UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W., a minor child, Plaintiff, v. EVANSVILLE VANDERBURGH SCHOOL CORPORATION, Defendant.	)	No. 3:18-cv-00037-WTL-MPB

Memorandum in Opposition to Defendant's Motion to Dismiss

I. Introduction

On February 22, 2018, J.A.W. filed his Complaint for Declaratory and Injunctive Relief and Damages against defendant Evansville Vanderburgh School Corporation ("EVSC"). (Dkt. 1). EVSC has acknowledged that the case seeks damages as well as injunctive relief as it has demanded a jury trial and has raised what it deems to be defenses to the damages claims. (Dkt. 34 at 1, 5). On August 3, 2018, this Court entered its preliminary injunction allowing J.A.W. to utilize male restrooms within EVSC. (Dkt. 68). EVSC has now filed a motion to dismiss, arguing that J.A.W. has graduated from high school and this matter is now moot. While it is certainly true that when J.A.W.'s high school career ends within EVSC, something that has not yet occurred, his claims for injunctive relief may become moot, his damages claim certainly survives as, if a plaintiff seeks monetary damages in addition to injunctive relief, "his case is not moot even if the underlying misconduct that caused the injury has ceased." *Brown v. Bartholomew Consol.*

School Corp., 442 F.3d 588, 596 (7th Cir. 2006) (internal citation omitted). EVSC has overlooked this elementary principle of justiciability, and the motion should be denied.

II. As of today, the injunction claim is not moot

EVSC's motion is made pursuant to Federal Rule of Civil Procedure 12(b)(1), addressing an alleged lack of subject-matter jurisdiction by this Court. In such a case a defendant may mount a facial attack, basing its argument on the pleadings, or it may rely on material outside of the pleadings to attempt to demonstrate that jurisdiction is wanting. *See, e.g., Paper, Allied-Industrial, Chemical and Energy Workers Intern. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). In its motion EVSC asserts that J.A.W. has now graduated, a fact not in the record, but it has not provided any evidentiary support for this. However, in J.A.W.'s Second Supplemental Declaration, attached to his motion for partial summary judgment (Dkt. 87-1), he notes that he did finish his studies within EVSC after the fall semester of 2018 so that he has graduated. (*Id.* ¶ 4).

However, this does not, at this point, moot J.A.W.'s need for an injunction. Although he has graduated, he has been informed by EVSC that he may return to his high school in the spring of 2019 to march with his class for his graduation and he intends to do this. (*Id.* ¶ 6). This will necessitate him being present on EVSC property to participate in both the graduation ceremony and graduation rehearsal and he obviously wishes to be able to continue to use the male restrooms when he returns to EVSC. (*Id.* ¶ 7).

J.A.W. is alleging that EVSC has violated, among other things, Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination" by EVSC. Denial of the male restrooms at his graduation ceremony would be a denial of benefits and exclusion from participation and a continuation of the discrimination, violative of Title IX, that existed when EVSC denied J.A.W. access to male bathrooms prior to his graduation. *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017), *pet. for cert. dismissed*, --U.S.--, 138 S. Ct. 1260 (2018). It would also be a continuation of the sex discrimination prohibited by equal protection that the EVSC policy caused. *Id.* at 1054.

Therefore, as of this date, J.A.W.'s claim for injunctive relief is not moot as he continues to need to be able to access male restrooms within EVSC. However, certainly this case will be tried subsequent to the spring of 2019 and, by that point, J.A.W. will have marched with his class at graduation. At that point the injunctive claim can properly be deemed to be moot.

III. Even though the claim for injunctive relief may be moot in the future, the well-plead claim for damages by J.A.W. prevents any mootness finding

Of course, even once J.A.W.'s claim for an injunction becomes moot, this case will not be moot as his damages claim remains to be decided. This is an obvious point that EVSC's memorandum in support of its motion ignores as it fails to mention the damages

claim at all. But, the law in this case could not be clearer as summarized by the Seventh Circuit.

> Article III, § 2 of the Constitution grants jurisdiction to federal courts to adjudicate only "actual, ongoing controversies." *See Honig v. Doe,* 484 U.S. 305, 317, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). For a case to be justiciable, a live controversy must continue to exist at all stages of review, not simply on the date the action was initiated. *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 477–78. . . (1990); *Jordan by & through Jones v. Indiana High Sch. Athletic Ass'n, Inc.,* 16 F.3d 785, 787 (7th Cir.1994). A case becomes moot when a court's decision can no longer affect the rights of litigants in the case before them and simply would be "an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice,* 404 U.S. 244, 246. . . (1971) (internal quotation marks omitted). In an action seeking only injunctive relief, this requirement ordinarily means that, once the threat of the act sought to be enjoined dissipates, the suit must be dismissed as moot. *See, e.g., Wernsing v. Thompson,* 423 F.3d 732, 744–45 (7th Cir.2005). If, however, a plaintiff also seeks monetary damages, his case is not moot even if the underlying misconduct that caused the injury has ceased. *See Powell v. McCormack,* 395 U.S. 486, 496 . . . (1969) (holding that, although injunctive relief was moot, a case or controversy still existed because the plaintiff requested declaratory relief and damages); *Crue v. Aiken,* 370 F.3d 668, 677–78 (7th Cir.2004) ("When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive.").

Brown, 442 F.3d at 596. Thus even when "plaintiff['s] claim for injunctive relief is moot, plaintiff['s] claims for monetary damages and declaratory relief still present a life case or controversy." *Wernsing v. Thompson*, 423 F.3d 732, 746 (7th Cir. 2005).

EVSC completely misses this clear principle. In support of its argument it cites a number of cases where students' claims were held to be moot after graduation, but it is clear that the mootness determination in every case cited only concerned claims for injunctive relief, not damages. *See Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 128 at n.* (1975) (noting that although the plaintiffs had sought damages that had been denied by

the trial court, the damages issue was not appealed); *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 859 n.4 (7th Cir. 2018) ("Mootness guides our analysis because plaintiffs do not seek damages in this claim."); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (given the student's graduation her claims for injunctive relief were moot and only her "claim for nominal damages for the violation of her constitutional rights remain for our review"); *Stotts v. Cmty. Unit Sch. Dist. No. 1*, 230 F.3d 989, 990 (7th Cir. 2000) (appeal of denial of preliminary injunction was mooted when the student graduated during the pendency of the appeal); *Sinn v. Lemmon*, No. 1:15-cv-1394-WTL-DML, 2017 WL 34471, *2-*7 (S.D. Ind. Jan. 24, 2017) (although release from the particular prison mooted plaintiff's claim for injunctive relief, damages claims against defendants sued in their individual capacity were considered and some were allowed to proceed). Indeed, in one of the cases that EVSC cited to support its misguided argument, *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000), the court, in language directly applicable here, stated that "[a]lthough a student's graduation moots his claims for declaratory and injunctive relief against school officials, it does not moot his damages claim . . . . Thus, we must address the damages claim brought." *Id.* at 1099-1100) (internal citation omitted).

Not surprisingly, there are numerous cases asserting a violation of Title IX and the United States Constitution by students or on behalf of students where courts specifically hold that graduation does not moot the plaintiff's damages claims. For example, in *Parker v. Franklin Co. Comm'ty Sch. Corp.*, 667 F.3d 910 (7th Cir. 2012), the Seventh Circuit held that the fact that the child was no longer a student at the school mooted her Title IX

injunctive claim; "however, her claims for compensatory damages remain alive." *Id.* at 915. *See also, e.g., Pederson v. Louisiana State Univ.*, 213 F.3d 858, 875 (5th Cir. 2000) (although named plaintiffs in putative class action challenging a violation of Title IX had graduated, their damages claim were not moot as "to the extent that LSU's violations caused a named plaintiff's actual damages, that person is entitled to be compensated for those damage. A live controversy, therefore, exists with regard to the damages claim."); *Stephenson v. Davenport Comm'ty Sch. Dist.*, 110 F.3d 1303, 1306 n.3 (8th Cir. 1997) (former student's challenge to school regulation was not mooted by his graduation as "'[c]laims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable'" [quoting 13A Charles A. Wright, Arthur R. Miller & Edward Hi. Cooper, *Federal Practice and Procedure* § 3533.3, at 262 (2d ed. 1984)]); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 598-99 (S.D. Ohio 2016) ("Doe II's graduation does not moot a claim against the individual defendant for damages for alleged past due process violations. Similarly, Doe II's graduation does not moot his Title IX claims for alleged past gender discrimination); *Barrs v. Southern Conference*, 734 F. Supp. 2d 1229, 1233 (N.D. Ala. 2010) ("While a student athlete's graduation will render the claims for declaratory or injunctive relief moot, her graduation does not moot her claim for damages." [internal citations omitted]).

Although further citation is hardly necessary, the well-reported case of Gavin Grimm should be noted. His challenge under Title IX and equal protection to a policy banning him from the restroom that was consistent with his gender identity resulted in a preliminary injunction that was reversed in part and vacated in part on appeal, leading

eventually to a remand from the Supreme Court. *Grimm v. Gloucester Co. Sch. Bd*. 302 F. Supp. 3d 730, 738 (E.D. Va. 2018). Although he has now graduated, *id.* at 736, the district court considering the case concluded that the plaintiff had plead valid claims under both Title IX and equal protection and has allowed the case to proceed, *id.* at 752.

Conclusion

In *Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016), the court quickly dismissed the significance of the mooting of injunction claims when the case also presented a claim for damages. "Mr. Werner concedes that this official-capacity claims for injunctive relief . . . are now moot because the [challenged] directive is no longer in effect. . . . Mr. Warner's individual claims for damages, of course, are not affected by this development." *Id.* at 759 n.17. Similarly, J.A.W.'s "individual claims for damages, of course" are not moot. EVSC's request to dismiss this case must be denied.

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