

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

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

**Motion to File Surreply to Defendant’s Reply Brief in Support of Second Motion to Dismiss**

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Plaintiff, by counsel, says that:

1. In its Motion to Dismiss and supporting memorandum of law defendant (“EVSC”) argued, without any extrinsic evidence, that this case is moot because plaintiff had graduated from high school. (Dkt. 83, 84).
2. In his response J.A.W. noted, through a declaration, that he would be returning to EVSC property to participate in both the graduation ceremony for the Class of 2019 and the rehearsal for the ceremony and therefore was still in need of injunctive relief. (Dkt. 89-1).
3. Further, J.A.W. noted that regardless of whether or not his claim for an injunction was moot at this point, this case was not moot as he sought damages and this claim obviously survived the termination of any need for injunctive relief.

4. Accompanying its reply brief (Dkt. 91), EVSC attached a declaration from its Superintendent (Dkt. 91-1) to address J.A.W.'s argument that this case was not moot. The reply brief was the first time that EVSC presented this evidence.

5. Also in its reply brief EVSC argued that J.A.W. did not have a claim for damages at all. (Dkt. 91 at 3-6). EVSC has never made this argument before its reply brief.

6. As noted by another Judge of this Court:

The "purpose for having a motion, response and reply is to give the movant the final opportunity to be heard and to rebut the non-movant's response, thereby persuading the court that the movant is entitled to the relief requested by the motion." *Lady Di's, Inc. v. Enhanced Servs. Billing, Inc.*, 2010 U.S. Dist. LEXIS 29463, at \*4 (S.D. Ind. Mar. 25, 2010). However, "new arguments and evidence may not be raised for the first time in a reply brief. Reply briefs are for replying, not raising new arguments or arguments that could have been advanced in the opening brief." *Reis v. Robbins*, 2015 U.S. Dist. LEXIS 23207, at \*5 (S.D. Ind. Feb. 26, 2015) (citations omitted). "[T]his serves to prevent the nonmoving party from being sandbagged." *Id.* (citation omitted). Courts allow a surreply only in limited circumstances to address new arguments or evidence raised in the reply brief or objections to the admissibility of the evidence cited in the response. *See, e.g., id.; Miller v. Polaris Labs., LLC*, 2014 U.S. Dist. LEXIS 18161 (S.D. Ind. Feb. 12, 2014).

*Red Barn Motors, Inc. v. NextGear Capital, Inc.*, No. 1:14-cv-01589-TWP-DKL, 2017 WL 5178274, at \*1 (S.D. Ind. Mar. 27, 2017).

7. Here EVSC has presented both new arguments and new evidence and therefore a surreply to address both is warranted.

8. Accompanying this motion J.A.W. is filing his proposed surreply.

WHEREFORE, plaintiff requests that this Court allow him to file the attached Surreply in Opposition to Defendant's Second Motion to Dismiss, and for all other proper relief.

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SCHOOL COPORATION,	)	
	)	
Defendant.	)	

**Order**

Plaintiff, having filed his Motion to File Surreply to Defendant’s Reply Brief in Support of Second Motion to Dismiss, and the Court having read the motion and being duly advised, finds that good cause exists to grant it, and,

IT IS THEREFORE ORDERED that plaintiff’s Surreply to Defendant’s Reply Brief in Support of Second Motion to Dismiss is deemed FILED.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Senior Judge, United States District Court

To: All ECF-registered counsel of record

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**Surreply to Defendant’s Reply Brief in Support of Second Motion to Dismiss**

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Defendant (“EVSC”) makes two arguments in its reply in support of its motion to dismiss. It first argues that J.A.W.’s claim for injunctive relief is moot despite the fact that he will be returning to school for his graduation ceremony and graduation rehearsal because EVSC will allow him to use male restrooms. It makes this argument supported by an affidavit from its Superintendent. It then argues that his claim for damages is not viable because he has not demonstrated what EVSC believes must be demonstrated to obtain damages. EVSC’s arguments are not well-taken.

**I. J.A.W.’s claim for injunctive relief is not moot**

Without an injunction J.A.W. risks adverse action when he returns to EVSC property for the graduation ceremony and rehearsal. While he may be immune from school discipline as he has graduated, he is certainly not immune from school authorities taking other actions – including barring him or reporting him to law enforcement.

However, EVSC argues that this is not a risk as its Superintendent attests that he will be permitted to use male restrooms.

EVSC recognizes (Dkt. 91 at 2) that generally “voluntary cessation of allegedly illegal conduct” does not create mootness as “[t]he defendant is free to return to his old ways.” *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). It is up to the defendant to demonstrate that “there is no reasonable expectation that the wrong will be repeated” and “the burden is a heavy one.” *Id.* at 633 (internal quotation marks, citation, and footnote omitted). EVSC argues that it has satisfied this burden and that its representations are entitled to elevated respect because it is a government entity. (Dkt. 91 at 2). EVSC errs.

The Seventh Circuit has explicitly rejected the notion that “a mere informal promise or assurance on the part of the defendants that the challenged practice will cease” may render a case moot. *Burbank v. Twomey*, 520 F.2d 744, 748 (7th Cir. 1975); *see also, e.g., St. Paul Fire & Marine Ins. Co. v. T.J. Lambrecht Const. Co., Inc.*, No. 01-C-6496, 2001 WL 1609374, at \*3 (N.D. Ill. Dec. 14, 2001) (“A defendant cannot moot a case with a voluntary cessation of contested conduct and a mere informal promise or assurance that it will not resume.”) (further citations omitted). EVSC has not alleged that it has changed its policy that would normally prevent a transgender person from using the bathrooms associated with his or her identity. Indeed, its litigation position to the current time belies the notion that it has altered the policy giving rise to this litigation. It has instead just, in effect, indicated that it will not enforce the policy against J.A.W. When “government actors voluntarily modif[y]” a challenged practice after a lawsuit is initiated, “but d[o]

not institute any new policy or procedure that would provide assurances that the voluntary cessation [i]s other than temporary,” a case is not moot. *D.C. Prof. Taxicab Drivers Ass’n v. District of Columbia*, 880 F. Supp. 2d 67, 76 (D.D.C. 2012) (citing, as examples, *Goings v. Court Servs. & Offender Supervision Agency*, 786 F. Supp. 2d 48, 63 (D.D.C. 2011), and *Jackson v. U.S. Parole Comm’n*, 806 F. Supp. 2d 201, 208 (D.D.C. 2011)).

This is precisely what the Seventh Circuit determined in *Doe ex rel. Doe v. Elmbrook School District*, 658 F.3d 710 (7th Cir. 2011), *adopted in relevant part by en banc court*, 687 F.3d 840, 842-43 (7th Cir. 2012). In that case, which arose as an Establishment Clause challenge to a school district’s practice of holding high school graduation ceremonies in a church, the defendant offered only “a few scattered representations” that it would not revert to the challenged practice, and “presented no evidence of a formal or even an informal policy change.” *Id.* at 720. This did not suffice to render the case moot, even when the Superintendent of the school district and the principals of the two high schools at issue all “represented that they d[id] not intend” to conduct graduation ceremonies at the church again. *Id.*

Moreover, numerous courts have held that EVSC’s assurance must be viewed with skepticism from the outset given that a court order—the preliminary injunction—was necessary to alter its behavior in the first place. “Compliance with the provisions of a preliminary injunction . . . does not render moot the underlying claims,” for, “[i]f the injunction is dissolved without a decision on the merits, there is nothing to keep [the] defendants from resuming the activity that had been restrained by the preliminary injunction.” *LaPeer Cnty. Med. Care Facility v. Michigan*, No. 1:91-CV-333, 1992 WL 220917,

at \*7 (W.D. Mich. Feb. 4, 1992). And, as another court has held, when the cessation of a challenged activity is “effected only in response” to a preliminary injunction it is “far from voluntary,” and a defendant cannot demonstrate that the activity “could not ‘reasonably’ be expected to recur, no less demonstrate that such is ‘absolutely clear.’” *Courthouse News Serv. v. Jackson*, No. H-09-1844, 2009 WL 4927549, at \*1 (S.D. Tex. Dec. 18, 2009).<sup>1</sup>

EVSC’s voluntary cessation of its activity following the issuance of a preliminary injunction therefore does not create mootness. Its motion to dismiss should be denied.

## **II. J.A.W. has a claim for damages**

In its reply brief EVSC makes a new claim, never raised before, that plaintiff cannot demonstrate damages here because prior to his lawsuit he did not make a demand to use male restrooms. It is unclear what this argument means in the context of a motion to dismiss. In its motion to dismiss EVSC argued that dismissal was required by Federal Rule of Civil Procedure 12(b)(1). (Dkt. 83). However, the argument that it now raises for the first time in its reply memorandum is not that the Court lacks jurisdiction, the province of Rule 12(b)(1), but appears to be that plaintiff has failed to state a claim for relief under Rule 12(b)(6). The problem with this is that all that is required to withstand a motion to dismiss under Rule 12(b)(6) is for the plaintiff’s complaint to “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its

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<sup>1</sup> Moreover, the Superintendent’s assurance that J.A.W. can use the male restrooms must be deemed to be subject to the same qualification that the Superintendent made in the preliminary injunction hearing – if a disruption occurs, access may be denied. (Dkt. 68 at 7).

face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). For this the Court is to look at the allegations of the complaint. *See, e.g., Guile v. Berryhill*, No. 18-CV-671, 2018 WL 6204603, at \*4 (E.D. Wis. Nov. 28, 2018).<sup>2</sup> Here, the complaint clearly contains factual matter, which if accepted as true, states that J.A.W. has been damaged by the violations committed by EVSC. It alleges that EVSC was aware when he was a freshman that he was not comfortable in female restrooms but that all he was offered was the ability to use the restroom in the nurse’s office. (Dkt. 1 at ¶¶ 13-15). It further alleges that when he was a sophomore he specifically asked his principal if he could use the male restrooms and was denied that right. (*Id.* at ¶¶ 19-21). It also alleges that his attorney formally asked in January of 2018 that J.A.W. be allowed to use the male restrooms and EVSC, through its attorney, denied this request. (*Id.* at ¶¶ 33-36). It also alleges that because of this J.A.W. has suffered depression and other emotional difficulties; he has restricted his fluid intake so he wouldn’t have to use the restrooms at school, which cause him pain and distressed; and he has generally been damaged. (*Id.* at

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<sup>2</sup> It is true, of course, that if extrinsic evidence is submitted with a motion to dismiss under Rule 12(b)(6) the court “must either convert the 12(b)(6) motion into a motion for summary judgment under Rule 56 and proceed in accordance with the latter rule, or exclude the documents attached to the motion to dismiss and continue under Rule 12.” *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998). EVSC has not submitted any extrinsic evidence in support of its claim that J.A.W. has no claim for damages here and refers in its memorandum only to a sentence from this Court’s preliminary injunction determination. *See* Dkt. 91 at 4 (quoting Dkt. 68 at 5). Of course, a court’s decision is not evidence. *See, e.g., Berrios-Romero v. Estado Libre Asociado de Puerto Rico*, 641 F.3d 24, 27 (1st Cir. 2011) (“even when a copy of a judicial decision is placed in the record, it is not ‘evidence’ nor is it fact”). Thus, EVSC has not presented any facts before the Court that would justify converting the motion to dismiss into one for summary judgment. Moreover, given that J.A.W.’s motion for partial summary judgment is pending before the Court, with an opportunity for EVSC to file a cross-motion, it would make no sense to convert the motion to dismiss into one for summary judgment, particularly because EVSC chose to raise this issue for the first time in its reply memorandum.

¶¶30-32, 39). This is all sufficient to demonstrate that EVSC's policy that prevented J.A.W. from using male restrooms violated both Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), and Equal Protection. (*See* Dkt. 88 at 22-32).

Moreover, a motion to dismiss under Rule 12(b)(6) "must be made before pleading if a responsive pleading is allowed." Federal Rule Civil Procedure 12(b). Given that the responsive pleading was filed in this case on June 13, 2018 (Dkt. 34), it simply is too late for EVSC to make this argument. J.A.W.'s motion for partial summary judgment is pending before the Court. If EVSC believes that J.A.W. has not established a claim for damages it may attempt to demonstrate this by presenting evidence in responding to J.A.W.'s partial summary request. It is not an argument to be made for the first time in a reply memorandum in support of a motion to dismiss predicated on a different point entirely.

It should be noted, however, if only in passing, that EVSC errs in arguing that it cannot be liable for damages if it did not know that J.A.W. desired to use the male restrooms. For its liability is based on the fact that it had a policy that adversely affected J.A.W. from at least the time he started high school. *See, e.g., Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017), *pet. for cert. dismissed*, --U.S.--, 138 S. Ct. 1260 (2018) ("[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes the individual for his or her gender non-conformance, which in turn violates Title IX"; "the School District's policy cannot be stated without referencing sex" and is thereby subject to elevated scrutiny under Equal Protection). EVSC appears to argue that if a school had a

policy of refusing to allow black children into the lunchroom that a student, who did not use the restroom because of the policy, could not have a claim for damages unless he or she formally asked to use the restroom and was refused. This is clearly wrong. It is the policy that is damaging. The allegations of the complaint establish J.A.W.'s claim for damages.<sup>3</sup>

### III. Conclusion

EVSC's motion to dismiss is not meritorious and must be denied.

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<sup>3</sup> As noted, extrinsic evidence is not to be considered in the course of deciding a motion to dismiss under Rule 12(b)(6); only the allegations of the complaint should be reviewed. *Stagg Industrial Development Corp. v. Gencorp, Inc.*, EV 99-0119-C M/H, 2000 WL 1428669, at \*5 (S.D. In. May 26, 2000) ("consideration of extrinsic evidence [makes] dismissal under Rule 12(b)(6) inappropriate"). But, given all the factual evidence developed in this case, and the pendency of J.A.W.'s motion for partial summary judgment, it is worth pointing out that the evidence adduced in this case demonstrates the truth of the complaint's allegations that EVSC had been aware for quite some time of J.A.W.'s transgender status and his need to use the male restrooms. When he was a freshman he told school personnel he was transgender and expressed discomfort in using female facilities when he was caught changing in the male restrooms and he was offered the nurse's bathroom as an accommodation. (Dkt. 50-1 at 109 [l. 21] - 110 [l. 17]). When he was a sophomore, both he and his mother had conversations with the school principal about his discomfort with using the male restrooms and he presented the "the Dear Colleague" letter to the principal with the since rescinded Administration interpretation of Title IX that required transgender students be allowed to use bathrooms consistent with their gender identities, but the principal indicated EVSC was not abiding by the Administration's interpretation. (Id. at 57 [l. 4] - 1. 15]). In November of 2016, J.A.W. contacted EVSC's Chief Diversity Officer, identifying himself as transgender and asking about EVSC's policy on bathroom access and was told that the policy was that students must use the nurses' restrooms or individual unisex bathrooms. (Ex. 11 at 2 to Dkt. 50-2). And, in the next school year, in January of 2018, J.A.W.'s counsel contact EVSC's counsel to reiterate the request that J.A.W. be allowed to use the male restrooms and this request was denied. (Ex.1 and 8 to Dkt. 50-2). The complaint clearly establishes a claim for damages for J.A.W. and the actual evidence in this case supports the claim.

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