

6. Defendant believes the attached sur-reply will be helpful to both the court and the parties in framing the issues to be addressed at the upcoming hearing. Specifically, in his reply, Plaintiff has asserted for the first time his belief that EVSC requires transgender students to undergo sex reassignment surgery in order to be permitted access to the restrooms consistent with their gender identities, a point which EVSC vigorously disputes. EVSC is therefore requesting leave to file the attached sur-reply, which it believes will assist the court in addressing the motion for preliminary injunction. *See Symons Int'l Grp., Inc. v. Cont'l Cas. Co.*, No. 1:01-cv-00799-RLY-MJD, 2017 U.S. Dist. LEXIS 157348, at *2-3 (S.D. Ind. Sep. 26, 2017) (explaining that it is “well settled that the decision whether to grant a motion for leave to file a sur-reply is within the Court’s discretion”).

WHEREFORE, EVSC respectfully requests leave to file the attached Sur-Reply in Opposition to Plaintiff’s Motion for Preliminary Injunction.

Respectfully submitted,

s/ Patrick A. Shoulders

Patrick A. Shoulders #308-82

Robert L. Burkart #16664-82

Jean M. Blanton #24840-82

ZIEMER STAYMAN WEITZEL & SHOULDERS, LLP

20 N. W. First Street

P. O. Box 916

Evansville, IN 47706

Tel. No. (812) 424-7575

Fax No. (812) 421-5089

Email: pshoulders@zsws.com

rburkart@zsws.com

jblanton@zsws.com

Attorneys for the Defendant.

CERTIFICATE OF SERVICE

I certify that on the 18th 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.

Kenneth J. Falk
kfalk@aclu-in.org

Gavin M. Rose
grose@aclu-in.org

Jan P. Mensz
jmensz@aclu-in.org

s/ Patrick A. Shoulders

Patrick A. Shoulders

II. Argument

In an attempt to force the facts of this case into the *Whitaker* mold, Plaintiff insists that EVSC will not permit him access to the boys' restrooms unless and until he undergoes sex reassignment surgery.¹ The only support Plaintiff has provided for this assertion is citation to the deposition of Dr. David Smith, the EVSC superintendent. Dkt. 50-2. Specifically, Plaintiff relies on the following exchange:

- Q: Okay. And why is J.A.W. not able to use the male restrooms?
A: Because biologically he's a female.
Q: So it's EVSC policy that students must use the restroom consistent with their assigned gender at birth; is that correct?
A: Yes. Well—
Q: Or if they actually surgically get a - - go through sex reassignment surgery; is that fair?
A: Or if they request to use a gender neutral restroom.
Q: And we've discussed already what gender neutral restrooms might be available to him?
A: Correct.
Q: Is this policy written down anywhere?
A: No.
Q: And what is the basis for the policy?
A: Basically Indiana law. We do group our students according to sex.
Q: And sex, in your mind, is defined as gender at birth?
A: Gender at birth, sex at birth.

Dkt. 50-2 at 26-27.

Notably, it was Plaintiff's counsel who introduced the idea that EVSC requires transgender students to undergo sex reassignment surgery prior to being afforded access to the restrooms aligned with their gender identity. Indeed, prior to counsel's question, no one had mentioned surgery, and Dr. Smith never said the word "surgery" or any variant thereof at any

¹ Plaintiff also incorrectly claims that "every federal case that has addressed the issue of whether a transgender student who has consistently presented as being a sex different than birth sex can utilize restrooms consistent with the student's identified gender has entered decisions in favor of the student." Dkt. 54 at 16 n.15. In *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), a district court held that a university's refusal to allow a transgender student to use the restrooms and locker rooms consistent with his gender identity did not violate Title IX or the Equal Protection Clause.

point in his deposition. Moreover, Plaintiff's counsel interrupted Dr. Smith as he began to elaborate on what EVSC's bathroom policy actually was and supplied his own answer. Rather than agreeing with counsel's leading question, Dr. Smith mentioned that students may be allowed use of gender neutral restrooms. Plaintiff's counsel did not bring up sex reassignment surgery again.

In any event, when the statements are viewed in context, it is apparent that Dr. Smith was simply describing EVSC's default position—that students are generally assigned to restrooms consistent with their biological and/or anatomical sex. Plaintiff's counsel did not elicit testimony concerning EVSC's policy for handling parental requests that a student be permitted to use a different restroom. As the party seeking a preliminary injunction, Plaintiff bears the burden of establishing by a clear showing that such relief is warranted. *See Goodman v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 437-38 (7th Cir. 2005). Plaintiff cannot rely on his own failure to fully pursue the relevant line of questioning to support his mischaracterization of the EVSC policy. Aside from this deposition testimony, Plaintiff has cited no evidence suggesting that EVSC ever had a policy requiring transgender students to undergo sex reassignment surgery to gain access to their preferred restrooms or that such policy was ever communicated to J.A.W.

III. Conclusion

For the foregoing reasons, EVSC respectfully requests that Plaintiff's Motion for Preliminary Injunction be denied.

Respectfully submitted,

s/ Patrick A. Shoulders

Patrick A. Shoulders #308-82

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P. O. Box 916

Evansville, IN 47706

Tel. No. (812) 424-7575
Fax No. (812) 421-5089
Email: pshoulders@zsws.com
rburkart@zsws.com
jblanton@zsws.com

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