UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

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

DEFENDANT'S REPLY BRIEF IN SUPPORT OF SECOND MOTION TO DISMISS

The Evansville Vanderburgh School Corporation ("EVSC"), submits this Reply Brief in Support of its Motion to Dismiss.

I. Introduction

In response to EVSC's motion to dismiss, Plaintiff acknowledges that he has now graduated from high school. He argues, however, that his claims are not moot for two reasons: first, he argues that the issue of restroom usage may again arise when he returns to EVSC property for his graduation ceremony and rehearsal this spring, and second, that his claim for damages precludes a finding of mootness.

The upcoming graduation rehearsal and ceremony will not save Plaintiff's claims from dismissal mootness. Should Plaintiff return to campus as planned, he is no longer a student and therefore not subject to discipline. Moreover, EVSC has agreed to allow Plaintiff to use the boys' bathrooms if and when he returns to campus for his graduation rehearsal and ceremony. Although a valid claim for damages would preclude a finding of mootness, Plaintiff's request for damages is not legally viable. Accordingly, this matter no longer involves an actual, ongoing controversy—it must therefore be dismissed as moot.

II. Argument

1. *Plaintiff has no claim for continued injunctive relief.*

Plaintiff's argument that an invitation to participate in graduation ceremonies this spring precludes mootness overlooks the fundamental change in his status with EVSC. Plaintiff is no longer a student. EVSC can no longer discipline him for violating school rules around restroom usage. Thus, Plaintiff has no reasonable expectation that the harm alleged in his Complaint could recur. *See* Dkt. 1 at 5-6 (referencing February 2018 letter from EVSC representative indicating that Plaintiff could not use the boys' restrooms "without risk of punishment" and asking for injunctive relief allowing him to use his preferred restrooms "without penalty"); *Magnuson v. Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991) ("To maintain a claim for injunctive relief in federal court, the plaintiff must do more than merely speculate that he again will experience injury as the result of a particular practice.")

Furthermore, even if Plaintiff's concerns regarding the upcoming graduation ceremony could be sufficient to preclude a finding of mootness, EVSC will allow Plaintiff to use the boys' restrooms if he returns to campus to participate in graduation exercises. *See* Affidavit of David B. Smith, Ed.D. Although a private party's voluntary cessation of conduct typically does not render a case moot, similar actions taken by public officials are treated differently. *Fed'n of Advert. Indus. Representatives, Inc. v. City of Chi*., 326 F.3d 924, 929 (7th Cir. 2003). Federal courts "place greater stock" in public officials' acts of self-correction, provided they appear genuine. *Id.* (quoting *Magnuson*, 933 F.2d at 565).

There is no basis for this Court to presume that EVSC's promise to allow Plaintiff access to the boys' restrooms during graduation exercises is made in bad faith. *Freedom from Religion Found., Inc. v. Manitowoc Cty*., 708 F. Supp. 2d 773, 777 (E.D. Wis. 2010) ("federal courts need not—and should not—view the statements of public officials with a jaundiced eye"). This is

particularly true in light of the fact that EVSC complied with the preliminary injunction issued in this case without incident. *See* Dkt. 87-1. Because there is nothing left for this court to enjoin, Plaintiff's claim for injunctive relief is moot.

2. *Plaintiff has no viable claim for damages.*

Plaintiff also argues that his request for damages saves his claims from mootness. A legally cognizable claim for damages would of course keep this controversy alive. Plaintiff, however, has no such claim.

Assuming that Title IX and the Equal Protection Clause guaranteed Plaintiff access to the boys' restrooms at school, it is necessary to consider *when* such right—and any concomitant entitlement to damages for violation thereof—accrued. To EVSC's knowledge, this question has not yet been answered by any court, but the Seventh Circuit's decision in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. dismissed*, provides guidance. In that case, the plaintiff, "Ash," was a transgender boy who sought access to the boys' restrooms at his high school. *Id*. at 1040. Ash's mother made several requests for such access on her son's behalf, she met with school officials regarding these requests on multiple occasions, and she provided medical documentation to establish his transgender status. When her requests were denied, she brought suit on Ash's behalf.

In granting the plaintiff's request for a preliminary injunction allowing Ash access to the boys' restrooms while at school, the *Whitaker* court rejected the school district's argument that Ash could not "unilaterally declare" his gender—not because its premise was flawed, but because the argument "misrepresent[ed] Ash's claims and dismisse[d] his transgender status." *Id.* at 1050. The court explained further, "[t]his is not a case where a student has merely announced that he is a different gender." *Id.*

Clearly, the Seventh Circuit has recognized that some threshold showing is required to trigger protections for transgender students. A mere "announcement" of one's transgender status is practically and legally insufficient. Here, Plaintiff's right to use boys' restrooms could not have accrued until EVSC received something more than Plaintiff's mere announcement of his gender and unilateral demand for access to his preferred restrooms.

Prior to commencing this suit, however, Plaintiff had done nothing more than make such an announcement and demand. Indeed, as this court found in its Entry on Motion for Preliminary Injunction, "*[p]rior to the institution of these proceedings, EVSC had never been made aware that J.A.W. had been diagnosed with gender dysphoria, that he was undergoing hormone therapy, or that he had any complaints regarding the proximity and accessibility of the gender-neutral restroom EVSC had made available to him*." Dkt. 68 at 5 (emphasis supplied). Moreover, EVSC had heard nothing at all from Plaintiff's mother on the subject of his restroom access, nor had it been provided with any medical substantiation of his transgender status until after litigation was commenced.

Thus, EVSC was not made aware of Plaintiff's diagnosis and treatment for gender dysphoria or his mother's wishes regarding his restroom access until last summer—the summer following Plaintiff's junior year. Plaintiff's right to access the boys' restrooms, if any, was not triggered until that time. Before the beginning of Plaintiff's senior year—i.e, before any violation of Plaintiff's newly-established right could have occurred—this Court issued its preliminary injunction requiring EVSC to permit Plaintiff access to the boys' restroom at school. EVSC complied with the preliminary injunction. Consequently, Plaintiff cannot, as a matter of law, establish any violation of his rights giving rise to a cognizable claim for compensatory or nominal damages. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66, 112 S. Ct. 1028, 1033 (1992) (holding that a plaintiff may be awarded compensatory damages for a violation of

Title IX "to make good the wrong done"); *Carey v. Piphus*, 435 U.S. 247, 255, 98 S. Ct. 1042, 1048 (1978) (discussing availability under 42 U.S.C. § 1983 of compensatory and nominal damages for actions found to violate constitutional rights).

It is on this basis that the case of Gavin Grimm, which Plaintiff cites in his Memorandum in Opposition to Defendant's Motion to Dismiss, Dkt. 89 at 6-7, is distinguishable. In that case, prior to filing suit, Grimm and his mother met with school officials and provided them with a letter from his medical providers confirming that he was receiving treatment for gender dysphoria and was to be treated as a male in all respects. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 736-37 (E.D. Va. 2018). Although Grimm was initially allowed to use the boys' restrooms, the School Board later adopted a policy requiring students to use restrooms corresponding to their "biological genders" or alternative private facilities. *Id.* at 737. Thus, at the time the school withdrew permission for Grimm to use the boys' restrooms, it was undeniably on notice that Grimm was transgender and suffering from gender dysphoria, that access to the boys' restrooms had been deemed by Grimm's physicians to be medically necessary, and that Grimm's mother had requested such access on his behalf. Grimm's right to access the boys' restrooms, to the extent such a right exists, had clearly been triggered and violated by the school pre-suit.

Upon his graduation from high school, Grimm consented to the dismissal of his requests for prospective declaratory and injunctive relief. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54, 2017 U.S. Dist. LEXIS 221975, at *3 (E.D. Va. Dec. 12, 2017). The district court found that Grimm's remaining requests for retrospective declaratory relief and nominal damages were not moot. The court first noted that students' claims for declaratory and injunctive relief typically become moot upon their graduation. *Id.* at *4. The court noted further, however, that even where claims for injunctive relief have become moot, an action is not mooted if the plaintiff

may be entitled to at least nominal damages, and that retrospective declaratory relief claims may survive to the extent such relief determines liability for such damages. *Id.* at *4-*5.

Here, however, Plaintiff's claim for damages—whether nominal or compensatory—must flow from a *past* violation of his rights under Title IX or the Equal Protection Clause.[1] Plaintiff has not pled any such past violation. Consequently, his unsupported claim for retrospective damages cannot save the current action from mootness. In sum, Plaintiff has no viable claim for relief presently pending before this Court for resolution.

Conclusion

It is well settled that graduation moots a student's claims for injunctive relief against schools and school administrators. *See Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129, 95 S. Ct. 848, 850 (1975) (finding constitutional claims brought by students relating to publication and distribution of a student newspaper were moot because "all of the named plaintiffs in the action had graduated"); *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 862 (7th Cir. 2018) (finding claims of university students who had graduated moot because they had "no reasonable expectation of being governed by the defendant Student Association"); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (finding student's First Amendment and Equal Protection challenge to high school's policy requiring prior approval of graduation speeches mooted by her graduation); *Stotts v. Cmty. Unit Sch. Dist. No. 1*, 230 F.3d 989, 991 (7th Cir. 2000) (finding high school student's challenge to tattoo rule moot because student no longer had "a reasonable expectation of being subjected to the Board's appearance regulation"); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098 (9th Cir. 2000) ("It is well-settled that once a

[1] Although Plaintiff has not suggested that any claim for retrospective declaratory relief would prevent mootness in this case, it should nevertheless be noted that the same facts that foreclose Plaintiff's claim for damages would likewise preclude a claim for retrospective declaratory relief. Nor can a claim for attorney fees prevent mootness. As the Seventh Circuit has explained, "when a case becomes moot on the merits, the party no longer has a claim for attorneys' fees." *Bd. of Educ. v. Nathan R.*, 199 F.3d 377, 381 (7th Cir. 2000)

student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy."). This is so because, upon graduation, a student is no longer subject to enforcement of school rules and policies, and consequently has no reasonable expectation that any injury flowing therefrom could recur. *See also Sinn v. Lemmon,* No. 1:15-cv-1394-WTL-DML, 2017 U.S. Dist. LEXIS 9446, at *6 (S.D. Ind. Jan. 24, 2017) (finding former inmate's claim for declaratory judgment regarding the constitutionality of certain prison policies were mooted by the inmate's release from prison). So it is here. Plaintiff is no longer a student, and he is therefore beyond the reach of EVSC's rules, practices, and policies regarding restroom usage.

Plaintiff's claim for injunctive relief is moot. He has no cognizable claim for damages. Consequently, this Court no longer has subject-matter jurisdiction and Plaintiff's Complaint must be dismissed.

Respectfully submitted,

s/ Patrick A. Shoulders

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CERTIFICATE OF SERVICE

I certify that on the 29th day of January, 2019, 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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s/ Patrick A. Shoulders
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v.	)	Cause No. 3:18-cv-37-WTL-MPB
EVANSVILLE VANDERBURGH SCHOOL CORPORATION, Defendant.	)	

AFFIDAVIT

The undersigned, David B. Smith, Ed.D., being duly sworn upon his oath, states as follows:

1. I have been employed with the Evansville Vanderburgh School Corporation ("EVSC") for over thirty-six (36) years. I currently hold the position of EVSC Superintendent.

2. All EVSC school principals report to me and are under my supervision as Superintendent.

3. I am familiar with the Plaintiff and the issues presented in this case.

4. I am aware that Plaintiff graduated from North High School in December 2018.

5. I am further aware that Plaintiff has been invited to return to North High School this spring to participate in graduation celebrations with the class of 2019.

6. I have instructed the principal at North High School that Plaintiff is to be permitted to use the restrooms designated for males if and when he returns to campus this spring to participate in his graduation ceremony, graduation rehearsal, or other activities related to his graduation.

FURTHER, the Affiant sayeth not.

David B. Smith

David B. Smith, Ed.D.

STATE OF INDIANA)
) SS:
COUNTY OF VANDERBURGH)

SUBSCRIBED and SWORN to before me, a Notary Public in and for said County and State, this 28th day of January, 2019.

AMY LYNN DRESSEL
Resident of Posey County, IN
Commission Expires: October 5, 2023
Commission # 674102

Amy Lynn Dressel

Amy Lynn Dressel, Notary Public,
whose residence is Posey County, Indiana
My Commission Expires: October 5, 2023

28th January

AMY LYNN DRESSEL
Resident of Posey County, IN
Commission Expires October 5, 2020
Commission # 674106

October 5, 2020