

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

ASHTON WHITAKER,

Plaintiff,

v.

KENOSHA UNIFIED SCHOOL DISTRICT  
NO. 1 BOARD OF EDUCATION,

Defendant.

Civ. Action No. 2:16-cv-00943-PP  
Judge Pamela Pepper

**MOTION TO COMPEL DISCOVERY RESPONSES**

Pursuant to Fed. R. Civ. P. 37(a)(3)(B)(iii)-(iv) and Civ. L.R. 37, Plaintiff Ashton Whitaker (“Plaintiff” or “Ash”) respectfully moves this court to compel Defendant Kenosha Unified School District No. 1 Board of Education (“Defendant” or “KUSD”) to disclose, in response to certain of Plaintiff’s Interrogatories and Requests for Production of Documents, the following: (1) information pertaining to the existence, application, and enforcement of any policies or practices regarding the treatment of transgender students at all of KUSD’s middle schools and high schools for the period from August 1, 2013, to present, and (2) information related to KUSD’s treatment of other transgender students who have attended middle school or high school in KUSD for the period running from August 1, 2013, to present.<sup>1</sup>

In support of this motion, Plaintiff submits the accompanying memorandum of law and states the following:

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<sup>1</sup> Plaintiff notes that his original requests sought District-wide information for the period running from August 1, 2011 to present, but narrows the scope and time period of his requests for this motion.

1. On November 21, 2016, Plaintiff propounded his First set of Interrogatories and Requests for Production of Documents on Defendant. At issue to the present motion, Plaintiff's Interrogatories Nos. 4, 6, and 15, and Requests for Production Nos. 17, 18, 19, 20, 26, 27, and 28, in whole or in part, requested information about KUSD's application or enforcement of any policies or practices pertaining to transgender students, or the existence of such policies or practices, at all KUSD's schools, as well as to the application or enforcement of any such policies both to Ash and other transgender students.

2. On February 7, 2017, KUSD served Plaintiff with responses and objections to Plaintiff's first set of discovery requests. With respect to the Interrogatories and Requests for Production identified in ¶ 1 above, KUSD objected to Plaintiff's requests for information about other KUSD schools and other transgender students as, *inter alia*, overbroad and not relevant. Plaintiff disagreed with these objections in a letter to Defendant, dated March 24, 2017.

3. The disputed Interrogatories and Requests for Production, with KUSD's responses and objections, as well as Plaintiff's written responses to those responses and objections, are reproduced, in relevant part, and attached to this motion as Exhibit A.

4. As stated in the written certification by Plaintiff's counsel, attached as Exhibit A to this motion, Plaintiff has in good faith conferred with Defendant in an effort to obtain the requested information without court action, but the parties have been unable to reach agreement. In addition, the parties participated in a pre-motion conference with the Court on August 31, 2017, to discuss this dispute. During that conference, the Court instructed Plaintiff to file this motion and set a briefing schedule.

Based on the foregoing, and for the reasons explained in the accompanying memorandum of law, Plaintiff respectfully requests that the Court grant this motion and enter an order directing Defendant to disclose the withheld information no later than September 22, 2017.

Dated: September 5, 2017

Respectfully submitted,

/s Joseph J. Wardenski

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# **EXHIBIT**

**A**

## **PLAINTIFF'S FIRST SET OF INTERROGATORIES**

**PLAINTIFF'S INTERROGATORY NO. 4:** Describe any action Defendants have taken pursuant to any policy or practice referenced in response to Plaintiff's Interrogatory No. 3.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S INTERROGATORY NO. 4:**

Defendants object to the request as vague and overbroad. The term "any action" is undefined and, taken literally, could mean anything at all related to the practice. Subject to and without waiving the above objection, and assuming Plaintiff seeks information about any enforcement or disciplinary action taken, Defendants state that they have enforced and applied this practice, just as they do any other policy or practice at Tremper. Generally, administration at Tremper is charged with ensuring the practice is followed and may take disciplinary action if the practice is not followed. However, Tremper administration has never taken any disciplinary measures against any student for violation of this practice where a transgender student has used a bathroom not consistent with the sex on their birth certificate. However, Tremper administration met with Plaintiff on several occasions to remind Plaintiff about the practice and also discussed the practice with Plaintiff's mother. Defendant also identifies that there may have been occasions on which the practice was enforced and disciplinary action taken where a student of the opposite sex was caught in the incorrect bathroom for reasons entirely unrelated to their transgender status, preference to use a certain restroom, or the like. However, Defendants assume Plaintiff does not seek such irrelevant information.

**PLAINTIFF'S DEFICIENCY LETTER TO DEFENDANT RE:**

**INTERROGATORY NO. 4:** Defendants' responses to Interrogatories Nos. 4 and 6 are incomplete. For example, although Plaintiff's Interrogatory No. 4 seeks a description of any action taken pursuant to Defendants' policy on restroom usage, Defendants have not explained why they have a video of Ash using the boys' restroom, as indicated on Defendants' privilege log, or what circumstances led to one of Defendants' employees filling out a form (that that is designed for student use) to discuss Plaintiff's restroom use, *see* KUSD 1320. Additionally, Defendants have not described any other situation in which any student whose gender identity is different from the sex listed on their birth certificate or school records requested to use a school facility or stay in an overnight accommodation matching the student's gender identity. Please either provide such information or confirm that no such information exists. Finally, enforcement of these policies against other students is not, as Defendants claim, "irrelevant." Plaintiff is entitled to determine whether Defendants enforced the policy against Plaintiff and other students in the same manner. Please include this information in your revised responses as well.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S DEFICIENCY LETTER RE:**

**INTERROGATORY NO. 4:** Defendants have identified that they have enforced and applied the policies at issue in this case just like any other policy. When any policy is violated, the Defendants may seek to preserve information establishing the violation of the policy - such as a videotape or a witness statement. Again, Plaintiff claims he is entitled to discovery of how other students were treated to see if Plaintiff was treated less

favorably than a similarly situated student. Again, there is no such allegation in the Complaint and Defendants have already admitted that they treated Plaintiff differently than males generally because of the practice in place and the sex identified on Plaintiff's birth certificate. Further, Plaintiff has never been disciplined for his self-admitted numerous violations of the practice in place and, thus, Plaintiff could not be treated less favorably than another student. Finally, it is indeed entirely irrelevant if another student violated the overnight accommodation practice, for example, because of a romantic interest in a member of the opposite sex. Such individuals would not be similarly situated to Plaintiff, could not be used as comparators and could not give rise to liability for differential treatment.

**DEFENDANT'S SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 4:**

Defendant objects to the request as vague and over broad. The term "any action" is undefined and, taken literally, could mean anything at all related to the practice. Further, that the request seeks information not relevant to the claims asserted in the Complaint. Subject to and without waiving the above objection, and assuming Plaintiff seeks information about any enforcement or disciplinary action taken, Defendant states that it has enforced and applied this practice, just as they do any other policy or practice at Tremper. Generally, administration at Tremper is charged with ensuring the practice is followed and may take disciplinary action if the practice is not followed. Tremper administration may also take steps to document or preserve information regarding any policy violation - such as videotapes or witness statements, where appropriate - and may seek to preserve such documents or information. Tremper administration has never taken any disciplinary measures against any student for violation of this practice where a transgender student has used a bathroom not consistent with the sex on their birth certificate. However, Tremper administration met with Plaintiff on several occasions to remind Plaintiff about the practice and also discussed the practice with Plaintiff's mother. Defendant further identifies that there was at least one other student who identified as transgender during the pertinent time period at Tremper who was informed of the same policy and chose to use the single-user, gender-neutral restroom offered to them without incident. To Defendant's knowledge no other transgender student at Tremper has violated the practice identified.

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**PLAINTIFF'S INTERROGATORY NO. 6:** Describe any action Defendants have taken pursuant to any policy or practice referenced in response to Plaintiff's Interrogatory No. 5.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S INTERROGATORY NO. 6:**

Defendants object to the request as vague and overbroad. The term "any action" is undefined and, taken literally, could mean anything at all related to the practice. Subject to and without waiving the above objection, Defendants state that they have enforced and applied this practice, just as they do any other policy or practice at Tremper. Generally, administration at Tremper is charged with ensuring the practice is followed and may take disciplinary action if the practice is not followed. However, Tremper administration, or those in charge of such trips, have never taken any disciplinary measures against a student for violation of this practice where a transgender student has roomed with a

student not consistent with the sex on their birth certificate. Tremper administration, along with those in charge of the trips, did inform Plaintiff that Plaintiff needed to room with someone of the same sex on the trips or other arrangements would have to be made. Defendants also identify that there may have been occasions on which the practice was enforced and disciplinary action was taken where a student of the opposite sex was caught in a room of a member of the opposite sex for reasons entirely unrelated to their transgender status, preference to sleep in a certain room, or the like. However, Defendants assume Plaintiff does not seek such irrelevant information.

**PLAINTIFF'S DEFICIENCY LETTER TO DEFENDANT RE:**

**INTERROGATORY NO. 6:** Defendants' responses to Interrogatories Nos. 4 and 6 are incomplete. For example, although Plaintiff's Interrogatory No. 4 seeks a description of any action taken pursuant to Defendants' policy on restroom usage, Defendants have not explained why they have a video of Ash using the boys' restroom, as indicated on Defendants' privilege log, or what circumstances led to one of Defendants' employees filling out a form (that that is designed for student use) to discuss Plaintiff's restroom use, *see* KUSD 1320. Additionally, Defendants have not described any other situation in which any student whose gender identity is different from the sex listed on their birth certificate or school records requested to use a school facility or stay in an overnight accommodation matching the student's gender identity. Please either provide such information or confirm that no such information exists. Finally, enforcement of these policies against other students is not, as Defendants claim, "irrelevant." Plaintiff is entitled to determine whether Defendants enforced the policy against Plaintiff and other students in the same manner. Please include this information in your revised responses as well.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S DEFICIENCY LETTER RE:**

**INTERROGATORY NO. 6:** Defendants have identified that they have enforced and applied the policies at issue in this case just like any other policy. When any policy is violated, the Defendants may seek to preserve information establishing the violation of the policy - such as a videotape or a witness statement. Again, Plaintiff claims he is entitled to discovery of how other students were treated to see if Plaintiff was treated less favorably than a similarly situated student. Again, there is no such allegation in the Complaint and Defendants have already admitted that they treated Plaintiff differently than males generally because of the practice in place and the sex identified on Plaintiff's birth certificate. Further, Plaintiff has never been disciplined for his self-admitted numerous violations of the practice in place and, thus, Plaintiff could not be treated less favorably than another student. Finally, it is indeed entirely irrelevant if another student violated the overnight accommodation practice, for example, because of a romantic interest in a member of the opposite sex. Such individuals would not be similarly situated to Plaintiff, could not be used as comparators and could not give rise to liability for differential treatment.

**DEFENDANT'S SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 6:**

Defendant objects to the request as vague and over broad. The term "any action" is undefined and, taken literally, could mean anything at all related to the practice. Further,

that the request seeks information not relevant to the claims asserted in the Complaint. Subject to and without waiving the above objection, Defendant states that it has enforced and applied this practice, just as it does any other policy or practice at Tremper. Generally, administration at Tremper is charged with ensuring the practice is followed and may take disciplinary action if the practice is not followed. However, Tremper administration, or those in charge of such trips, have never taken any disciplinary measures against a student for violation of this practice where a transgender student has roomed with a student not consistent with the sex on their birth certificate. Tremper administration, along with those in charge of the trips, did inform Plaintiff that Plaintiff needed to room with someone of the same sex on the trips or other arrangements would have to be made. Defendant further identifies that during the pertinent time period at Tremper no other transgender student has requested to room with individuals of their same biological sex for overnight accommodations.

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**PLAINTIFF'S INTERROGATORY NO. 15:** Identify and describe all communications made or received by Defendants, to or from any individual or entity, concerning the access to or use of student restrooms, locker rooms, changing areas, overnight accommodations, athletics teams, extracurricular activities (including prom court, homecoming court, and similar activities), or other sex-specific or sex-segregated programs or activities, by Plaintiff or other transgender students (regardless of whether Plaintiff or other students were identified by name), or concerning any policy, practice, or proposal to distribute green wristbands/stickers or other physical identifiers to Plaintiff or other transgender students, including identifying the parties to any such communications.

**DEFENDANT'S RESPONSE TO INTERROGATORY NO. 15:** Defendants object to the request as vague, compound, overbroad, unduly burdensome, unlikely to lead to the discovery of admissible evidence and an invasion of the privacy interests of minors. First, it would require the disclosure and/or identification of other transgender students. Second, the request as drafted, is impossible for Defendant to respond to as it does not know whether students are transgender, unless they have voluntarily disclosed that information to Defendants in some fashion. Further, the request seeks information regarding all athletic teams or other programs or activities regardless of whether Plaintiff participated in the same. Again, this is a single-plaintiff Title IX case. Also, there are no claims in the Complaint by Plaintiff that any rights under Title IX were violated in regards to athletic programs or other programs or activities, other than those specifically mentioned. Upon the request being appropriately limited and altered to address its compound nature, Defendants will consider such a request.

**PLAINTIFF'S DEFICIENCY LETTER TO DEFENDANT RE:**

**INTERROGATORY NO. 15:** Defendants have raised three objections to Plaintiff's request for a description of all communications concerning restroom and locker room usage by transgender students, transgender students' participation in sex-segregated activities, and Defendants' policy regarding the use of green stickers. None justifies Defendants' failure to respond. First, Defendants assert that the interrogatory requires the disclosure of the names of transgender students, but as explained above, Defendants, as

stated above, are free to provide the initials of students or use a unique pseudonym or identifier to identify individual students. Second, Defendants assert that they do not know the identity of all students who are transgender. Plaintiff's request seeks only communications about students who Defendants know to be transgender. Third, Defendants have refused to respond on the ground that the interrogatory seeks communications about activities in which Plaintiff did not participate. Again, Plaintiff is entitled to this information to determine if Defendants have consistently applied their alleged policies and practices. *See, e.g., Yonkers Bd. of Educ.*, 624 F. Supp. at 1381; *Occhione*, 886 F. Supp. 2d at 748. Finally, Plaintiff will narrow this request to seek only a description of oral communications about which Defendants have actual knowledge. Please provide a description of all such communications.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S DEFICIENCY LETTER RE: INTERROGATORY NO. 15:** For all practical purposes, the Interrogatory requests Defendant to identify any communication made or received that has anything to do with the allegations in the Complaint. Such requests are patently overbroad. *Kearney Partners Fund, LLC v. United States*, No. 210CV153FTM36SPC, 2011 WL 13137948, at \*3 (M.D. Fla. Dec. 19, 2011) ("The Defendant's objection is well taken. Request for production that request any and all communications are generally considered overbroad and unduly burdensome.") *See also, Goodbys Creek, LLC v. Arch Insurance Co.*, 2008, WL 4279693 \* 2 (M.D. Fla. September 15, 2008) (holding that such a request for all communications is overbroad); *Symetra Life Ins. Co. v. Rapid Settlements, Ltd*, 2008 WL 597711 \*5-6 (E.D. Pa. March 4, 2008) (finding a request seeking "all communications" concerning a party overbroad).

Further, Defendants will not identify students and/or their transgender status by a unique pseudonym or identifier as Plaintiff and his mother are in a unique position to be able to determine who the individuals are. And, again, such information has little probative value given there are no allegations in the Complaint that Plaintiff was treated differently than any other specific similarly situated student.

## **PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS**

**PLAINTIFF'S REQUEST FOR PRODUCTION NO. 17:** All documents relating to students' access to or use of restrooms in any KUSD school or at any other site during a school-sponsored trip or activity.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR PRODUCTION NO. 17:** Defendants object to the request as vague and overbroad. Documents related to other activities involving other students has no bearing or relevance on this present litigation. Subject to and without waiving the above objections, and limiting the response to only those trips or activities that Plaintiff was actually involved in, no other responsive documents exist other than those produced in response to other requests.

**PLAINTIFF'S DEFICIENCY LETTER TO DEFENDANT RE: REQUEST FOR PRODUCTION NO. 17:** This is a discrimination case, and Plaintiff therefore has a right to determine whether Defendants have applied their alleged policies and practices in a consistent manner or whether Ash has been singled out for discriminatory or differential treatment. *See, e.g., United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1381 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987) (explaining, in the context of a discrimination case, that "[a]mong the most relevant factors to consider is the extent to which the [policy at issue] is applied in a consistent manner"); *see also, e.g., Occhione v. PSA Airlines, Inc.*, 886 F. Supp. 2d 736, 748 (S.D. Ohio 2012) (considering whether defendant "consistently applied its policy" relevant to claim of discrimination). Because KUSD has asserted that its treatment of Ash was made pursuant to a district-wide practice, it follows that Defendants must provide documents related to restroom use (RFP No. 17), locker rooms and changing areas (RFP No. 18), and sleeping accommodations (RFP No. 19) at other KUSD schools and for trips or activities in which Ash did not participate. Further, communications with third parties regarding these issues (RFP No. 20) are relevant to determine whether Defendants' policies or the third party's were the basis for Defendants' conduct. To the extent Defendants withheld any documents based on these objections, please produce all responsive, non-privileged documents at this time. Additionally, Defendants have failed to justify their decision to withhold a video of Ash entering a school restroom. "The party opposing discovery has the burden of showing, *with specificity*, that the discovery is . . . unduly burdensome." *Brown v. Automotive Components Holdings, LLC*, No. 106-CV-1802-RLY-TAB, 2008 WL 747562, at \*3 (S.D. Ind. Mar. 18, 2008) (emphasis added). Defendants' conclusory assertion that the video—which is responsive, at a minimum, to Plaintiff's RFP No. 17—cannot be redacted is therefore inadequate. Defendants have failed to explain why images of students recorded at Tremper High School, presumably in a public hallway, are protected by FERPA in the first instance. FERPA protects improper disclosure of student information contained in education records; a videotape of students in a school hallway is not "student information" or an "education record" covered by FERPA. Nor does any student have a presumption of privacy in public spaces at school: presumably any visitor to Tremper High School can see students walking down a hallway without running afoul of KUSD's FERPA obligations. Even assuming the images of students are somehow protected, Defendants have not stated with particularity what, if any, measures they have

taken in an attempt to “redact” the video and the estimated cost of retaining a third-party to redact the information. Plaintiff therefore demands that Defendants produce this video immediately, marked, as appropriate, with a confidentiality designation under the protective order in this case.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S DEFICIENCY LETTER RE: REQUEST FOR PRODUCTION NO. 17:** You entirely mischaracterize the allegations set forth in the Amended Complaint and the issues present in this lawsuit. The only allegations in the Amended Complaint are that Plaintiff was treated “differently from other male students” in that Plaintiff was not permitted to use the men’s restroom, was not permitted to room with males on trips, and the like. However, there are no allegations that Plaintiff was treated differently than a similarly situated individual or that the policy was applied differently to different individuals. Your attempts to twist this case into something it is not will not prevail. Further, while the policy was one which applied to the whole District, its application and enforcement at each and every school was done at the building level. Thus, just like in employment discrimination cases, there is no basis for discovery beyond the decisional unit at issue - Tremper High School. Simply because an employer has a company-wide policy not to discriminate does not render every discrimination claim subject to company-wide discovery.

As to the video described, see above response regarding same.

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**PLAINTIFF’S REQUEST FOR PRODUCTION NO. 18:** All documents relating to students’ access to and use of locker rooms or changing areas in any KUSD school or at any other site during a school-sponsored trip or activity.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S REQUEST FOR PRODUCTION NO. 18:** Defendants object to the request as vague and overbroad. Documents related to other activities involving other students has no bearing or relevance on this present litigation. Subject to and without waiving the above objections, and limiting the response to only those trips or activities that Plaintiff was actually involved in, no other responsive documents exist other than those produced in response to other requests.

**PLAINTIFF’S DEFICIENCY LETTER TO DEFENDANT RE: REQUEST FOR PRODUCTION NO. 18:** This is a discrimination case, and Plaintiff therefore has a right to determine whether Defendants have applied their alleged policies and practices in a consistent manner or whether Ash has been singled out for discriminatory or differential treatment. *See, e.g., United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1381 (S.D.N.Y. 1985), *aff’d*, 837 F.2d 1181 (2d Cir. 1987) (explaining, in the context of a discrimination case, that “[a]mong the most relevant factors to consider is the extent to which the [policy at issue] is applied in a consistent manner”); *see also, e.g., Occhione v. PSA Airlines, Inc.*, 886 F. Supp. 2d 736, 748 (S.D. Ohio 2012) (considering whether defendant “consistently applied its policy” relevant to claim of discrimination). Because KUSD has asserted that its treatment of Ash was made pursuant to a district-wide practice, it follows that Defendants must provide documents related to restroom use (RFP

No. 17), locker rooms and changing areas (RFP No. 18), and sleeping accommodations (RFP No. 19) at other KUSD schools and for trips or activities in which Ash did not participate. Further, communications with third parties regarding these issues (RFP No. 20) are relevant to determine whether Defendants' policies or the third party's were the basis for Defendants' conduct. To the extent Defendants withheld any documents based on these objections, please produce all responsive, non-privileged documents at this time. Additionally, Defendants have failed to justify their decision to withhold a video of Ash entering a school restroom. "The party opposing discovery has the burden of showing, *with specificity*, that the discovery is . . . unduly burdensome." *Brown v. Automotive Components Holdings, LLC*, No. 106-CV-1802-RLY-TAB, 2008 WL 747562, at \*3 (S.D. Ind. Mar. 18, 2008) (emphasis added). Defendants' conclusory assertion that the video—which is responsive, at a minimum, to Plaintiff's RFP No. 17—cannot be redacted is therefore inadequate. Defendants have failed to explain why images of students recorded at Tremper High School, presumably in a public hallway, are protected by FERPA in the first instance. FERPA protects improper disclosure of student information contained in education records; a videotape of students in a school hallway is not "student information" or an "education record" covered by FERPA. Nor does any student have a presumption of privacy in public spaces at school: presumably any visitor to Tremper High School can see students walking down a hallway without running afoul of KUSD's FERPA obligations. Even assuming the images of students are somehow protected, Defendants have not stated with particularity what, if any, measures they have taken in an attempt to "redact" the video and the estimated cost of retaining a third-party to redact the information. Plaintiff therefore demands that Defendants produce this video immediately, marked, as appropriate, with a confidentiality designation under the protective order in this case.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S DEFICIENCY LETTER RE: REQUEST FOR PRODUCTION NO. 17:** You entirely mischaracterize the allegations set forth in the Amended Complaint and the issues present in this lawsuit. The only allegations in the Amended Complaint are that Plaintiff was treated "differently from other male students" in that Plaintiff was not permitted to use the men's restroom, was not permitted to room with males on trips, and the like. However, there are no allegations that Plaintiff was treated differently than a similarly situated individual or that the policy was applied differently to different individuals. Your attempts to twist this case into something it is not will not prevail. Further, while the policy was one which applied to the whole District, its application and enforcement at each and every school was done at the building level. Thus, just like in employment discrimination cases, there is no basis for discovery beyond the decisional unit at issue - Tremper High School. Simply because an employer has a company-wide policy not to discriminate does not render every discrimination claim subject to company-wide discovery.

As to the video described, see above response regarding same.

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**PLAINTIFF’S REQUEST FOR PRODUCTION NO. 19:** All documents relating to overnight lodging/sleeping accommodations for KUSD students on school-sponsored or school-sanctioned trips.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S REQUEST FOR PRODUCTION NO. 19:** Defendants object to the request as vague and overbroad. Documents related to trips taken by other students has no bearing or relevance on this present litigation. Subject to and without waiving the above objections, and limiting the response to only those trips or activities that Plaintiff was actually involved in, see attached documents concerning rooming lists for Golden String camps and trips which Plaintiff participated in. KUSD 1656-1705.

**PLAINTIFF’S DEFICIENCY LETTER TO DEFENDANT RE: REQUEST FOR PRODUCTION NO. 19:** This is a discrimination case, and Plaintiff therefore has a right to determine whether Defendants have applied their alleged policies and practices in a consistent manner or whether Ash has been singled out for discriminatory or differential treatment. *See, e.g., United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1381 (S.D.N.Y. 1985), *aff’d*, 837 F.2d 1181 (2d Cir. 1987) (explaining, in the context of a discrimination case, that “[a]mong the most relevant factors to consider is the extent to which the [policy at issue] is applied in a consistent manner”); *see also, e.g., Occhione v. PSA Airlines, Inc.*, 886 F. Supp. 2d 736, 748 (S.D. Ohio 2012) (considering whether defendant “consistently applied its policy” relevant to claim of discrimination). Because KUSD has asserted that its treatment of Ash was made pursuant to a district-wide practice, it follows that Defendants must provide documents related to restroom use (RFP No. 17), locker rooms and changing areas (RFP No. 18), and sleeping accommodations (RFP No. 19) at other KUSD schools and for trips or activities in which Ash did not participate. Further, communications with third parties regarding these issues (RFP No. 20) are relevant to determine whether Defendants’ policies or the third party’s were the basis for Defendants’ conduct. To the extent Defendants withheld any documents based on these objections, please produce all responsive, non-privileged documents at this time. Additionally, Defendants have failed to justify their decision to withhold a video of Ash entering a school restroom. “The party opposing discovery has the burden of showing, *with specificity*, that the discovery is . . . unduly burdensome.” *Brown v. Automotive Components Holdings, LLC*, No. 106-CV-1802-RLY-TAB, 2008 WL 747562, at \*3 (S.D. Ind. Mar. 18, 2008) (emphasis added). Defendants’ conclusory assertion that the video—which is responsive, at a minimum, to Plaintiff’s RFP No. 17—cannot be redacted is therefore inadequate. Defendants have failed to explain why images of students recorded at Tremper High School, presumably in a public hallway, are protected by FERPA in the first instance. FERPA protects improper disclosure of student information contained in education records; a videotape of students in a school hallway is not “student information” or an “education record” covered by FERPA. Nor does any student have a presumption of privacy in public spaces at school: presumably any visitor to Tremper High School can see students walking down a hallway without running afoul of KUSD’s FERPA obligations. Even assuming the images of students are somehow protected, Defendants have not stated with particularity what, if any, measures they have taken in an attempt to “redact” the video and the estimated cost of retaining a third-party

to redact the information. Plaintiff therefore demands that Defendants produce this video immediately, marked, as appropriate, with a confidentiality designation under the protective order in this case.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S DEFICIENCY LETTER RE: REQUEST FOR PRODUCTION NO. 19:** You entirely mischaracterize the allegations set forth in the Amended Complaint and the issues present in this lawsuit. The only allegations in the Amended Complaint are that Plaintiff was treated “differently from other male students” in that Plaintiff was not permitted to use the men’s restroom, was not permitted to room with males on trips, and the like. However, there are no allegations that Plaintiff was treated differently than a similarly situated individual or that the policy was applied differently to different individuals. Your attempts to twist this case into something it is not will not prevail. Further, while the policy was one which applied to the whole District, its application and enforcement at each and every school was done at the building level. Thus, just like in employment discrimination cases, there is no basis for discovery beyond the decisional unit at issue - Tremper High School. Simply because an employer has a company-wide policy not to discriminate does not render every discrimination claim subject to company-wide discovery.

As to the video described, see above response regarding same.

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**PLAINTIFF’S REQUEST FOR PRODUCTION NO. 20:** All documents concerning communications with other schools, colleges or universities, hotels or other sleeping accommodation providers, tour providers or chaperones, or any other person or entity concerning access to or use of restrooms, locker rooms, changing areas, overnight accommodations, as well as access to or participation in any other sex-segregated spaces or activities for Plaintiff or other transgender students at school or during school-sponsored or school-sanctioned trips or activities outside of KUSD.

**DEFENDANT’S RESPONSE TO REQUEST FOR PRODUCTION NO. 20:** Defendants object to the request as vague, compound and overbroad. Documents related to other activities involving other students have no bearing or relevance on this present litigation. Subject to and without waiving the above objections, and limiting the response only to those trips or activities that Plaintiff was actually involved in, no such hard copies of communications are believed to exist which would contain communications between KUSD and the third parties listed about the topics identified. As stated, Defendant is willing to discuss acceptable search terms for electronic records.

**PLAINTIFF’S DEFICIENCY LETTER TO DEFENDANT RE: REQUEST FOR PRODUCTION NO. 20:** This is a discrimination case, and Plaintiff therefore has a right to determine whether Defendants have applied their alleged policies and practices in a consistent manner or whether Ash has been singled out for discriminatory or differential treatment. *See, e.g., United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1381 (S.D.N.Y. 1985), *aff’d*, 837 F.2d 1181 (2d Cir. 1987) (explaining, in the context of a discrimination case, that “[a]mong the most relevant factors to consider is the extent to

which the [policy at issue] is applied in a consistent manner”); *see also, e.g., Occhione v. PSA Airlines, Inc.*, 886 F. Supp. 2d 736, 748 (S.D. Ohio 2012) (considering whether defendant “consistently applied its policy” relevant to claim of discrimination). Because KUSD has asserted that its treatment of Ash was made pursuant to a district-wide practice, it follows that Defendants must provide documents related to restroom use (RFP No. 17), locker rooms and changing areas (RFP No. 18), and sleeping accommodations (RFP No. 19) at other KUSD schools and for trips or activities in which Ash did not participate. Further, communications with third parties regarding these issues (RFP No. 20) are relevant to determine whether Defendants’ policies or the third party’s were the basis for Defendants’ conduct. To the extent Defendants withheld any documents based on these objections, please produce all responsive, non-privileged documents at this time. Additionally, Defendants have failed to justify their decision to withhold a video of Ash entering a school restroom. “The party opposing discovery has the burden of showing, *with specificity*, that the discovery is . . . unduly burdensome.” *Brown v. Automotive Components Holdings, LLC*, No. 106-CV-1802-RLY-TAB, 2008 WL 747562, at \*3 (S.D. Ind. Mar. 18, 2008) (emphasis added). Defendants’ conclusory assertion that the video—which is responsive, at a minimum, to Plaintiff’s RFP No. 17—cannot be redacted is therefore inadequate. Defendants have failed to explain why images of students recorded at Tremper High School, presumably in a public hallway, are protected by FERPA in the first instance. FERPA protects improper disclosure of student information contained in education records; a videotape of students in a school hallway is not “student information” or an “education record” covered by FERPA. Nor does any student have a presumption of privacy in public spaces at school: presumably any visitor to Tremper High School can see students walking down a hallway without running afoul of KUSD’s FERPA obligations. Even assuming the images of students are somehow protected, Defendants have not stated with particularity what, if any, measures they have taken in an attempt to “redact” the video and the estimated cost of retaining a third-party to redact the information. Plaintiff therefore demands that Defendants produce this video immediately, marked, as appropriate, with a confidentiality designation under the protective order in this case.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S DEFICIENCY LETTER RE: REQUEST FOR PRODUCTION NO. 20:** You entirely mischaracterize the allegations set forth in the Amended Complaint and the issues present in this lawsuit. The only allegations in the Amended Complaint are that Plaintiff was treated “differently from other male students” in that Plaintiff was not permitted to use the men’s restroom, was not permitted to room with males on trips, and the like. However, there are no allegations that Plaintiff was treated differently than a similarly situated individual or that the policy was applied differently to different individuals. Your attempts to twist this case into something it is not will not prevail. Further, while the policy was one which applied to the whole District, its application and enforcement at each and every school was done at the building level. Thus, just like in employment discrimination cases, there is no basis for discovery beyond the decisional unit at issue - Tremper High School. Simply because an employer has a company-wide policy not to discriminate does not render every discrimination claim subject to company-wide discovery.

As to the video described, see above response regarding same.

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**PLAINTIFF’S REQUEST FOR PRODUCTION NO. 26:** All documents concerning any policy for any school in KUSD regarding adult volunteers’ participation in student activities, including participation criteria and volunteers’ obligations to comply with KUSD policy and federal or state law.

**DEFENDANT’S RESPONSE TO REQUEST FOR PRODUCTION NO. 26:**

Defendant objects to the request as vague, overbroad and unlikely to lead to the discovery of admissible evidence. Whether someone volunteers for an activity or event that is completely unrelated to this litigation or Plaintiff, and any policies which may apply to that volunteer, have nothing to do with this lawsuit. If Plaintiff desires information about a specific volunteer or about volunteers related to a specific activity or event, Plaintiff may request that information and Defendants will consider the same. Subject to and without waiving the above objections, generally speaking, all volunteers are required to complete a background check and volunteer application. Copies of samples of these documents are being provided. (KUSD2068-2070, 885-894). Depending on the nature and role of the volunteer other documents may be required and other policies may apply.

**PLAINTIFF’S DEFICIENCY LETTER TO DEFENDANT RE: REQUEST FOR PRODUCTION NO. 26:**

In response to Plaintiff’s RFP No. 27—seeking documents concerning complaints made against a volunteer—Defendants have improperly objected that complaints against volunteers in activities other than those in which Ash participated are irrelevant. Again, this misapprehends the basis of a complaint of discrimination. Ash is entitled to documents to help him determine whether his complaint against a volunteer was handled differently than others’ complaints. *See Yonkers Bd. of Educ.*, 624 F. Supp. at 1381; *Ochione*, 886 F. Supp. 2d at 748. Defendants’ limitation of its response to “events or activities in which Plaintiff participated” incorrectly and unreasonably limits the scope of the request, since the request is relevant to assess Defendants’ handling of complaints about and from school volunteers. Relatedly, the policies governing school volunteers—the subject of Plaintiff’s RFP No. 26—is relevant to whether Defendants’ handling of other complaints was a result of different policies or a result of Defendants discriminating against Ash. Please produce all documents responsive to RFP Nos. 26 and 27.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S DEFICIENCY LETTER RE: REQUEST FOR PRODUCTION NO. 26:**

You entirely mischaracterize the allegations set forth in the Amended Complaint and the issues present in this lawsuit. The only allegations in the Amended Complaint are that Plaintiff was treated “differently from other male students” in that Plaintiff was not permitted to use the men’s restroom, was not permitted to room with males on trips, and the like. However, there are no allegations that Plaintiff was treated differently than a similarly situated individual or that the policy was applied differently to different individuals. Your attempts to twist this case into something it is not will not prevail. Further, while the policy was one which applied to

the whole District, its application and enforcement at each and every school was done at the building level. Thus, just like in employment discrimination cases, there is no basis for discovery beyond the decisional unit at issue - Tremper High School. Simply because an employer has a company-wide policy not to discriminate does not render every discrimination claim subject to company-wide discovery.

As to the video described, see above response regarding same.

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**PLAINTIFF’S REQUEST FOR PRODUCTION NO. 27:** All documents concerning any complaint made by or against an adult volunteer regarding discrimination, harassment, bullying, or retaliation based on sex, gender, gender identity, or transgender status, or regarding discrimination, harassment, bullying, or retaliation against Plaintiff on any basis.

**DEFENDANT’S RESPONSE TO REQUEST FOR PRODUCTION NO. 27:** Defendant objects to the request as vague, overbroad and unlikely to lead to the discovery of admissible evidence. Complaints about other volunteers for issues completely unrelated to the litigation are not relevant or pertinent to this case. Subject to and without waiving the above objections, and adopting a reasonable interpretation of complaints made against adult volunteers in events or activities in which Plaintiff participated, find attached documents related to a complaint made by Plaintiff and Plaintiffs mother against an adult volunteer with Golden Strings. KUSD1213-1538.

**PLAINTIFF’S DEFICIENCY LETTER TO DEFENDANT RE: REQUEST FOR PRODUCTION NO. 27:** In response to Plaintiff’s RFP No. 27—seeking documents concerning complaints made against a volunteer—Defendants have improperly objected that complaints against volunteers in activities other than those in which Ash participated are irrelevant. Again, this misapprehends the basis of a complaint of discrimination. Ash is entitled to documents to help him determine whether his complaint against a volunteer was handled differently than others’ complaints. *See Yonkers Bd. of Educ.*, 624 F. Supp. at 1381; *Occhione*, 886 F. Supp. 2d at 748. Defendants’ limitation of its response to “events or activities in which Plaintiff participated” incorrectly and unreasonably limits the scope of the request, since the request is relevant to assess Defendants’ handling of complaints about and from school volunteers. Relatedly, the policies governing school volunteers—the subject of Plaintiff’s RFP No. 26—is relevant to whether Defendants’ handling of other complaints was a result of different policies or a result of Defendants discriminating against Ash. Please produce all documents responsive to RFP Nos. 26 and 27.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S DEFICIENCY LETTER RE: REQUEST FOR PRODUCTION NO. 27:** You entirely mischaracterize the allegations set forth in the Amended Complaint and the issues present in this lawsuit. The only allegations in the Amended Complaint are that Plaintiff was treated “differently from other male students” in that Plaintiff was not permitted to use the men’s restroom, was not permitted to room with males on trips, and the like. However, there are no allegations that Plaintiff was treated differently than a similarly situated individual or that the policy

was applied differently to different individuals. Your attempts to twist this case into something it is not will not prevail. Further, while the policy was one which applied to the whole District, its application and enforcement at each and every school was done at the building level. Thus, just like in employment discrimination cases, there is no basis for discovery beyond the decisional unit at issue - Tremper High School. Simply because an employer has a company-wide policy not to discriminate does not render every discrimination claim subject to company-wide discovery.

As to the video described, see above response regarding same.

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**PLAINTIFF’S REQUEST FOR PRODUCTION NO. 28:** All documents concerning Defendants’ knowledge of and treatment of transgender students other than Plaintiff regarding access to and use of student restrooms, locker rooms, changing areas, overnight accommodations, as well as access to or participation in any other sex-segregated spaces or activities at school or on school-sponsored trips or activities.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S REQUEST FOR PRODUCTION NO. 28:** Defendants object to the request as overbroad, an invasion of the privacy interests of minors and unlikely to lead to the discovery of admissible evidence. This is a single-plaintiff Title IX case. It is irrelevant whether there are any other transgender students at Tremper or any other KUSD school. The only pertinent issue is whether some action or inaction by KUSD violated some recognized right of this particular Plaintiff. Further, courts do not force entities to poll their own employees as to information not already known to the employer. Certainly, a school cannot be forced to poll its minor students as to their transgender status. *See Shott v. Rush Univ. Med Ctr.*, 652 F. App’x 455, 459 (7th Cir. 2016) (“As the district court pointed out, Rush was in no better position to ask its employees about their religious practices than Shott herself was, and such questions would have been particularly problematic coming directly from an employer. Shott was free to question the thirteen biostatisticians informally or to take their depositions to determine whether they practiced Judaism.”) Further, any modicum of relevancy is vastly outweighed by the privacy interests of the students.

**PLAINTIFF’S DEFICIENCY LETTER TO DEFENDANT RE: REQUEST FOR PRODUCTION NO. 28:** Defendants have raised two objections to Plaintiff’s request for all documents concerning Defendants’ knowledge and treatment of other transgender students with respect to restroom usage, locker rooms, overnight accommodations, and other sex-segregated activities and spaces. First, Defendants assert that they are not required to “poll” their own students to determine who is transgender. It should be obvious, however, that Plaintiff seeks only documents related to students whom Defendants already know are transgender. Second, Defendants have objected that the students’ privacy interests outweigh the relevancy of such documents. That concern lacks merit in light of Plaintiff’s agreement that Defendants may redact personally identifiable information at this stage. Please produce all non-privileged documents responsive to this request.

**DEFENDANT’S RESPONSE TO PLAINTIFF’S DEFICIENCY LETTER RE: REQUEST FOR PRODUCTION NO. 28:** Unless there is an allegation that Plaintiff was treated differently from other transgender students - and there is no such allegation- Defendants’ knowledge of how other transgender students were treated regarding bathroom usage, overnight accommodations, and the like, are not relevant to Plaintiffs claims. Again, the only allegation of differential treatment in the Complaint is that Plaintiff was treated differently than males because Plaintiff was not permitted to use the male restroom, room with males on overnight trips, etc.

# **EXHIBIT**

## **B**

**PLAINTIFF'S FIRST SET OF INTERROGATORIES**

**PLAINTIFF'S INTERROGATORY NO. 3:** Describe any policy or practice, whether current or former, written or unwritten, that Defendants have relating to students' access to or use of restrooms, locker rooms, or changing areas in any school in KUSD or off-campus on school-sponsored or school-sanctioned trips or activities.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S INTERROGATORY NO. 3:**

Defendants have an unwritten practice that each student must use the restroom that matches the sex designated on their birth certificate or one of the sex-neutral restrooms which have been made available across the Tremper campus. As to locker rooms or changing rooms, the practice is that the student must use the restroom that matches the sex designated on their birth certificate. If a student has concerns or would like to request an accommodation, they are always encouraged to speak with their guidance counselor or building administration to determine whether alternative arrangements can be made that fit within the practice established. Further, Defendants identify that they have modified this practice as it applies to Plaintiff so as to comply with the court-issued injunction. Finally, Defendants identify that the same policies which apply at school apply on school-sponsored or school-sanctioned trips or activities.

###

**PLAINTIFF'S INTERROGATORY NO. 5:** Describe any policy, whether current or former, written or unwritten, that Defendants have relating to overnight lodging for school-sponsored or school-sanctioned trips for students of any school in KUSD, including, but not limited to Tremper High School.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S INTERROGATORY NO. 5:**

Defendants have an unwritten practice that students must room with members of the same sex, as designated on their birth certificate. In addition, Defendants would direct Plaintiff to Board Policy 6520 and 6700 to the extent they further inform Plaintiff regarding tangential policies related to field trips and extracurricular activities.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

ASHTON WHITAKER,

Plaintiff,

v.

KENOSHA UNIFIED SCHOOL DISTRICT  
NO. 1 BOARD OF EDUCATION,

Defendant.

Civ. Action No. 2:16-cv-00943-PP  
Judge Pamela Pepper

**DECLARATION OF JOSEPH J. WARDENSKI**

Pursuant to Civ. L.R. 37, I certify and declare that:

1. My name is Joseph J. Wardenski. I am an attorney with Relman, Dane & Colfax, PLLC. I represent Plaintiff Ashton Whitaker (“Plaintiff”) in the above-captioned matter and have actual knowledge of the matters contained in this declaration.

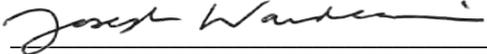
2. Plaintiff, through his counsel, has conferred with counsel for Defendant Kenosha Unified School District (“Defendant”) in a good-faith effort to resolve the parties’ present dispute over the scope of discovery without court action. On July 17, 2017, at 3:30 p.m. CDT, counsel for the parties participated in a telephonic Rule 37 conference to discuss the present dispute and other discovery disputes. The participants in the telephonic conference were Joseph J. Wardenski and Robert Friedman, representing Plaintiff, and Aaron Graf, representing Defendant.

4. On August 31, 2017, counsel for the parties participated in a pre-motion conference with the Court to further discuss this dispute. The participants in that conference were Joseph J. Wardenski and Shawn Meerkamper, representing Plaintiff, and Ronald Stadler and Aaron Graf, representing Defendant.

5. The parties have been unable to reach an accord on this dispute and, accordingly, Plaintiff is filing a motion to compel discovery responses.

Pursuant to 8 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 5, 2017.

  
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JOSEPH J. WARDENSKI  
*Counsel for Plaintiff*