

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

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

**Response to Defendant’s Objections to Plaintiff’s Exhibits to be Presented
at the Preliminary Injunction Hearing**

INTRODUCTION

This case concerns the defendant’s (“EVSC’s”) refusal to permit a transgender student to use high school bathrooms that correspond with his gender identity. Given the plaintiff’s belief that the operative facts in this case are largely or entirely undisputed, it intends to rely—in keeping with precedent from the U.S. Supreme Court and the Seventh Circuit—primarily on the submission of affidavit and other documentary evidence at the upcoming preliminary-injunction hearing. EVSC has filed objections to the overwhelming majority of the plaintiff’s evidence. While it erroneously believes the plaintiff’s evidence to be inadmissible for a variety of reasons, its most common objection is simply that this evidence is not relevant. A simple review of the plaintiff’s submissions establishes the futility of this objection—the evidence by the plaintiff is highly pertinent to the issues presented by this case. In any event, the plaintiff is cognizant that the Court will serve as fact-finder on

preliminary injunction, and the plaintiff's evidence may be given the weight to which it is entitled without the need to address EVSC's relevance objection. Its other objections are similarly without merit.

ARGUMENT

I. Affidavit evidence is admissible on preliminary injunction

Although somewhat buried in its filing, EVSC objects to the affidavits relied upon by the plaintiff as “clearly hearsay—they are each out-of-court statements that Plaintiff seeks to admit for the truth of the matter asserted.” (Dkt. 49 at 9 [argument concerning non-expert affidavits]; *see also id.* at 7 [identical argument concerning expert affidavits]). Given that this objection presumably applies to each of the plaintiff's submissions, it is appropriately addressed at the outset.

Unfortunately for EVSC, the law is perfectly clear that “[a]ffidavits are ordinarily inadmissible at trials but they are fully admissible in summary proceedings, including preliminary-injunction proceedings.” *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997) (citations omitted). In *Elrod v. Burns*, 427 U.S. 347 (1976), the U.S. Supreme Court accordingly accepted as true the “well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for preliminary injunction.” *Id.* at 350 n.1. And the circuit courts are uniform in permitting affidavit evidence at this stage in litigation. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016) (collecting cases from the First, Second, Third, Fifth, Ninth, and Eleventh Circuits), *vacated and remanded*, 137 S. Ct. 1239 (2017). Indeed, *Whitaker ex rel. Whitaker v.*

Kenosha Unified School District No. 1, 858 F.3d 1034 (7th Cir. 2017)—relied on extensively by both parties—was itself decided on the basis of affidavit evidence. See No. 16-CV-943-PP, 2016 WL 5239829, at *1-2 (E.D. Wis. Sept. 22, 2016), *aff'd*, 858 F.3d 1034 (7th Cir. 2017); see also 858 F.3d at 1042 (noting that the district court had simply “heard oral arguments on [the] motion for preliminary injunction).

EVSC ignores this uniform and controlling authority, and its argument must be rejected.¹

II. The plaintiff’s expert declarations are admissible²

EVSC raises several objections to the expert declarations relied upon by the

¹ Indeed, in recent years, this Court has routinely entered preliminary injunctions largely or entirely on the basis of affidavit testimony. See, e.g., *People for Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc.*, No. 4:17-cv-00186-RLY-DML, 2018 WL 828461, at *3-4 (S.D. Ind. Feb. 12, 2018); *Hope v. Commissioner of Ind. Dep’t of Correction*, No. 1:16-cv-02865-RLY-TAB, 2017 WL 1301569, at *3-4 (S.D. Ind. Apr. 6, 2017); *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner*, 194 F. Supp. 3d 818, 824 (S.D. Ind. 2016); *Allen v. Bartholomew Cty. Court Servs. Dep’t*, 185 F. Supp. 3d 1075, 1078-80 (S.D. Ind. 2016). Rather than accepting the rudimentary and well-established principle that affidavits may be relied upon for these purposes, EVSC appears to contemplate a requirement that plaintiffs seeking preliminary relief may only do so through a potentially days long trial, even when their request is premised on largely undisputed facts. The injury that that would inflict on the efficient administration of justice scarcely deserves mention.

² EVSC appends to its objection to the experts’ declaration a complaint that it “has not had the opportunity to cross-examine any of the persons whose declarations Plaintiff has offered,” which it believes means that the declarations are more prejudicial than probative. (Dkt. 49 at 7 [citing Fed. R. Evid. 403]). This is a curious complaint: each witness was identified on the plaintiff’s initial disclosures (tendered to EVSC nearly a month ago) and was again listed on the plaintiff’s preliminary witness list filed a week later (Dkt. 38). At no point have EVSC’s attorneys sought to depose any of these expert witnesses, and EVSC may not complain about the admission of their affidavits simply because it chose not to employ the discovery tools available to it. In any event, evidence is only unfairly prejudicial under Rule 403 “if it appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.” *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980). The “prejudice” contemplated by this rule is not implicated simply because a party comes to regret its failure to take a witness’s deposition.

plaintiff: the declaration of Dr. Randi Ettner (Dkt. 50-5), a psychologist who previously served as the chief psychologist of the Chicago Gender Center and who has evaluated and/or treated thousands of patients with gender dysphoria over the course of decades; the declaration of Dr. James Fortenberry (Dkt. 50-6), a physician and professor who has worked with persons with gender identity issues for his entire career and who founded and directs the only comprehensive gender health program in Indiana that serves patients under the age of twenty-one; the declaration of Dr. Janine Fogel (Dkt. 50-7), a physician who has extensive experience providing medical care to transgender persons and who serves as the Medical Director of the Transgender Health and Wellness Program at the Eskenazi Health Outpatient Center; and the declaration of Dr. Judy Chiasson (Dkt. 50-8), a program director for the second-largest school district in the country who directed the implementation of a policy allowing transgender students to use the bathroom that corresponds to their gender identity. None of EVSC's objections has any merit.

1. EVSC first raises a relevancy objection to each of these expert declaration. (Dkt. 49 at 3-4). The relevance of the plaintiff's declarations has at this point been detailed in the plaintiff's reply brief in support of his preliminary-injunction request (Dkt. 54), and it is not clear whether this filing quells EVSC's concerns. Indeed, the Seventh Circuit in *Whitaker* relied on exceedingly similar expert evidence in reaching its conclusions. *See, e.g.*, 858 F.3d at 1045.

In any event, the declarations of Drs. Fogel, Ettner, and Fortenberry are relevant for at least four purposes:

- To establish foundational facts concerning the medical and psychological basis, treatment, and effects of an individual's gender dysphoria or transgender status, which is of course at the heart of this case and certainly not within general knowledge.
- To undercut EVSC's apparent privacy justification for its policy, an issue central to the merits of this case, by establishing that a transgender male such as the plaintiff appears male and *is* male.
- To demonstrate the harm that a transgender person, particularly a transgender minor, suffers when he is not permitted to use the bathrooms that correspond with his gender identity and is instead relegated to "outsider" status as well as the benefits to allowing such usage as a part of the person's social role transition.
- To bolster the plaintiff's credibility by demonstrating that his experiences, either in terms of his injury resulting from the inability to use the bathrooms at school or in terms of his transgender status in general, are not unique but are instead similar or identical to what would be experienced by any transgender minor under the circumstances.

If anything, the relevance of Dr. Chiasson's declaration is even more apparent: it details the manner in which the second to largest school district in the nation was able to allow transgender students access to bathrooms that correspond to their gender identities without suffering disruption or other harmful effects; clearly it is relevant to demonstrating that EVSC's asserted privacy and safety justification for its policy is simply not rational.

EVSC's relevance objection to the plaintiff's expert submissions is utterly without merit.

2. Not satisfied with this, EVSC next contends that none of these expert declarations meet the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509

U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence. (Dkt. 49 at 5-6).³ *Daubert*, of course, requires “a three-step analysis” before expert testimony is admitted: the Court “must determine whether the witness is qualified; whether the expert’s methodology is scientifically reliable; and whether the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 779 (7th Cir. 2017) (quotation and citation omitted).

EVSC’s cursory *Daubert* objection is not altogether clear, for it does not appear to question the experts’ qualifications or the reliability of their methods, which are supported by decades’ worth of experience and, in the case of Drs. Ettner and Fortenberry, by lengthy bibliographies. Rather, it appears that EVSC is primarily concerned that none of the plaintiff’s experts personally treated J.A.W. This appears to be a reiteration of EVSC’s futile relevance objection rather than a separate *Daubert* objection to the experts’ opinion testimony. Regardless, this is not a case where the plaintiff’s transgender status is in doubt: it is undisputed that he is a transgender male and, indeed, EVSC’s Rule 30(b)(6) designate acknowledged as much in deposition testimony. Given this, the experts’ descriptions of what it means to be transgender and the effect of a discriminatory bathroom policy on transgender individuals clearly “assist[s] the trier of fact to understand the evidence or to

³ Although EVSC appears to articulate a *Daubert* objection with respect to each of the plaintiffs’ experts, its arguments do not appear to be targeted toward the testimony of Dr. Chiasson.

understand a fact in issue.”⁴

EVSC’s nebulous *Daubert* objection cannot carry the day. The plaintiff’s expert witnesses are exceedingly qualified to render the opinions they articulate, have applied their extensive expertise and familiarity with the research in their chosen fields reliably, and have detailed opinions that will assist this Court in resolving the preliminary injunction motion.

III. The plaintiff’s non-expert submissions are admissible

EVSC next raises several objections to the plaintiff’s non-expert submissions. These objections, too, lack merit.

1. EVSC raises a relevance objection to the affidavits of Zachary Mulholland (Dkt. 50-9) and Alecander Dean (Dkt. 50-10), which describe the policies allowing transgender persons access to the bathroom that accords with their gender identity in the Indianapolis Public Schools (Mulholland) and at Kokomo High School (Dean). (Dkt. 49 at 7-8). As set forth both above and at greater length in the plaintiff’s preliminary-injunction briefing, a central issue in this case—indeed, a central issue in *any* equal-protection case—concerns the government’s basis underlying a discriminatory policy. The asserted justification for EVSC’s refusal to permit the plaintiff to use the bathrooms that correspond to his gender identity is a perceived

⁴ Indeed, Drs. Ettner, Fogel, and Fortenberry all reviewed the plaintiff’s medical records in rendering their opinions. To the extent that EVSC is insisting that a personal examination is necessary—a curious insistence given that everyone agrees that J.A.W. is transgender—authority clearly establishes that expert witnesses may rely on documentary records or similar evidence in lieu of a personal examination. *See, e.g., Harris v. City of Chicago*, No. 14-CV-4391, 2017 WL 2080353, at *7 (N.D. Ill. May 15, 2017) (“Physicians commonly look at medical records and autopsy reports to determine a cause of death or other medical condition.”) (citing several cases from the Seventh Circuit).

need to prevent disruption and to protect the safety of students (Dkt. 41 at 19), although the only evidence that it believes supports this justification is a decades-old incident where an adult custodian was made to feel uncomfortable when a student walked in on him in the bathroom. Given EVSC's asserted justification, as well as the flimsy evidentiary foundation *for* that justification, the fact that other Indiana schools have allowed transgender students to access the bathrooms that correspond with their gender identity is highly pertinent. EVSC's argument to the contrary is without merit.

2. EVSC next objects (Dkt. 49 at 8-9), also on relevance grounds, to the short declaration of Tammy Work (Dkt. 50-4), the plaintiff's mother, who simply indicates that she is "fully supportive of [her] child's efforts to obtain access to male restrooms within his schools." The plaintiff agrees that Ms. Work's declaration should not be necessary: what is relevant is J.A.W.'s transgender status, his desire to use the restrooms that correspond to his gender identity, and EVSC's refusal to allow him to do so. Nonetheless, Ms. Work's declaration has been submitted in direct response to EVSC's emphasis in briefing on her desires. Ignoring this, EVSC argues that the declaration is irrelevant simply because she does not indicate that she herself sought permission from EVSC for J.A.W. to use the male restrooms. But this is a requirement that has been created out of whole cloth: not only does EVSC cite no authority whatsoever for such a requirement (which presumably is not imposed on non-transgender students enrolled in its schools), but it is undisputed that the plaintiff would not be permitted to use the male restrooms *even if* his mother made

such a request. In briefing, EVSC specifically challenged the plaintiff to tender an affidavit from his mother: “Plaintiff’s mother is not on his witness list, and to date, she has not submitted so much as an affidavit on his behalf.” (Dkt. 41 at 14). Having made that challenge, EVSC cannot complain when it is met. J.A.W. fully agrees that this case should be resolved without resort to the declaration of his mother, but to the extent the Court agrees with EVSC that her desires must be evaluated, the declaration is clearly relevant.

3. Finally, EVSC objects on hearsay grounds to an article from the Indianapolis Star cited by the plaintiff. (Dkt. 49 at 9-10). This article, cited by the plaintiff in briefing (Dkt. 54 at 14 n.11), establishes that transgender students are permitted to use the bathroom that corresponds with their gender identity in three identified school corporations in Indiana. Given that “hearsay can be considered in entering a preliminary injunction,” *S.E.C. v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991), EVSC’s objection is plainly without merit and the cited article may be given the weight to which this Court believes it to be entitled. EVSC’s “best evidence” objection is also inapposite at the preliminary-injunction stage. *See, e.g., Bar J-B Co., Inc. v. Texas Dep’t of Transp.*, No. 3:18-CV-0576, 2018 WL 2971157, at *11 (N.D. Tex. May 15, 2018) (rejecting a “best evidence” objection insofar as “evidentiary standards at the preliminary injunction stage are less formal, and the court may rely on otherwise inadmissible evidence in determining whether to grant a preliminary injunction”).

CONCLUSION

EVSC's evidentiary objections to the exhibits that the plaintiff has relied on and intends to rely on to support his preliminary-injunction request are completely without merit. They must be rejected.

s/ Kenneth J. Falk
Kenneth J. Falk
No. 6777-49

s/ Gavin M. Rose
Gavin M. Rose
No. 26565-53

s/ Jan P. Mensz
Jan P. Mensz
No. 33798-49
ACLU of Indiana
2457 E. Washington St., Suite Z
Indianapolis, IN 46201
317/635-4059
fax: 317/635-4105
kfalk@aclu-in.org
grose@aclu-in.org
jmensz@aclu-in.org

Attorneys for Plaintiff