related to the storm yesterday, the discovery requests to you will be delayed until tomorrow.

Respectfully,



R. Kelly Hamilton

**IN THE MATTER OF JOHN FRESHWATER**

Mount Vernon City School  
District Board of Education

Employer

AND

REFEREE: R. Lee Shepherd

John Freshwater

Teacher

---

**JOHN FRESHWATER'S REQUEST FOR THE ISSUANCE OF SUBPOENA'S**

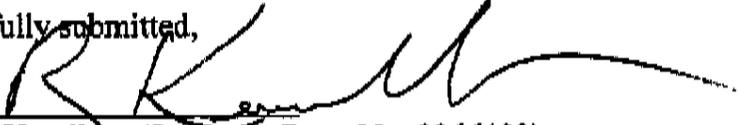
Now comes John Freshwater, by and through counsel, pursuant to Ohio Revised Code 3319.16, *Termination of contract by board of education*, and requests that the treasurer, of the employer issue subpoenas for the following persons known to the employer as indicated in the *Mount Vernon City Schools Independent Investigation of a Complaint Regarding John Freshwater*, hereinafter referenced as the "investigative report". Said subpoenas are to be issued to the person named hereafter directing them to appear in an open-hearing to be held according to statute beginning on October 1, 2008, at 10:00AM and continuing thereafter until the conclusion of testimony scheduled to occur on October 3, 2008.

1. Thomas J. Herlevi, 11321 St. Andrews Way, Concord, Ohio, 44077.
2. Julia F. Herlevi, 11321 St. Andrews Way, Concord, Ohio, 44077.
3. All of those persons referenced and identified on page 2 of the investigative report, specifically including:
  - A. The parents who filed the complaint;
  - B. The child-student of the parents who filed the complaint;
  - C. Stephen Short, Superintendent of the employer;

- D. Jeff Maley, former Superintendent of the employer;
  - E. Bill White, middle school principal of the employer;
  - F. Kathy Kasler, high school principal of the employer;
  - G. Lynda Weston, director of Teaching and Learning for the employer;
  - H. The monitor assigned to John Freshwater's classroom;
  - I. Unnamed or otherwise identified but described in the investigative report as "twelve other teachers in the Middle School and High School"; and
  - J. Unnamed or otherwise identified "five current or former students of Mr. Freshwater along with, in four instances, their parents".
4. Unnamed or otherwise identified but described in the investigative report as "two representatives of the science department".
  5. Unnamed or otherwise identified but described in the investigative report as "a parent of a former student" who said John Freshwater distributed two worksheets titled, "The Giraffe" and "The Woodpecker".
  6. Unnamed or otherwise identified but described in the investigative report as "a parent of a former student" who said John Freshwater distributed a worksheet titled, "Dragon History", "Dinosaur Fossils – Age Old Debate" and "Dinosaur Extinction"
  7. Unnamed or otherwise identified but described in the investigative report as a "former student" who had a copy of the "Dinosaur Extinction" that included the full document.
  8. Tim Keib, former assistant principal of employer.
  9. Jeff Kuntz, former principal of employer.

10. Unnamed or otherwise identified but described in the investigative report as "a ninth grade science teacher" who provided copies of questionnaires that incoming student complete.
11. Unnamed or otherwise identified but described in the investigative report as "high school science teachers" who expressed frustration and concern regarding having to re-teach concepts that in their opinion had been improperly taught by John Freshwater.
12. Unnamed or otherwise identified but described in the investigative report as "a teacher who was present in Mr. Freshwater's classroom on a substitute basis for one period in either 2006 or 2007".
13. Unnamed or otherwise identified but described in the investigative report as "another teacher whose duties included being in Mr. Freshwater's classroom during the 2006-2007 school year...but said that some information that he presented created doubt regarding Darwin's findings..."
14. Unnamed or otherwise identified but described in the investigative report as "students who were interviewed who were members of FCA.."

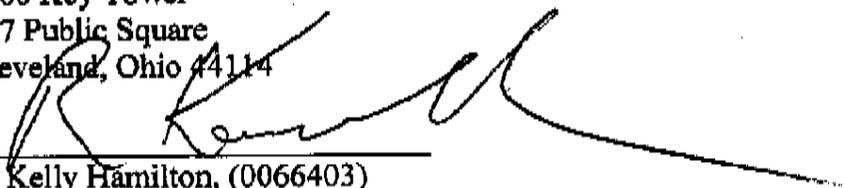
Respectfully submitted,

  
R. Kelly Hamilton (Supreme Court No. 0066403)  
**Mail to:** P.O. Box 824, Grove City, Ohio 43123  
**Office:** 3800 Broadway, Grove City, Ohio 43123  
Phone 614-875-4174 / Fax 614-875-4188

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing John Freshwater's Request for the Issuance of Subpoenas was delivered this September 15, 2008 by counsel to:

David Millston  
4900 Key Tower  
127 Public Square  
Cleveland, Ohio 44114

  
R. Kelly Hamilton, (0066403)