

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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ASHTON WHITAKER,

Plaintiff,

Civ. Action No. 2:16-cv-00943

KENOSHA UNIFIED SCHOOL DISTRICT  
NO. 1 BOARD OF EDUCATION,

Defendant.

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**BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY  
RESPONSES**

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**INTRODUCTION**

Plaintiff's motion to compel discovery responses presents a single central issue: whether Plaintiff should be permitted to engage in a fishing-expedition of district-wide discovery. Plaintiff asserts such discovery is justified here because Plaintiff desires to know how the unwritten policies at issue here were developed and applied. Pl. Brief, p. 6-7. Further, Plaintiff claims to need such information to determine whether Defendant treated him differently than others based on sex and, if so, whether Defendant had a genuine, exceedingly persuasive justification for the same. *Id.* None of these asserted reasons justifies Plaintiff's overly broad expedition.

Plaintiff's Complaint details various issues, including how KUSD's unwritten policy applied to Plaintiff at Tremper High School allegedly harmed him and violated Title IX and Equal Protection. Nevertheless, the Complaint provides absolutely no basis for engaging in a district-wide fishing expedition which would be disproportionate to the needs of this case and be extremely unlikely to result in any relevant, probative evidence being uncovered above and beyond that already provided regarding the District's central administration and Tremper High School.

There is a dearth of case law regarding this issue in the school/student context. As set forth below, however, case law establishes that such discovery has been routinely disallowed in analogous contexts. Further, neither of Plaintiff's two legal arguments overcomes the weight of the reasons for denying the motion to compel.

### ARGUMENT

Rule 26 (b)(1) governs the scope of discovery and provides that:

**(1) Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties 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**, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1)(emphasis added). District-wide discovery is of limited value to this case and its minimum relevance to the allegations in the Complaint are disproportionate to Plaintiff's needs in order to continue to prosecute his case.

**I. AS SEEN IN THE EMPLOYMENT DISCRIMINATION CONTEXT, DISTRICT (OR COMPANY) WIDE DISCOVERY IS INAPPROPRIATE BECAUSE THE ALLEGATION OF DISCRIMINATION FOCUSES ON CONDUCT THAT TOOK PLACE IN A UNIQUE SUB-SET OF THE ORGANIZATION.**

Plaintiff's request for district-wide discovery concerns the application of KUSD's unwritten policy of requiring students to use the bathroom facilities consistent with their biological sex rather than gender identity, and requiring students to room with other students of the same biological sex in overnight accommodations on school sponsored outings. Plaintiff's Complaint focuses solely on how these policies affected him while he attended Tremper High School and there are no allegations included that the policy was applied differently *to transgender students at other schools*. Plaintiff now attempts to expand what is relevant to this case and seeks district-

wide discovery, much like plaintiffs often do in the employment discrimination context. The well-developed case law in this analogous context holds that the discovery proposed by Plaintiff should be denied.

Plaintiff's discovery request is akin to when employees alleging employment discrimination seek discovery regarding company-wide information when the allegation concerns events that took place at a specific office, building, or department. This is analogous because here it is undisputed that the District has a School Board (similar to a governing body of a corporation), a Superintendent (similar to a CEO of a corporation), various administrative departments in central administration such as human resources, finance, accounting, accounts payable (much like a corporation), 43 schools (much like corporations with multiple locations), and an administration at each of the school buildings consisting of principals and assistant principals (akin to management at each corporate location).

In the employment discrimination context, employees are routinely prohibited from conducting company-wide discovery even when alleging an unlawful application of a company-wide policy. "In employment discrimination cases, discovery is usually limited to information about employees in the same department or office absent a showing of a more particularized need for, and the likely relevance of, broader information." *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 620 (S.D. Ind. 2002) (collecting cases).

For example, in *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 319 (7th Cir. 2003), *as amended* (May 22, 2003), the plaintiffs in an age discrimination suit alleged a company-wide campaign to elevate its more youthful employees because of their age. Specifically, the employees sought company-wide personnel information on any present or former employees at the supervisor level or above and personnel records of all employees in their specific

department who were laid off, terminated, or retired during a set time in order to show a pattern or practice of dissemination. *Id.* at 329-20. The Seventh Circuit upheld the District Court's decision to limit the discovery request to employees who were similarly situated to the plaintiffs by only permitting discovery regarding the relevant corporate department, similarly situated employees, time period, and decision makers. *Id.*

Likewise, the Eighth Circuit has upheld the denial of company-wide discovery, when an employee requested company-wide discovery to examine how the employer interpreted and applied a section of its employment manual, which governed document falsification, in all of its branches. *See Semple v. Fed. Exp. Corp.*, 566 F.3d 788, 794 (8th Cir. 2009). The employee had been terminated by the manager at the local branch of the company that employed him. *Id.* The Eighth Circuit maintained that company-wide discovery was inappropriate when the facts indicated that no one besides the management at the employee's own branch was involved with the employment decision and that the policy at issue applied nationally had "little application by local management". *Id.*; *see also Sallis v. Univ. of Minn.*, 408 F.3d 470, 478 (8th Cir. 2005) (denying request for information on complaints lodged in all university departments and limiting discovery in employment discrimination case to the particular university department that the plaintiff had worked in); *Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392, 398 (5th Cir. 2000) (affirming the district court's decision to limit discovery to the records of the university department that the plaintiff worked in as those employees were the only ones that would be similarly situated).

In this analogous context, district courts within the Seventh Circuit err on limiting discovery to the particular office, department, or other sub-unit in which the plaintiff was located, because even when utilizing a company-wide policy, employment decisions are generally made at the local level. *See Chavez*, 206 F.R.D. at 620 (limiting discovery to information concerning

employees within the plaintiff's particular department since employees outside that classification were not similarly situated for purposes of plaintiff's ADEA claim); *Vajner v. City of Lake Station, Indiana*, No. 2:09-CV-245, 2010 WL 4193030, at \*3 (N.D. Ind. Oct. 18, 2010) ("Because the ultimate inquiry in this employment discrimination suit will turn upon how Vajner was treated relative to similarly situated employees, information regarding employees in different departments with different supervisors, performance expectations, and qualifications is irrelevant to whether her termination was unlawful."); *Sommerfield v. City of Chicago*, 613 F. Supp. 2d 1004, 1007–08 (N.D. Ill. 2009), *objections overruled*, No. 06 C 3132, 2010 WL 780390 (N.D. Ill. Mar. 3, 2010) (denying discovery related to claims of discrimination by supervisors outside of a police officer's particular district, because how different decision-makers in other district meted out discipline was irrelevant to the discrimination and retaliation the plaintiff claimed to experience in his district); *see also . United States v. Moore*, 543 F.3d 891, 897 (7th Cir. 2008) (stating that "where different decision-makers are involved, two decisions are rarely similarly situated in all relevant respects") (internal citations omitted).

Here, Plaintiff has asserted causes of action under Title IX and Equal Protection concerning how a district-wide policy was applied to him at Tremper. Now, however, he asserts that he should be entitled to conduct wide-ranging discovery of "all of KUSD's high schools and middle schools, and all transgender students who have attended those schools, from August 1, 2013 to present." Pl. Brief, p. 1-2. Given that courts have held that discovery into the application of company-wide policies at a particular branch is inappropriate in the analogous employment discrimination cases, such discovery with regards to the application of KUSD's policies at schools other than Tremper is also inappropriate. Each school has different employees, faculty, and administrators. Each school is physically different and has different bathrooms and different overnight trips and

accommodations. Despite Plaintiff's claims to the contrary, discovery on how the policy was implemented at other district schools has nominal, if any, evidentiary value, and Plaintiff has not established a proportional need for this information in this particular case for the reasons described more fully below.

## **II. DISTRICT-WIDE DISCOVERY IS NOT NEEDED FOR PLAINTIFF TO PURSUE HIS CONTENTIONS CONCERNING THE EXISTENCE AND DEVELOPMENT OF THE POLICY.**

Plaintiff sets forth allegations from his Complaint which establish nothing more than his unsupported disbelief about the genesis of the policy and its application to him. In contrast to that, Plaintiff readily admits that Defendant has provided sworn discovery responses and document production about how the policy was developed and applied at Tremper. Plaintiff's self-serving disbelief on these issues, without anything more, does not justify a fishing expedition into district-wide discovery. Courts routinely hold that "[t]he district court, however, is not required to permit plaintiff to engage in a 'fishing expedition' in the hope of supporting his claim....Discovery,...is not intended to be a fishing expedition, but rather is meant to allow the parties to flesh out allegations for which they initially have at least a modicum of objective support." *Martinez v. Cornell Corr. of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (internal citations and quotations omitted).

The Seventh Circuit, and its various district courts, have similarly held:

But, say the defendant's lawyers, perhaps Mr. Sirazi made statements to one or more of his three prior law firms in the three separate matters involving Rezko about matters subsumed within this case. If he did, they are obviously relevant. But there is no basis on the present record for concluding he did or even that he might have. Speculation is not evidence, *In re Cohen*, 507 F.3d 610, 614 (7th Cir.2007), and hypothesis is not proof. *Louth v. McCollum*, 424 F.3d 631, 634 (7th Cir.2005) (Posner, J.). *Cf. United States v. Holland*, 445 F.2d 701, 793 (D.C.Cir.1971) ("The trouble with absence of evidence is that it is consistent with *any* hypothesis.") (Emphasis in original). This is not to say that a request for information that seeks to probe the facts underlying an opponent's case is impermissible because it

constitutes, to use the time-worn phrase, a “fishing expedition.” **But, without some reason to conclude that the pond might be stocked, one cannot demand to “fish.”**

*Sirazi v. Panda Express, Inc.*, No. 08 C 2345, 2009 WL 4232693, at \*3 (N.D. Ill. Nov. 24, 2009) (emphasis added) (unpublished). *See also Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 931 (7th Cir. 2004) (“And of course, pretrial discovery is a fishing expedition and one can't know what one has caught until one fishes. But Fed.R.Civ.P. 45(c) allows the fish to object, and when they do so the fisherman has to come up with more than the government has been able to do in this case despite the excellence of its lawyers.”)

Further, there is absolutely no reason discovery at other schools would be necessary to determine this information rather than conducting discovery of the decision makers at central administration who developed the policy. There is no contention – whether factual or speculation – by Plaintiff that anyone at any of these other schools played a role in developing the policy or applying it to him.

Plaintiff also argues, without any support whatsoever, that because it is a district-wide policy it justifies district-wide discovery. However, just like a company with a company-wide anti-discrimination policy does not open itself up for wide-ranging discovery of locations across the country in a single-plaintiff discrimination case, neither does a school district subject itself to district-wide discovery simply because it has a district-wide policy. What matters in this case is how that policy was created by central administration and how that policy was implemented and applied as it pertains to Plaintiff, not how different decision makers at different schools involving different students and circumstances applied that same policy at their school.

In addition, to the extent Plaintiff wishes to pursue this inquiry, more direct and efficient means of discovery are available. Specifically, depositions for members of central administration

are already scheduled. In addition, KUSD has provided responses to Plaintiff's discovery requests sufficiently as they reflected information regarding development of the policy by central administration and then how that policy was applied to Plaintiff at Tremper. These means of discovery are more than sufficient to determine how the policy was developed by central administration. There is no justification for conducting extensive district-wide discovery at other middle schools and high schools to uncover evidence about how a policy was created by central administration.

### **III. THERE IS NOTHING ABOUT THIS DISCOVERY WHICH IS NECESSARY TO SUPPORT PLAINTIFF'S EQUAL PROTECTION CLAIM.**

To state a *prima facie* claim under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must demonstrate that “(1) he is otherwise similarly situated to members of the unprotected class; (2) he was treated differently from members of the unprotected class; and (3) the defendant acted with discriminatory intent.” *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000). In this regard, Plaintiff frames his equal protection claim as follows:

Defendants . . . have discriminated and continue to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex and transgender status, in violation of the Equal Protection Clause.”

Amended Comp. at ¶ 121 (emphasis added).

Plaintiff appears to admit that discovery regarding what happened to other transgender students at other middle and high schools does not pertain to this aspect of his Equal Protection claim.<sup>1</sup> Rather, Plaintiff argues that he requires this discovery to assess whether Defendant's stated

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<sup>1</sup> In other words, Plaintiff is not bringing a class-of-one equal protection claim where such evidence might have some relevance to such a claim, though such a claim appears nowhere in Plaintiff's Complaint in any event.

reasons for the policy were genuine and exceedingly persuasive and whether it was substantially related to any such interests under the heightened scrutiny analysis. Plaintiff intends to compare his own treatment to that of every other transgender minor student at any middle school or high school since August 1, 2013 to demonstrate that he was treated less favorably than those other transgender students. In other words, Plaintiff intends to argue that if Defendant did not apply this same district-wide policy to other transgender students at other schools, then this *ad hoc* application of the policy would demonstrate that the stated reasons for the policy were not genuine and exceedingly persuasive, otherwise the District would have applied it uniformly.

There are several inherent and incurable flaws in Plaintiff's argument. First, there is no evidence in the record at all, and certainly none cited to or provided by Plaintiff, that application of the policy at the building level by building administrators would somehow demonstrate that those that developed the policy at central administration did not have a genuine and exceedingly persuasive justification for the policy. In other words, the test is whether those that developed the policy had a genuine and exceedingly persuasive justification, not whether some building level administrator at another school ignored or disregarded the policy of central administration. Without curing this defect in their argument, the proposed discovery has no merit.

Second, before jumping off this cliff and delving into district-wide discovery, invading the privacy interests of other transgender minor students, and the like, Plaintiff should first be required to show that there is some evidence to justify such discovery. Plaintiff posits that "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 Plaintiff was sufficiently related to its purported privacy concerns." Pl. Br. p. 12. Perhaps this is true. But, after engaging in written discovery and having

many months to take the depositions of individuals, there is no evidence or even remote indication that any such events ever occurred. Without any such indication or evidence at all, Plaintiff's request is the classic, proverbial fishing-expedition of requiring massive, invasive discovery based on nothing more than an unsupported suspicion with no actual indication that such evidence exists. As noted above, the federal rules require more than mere suspicion that evidence might exist – there must be reason to think the pond is stocked before Plaintiff will be allowed to fish.

Third, as Plaintiff readily admits, “KUSD bears the burden of demonstrating that its justification for discriminating against [Plaintiff], is not only genuine but also exceedingly persuasive.” Pl. Brief, p. 10. Thus, this issue is not one that Plaintiff bears the burden of establishing or proving. This lessens “the importance of the discovery in resolving the issues” in the case under FRCP 26. If Plaintiff does not bear the burden of proof on the issue and Defendant has no intention of invoking what occurred at other middle and high schools, the need for Plaintiff to conduct the fishing expedition discovery is extremely limited.

#### **IV. PLAINTIFF SEEKS TO COMPEL DISCOVERY REGARDING SENSITIVE ISSUES INVOLVING OTHER MINOR STUDENTS WITHOUT ANY LEGITIMATE JUSTIFICATION FOR DOING SO.**

Regardless of all other issues raised, the privacy interests of other minor students at other schools who may be transgender must be taken into account. Individuals have a constitutional right to privacy to both avoid disclosure of personal matters and to maintain independence in making certain kinds of important personal decisions. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178–79 (3d Cir. 2005). *See also Denius v. Dunlap*, 209 F.3d 944, 958 (7th Cir. 2000) (holding that even financial information is entitled to a measure of protection under the federal constitutional right to privacy.”) These constitutional privacy rights extend to minor students. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178–79 (3d Cir. 2005) “In determining whether

information is entitled to privacy protection, [courts have] looked at whether it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.” *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 112 (3d Cir.1987). Intruding and trampling upon the constitutional privacy rights of other minor transgender students vastly weighs against any minimal probative value the information is likely to have to this particular case.

Plaintiff proposes conducting discovery regarding every transgender student that has attended any of the District’s eight middle schools and high schools<sup>2</sup> since August 1, 2013 to present. These other transgender students have not sued the District and may not desire to have their transgender status revealed in this case, revealed to the public at large, revealed to Plaintiff and his mother (who is an employee of the District), or the like. When a Plaintiff such as Ash Whitaker sues the District, they make a reasoned choice whether to put their name and transgender status in the public eye and whether that is worth the potential benefit at the end of the litigation. These other transgender minors would be given no choice in the matter and would have their transgender status revealed without any positive benefit to them at the end of the litigation.

Further, in addition to the more general privacy interests of students, such discovery is problematic as it would involve discovery specifically aimed at other students and their personally identifiable information. This raises a plethora of issues and concerns regarding the Federal Educational Rights and Privacy Act (“FERPA”) (34 CFR 99.30), Wisconsin’s Pupil Records law (Wis. Stat. §118.125) and potentially other various laws implicated including special provisions for pupil records of students with disabilities (*see* Wis. Stat. 115.787, 115.792 and 115.807; 34 CFR 300.610-627) and HIPPA. These issues will further complicate what is already a fishing

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<sup>2</sup> This does not include several charter schools and choice schools which also educate similarly aged children and may, or may not, be included in the discovery request.

expedition and weighs against allowing the discovery under FRCP 26 as “the burden or expense of the proposed discovery outweighs its likely benefit.”

Presumably, Plaintiff will argue that the District can redact the names of the transgender students and any personally identifiable information and use anonymous designations to protect their identify. While this arduous task could be completed at significant time and expense, it would do nothing to cure the practical effects of the discovery on the students’ privacy interests. After all, Plaintiff claims to desire this information so they can locate other transgender students and determine whether Plaintiff was singled out and treated differently. If the written discovery and document production reveals the existence of such individuals, Plaintiff will undoubtedly desire to conduct additional discovery to obtain more detailed information regarding whether the students were similarly situated and whether they were treated more favorably than Plaintiff in some regard. However, this additional detailed discovery is extremely likely to reveal the identity of the transgender minor student no matter how careful the parties are as, eventually, enough contextual clues would be divulged to allow someone familiar with the school to determine who the individual is. And, of course, one presumes that Plaintiff would feel compelled to call the transgender minor student at trial to testify about their own experiences. If not, the underlying discovery would have been useless in the first place and only meant to harass the District. The miniscule probative value of this information is greatly outweighed by the privacy interests of these other transgender minor students.

A central tenet to Plaintiff’s claims is that the District did not respect his rights as a transgender student. For Plaintiff to now demand the effective disclosure of all other transgender students at all other middle schools and high schools, especially when there is minimal probative value, smacks of hypocrisy and insensitivity to the very rights at issue in this lawsuit.

**V. THE MOTION TO COMPEL SHOULD ALSO BE DENIED BECAUSE THERE IS OTHER, VASTLY MORE EFFICIENT METHODS OF OBTAINING THE INFORMATION.**

Plaintiff already has scheduled 11 depositions of various individuals at central administration and decision makers at Tremper over the course of the next several weeks. This includes Dr. Savaglio-Jarvis (Superintendent), Sue Valeri (Chief of Special Education and Student Support), Beth Ormseth (Chief of School Leadership), Richard Aiello (original Principal at Tremper), Holly Graf (Assistant Principal at Tremper), Brian Geiger (Assistant Principal at Tremper), Deb Tronvig (original school counselor for Plaintiff), Steve Knecht (subsequent Principal at Tremper), Jennifer Page (subsequent school counselor for Plaintiff), Julie Brede (educational assistant at Tremper) and Kristin Schaefer (administrative assistant to Tremper principal). These individuals, and particularly those from central administration, will be readily able to testify how the policy was developed and how it was implemented at Tremper and applied to Plaintiff. There is no need to conduct additional discovery, beyond the written discovery and document production already conducted along with the upcoming depositions.

In addition, Defendant would be willing to allow some leeway during the upcoming depositions for Plaintiff to explore a limited line of questioning of those in central administration about whether the policy was applied at other schools to their knowledge and any issues that arose from the application of that policy at other schools. If evidence is uncovered that suggests central administration was responsible for any unequal application of that policy at other middle and high schools to other transgender students, then the parties and this Court can revisit this issue. However, as explained more fully above, without such indications Plaintiff's discovery requests are nothing more than an unjustified fishing expedition that should be readily rejected.

**CONCLUSION**

For the reasons stated above, KUSD respectfully request that the Court deny Plaintiff's motion to compel discovery responses.

Dated this 12th day of September, 2017.

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