

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

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

**DEFENDANT’S OBJECTION TO PLAINTIFFS’ MOTION TO FILE SURREPLY TO
DEFENDANT’S REPLY BRIEF IN SUPPORT OF SECOND MOTION TO DISMISS**

The Evansville Vanderburgh School Corporation (“EVSC”) submits this Objection to Plaintiff’s Motion to File Surreply to Defendant’s Reply Brief in Support of Second Motion to Dismiss, and in support hereof states as follows:

1. In EVSC’s Motion to Dismiss and supporting brief, EVSC argued that Plaintiff’s claims are moot because Plaintiff had graduated from high school.

2. In his Memorandum in Opposition to Defendant’s Motion to Dismiss, Plaintiff argued that his graduation did not moot his claims because: (1) he plans to return to school to participate in graduation exercises in the spring; and (2) he seeks retrospective damages. Plaintiff attached an affidavit to this memorandum.

3. In its Reply Brief in Support of Second Motion to Dismiss, EVSC responded to Plaintiff’s arguments as follows: (1) Plaintiff’s injunctive relief claim is moot because he is no longer subject to school discipline and because EVSC will not interfere with his use of the boys’ restrooms if and when he returns to campus to participate in graduation exercises; and (2) Plaintiff’s claim for damages fails as a matter of law and, consequently, cannot prevent mootness.

4. In his Motion to File Surreply to Defendant’s Reply Brief in Support of Second Motion to Dismiss, Plaintiff complains that EVSC raised new arguments in its reply. To the contrary, EVSC appropriately responded to arguments Plaintiff made in his Memorandum in Opposition to Defendant’s Motion to Dismiss. *Red Barn Motors, Inc. v. NextGear Capital, Inc.*, No. 1:14-cv-01589-TWP-DKL, 2017 U.S. Dist. LEXIS 43871, at *1 (S.D. Ind. Mar. 27, 2017) (“[t]he 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” (citation omitted)). EVSC’s arguments are not “new”—they were raised by Plaintiff in his Memorandum in Opposition to Defendant’s Motion to Dismiss.¹

5. Plaintiff also argues that he is entitled to file a surreply because EVSC attached an affidavit to its Reply Brief in Support of Second Motion to Dismiss. Again, EVSC presented such evidence to rebut Plaintiff’s arguments made in his Memorandum in Opposition to Defendant’s Motion to Dismiss.²

6. Furthermore, “a defendant challenging jurisdiction need not accept as true the allegations in the complaint and may ask the court to decide the jurisdictional issue by considering additional documents and affidavits . . . or by holding an evidentiary hearing and making factual findings.” *Chi. Joe's Tea Room, LLC v. Vill. of Broadview*, 894 F.3d 807, 814 (7th Cir. 2018). If a defendant may present additional evidence at a hearing held after its motion to dismiss for lack of subject-matter jurisdiction is fully briefed, it would be incongruous to hold

¹ Furthermore, to the extent EVSC’s Reply Brief in Support of Second Motion to Dismiss contains any “new” arguments, the same can be said of Plaintiff’s proposed surreply.

² It bears noting that Plaintiff himself previously presented extensive “new” evidence in support of his Reply Memorandum in Support of Motion for Preliminary Injunction. Dkt. 54, 50, 50-1 through 50-10.

that presenting such evidence by way of affidavit prior to any such hearing is somehow improper.

7. In reality, Plaintiff attempts to use his surreply to shore up weaknesses in his legal arguments and to have the last word on EVSC's motion to dismiss. This is not the purpose of a surreply. See *Heckler & Koch, Inc. v. German Sport Guns GmbH*, No. 1:11-cv-1108-SEB-TAB, 2013 U.S. Dist. LEXIS 76580, at *7 (S.D. Ind. May 31, 2013) ("The purpose of a surreply is to address new matters argued in a reply brief.").

WHEREFORE, EVSC requests that this Court deny Plaintiff's Motion to File Surreply to Defendant's Reply Brief in Support of Second Motion to Dismiss.

Respectfully submitted,

s/ Patrick A. Shoulders

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CERTIFICATE OF SERVICE

I certify that on the 4th day of February, 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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