

**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

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF’S MOTION TO COMPEL DISCOVERY RESPONSES**

**I. INTRODUCTION**

Plaintiff Ashton Whitaker (“Plaintiff” or “Ash”) submits this memorandum of law in support of his Motion to Compel Discovery Responses [Dkt. No. 19] from Defendant Kenosha Unified School District No. 1 Board of Education (“Defendant” or “KUSD”). KUSD has improperly limited the scope of its responses to Plaintiff’s Interrogatories Nos. 4, 6, and 15, and Requests for Production Nos. 17, 18, 19, 20, 26, 27, and 28, to information that pertains only to Plaintiff and/or only to Tremper High School or KUSD’s central office. It has refused to turn over information pertaining to other KUSD schools in the District or to transgender students other than Plaintiff at any KUSD school during the requested time period.

Plaintiff requests that the Court order Defendant to respond, or to amend or supplement its previous responses, to Plaintiff’s Interrogatories Nos. 4, 6, and 15, and Requests for Production Nos. 17, 18, 19, 20, 26, 27, and 28, to disclose responsive information regarding all

of KUSD's high schools and middle schools, and all transgender students who have attended those schools, from August 1, 2013 to present.<sup>1</sup>

This information is relevant to Plaintiff's claims and Defendant's asserted defenses, particularly with respect to Plaintiff's constitutional claim under the Equal Protection Clause of the Fourteenth Amendment. Specifically, information about whether and how KUSD's purported District-wide policy has been applied to other students—or, indeed, whether any such policy existed prior to Plaintiff's requests to access boys' facilities and accommodations—is relevant to assessing whether KUSD can meet its burden of showing that its reasons for discriminating against Ash were both “genuine” and “exceedingly persuasive,” under the heightened scrutiny standard of review the Seventh Circuit held in this case to be applicable to Plaintiff's equal protection claims.

For the reasons set forth below, Plaintiff asks that this Court find that Plaintiff's requests seek relevant, discoverable information, and order Defendant to respond, amend, or supplement its discovery responses to immediately provide full and complete responses to the disputed discovery requests listed above.

## **II. BACKGROUND**

In Plaintiff's First Set of Interrogatories and First Set of Requests for Production, propounded on Defendant on November 21, 2016, Plaintiff made various requests seeking information regarding the existence, scope, implementation, application, and enforcement of any policy or practice (written or unwritten) regarding the assignment of Plaintiff and other

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<sup>1</sup> Plaintiff initially requested information for the period from August 1, 2011 to present, and for all schools and transgender students in the District, but agrees to limit his request to KUSD's middle schools and high schools, and transgender students who have attended those schools, for the shorter period running from August 1, 2013 to present, representing the four-year period in which Plaintiff attended high school.

transgender students to restrooms, overnight accommodations, and other sex-segregated facilities. In response, Defendant made several “overarching objections” to both Plaintiff’s interrogatories and requests for production, including stating that:

KUSD will only respond with information pertaining to Tremper High School or central District Administration (including the Superintendent and the Board of Education). If Plaintiff would like to identify a specific reason why another school in the District, and its policies, actions or inactions, are relevant or necessary, KUSD will consider the same.

Defs’ Resps. to Pl’s First Set of Interrogatories, at 1-2 (Feb. 6, 2017); Defs’ Resps. to Pl’s First Set of Requests for Production of Documents, at 1-2 (Feb. 6, 2017). In accordance with this blanket objection, Defendants made specific, similar objections in response to the specific discovery requests listed above, in which Defendant asserted, *inter alia*, that these requests were overbroad and that information about other KUSD schools’ treatment of transgender students was “irrelevant” to Plaintiff’s claims.<sup>2</sup> Defendant also refused to disclose information about other transgender students, whether at Tremper High School or any other school in the District, asserting objections based, *inter alia*, on relevance and privacy concerns.

The disputed discovery requests and Defendant’s objections, which are reproduced in Exhibit A to Plaintiff’s Motion, are summarized as follows:

**Requests for Production Nos. 17-20.** In these requests, Plaintiff requests all documents relating to “[transgender] students’ access to or use of restrooms in any KUSD school or at any other site during a school-sponsored trip or activity,” RFP No. 17; “[transgender] students’ access to and use of locker rooms or changing areas in any KUSD school or at any other site

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<sup>2</sup> For the Court’s reference, the full text of the disputed discovery requests, Defendant’s initial and supplemental (if any) written responses, and the parties’ written correspondence regarding each disputed request, is reproduced in relevant part and attached as Exhibit A to Plaintiff’s Motion.

during a school-sponsored trip or activity,” RFP No. 18; “overnight lodging/sleeping accommodations for KUSD [transgender] students on school-sponsored or school-sanctioned trips,” RFP No. 19; and 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 facilities for Plaintiff or other transgender students at school or during school-sponsored or school-sanctioned trips or activities outside of KUSD,” RFP No. 20.<sup>3</sup>

For each of these requests, Defendant objected to the request as vague, overbroad, and not relevant, stating that “[d]ocuments related to other activities involving other students has no bearing or relevance on the present litigation” and that the response would be limited “to only those trips or activities that Plaintiff was actually involved in.”

**Requests for Production Nos. 26 and 27.** In these requests, Plaintiff requested information about “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,” RFP No. 26, and “[a]ll 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,” RFP No. 27.

For each of these requests, Defendant objected to the request as “vague, overbroad and unlikely to lead to the discovery of admissible evidence,” arguing that “[c]omplaints about other

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<sup>3</sup> The referenced RFPs originally sought information regarding “students.” In response to Defendant’s concerns, Plaintiff agreed to amend these requests to seek information only regarding “transgender students”; these amendments are reflected by the brackets in the text.

volunteers for issues completely unrelated to the litigation are not relevant or pertinent to the case” and limiting responses only to “complaints made against adult volunteers in events or activities in which Plaintiff participated.”

**Request for Production No. 28.** This request asks for “[a]ll 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, [and] access to or participation in any other sex-segregated spaces or activities at school or on school-sponsored trips or activities.”

Defendant objected to this request as “overbroad, an invasion of the privacy interests of minors and unlikely to lead to the discovery of admissible evidence,” arguing, *inter alia*, that “[t]his is a single-plaintiff Title IX case” and “it is irrelevant whether there are any other transgender students at Tremper or any other KUSD school” and that “[t]he only pertinent issue is whether some action or inaction by KUSD violated some recognized right of this particular Plaintiff.”

**Interrogatories Nos. 4 and 6.** In these interrogatories, Plaintiff requested a description of “any action Defendants have taken pursuant to any policy or practice referenced in response” to Interrogatories Nos. 3 and 5, respectively, regarding transgender students’ access to and use of sex-segregated school facilities and overnight accommodations.

Defendant partially responded to these interrogatories with reference to Tremper High School only, and with respect to students other than Plaintiff, stated only that Tremper administration “has never taken any disciplinary measures against any student for violation of this practice” without explaining what actions other than discipline, if any, Tremper or other

schools have taken to implement, apply, or enforce the purported KUSD-wide policy governing transgender students' access to and use of sex-segregated facilities and accommodations.

**Interrogatory No. 15:** This interrogatory asked KUSD to “[i]dentify and describe all communications made or received by Defendants, to or from any individual or entity” regarding Plaintiff and other transgender students' access to and use of sex-segregated facilities, accommodations, and activities, as well as “any policy, practice, or proposal to distribute green wristbands/stickers or other physical identifiers to Plaintiff or other transgender students.”

Defendant objected to this interrogatory as “vague, compound, overbroad, unduly burdensome, unlikely to lead to the discovery of admissible evidence and an invasion of the privacy interests of minors” because, *inter alia*, “it would require the disclosure and/or identification of other transgender students” and because it seeks information about programs or activities in which Plaintiff did not participate. On the basis of these and other objections, Defendants have refused to respond to this interrogatory, and have rejected Plaintiff's invitation to identify other students using a unique pseudonym or identifier to protect their privacy interests.

### **III. ARGUMENT**

Under Rule 26, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). “Information within this scope of discovery need not be admissible in evidence to be discoverable.” *Id.* In this case, information regarding the existence, application, and enforcement of any District-wide or school-level policy pertaining to transgender students is relevant and discoverable because (a) a dispute exists between the parties about whether some or all of KUSD's discriminatory actions alleged in the Amended Complaint were made pursuant to an

existing District-wide policy or whether Plaintiff was singled out for sex-based discrimination because he is transgender, and, if any policy was in place, what that policy was at the time of the discriminatory actions, and (b) under the heightened scrutiny standard applicable to Plaintiff's Equal Protection Clause claims, to determine whether KUSD had a genuine, exceedingly persuasive justification for treating Plaintiff differently from other students based on sex.

**A. The parties dispute whether KUSD, or Tremper High School, had any District- or school-level policy regarding transgender students' use of sex-segregated facilities or overnight accommodations prior to KUSD's discriminatory treatment of Ash.**

In his Amended Complaint, Ash alleges that he was informed by Tremper administrators that neither Tremper nor KUSD had any existing written policy on students' restroom usage, but that Tremper's administration had decided it would not permit Ash to use male-designated facilities. Am. Compl. ¶¶ 38-40. The complaint specifically alleges that Plaintiff's mother "reasonably believes no such policy exists"; instead, "the Tremper administrators developed and enforced a school 'policy' in direct and specific response to those administrators' discomfort with the restroom usage of one student: Ash" because he is transgender. Am. Compl. ¶ 60. It also makes specific allegations justifying their belief. Plaintiff and his mother were first told that they must submit unspecified medical documentation in order to use boys' facilities, but the letters they subsequently submitted from his doctor were deemed insufficient, without explanation. Am. Compl. ¶¶ 46-47. At a meeting with KUSD District-level administrators, Plaintiff's mother was told no District-wide policy currently existed, but was in the process of being created. Am. Compl. ¶ 59.

However, throughout this litigation, KUSD has claimed that the discriminatory treatment of Ash alleged in Plaintiff's Amended Complaint—including denying him access to boys' restrooms at school and refusing to permit him to stay with male classmates during overnight

school trips—was done in accordance with a preexisting, albeit unwritten, District-wide “policy.” This policy, KUSD contends, requires transgender students to use sex-segregated facilities or stay in sex-segregated overnight accommodations matching the sex corresponding to their so-called “biological sex” or “the sex designated on the student’s birth certificate.” In its Answer, KUSD states that, although “no written policy exists,” KUSD nevertheless has a KUSD-wide “policy requiring students to use the bathroom that corresponds with the student’s biological sex, or the sex designated on the student’s birth certificate, and that students cannot stay in overnight accommodations with members of the opposite sex of the student’s biological sex, or the sex designated on the student’s birth certificate.” Defs’ Answer at ¶¶ 60, 96. In its interrogatory responses, KUSD states that “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,” Defs’ Response to Pl’s Interrogatory No. 3, and that “Defendants have an unwritten practice that students must room with members of the same sex, as designated on their birth certificate.” Defs’ Response to Pl’s Interrogatory No. 5.<sup>4</sup> KUSD has made similar assertions to this Court and the Seventh Circuit in briefing and argument.

In disputing Plaintiff’s allegation that no policy for transgender students existed before KUSD began to enforce it against Ash, it was the *school district*, not Plaintiff, who made its practices with respect to other transgender students in KUSD schools an issue in the case. Specifically, KUSD “*affirmatively asserts* that it has other students and/or staff who were born female and identify as male, or who are transgender . . . , transsexual, or the like,” and “[d]enies

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<sup>4</sup> For the Court’s reference, the full text of Interrogatories Nos. 3 and 5 and Defendant’s written responses are reproduced and attached as Exhibit B to Plaintiff’s Motion.

that KUSD developed and enforced a policy specifically in regards to Ash as there are multiple transgender students who understand the policy, and to the District’s knowledge, comply with same.” Answer ¶¶ 60, 62 (emphasis added).

KUSD’s various characterizations of its District-wide “policy” for sex-segregated facilities and accommodations conflict with Plaintiff’s allegations that no such policy existed when KUSD began to discriminate against him in the variety of ways alleged in the Amended Complaint, including, but not limited to, restroom use and overnight accommodations. Given this factual dispute, information that may substantiate or refute KUSD’s version of events leading up to its discriminatory actions is plainly relevant to Plaintiff’s claims. Plaintiff is entitled to discover information regarding whether the purported District-wide policy had ever been applied by other schools or to other transgender students—and whether it was done so consistently. Moreover, since KUSD repeatedly claims that Plaintiff “violated” an existing policy—the full nature of which was not disclosed to him by KUSD at the time of the incidents alleged in the Amended Complaint, but which was somehow understood by and complied with by other transgender students—Plaintiff has the right to discover information that might enable him to refute any further attempt KUSD might make in this case to shift the blame for its discriminatory conduct to Ash, the victim of that discrimination.

Finally, Plaintiff’s requests for information about KUSD’s policies and practices with regard to adult volunteers for school activities are directly relevant to his allegation that a school volunteer made inappropriate comments to Ash during an orchestra rehearsal, maintained a public Facebook group criticizing Ash, and remained a volunteer even after school officials were notified of this conduct. Information about KUSD’s volunteer policies and handling of other complaints, if any, against adult volunteers is relevant to this claim. For example, District-wide

information may be helpful to assess whether KUSD's actions (or inactions) in response to the alleged actions against this particular volunteer were laxer, or otherwise different in kind or degree, because the complaint was made by Plaintiff, a transgender student, rather than a non-transgender student experiencing some other form of discrimination.

**B. Plaintiff is entitled to discovery of evidence to assess whether KUSD's stated reasons for discriminating against him was both "genuine" and "exceedingly persuasive," and whether its discrimination was "substantially related" to any such interests.**

In its decision affirming the preliminary injunction in this case, the Seventh Circuit held that KUSD's treatment of Ash must be subjected to heightened scrutiny. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. et al.*, 858 F.3d 1034, 1051-52 (7th Cir. 2017). As the Seventh Circuit explained,

When a sex-based classification is used, the burden rests with the state to demonstrate that its proffered justification is 'exceedingly persuasive.' This requires the state to show that the 'classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. It is not sufficient to provide a hypothesized or *post hoc* justification created in response to litigation. Nor may the justification be based upon overbroad generalizations about sex. Instead, the justification must be genuine.

*Id.* at 1050. Thus, KUSD bears the burden of demonstrating that its justification for discriminating against Ash "is not only genuine, but also 'exceedingly persuasive.'" *Id.* at 1051-52.

As the Seventh Circuit itself pointed out, the sole defense and justification for its claimed policy of assigning transgender students to sex-segregated restrooms was that "it needs to protect the privacy rights of all 22,160 students" in the School District and that "[t]he mere presence of a transgender student in the bathroom, the School District argues, infringes upon the privacy rights of other students with whom he or she does not share biological anatomy." The court, applying

heightened scrutiny, acknowledged that “bathroom privacy rights” in general are legitimate, but that “this interest must be weighed against the facts of the case and not just examined in the abstract, to determine whether this justification is genuine.” *Id.* at 1052. In its discussion of Plaintiff’s equal protection claim, the Seventh Circuit further observed that there is no written policy, “[n]or is it clear that one exists,” and that, prior to the litigation, KUSD had never told Ash or his mother that their decisions had been based on the sex-marker on Ash’s birth certificate. *Id.* at 1053. Finally, recognizing that KUSD sometimes referred interchangeably to a student’s birth certificate and “biological sex,” the Seventh Circuit described at length the reasons why “the School District’s reliance upon a birth certificate’s sex marker demonstrates the arbitrary nature of the policy,” such that it was unlikely to satisfy equal protection scrutiny. *Id.*

For the reasons explained above, broad discovery is necessary to understand the existence and nature of the District-wide policy that KUSD claims to be the basis of some or all of its discriminatory actions against Ash. In addition, District-wide discovery is necessary to assess whether KUSD’s purported privacy interests were both “genuine” and “exceedingly persuasive,” and that its discrimination against Ash in this case was “substantially related” to that objective.

KUSD asserts that it discriminated against Ash in accordance with a District-wide policy meant to protect the privacy interests of *all* students in *every school* in the District. Discovery about whether KUSD’s schools consistently applied or enforced discriminatory policies against transgender students is relevant to evaluating whether KUSD was actually motivated by this concern when it discriminated against Ash. It is also relevant in assessing whether the particular policy or practice employed in this case—requiring Ash to use girls’ facilities or segregated, stigmatizing gender-neutral facilities—was substantially related to achieving KUSD’s purported

privacy interest. For example, if other transgender students at other schools were treated in a less discriminatory manner with no consequent harm to other students, that would tend to undermine KUSD's claims that Tremper's rigid enforcement of this policy against *Ash* was sufficiently related to its purported privacy concerns.

Finally, since there is a reasonable question about whether KUSD's birth certificate requirement and privacy justification existed at the time of the discrimination against *Ash*—or were, instead, merely invented as “*post hoc* justification[s] in response to [this] litigation”—Plaintiff is entitled to discovery that might shed more light on these issues in furtherance of his equal protection claim.

#### IV. CONCLUSION

For the reasons stated herein, Plaintiff is entitled to the requested District-wide discovery regarding (1) KUSD's policies or practices with regard to transgender students' access to and use of sex-segregated facilities and accommodations and (2) KUSD's handling of discrimination and harassment complaints by transgender students. Plaintiff respectfully requests that the Court grant his motion to compel discovery.

Dated: September 5, 2017

Respectfully submitted,

/s Joseph J. Wardenski

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*\* Application for admission to this Court  
pending*