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 COMBINED BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

The Evansville Vanderburgh School Corporation ("EVSC"), submits this Combined Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment.

I. Introduction

In his Memorandum in Support of Motion for Partial Summary Judgment, Plaintiff acknowledges that in light of his graduation, restroom access is no longer the issue in this case. The question now is whether EVSC is liable for damages for past violations of Plaintiff's rights under Title IX or the Equal Protection Clause. The undisputed facts of this case establish that no such violation occurred. Consequently, Plaintiff's motion for partial summary judgment should be denied and EVSC's cross-motion for summary judgment should be granted.

II. Standard of Review

Summary judgment is appropriate where the admissible evidence establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Hanover Ins. Co. v. N. Bldg. Co.*, 751 F.3d 788, 791 (7th Cir. 2014). A fact is

material if it affects the outcome of the suit; an issue is genuine when the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Id.* Where, on the other hand, the factual record could not lead a rational fact finder to find for the non-moving party, there is no genuine issue for trial. *Id.*

III. Undisputed Facts

Plaintiff's summary judgment brief sets forth a lengthy exposition on what it means to be transgender, the accepted treatments for gender dysphoria, and the importance of social role transition. Such discussion may be enlightening for individuals unfamiliar with these concepts, but it is not necessary here. EVSC does not dispute that Plaintiff is transgender, that he has suffered from gender dysphoria, or that he is in the process of social role transition. The relevant question is whether and when these facts coalesced into an enforceable statutory and constitutional right to access the boys' restrooms while at school. Accordingly, EVSC will confine its discussion to the facts relevant to those questions.

EVSC is a public school corporation and a recipient of federal funding for the purposes of Title IX. Dkt. No. 20 at 6. Plaintiff attended EVSC schools from kindergarten until his high school graduation in December 2018. Dkt. No. 50-1 at 15; Dkt. No. 87-1. When Plaintiff's mother enrolled him in EVSC schools, she was required to present his birth certificate. Dkt. No. 61 at 29. Because Plaintiff was born anatomically female, his birth certificate indicates that he is female. Dkt. No. 17-1 at ¶ 6; Dkt. No. 50-1 at 14, 30; Dkt. No. 61 at 11. During elementary and middle school, Plaintiff used the girls' restrooms and never requested access to the boys' restrooms. Dkt. No. 50-1 at 17-20.

In early adolescence, Plaintiff came to realize that he is transgender. Dkt. No. 17-1 at ¶¶ 7, 8; Dkt. No. 50-1 at 95-96. In eighth grade, Plaintiff began to present himself outwardly as a

boy; he cut his hair short, began wearing conventionally masculine clothing, and asked others to refer to him by his chosen masculine name, J.A.W., and masculine pronouns. Dkt. No. 50-1 at 23. Plaintiff did not, however, seek permission to use the boys' restrooms at school. Dkt. No. 50-1 at 20.

When he started high school, Plaintiff asked his teachers to address him by his chosen masculine name and to refer to him using masculine pronouns. Dkt. No. 50-1 at 23. Although Plaintiff had not legally changed his name or the gender marker on his birth certificate, school personnel accommodated these requests. Dkt. No. 61 at 12.

During his freshman year, Plaintiff attended classes at both North High School and Central High School, and he took his required physical education class at North. Dkt. No. 50-1 at 23; Dkt. No. 17-1 at ¶ 17. Plaintiff did not feel comfortable changing in the girls' locker room, so he and another transgender student began using a boys' restroom to change clothes for physical education without permission. Dkt. No. 50-1 at 37-39. School administrators at North became aware that Plaintiff was using a boys' restroom for this purpose when a parent called to complain that there were "two girls" using the boys' restroom. Dkt. No. 50-1 at 39. At that time, Plaintiff was instructed not to use the boys' restrooms for changing anymore. Dkt. No. 50-1 at 39. As an alternative, Plaintiff and the other transgender student were allowed to use a separate, otherwise unused girls' locker room to change for gym. Dkt. No. 50-1 at 41; Dkt. No. 61 at 19-20. For other restroom needs, Plaintiff was told to use the girls' restrooms or a gender-neutral, single-user restroom in the nurse's office. Dkt. No. 50-1 at 110; Dkt. No. 17-1 at ¶ 12. According to Plaintiff, the restroom in the nurse's office at North was far from his classes and often locked, but he never brought this issue to the attention of anyone at EVSC prior to initiating this litigation. Dkt. No. 17-1 at ¶¶ 12, 14; Dkt. No. 50-2, Ex. 8; Dkt. No. 61 at 35.

During Plaintiff's freshman year, Plaintiff's mother never contacted anyone at EVSC to request that Plaintiff be permitted access to the boys' restrooms. Dkt. No. 61 at 29.

During his sophomore year, Plaintiff attended classes at both North and Harrison High Schools. Per his request, teachers continued to address him as J.A.W. and refer to him using masculine pronouns. Dkt. No. 61 at 12. Early in the 2016-17 school year, Plaintiff approached the principal of North High School with the now-rescinded "Dear Colleague" letter jointly issued on May 13, 2016, by the U.S. Department of Justice, Civil Rights Division, and the U.S. Department of Education, Office for Civil Rights. Dkt. No. 61 at 23; Dkt. No. 50-1 at 57-58, 110. Based on the guidance provided therein, Plaintiff believed he was entitled to access the boys' restrooms. Dkt. No. 50-1 at 57-58. EVSC personnel reviewed the Dear Colleague letter and consulted with counsel, but ultimately denied Plaintiff's request to access the boys' restrooms. Dkt. No. 50-2 at 32. Plaintiff was instructed to use either the girls' restrooms or the gender-neutral, single occupancy restroom in the nurse's office. Dkt. No. 61 at 13; Dkt. No. 50-1 at 45. The arrangements for Plaintiff to change before and after physical education class also remained the same as the previous year. Dkt. No. 17-1 at ¶ 19.

In September 2016, Plaintiff began counseling for the purpose of obtaining a diagnosis of gender dysphoria, which would allow him to begin hormone replacement therapy. Dkt. No. 50-1 at 60-64. He did not, however, undergo hormone replacement therapy or any other medical treatment related to his gender dysphoria or social role transition during his sophomore year. *See* Dkt. No. 51-3. Nor did he complain to anyone at EVSC that the gender-neutral restrooms made available to him were inaccessible or otherwise unsatisfactory. Dkt. No. 61 at 35. Likewise, Plaintiff's mother never contacted anyone at EVSC to request that Plaintiff be permitted access to the boys' restrooms. Dkt. No. 61 at 58.

In November 2016, Plaintiff sent an email to Dr. Dionne Blue, EVSC Chief Diversity Officer, informing Dr. Blue that he is a transgender student attending North and asking about EVSC's policy on transgender students and access to restrooms and locker rooms. Dkt. 50-2, Ex. 11. Dr. Blue responded that EVSC did not have an official policy but that transgender students could use the nurse's office or other gender-neutral restrooms depending on the facilities available in the building. Dkt. 50-2, Ex. 11. Dr. Blue further stated that schools would address any other needs on a case-by-case basis. Dkt. 50-2, Ex. 11. Plaintiff did not follow up with Dr. Blue or make any requests of her. Dkt. No. 61 at 22-23.

During his junior year, which began in the fall of 2017, Plaintiff continued to attend both North and Harrison. Dkt. No. 50-1 at 52. Plaintiff's teachers continued to address him by his preferred name and masculine pronouns, and EVSC continued to make a gender-neutral, single-occupancy restroom in the nurse's office available to Plaintiff at both North and Harrison. Dkt. No. 50-1 at 56; Dkt. No. 61 at 13, 26, 35. During the first semester of his junior year, Plaintiff did not request access to the boys' restrooms at school. Dkt. No. 50-1 at 99-100.

At the beginning of his junior year, Plaintiff sought to begin hormone replacement therapy. After presenting his physician with a letter from his counselor indicating that Plaintiff met the criteria for gender dysphoria and would benefit from hormone therapy, Plaintiff was prescribed testosterone injections in the fall of 2017. Dkt. No. 51-2; Dkt. No. 51-3. Since that time, Plaintiff has been regularly taking testosterone injections. Dkt. No. 17-1 at ¶ 21. EVSC was not made aware of Plaintiff's gender dysphoria diagnosis or his hormone replacement therapy. Dkt. No. 50-1 at 100.

On January 21, 2018, EVSC's general counsel received a letter from Plaintiff's attorney. Dkt. No. 50-2, Ex. 1. In the letter, Plaintiff's counsel opined that under the Seventh Circuit's

recent decision in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. dismissed*, Plaintiff was entitled to use the boys' restrooms at school. Dkt. No. 50-2, Ex. 1. Counsel sought an assurance that Plaintiff would be permitted to do so without risk of discipline and indicated that if none were forthcoming, litigation might ensue. Dkt. No. 50-2, Ex. 1. Plaintiff's mother was not a signatory to this letter and her wishes were not mentioned. Dkt. No. 50-2, Ex. 1.

In a response dated February 5, 2018, EVSC's general counsel opined that *Whitaker* was distinguishable on its facts and, further, that it did not appear to represent the state of the law across the United States. Dkt. No. 50-2, Ex. 8. Counsel indicated that EVSC would continue to make a gender-neutral restroom available to Plaintiff, but he would not be permitted to use the boys' restrooms. Dkt. No. 50-2, Ex. 8.

On February 22, 2018, Plaintiff instituted the current litigation. Dkt. No. 1. Plaintiff's mother did not file suit on Plaintiff's behalf as his next friend. Dkt. No. 1. Prior to the institution of these proceedings, EVSC had never been made aware that Plaintiff had been diagnosed with gender dysphoria, that he was undergoing hormone replacement therapy, or that he had any complaints regarding the proximity and accessibility of the gender-neutral restroom EVSC had made available to him. Dkt. No. 61 at 36; Dkt. No. 50-1 at 53-54, 89-90; Dkt. No. 50-2 at 27-28; Dkt. No. 50-2, Ex. 8. Nor had Plaintiff's mother sought any sort of accommodation relating to Plaintiff's transgender status or registered any complaint regarding EVSC's handling of Plaintiff's requests. Dkt. No. 61 at 26-27, 35. In fact, it was only through discovery in this case that EVSC became aware of Plaintiff's diagnosis and treatment for gender dysphoria and that his mother was supportive of his attempt to gain access to the boys' restrooms

at school. This information was provided to EVSC during the summer following Plaintiff's junior year.

Prior to the commencement of Plaintiff's senior year, this Court issued a preliminary injunction requiring EVSC to permit Plaintiff to use the boys' restrooms at school. EVSC complied with the preliminary injunction and Plaintiff used the boys' restrooms at school during his senior year without incident. Dkt. No. 87-1 at ¶¶ 8-9. Plaintiff graduated in December 2018. Plaintiff plans to return to school property to participate in graduation exercises in the spring, and EVSC has no intention of interfering with his use of the boys' restrooms at that time. Dkt. No. 87-1 at ¶¶ 6-7; Dkt. No. 91-1 at ¶¶ 4-6.

IV. Argument[1]

Plaintiff asserts claims under both Title IX and the Equal Protection Clause. *Whitaker*[2] is the driving force behind both claims. It should be noted, however, that *Whitaker* involved an appeal from the entry of a preliminary injunction, not a final judgment. Thus, the Court was asked only to consider whether the plaintiff had a "better than negligible" chance of success on his claims. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1046 (7th Cir. 2017). The procedural posture of this case is quite different. Plaintiff seeks the entry of summary judgment on the question of liability. In order to prevail, he must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. This is sufficient standing alone to establish that *Whitaker* is not controlling here.

[1] EVSC acknowledges that this Court has already addressed its arguments concerning J.A.W.'s capacity to bring suit on his own behalf without a next friend. Because this Court has already ruled on this issue, EVSC will not reassert it here. However, EVSC reserves the right to raise the issue in any future appeal.

[2] EVSC takes issue with much of the analysis set forth in *Whitaker*, but acknowledges that this court is bound by decisions of the Seventh Circuit. EVSC will therefore assume, solely for the purposes of this brief, that *Whitaker* was correctly decided. EVSC reserves the right to challenge *Whitaker* in any future appeal.

Nevertheless, a thorough discussion of *Whitaker* is warranted. In that case, the plaintiff, "Ash," was a transgender boy and a high school senior. 858 F.3d at 1040. During his freshman year, Ash began to openly identify as a boy—he cut his hair, began to wear masculine clothing, and began to use a typically male name and male pronouns. *Id.* Ash also began to see a therapist, who diagnosed him with gender dysphoria. *Id.* Thereafter, Ash began hormone replacement therapy and legally changed his name. *Id.*

In the spring of his sophomore year, Ash and his mother met with his guidance counselor several times to request permission for Ash to use the boys' restrooms while at school. *Id.* The school denied the request and notified Ash that he could use the girls' restrooms or a gender-neutral, single-occupancy restroom in the school's main office. *Id.*

During the fall of his junior year, Ash began to use the boys' restrooms despite the school's policy, and he did so for six months without incident. *Id.* at 1041. When the school became aware that Ash was using the boys' restroom, however, Ash's guidance counselor again told Ash's mother that Ash was permitted to use only the girls' restrooms or the gender-neutral restroom in the main office. *Id.* The next month, Ash and his mother met with the school's assistant principal to discuss the restroom policy. *Id.* The assistant principal reiterated that Ash was not permitted to use the boys' restroom, but this time said that it was because Ash was listed as a female in the school's records and unspecified "legal or medical documentation" was required to change such records. *Id.*

Thereafter, the school was provided with two letters from Ash's pediatrician identifying Ash as a transgender boy and recommending that he be allowed to use the boys' restrooms. *Id.* The school deemed these letters insufficient and took the position that Ash would have to complete surgical transition to be permitted access to the boys' restrooms. *Id.*

In the spring of 2016, Ash engaged counsel who sent a letter to the school district demanding that Ash be permitted to use the boys' restroom at school. *Id.* at 1042. The school district again denied the request, and Ash, through his mother and next friend, filed a complaint in federal district court alleging that the school district had violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id.* The district court granted Ash's motion for a preliminary injunction, and the school district appealed. *Id.*

The Seventh Circuit affirmed, concluding that Ash had demonstrated a reasonable likelihood of success on both his Title IX and Equal Protection claims. *Id.* at 1046-54. With respect to the Title IX claim, the Court applied a sex-stereotyping theory to conclude that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Id.* at 1049. On the Equal Protection claim,[3] the Court first held that heightened review applied because the school's policy was "inherently based upon a sex-classification[.]" *Id.* at 1051. The Court went on to hold that the school's proffered justification for the policy—ensuring the privacy of its students—was not exceedingly persuasive because the presence of a transgender student poses no greater threat to privacy than any other student. *Id.* at 1052.

Whitaker stands for the proposition that an arbitrary school policy precluding transgender students' access to sex-segregated spaces consistent with their gender identity might, under certain circumstances, violate Title IX and the Equal Protection Clause. *Whitaker* did not directly address the point at which Ash's right to access the boys' restrooms accrued, but the

[3] The portion of *Whitaker* addressing the Equal Protection claim is likely dicta. *Whitaker*, 858 F.3d at 1050 (addressing the Equal Protection claim notwithstanding the "duty to avoid rendering unnecessary constitutional decisions," even though consideration of the claim was not necessary in light of the court's conclusion that the plaintiff had a likelihood of success on his Title IX claim).

court's reasoning gave some guidance. Specifically, the 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 dismiss[ed] 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.*

That is what sets this case apart from *Whitaker*—prior to engaging in discovery in this case, EVSC was presented with nothing more than Plaintiff's announcement that he is male. 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. No. 68 at 5 (emphasis supplied). As for the wishes of Plaintiff's mother, EVSC had heard nothing at all from Plaintiff's mother on the subject of his restroom access until shortly before the hearing on Plaintiff's Motion for Preliminary Injunction, when Plaintiff submitted a declaration in which Plaintiff's mother states that she is supportive of Plaintiff's efforts to gain access to the boys' restrooms. Dkt. No. 50-4 at ¶¶ 1-3.

Clearly, the Seventh Circuit has recognized that some threshold showing is required to trigger protections for transgender students, and a mere "announcement" of one's transgender status is practically and legally insufficient. Thus, in this case, Plaintiff's right to use boys' restrooms—assuming such a right exists—could not have accrued until EVSC received something more than Plaintiff's announcement that he is a boy and his unilateral demand for access to the boys' restrooms. EVSC did not receive that "something more" until the summer following Plaintiff's junior year, and by the time school started again in the fall, the preliminary

injunction was in place. It is undisputed that EVSC complied with the preliminary injunction. Dkt. No. 87-1. Consequently, Plaintiff's rights were never violated.

Plaintiff's claim for damages under Title IX also fails for another reason. Title IX was enacted pursuant to Congress's powers under the Spending Clause. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181, 125 S. Ct. 1497, 1507 (2005). Consequently, a private action for damages is available only where the recipient of federal funding had adequate notice that the conduct at issue could subject it to liability. *Id.* "When Congress enacts legislation under its spending power, that legislation is 'in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 1540 (1981)). Where Spending Clause legislation is concerned, the Supreme Court has "insist[ed] that Congress speak with a clear voice," *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640, 119 S. Ct. 1661, 1670 (1999), and conditions must be imposed "unambiguously." *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1540.

Title IX's implementing regulations expressly permit schools to provide separate toilet, locker room, and shower facilities on the basis of sex. 34 C.F.R. § 106.33. Title IX does not define the term "sex," and courts have reached differing conclusions with respect to whether it encompasses gender identity. *See Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 301 (W.D. Pa. 2017) (concluding that the law concerning the proper interpretation of 34 C.F.R. § 106.33 "is at this moment so clouded with uncertainty that this Court is not in a position to conclude which party in this case has the likelihood of success on the merits of" the transgender students' Title IX claim); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (holding that a university's refusal to allow a transgender student to use the restrooms and locker rooms consistent with his gender identity did

not violate Title IX or the Equal Protection Clause). The Supreme Court has yet to consider the issue. Under these circumstances, Congress cannot be said to have clearly and unambiguously required Title IX funding recipients to permit transgender students access to the restroom facilities aligning with their gender identities. Because EVSC did not have adequate notice that its conduct might be prohibited under Title IX, it is entitled to summary judgment on Plaintiff's Title IX claim.

V. Conclusion

In its Entry on Motion for Preliminary Injunction, this Court noted that "there is likely a line to be drawn with regard to when Title IX requires a school to permit a transgender student to use the restrooms that coincide with his gender identity." Dkt. 69 at 9. The time has come to draw that line. It was one thing to require EVSC to permit Plaintiff access to the boys' restrooms once he presented a statement from his mother and evidence of his gender dysphoria diagnosis and hormone treatment. To hold EVSC liable for damages for refusing to do so before being provided with such evidence is quite another. Whatever can be said regarding the legal foundations of *Whitaker*, it did not require public school corporations to accede to a student's unilateral demands for access to sex-segregated spaces inconsistent with the sex reported to the school by the child's parents, based solely on the child's declaration of his or her gender, with no accompanying parental request or permission, no evidence of a diagnosis of gender dysphoria, and no evidence that social or physical transition has been deemed medically necessary or appropriate. Because the undisputed facts establish that no violation of Title IX or the Equal Protection Clause occurred, EVSC is entitled to judgment as a matter of law.

Respectfully submitted,

s/ Patrick A. Shoulders
Patrick A. Shoulders #308-82
L. Katherine Boren #29169-49
ZIEMER STAYMAN WEITZEL & SHOULDERS, LLP
20 N. W. First Street
P. O. Box 916
Evansville, IN 47706
Tel. No. (812) 424-7575
Fax No. (812) 421-5089
Email: pshoulders@zsws.com
kboren@zsws.com

Attorneys for the Defendant.

CERTIFICATE OF SERVICE

I certify that on the 21st 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.

Kenneth J. Falk
kfalk@aclu-in.org

Gavin M. Rose
grose@aclu-in.org

Stevie J. Pactor
spactor@aclu-in.org

s/ Patrick A. Shoulders
Patrick A. Shoulders