UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W., a minor child,	)	
	)	
Plaintiff,	)	
v.	)	Cause No. 3:18-cv-37-WTL-MPB
	)	
EVANSVILLE VANDERBURGH SCHOOL CORPORATION,	)	
	)	
Defendant.	)	

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S EXHIBITS TO BE PRESENTED AT THE PRELIMINARY INJUNCTION HEARING

Comes now the Defendant, Evansville Vanderburgh School Corporation ("EVSC"), by counsel, and files its Objections to Plaintiff's Exhibits to be Presented at the Preliminary Injunction Hearing.

I. Introduction

On February 22, 2018, Plaintiff, J.A.W., a minor, filed a Complaint against EVSC seeking damages, declaratory judgment, and injunctive relief to use the male restrooms in the schools on the basis that he is a transgender high school student whose birth certificate notes gender at birth of female, but who identifies as male and has been diagnosed with gender dysphoria. (Complaint, Dkt. 1, ¶ 1) Plaintiff claims that EVSC has violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments Act of 1972. *Id.*

Plaintiff also asserts that he was advised to either utilize the female restrooms, which he did not wish to utilize, or the nurse's office. Plaintiff alleges that the nurse's office was "not a viable option as it was very far from his classes and was frequently locked as the nurse was

frequently not in the office." *Id.* at ¶¶ 15-17.[1] With respect to the use of the nurse's restroom, Plaintiff alleges:

> "[u]se of the nurse's restroom, which was offered in one of the two EVSC schools he is now attending, is not a viable option. Not only is it distant and not readily available, use of it would emphasize to both him and to the school community that he is "different" than everyone else and would undermine his transition."

Id. ¶ 29.

On April 10, 2018, Plaintiff filed a Motion for Preliminary Injunction with a supporting brief. On June 5, 2018, this Court set the Motion for Preliminary Injunction for a full day hearing to occur on July 20, 2018. Plaintiff filed his list of Witnesses and Exhibits for the Preliminary Injunction Hearing on July 6, 2018, indicating that he intended to call no witnesses at the hearing other than to authenticate medical records, which is no longer necessary due to a stipulation between the parties as to the authenticity of the medical records.[2] (Dkt. 45)

Plaintiff intends to offer as exhibits depositions taken of Plaintiff and of EVSC's Superintendent, Dr. David Smith, four declarations of expert witnesses, Plaintiff's Complaint, two declarations of Plaintiff, declarations of third parties, various state policies, rules or statutes, various school policies throughout the country, and a news article. (See Plaintiff's Exhibit List, Dkt. 45)

For the reasons stated below, EVSC objects to Plaintiff's proposed exhibits.

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[1] Plaintiff also alleges that he was required to utilize a locker room in an upstairs portion of the girls' locker room for his gym class while a freshmen and sophomore in high school. The allegations concerning the use of the locker rooms appear to be moot as Plaintiff has completed his gym requirements.

[2] The parties have not stipulated to the admissibility of the medical records, however, and EVSC specifically indicated its intent to object to the use of the medical records at the hearing for relevancy grounds and also on the basis of the inclusion of hearsay therein. EVSC hereby objects to the admissibility of the entirety of the records given their inclusion of hearsay.

II. Argument

1. Plaintiff's Expert Reports are Inadmissible.

a. Plaintiff's expert reports are not relevant.

Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

At the preliminary injunction herein, the Court is asked to determine whether the Plaintiff has:

> (1) some likelihood of succeeding on the merits of his Complaint, and (2) that Plaintiff has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied. If Plaintiff is able to overcome these hurdles, the Court must then consider (3) the irreparable harm that EVSC will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to Plaintiff if relief is denied, and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.

Abbott Labs v. Mead Johnson & Co., 971 F.2d 6, 11-12 (7th Cir. 1992).

Plaintiff does not specify the purpose of submitting the experts opinions, but it appears to be for the purpose of attempting to establish that Plaintiff will suffer irreparable harm if preliminary relief is denied. The four experts do not include any discussion of a constitutional nature, so it does not appear that any is offered for purposes of establishing a reasonable likelihood of success on the merits. These expert declarations, however, are completely irrelevant when it comes to establishing any harm that this particular Plaintiff will suffer.

None of the four experts claim to have even met the Plaintiff. In fact, Dr. Fortenberry acknowledges that "although [he] has never met the plaintiff"… just before he opines that he believes that Plaintiff's "overall health and wellbeing is best served through use of toilet facilities consistent with his experienced and expressed male gender." This "expert opinion" is stated after 7 pages of declarations that relate to transgender statistics, definitions, and general statements of what "some" transgender individuals experience. Similarly, the Declaration of

Randi Ettner, Ph.D., speaks about the experiences of "some" or in other instances "many" transgender individuals and acknowledges that individuals diagnosed with gender dysphoria are treated differently depending upon an "individualized assessment" of the medical needs of the patient. The treatment for "some" can be "changes in gender expression and role" also referred to as "social role transition." Randi Ettner does not (and cannot) offer an opinion of what treatment is appropriate for the Plaintiff. (Declaration of Ettner, p. 6, ¶¶ 15-17)

The declaration of Judy Chiasson appears to be offered for the purpose of describing the policies of a school district in California. The State of California notably enacted legislation in 2013 that requires schools to allow students to utilize facilities that match their gender identities. (Declaration of Chiasson, p. 7) Indiana has no such legislation.

None of the four proferred experts treated Plaintiff, assessed Plaintiff, met Plaintiff, or even reviewed any testimony of Plaintiff. Put simply, none of the four proferred experts are in a position to opine or to help this Court or EVSC determine what is best for the Plaintiff, whether Plaintiff will suffer any irreparable harm, or whether any particular decision or action constitutes a constitutional violation, when they have not examined, assessed, or met Plaintiff and when they have also not reviewed any of Plaintiff's sworn testimony either in the form of Plaintiff's declarations or his deposition.[3]

Dr. Janine Fogel and Dr. James Fortenberry each state that s/he reviewed the Complaint in this case and the Plaintiff's medical records from ECHO Community Health Care ("ECHO") and Within Sight. Judy Chiasson, Ph.D., states that she reviewed the Complaint in this case. Randi Ettner, Ph.D., reviewed the Plaintiff's medical records from ECHO and the counseling records from Within Sight.

[3] The four experts have indicated that they have reviewed the Complaint in this case. The Complaint is unverified and it was filed by a community activist and advocate on Plaintiff's behalf. (See Complaint, Dkt. 1; *See also,* Defendant's Motion to Dismiss, supporting brief Dkts. 12 and 13)

b. Plaintiff's expert declarations are inadmissible pursuant to Rule 702 of the Rules of Evidence and *Daubert* and its progeny.

Because Plaintiff's experts acknowledge that they have not met, treated, or assessed Plaintiff, and because they have not reviewed the testimony or statements under oath of the Plaintiff, their declarations are not admissible in accordance with Rule 702 of the Federal Rules of Evidence and *Daubert* and its progeny.

To be admissible as expert testimony under *Daubert*, the Plaintiff must demonstrate: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), which interpret an earlier version of FRE 702.

In addition to the three factors set forth in *Daubert*, the subsequently revised Rule 702 only permits an expert qualified by knowledge, skill, experience, training, or education to testify if the expert has "reliably applied the principles and methods to the facts of the case".

For the reasons discussed above, the expert's testimony will not help this court determine a fact at issue in this case, is not based on sufficient facts of this case, is not the product of reliable principles and methods, as no expert attempts to opine as to Plaintiff specifically, and also fails to apply any principles or methods to the facts of this case.

If an expert fails to reliably apply the principles and methods he or she utilizes to formulate an opinion to the facts of the case at issue, the evidence is properly excluded. *Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675, 681 (7th Cir. 2006)(expert opinion completely excluded when the expert failed to inspect the car alleged to be a defective product)(*citing Zenith Electronics Corp. v. WH-TV Broadcasting Corp*, 395 F.3d 416, 418 (7th Cir. 2005)). In this case, none of the experts attempt to apply the principles upon which they opine to the Plaintiff or

the EVSC. Each either makes generalized statements concerning medical treatment of "some" transgender individuals, discusses the policies impacting or experiences of "some" or "many" transgender individuals, or refer generally to what may happen to "some" transgender individuals. None of the experts offered for purposes of discussing gender dysphoria generally attempt to evaluate Plaintiff for gender dysphoria or to opine as to his healthcare or treatment for such a condition.[4]

"An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989). See also, e.g., *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 933 (7th Cir. 2003); *Huey v. UPS.*, 165 F.3d 1084, 1087 (7th Cir. 1999); *Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.*, 135 F.3d 526, 530-31 (7th Cir. 1998); *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027, 1031 (7th Cir. 1997); *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 537-38 (7th Cir. 1997); *Braun v. Lorillard Inc.*, 84 F.3d 230, 235 (7th Cir. 1996).

Plaintiff's expert declarations are inadmissible and should not be considered for purposes of the motion for preliminary injunction or trial herein.[5]

[4] Dr. Fortenberry's declaration does state that the Plaintiff's medical records seem to support the criteria for gender dysphoria given that the records note that Plaintiff has received male hormones since November, 2017, and has a male appearance.

[5] It should also be noted that at least one of the experts acknowledge that the research is still developing but that "evidence strongly suggests" that gender identity is innate or fixed at a very young age and that gender identity has a strong biological basis." In other words, science and research are not sufficient as of yet to make a determination or opinion as to these issues. As a result, such opinions are inadmissible as failing the reliability and sufficiency tests of Rule 702 and *Daubert*. (Declaration of Dr. Fogel, ¶ 19)

c. Plaintiff's expert declarations contain inadmissible hearsay.

Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Each expert declaration offered by Plaintiff falls squarely within this definition. Additionally, EVSC has not had the opportunity to cross-examine any of the persons whose declarations Plaintiff has offered. Each expert for whom Plaintiff offers a declaration is also outside the 100-mile radius of the place of trial and is therefore outside of this Court's subpoena power pursuant to Fed. R. Civ. P. 45(c). As a result, EVSC will be prejudiced by the introduction of the expert declarations and said prejudice outweighs the probative value of any of the statements made in the declarations. Fed. R. Evid. 403.

2. The Third Party Declarations are Inadmissible.

a. Plaintiff's third-party declarations are not relevant.

Plaintiff also intends to offer three third-party, non-expert declarations as exhibits. These include the declaration of Zachary J. Mulholland, an attorney employed by Indianapolis Public Schools ("IPS"); the declaration of Aleczander Dean, a transgender man who previously attended Kokomo High School in Kokomo, Indiana; and the declaration of Tammy Work, Plaintiff's mother.

As noted above, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Review of the third-party declarations reveals that they are not relevant to any material fact in issue in this case.

Mr. Mulholland's declaration is, for the most part, a vehicle for the introduction of the IPS bylaw and policy forbidding sex discrimination (which the policy defines to include discrimination on the basis of gender identity) and the IPS administrative guideline developed in

2016 "concerning the maintenance of an inclusive learning environment for transgender and gender non-conforming students." The only substantive content of the declaration itself is Mr. Mulholland's assertion that he is not personally aware of any disruptions at IPS resulting from allowing students to have access to restrooms corresponding to their gender identities, nor is he aware of the IPS School Board being informed of any such disruptions.

Neither the IPS discrimination policy nor its policy on transgender restroom access is relevant to any material fact in this case. IPS's policies are clearly irrelevant to whether Plaintiff will suffer irreparable harm. Nor are they relevant to his likelihood of success on the merits. Simply put, IPS's decision to adopt a given policy has no bearing on whether EVSC is required by Title IX or the Equal Protection Clause to allow Plaintiff access to the boys' restrooms under the circumstances of this case. As for Mr. Mullholland's assertion that he is unaware of any problems that have arisen from the IPS restroom policy, what one IPS employee is or is not aware of has no impact on whether Plaintiff is likely to succeed on the merits or whether he will suffer irreparable harm.

Mr. Dean's declaration is not relevant for similar reasons. He asserts that he is a transgender male who graduated from Kokomo High School in 2018, and that he used the male restrooms at school during his junior and senior years with the school's permission. Mr. Dean goes on to assert that, "[t]o the best of [his] knowledge, [his] use of male restrooms at Kokomo High School did not cause any disruption or problems with [his] fellow students." The belief of one transgender former student that his use of a bathroom in accordance with his gender identity did not cause any disruption or problems has no bearing on whether EVSC must allow Plaintiff such access under the circumstances of this case.

Ms. Work's declaration also lacks relevance to any material issue. In the declaration, Ms. Work states that she is Plaintiff's mother, that she is aware of the litigation, and that she is "fully

supportive of [Plaintiff's] efforts in this litigation to obtain access to male restrooms within his schools." Notably absent from Ms. Work's declaration is any assertion that *she* has ever sought permission from EVSC for Plaintiff to use the boys' bathrooms. Ms. Work's personal feelings concerning the litigation are of no consequence; what matters is that, to date, she has never asked EVSC to allow Plaintiff access to the boys' bathrooms.

b. The third-party affidavits are inadmissible hearsay.

In addition to lacking relevance, the third-party declarations are clearly hearsay—they are each out-of-court statements that Plaintiff seeks to admit for the truth of the matter asserted. The third-party declarations are not subject to cross-examination or otherwise capable of meaningful adversarial testing. For the foregoing reasons, Plaintiff's third-party declarations are inadmissible and should not be considered for purposes of the motion for preliminary injunction.

3. The pleadings in the case are not admissible evidence.

The Plaintiff also included the Plaintiff's Complaint and EVSC's Answer on its Exhibit List for the hearing on the Motion for Preliminary Injunction. The pleadings are not verified under oath and contain a plethora of irrelevant hearsay statements, unsubstantiated facts, and general statements of law that are not admissible as evidence at the hearing.

4. The Indianapolis Star article is inadmissible.

The Plaintiff lists a newspaper article as an exhibit to be submitted at the hearing on the Motion for Preliminary Injunction. The article contains a multitude of hearsay statements and generalized statement without a proper foundation for their reliability and accuracy. The article also contains statements in violation of the best evidence rule in that it refers generally to

documents or includes quotes from various documents, but the actual documents would constitute the best evidence. FRE 1001, *et. seq.*

V. Conclusion

As a result of the foregoing, the Court should strike the Exhibits referenced herein as inadmissible.

Respectfully submitted,

s/ Patrick A. Shoulders

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CERTIFICATE OF SERVICE

I certify that on the 13th day of July, 2018, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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