UNITED STAES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

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

Plaintiff's Response Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment and Reply Memorandum in Support of his Motion for Partial Summary Judgment

Introduction

In its memorandum in support of its cross-motion for partial summary judgment (Dkt. 96), defendant ("EVSC") does not dispute that *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. dismissed*, --U.S.--, 138 S. Ct. 1260 (2018), holds that a policy that prohibits transgender students from using the restrooms associated with their gender identities violates both Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), and the Equal Protection Clause of the Fourteenth Amendment. Nor does it deny that J.AW. is transgender. Nevertheless, it denies that it is liable for any damages resulting from J.A.W.'s exclusion from male restrooms in EVSC buildings because it claims that his claim for damages never accrued. EVSC contends that it was never put on notice, either factually or legally under Title IX,

that J.A.W. had the right to use male restrooms. This argument, made against the backdrop of an EVSC policy that denied bathroom-access to J.A.W., who expressed discomfort about using female restrooms from the time he was a freshman in high school and asked about male restroom usage on a number of occasions, is not well-taken. EVSC has failed to respond to J.A.W.'s Motion as to his equal protection claim, and it provided no argument in support of its Cross-Motion as to that claim. J.A.W. is entitled to partial summary judgment as to liability at this juncture, with his damages to be determined at trial.

Summary of material facts that are not disputed

EVSC has not introduced any evidence beyond that produced by J.A.W., nor has it challenged any of J.A.W.'s evidence. Given EVSC's argument, it is useful to briefly recapitulate some of the uncontested material facts that are more fully set out in J.A.W.'s summary judgment memorandum. (Dkt. 88).

1. *It is undisputed that EVSC does not allow transgender students to use the bathrooms that are consistent with their gender identities and this is a longstanding practice or policy of the district*

It is undisputed that throughout the entirety of J.A.W.'s high school career, EVSC did not allow transgender students to use restrooms consistent with their gender identities. Thus:

- Although not a written policy, EVSC's position is that transgender students cannot use the restrooms associated with their gender identities because, as noted by EVSC's Superintendent at the preliminary injunction hearing, "[b]iological sex is the determining factor." (Dkt. 61 at 39 [ll. 7-8]).

- During J.A.W.'s sophomore year, EVSC's Chief Diversity Officer indicated that transgender students must "use the nurse's office or an individual/unisex bathroom." (Ex. 11 at 2 to Dkt. 50-2). It was this policy or practice that resulted, during J.A.W.'s freshman year a year earlier, in the school offering him the option of using either female restrooms or the individual bathroom in the nurse's office. (Dkt. 50-1 at 45 [l. 24] – 46 [l. 12]; Dkt. 17-1 ¶3).

- EVSC did not allow J.A.W. to use male restrooms within EVSC buildings because he was not considered by EVSC to be male. (Dkt. 61 at 39 [ll. 7-8, 14-17]).

2. *It is uncontested that EVSC was on notice throughout J.A.W.'s high school career that he was transgender and wanted to use male facilities*

It is therefore undisputed that throughout J.A.W.'s academic career, EVSC had in place a policy or practice that prevented him from using male facilities. It is also undisputed that he frequently notified school authorities that he was transgender and that he did not wish to use female facilities, but wanted to use male facilities. The undisputed facts establish that:

- when J.A.W. was in middle school, he dressed as a boy, adopted a boy's haircut, and informed EVSC employees that he wanted to be addressed by a male name and wanted to be referred to using male pronouns. (Dkt. 50-1 at 20 [l. 22] – 22 [l. 14]; 23 [ll. 4-13]).

- when J.AW. was a freshman in high school, after being caught changing for gym in a male restroom, he indicated that he was transgender and wanted to use male facilities. (*Id.* at 109 [l. 21] – 110 [l. 5]). He was informed by the dean that as far as gym was concerned, J.A.W. could change in an upstairs portion of the female locker room that was unlocked and open to other female students. (*Id.* at 37 [l. 16] – 41 [l. 22]). As far as restroom usage was concerned, school administrators indicated that his only options were female restrooms or the restroom in the nurse's office. (*Id.* at 45 [l. 24] – 46 [l. 12]; Dkt. 17-1 ¶ 13).

- when J.A.W. was a sophomore, both he and his mother had conversations with the principal of the high school about the restroom issue. (Dkt. 50-1 at 57 [l. 4] - 58

[l. 5]). J.A.W. spoke to the principal about the Obama administration's "Dear Colleague" letter that indicated that transgender students should be able to use bathrooms that align with their gender identity. (*Id.* at 57 [ll. 15-23]). He was told he could not use male restrooms. (Dkt. 17-1 ¶ 18).

- also when J.A.W. was a sophomore, he made the above-mentioned contact with EVSC's Chief Diversity Officer identifying himself as transgender, requesting information concerning EVSC's policy on transgender students' access to bathrooms and locker rooms. (Ex. 11 at 2 to Dkt. 50-2).

- in January of 2018, during his junior year, J.A.W.'s attorney requested that he be allowed to use male restrooms, only to be told that if J.A.W. used male restrooms, he would be subject to discipline. (Exs. 1 and 8 to Dkt. 50-2).

It is also undisputed that at no time prior to this litigation, although EVSC was aware that J.A.W. identified himself as transgender, did EVSC request that J.A.W. present evidence as to his transgender status or his diagnosis of gender dysphoria. (Dkt. 50-2 at 16 [l. 24] - 17 [l. 6]; Dkt. 61 at 20 [ll. 4-8]).

3. *It is uncontested that J.A.W. has been injured by EVSC's prohibition against using male restrooms*

In his summary judgment briefing, J.AW. outlined, in detail, the harm that is caused to transgender persons who are denied the ability to utilize bathrooms consistent with their gender identities. (Dkt. 88 at 7-9). EVSC does not deny any of these well-supported facts—they are uncontested.

Moreover, EVSC does not deny that prohibiting J.A.W. from utilizing male restrooms caused him both physical and emotional harm. It makes no attempt to counter the evidence that demonstrates that:

- being denied the ability to use male restrooms forced J.AW. to deny who he is, which made him feel different and segregated from his peers, causing stress, depression, anxiety, concern and psychological harm. (Dkt. 17-1 ¶ 34; Dkt. 50-1 at 112 [ll. 4-17]; Dkt. 87-1 ¶ 10).

- to avoid having to use the bathroom while at school J.A.W. severely restricted his fluid intake, causing him pain and discomfort. (Dkt. 17-1 ¶¶ 26-27).

- when he had to go to the bathroom while at school, and was forced to use female restrooms, he suffered discomfort, anxiety, depression, and other emotional difficulties, as he is not female. (Dkt. 17-1 ¶28; Dkt. 50-1 at 84 [ll. 6-9]; Dkt 61 at 19 [ll. 4-8]). He felt ostracized, which was extremely upsetting. (Dkt. 61 at 19 [ll. 4-8]).

4. *It is uncontested that there is little or no evidence that justifies EVSC's determination that J.A.W. could not use male restrooms*

EVSC has introduced no new evidence designed to support its decision denying J.A.W. access to restrooms consistent with his gender identity. It is therefore uncontested that:

- the only incident, prior to the preliminary injunction hearing, that EVSC was able to articulate to justify banning transgender students from restrooms that are consistent with their gender identities was an incident occurring years before, when a school custodian was upset when a female walked in on him while he was using the restroom. (Dkt. 50-2 at 28 [l. 11] – 29 [l. 8]).

- at the preliminary injunction hearing, EVSC's Superintendent stated that he had been informed that the mother of a student was upset that a transgender man had been in the bathroom with her daughter. (Dkt. 61 at 33 [ll. 10-17]). How this supports EVSC's position is not clear, as a "transgender man" is a person who was assigned the sex of female at birth (Dkt. 50-5 ¶21), like J.A.W., and it is EVSC's position that this person must use the female restroom.

- J.A.W.'s use of the male restrooms in the first semester of the 2018-2019 school year, after the issuance of the preliminary injunction and prior to his graduation, caused absolutely no incidents. (Dkt. 87 ¶ 9).

Argument

I. EVSC's refusal to allow J.A.W. to utilize male restrooms constitutes intentional discrimination in violation of Title IX

In opposition to J.A.W.'s Motion for Partial Summary Judgment, and in support of its Cross-Motion for Summary Judgment, EVSC raises two arguments regarding J.A.W.'s Title IX claim. First, it argues that prior to filing suit, J.A.W. was required to make some sort of "threshold showing" to EVSC of his entitlement to protection by Title IX and that he failed to do so. Second, citing the Spending Clause of the United States Constitution, EVSC contends that it lacked sufficient notice that its conduct could subject it to liability under Title IX.

A. No "threshold showing" is required to trigger the protections of Title IX

EVSC contends that in order to "trigger the protections" of Title IX, J.A.W. was required to make a "threshold showing" to EVSC of his entitlement to protection. (Dkt. No. 96 at 10). EVSC argues that "prior to engaging in discovery in this case, EVSC was presented with nothing more than Plaintiff's announcement that he is male" and his "unilateral demand for access to the boys' restroom." (*Id.*) This, EVSC argues, was "practically and legally insufficient" to trigger protection, and J.A.W. was required to provide "something more." (*Id.*) It is unclear whether EVSC argues that J.A.W. failed to provide notice of his desire to use the boys' restrooms, or rather that he failed to provide adequate proof of his transgender status. Because neither notice nor proof of status are

required to "trigger" the protections of Title IX regarding a discriminatory policy, both arguments fail.

Moreover, in light of EVSC's consistent policy to prohibit transgender students from using the restroom of their gender identity, this argument is not well-taken. Any request J.A.W. could have made to use the boys' restroom, in any form, even if accompanied by "proof" of his transgender status, would have been met with refusal, just as all of J.A.W.'s other requests were. Even after being provided with explicit notice of J.A.W.'s request and status in the form of a demand letter, a complaint, and discovery, EVSC only provided J.A.W. with access to the restroom that corresponds with his gender after this Court enjoined it to do so. It can hardly now suggest that J.A.W. was required to take actions that, the undisputed evidence here demonstrates, would have been futile.

EVSC cites no case law or other authority in support of its contention that a student must establish some sort of "threshold showing" before a public school is required to extend him the protections of Title IX. No such authority exists, of course, because the civil rights protections afforded by Title IX do not spring into effect only if a person specifically requests that they be provided. The Seventh Circuit has repeatedly concluded that, where a policy is what excludes a person from participation in, or the benefits of, an educational program or activity, it is the *policy itself* that violates Title IX. In *Whitaker*, for example, the Seventh Circuit specified 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. … it is the policy itself which violates the Act." *Whitaker*, 858 F.3d at 1050; *see also Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 583 (7th Cir. 2014) (finding an intent to discriminate attributable to the school district and that "[t]he discrimination at issue here takes the form of a school policy"). It is uncontested that throughout the entirety of J.A.W.'s high school career, EVSC's policy did not allow transgender students to use restrooms consistent with their gender identities.

To the extent that EVSC argues that J.A.W. was required to establish a threshold evidentiary showing of his gender (or his transgender status) in order to be entitled to the protections of Title IX, again, it provides no authority to support such a contention. That is not surprising as the Seventh Circuit's discussion in *Whitaker* applies here with equal force, and it forecloses EVSC's argument. There, the court took issue with the school district's repeated assertions that the student, Ash, had "unilaterally declare[d]" his gender, stating that "this argument misrepresents Ash's claims and dismisses his transgender status." *Whitaker*, 858 F.3d at 1050. The court stressed that:

> [t]his is not a case where a student has merely announced that he is a different gender. Rather, Ash has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity. This law suit demonstrates that the decision to do so was not without cost or pain. Therefore, we find that Ash has sufficiently established a probability of success on the merits of his Title IX claim.

Id. The same is true here.

J.A.W. has been diagnosed with gender dysphoria and has consistently lived in accordance with his gender identity (a fact of which EVSC was undisputedly aware) since eighth grade. Notably, in *Whitaker* the Seventh Circuit did not frame its discussion of the student's gender identity in terms of what the school knew regarding his transition or his diagnosis of gender dysphoria. Instead, the court inquired as to what was factually true about him and his gender identity.[1] The circumstances are identical here. While EVSC in its briefing refers to J.A.W. as having provided only a "mere announcement" of his gender identity and a "unilateral demand" to use the boys' restrooms, that misrepresents J.A.W.'s claims and dismisses his transgender status. No "threshold" evidentiary showing is required under Title IX, but to the extent that evidence of gender is relevant at all, this case mirrors the Seventh Circuit's findings in *Whitaker*.

Finally, in response to a similar argument made by EVSC in its motion to dismiss, J.A.W. highlighted the untenable consequences that would flow from an adoption of EVSC's "threshold showing" argument. EVSC appears to argue that if a school had a policy refusing to allow black children into the restroom (in the analogous Title VI context), a student who did not use the restroom because of that policy could only raise a claim for damages if he formally requested to enter the restroom and was denied. That

[1] To the extent that EVSC argues that a gender dysphoria diagnosis is a necessary condition for a finding of discrimination, *Whitaker* did not so hold. *Whitaker* drew from case law developed in the Title VII context, in which non-transgender employees have been punished for failing to conform to sex stereotypes associated with their genders—for example, a woman presenting as "too masculine" or a man presenting as "too feminine." *See Whitaker*, 858 F.3d at 1054.

is clearly wrong, as the policy itself violates Title IX, and is, by its designed operation, injurious to those affected.

B. Even if an evidentiary showing were required, the timeline of events supports a claim for damages

J.A.W. has outlined above, as a legal matter, why EVSC's "threshold showing" argument fails as a matter of law. But even if EVSC were correct in asserting that some sort of notice or evidence were required in order for a Title IX claim to "accrue," the undisputed factual evidence establishes that EVSC has long been aware of J.A.W.'s transgender status and of his repeated requests to use the boys' restrooms. EVSC contends that, prior to engaging in discovery, it was "presented with nothing more than Plaintiff's announcement that he is male," and therefore that no claim accrued prior the entry of a preliminary injunction. (Dkt. 96 at 10). Specifically, it states that "it 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." (Dkt. 96 at 10). In addition to misunderstanding the applicable law, as detailed already, this argument misconstrues the undisputed factual evidence.

EVSC does not dispute that, by eighth grade, J.A.W. consistently presented himself to the world as male. He began dressing and grooming as a boy, and he informed EVSC employees that he wanted to be known by a boy's name and male pronouns—a request to which they undisputedly agreed. During his freshman year of high school, J.A.W. and his mother met with an EVSC social worker to discuss J.A.W.'s discomfort with using

female locker rooms. After being denied access to the boys' restroom to change clothes, he and another transgender student were given access to a separate portion of the female locker room. At around this time, J.A.W. identified himself as transgender and again asked to use the male facilities. He was again denied access, and was given the option to use the restroom in the nurse's office. He attempted to use that restroom several times, though ultimately gave up, because it was always locked.[2]

During his sophomore year, he presented his principal with a copy of the Obama administration's "Dear Colleague" letter, which specified that the administration interpreted Title IX to require that transgender students be allowed to use restrooms consistent with their gender identities. After his request was again refused, his mother called to discuss the matter with the school principal. In November 2016, J.A.W. sent an email to EVSC's Chief Diversity Officer, identifying himself as transgender and asking for EVSC's policy on restroom and locker room use. Again, he was told that transgender students must use the nurse's office or individual/unisex restrooms. In January 2018, J.A.W. formally requested, through his attorney, access to the boys' restrooms, and that request was refused in early February. He filed this Complaint in February 2018.

[2] EVSC faults J.A.W. for not complaining about the restroom's locked status, or its distant location from his classrooms. Presumably, EVSC was aware of the location of the restroom and the fact that it was kept locked. But in any event, as described above, EVSC's policy prohibited J.A.W. from using the boys' restrooms, so it is unclear what difference EVSC alleges this notification would have made.

It is worth pausing here to note that EVSC does not dispute the record evidence that, on multiple occasions prior to the commencement of litigation, J.A.W.'s mother discussed the restroom issue with EVSC officials. In any event, to the extent that EVSC claims that "parental support" for restroom access is a necessary prerequisite to the accrual of a claim for damages, it cites no authority for that proposition. Most importantly, it is undisputed that even if J.A.W.'s mother had sent multiple written demands that her son be allowed to use the bathroom, the requests would have been denied because EVSC considered J.A.W. to be biologically male.

Likewise, EVSC's description of J.A.W.'s communications as simply "announcement[s] that he is male" mischaracterizes the record evidence. J.A.W. informed EVSC on multiple occasions that he is transgender. EVSC appears to fault J.A.W. for not providing it with a record of his gender dysphoria diagnosis or information about his hormone therapy. But EVSC fails to provide any argument or evidence showing that information was relevant to its decision-making, or indeed would have been considered at all. First, if proof of a diagnosis of gender dysphoria were required by EVSC in order to establish a student's transgender status, EVSC could have requested that information from J.A.W. on one of the many occasions in which J.A.W. informed EVSC that he is transgender. It did not do so.

Second, the evidence is clear that even if J.A.W. had presented proof of his diagnosis of gender dysphoria, it would have made no difference, as he still would have

been denied use of the male restrooms. The Superintendent outlined two possible policies, and neither of which consider gender dysphoria. (*See* Dkt. 50-2 at 26 [ll. 18-20]; 27 [ll. 8-12]; 28 [ll. 2-10]; 32 [ll. 6-12]; Dkt. 61 at 39 [ll. 7-8], policy relying upon the anatomy a person was assigned at birth; *and* Dkt. 61 at 40 [l. 19] – 41 [l. 7], relying on the gender marker on a student's birth certificate). EVSC has also stated that if a transgender student attempted to use the restroom of his or her gender identity without having undergone sex-reassignment surgery, the student could still be banned from that restroom if the school deemed it to be disruptive, even if the gender marker had been changed on the student's birth certificate. (Dkt. 61 at 54 [ll. 5-25]). In short, none of EVSC's cited policies include permission based upon knowledge of a diagnosis of gender dysphoria.

J.A.W. was not required to make a "threshold showing" to trigger the protections of Title IX, but even if he were, the undisputed evidence establishes that he did so here.

C. EVSC had ample notice that the conduct at issue could subject it to liability under Title IX

The Supreme Court has made clear that "because Title IX was enacted pursuant to the Spending Clause, private damages [are] available against a funding recipient only if it had adequate notice of its potential liability." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999). EVSC contends that it lacked adequate notice of any potential liability because Title IX does not explicitly define the term "sex" to encompass gender identity. In support of that argument, it cites two cases from the Western District of

Pennsylvania as evidence that courts have come to different conclusions regarding whether "sex" encompasses gender identity. (Dkt. 96 at 11).

A recipient of federal funding need not be certain that its conduct will render it liable—it need only be aware of its "potential liability." Unanimity in the case law is not necessary to demonstrate "potential liability," so the suggested significance of the Pennsylvania district court cases is unclear. But EVSC had more than "adequate notice of its potential liability" since at least the date that *Whitaker* was decided, May 30, 2017.

Even before that date, a number of other courts had reached the same conclusion regarding discrimination on the basis of sex. *See, e.g., Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016); *Carcano v. McCrory*, 203 F. Supp. 3d 615, 639 (M.D.N.C. 2016). Subsequent cases have confirmed the same. *See, e.g., Grimm v. Gloucester Co. Sch. Bd*, 302 F. Supp. 3d 730 (E.D. Va. 2018); *M.A.B. v. Bd. of Ed. of Talbot Co.*, 286 F. Supp. 3d 704 (D. Md. 2018); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. 2017); *see also Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Ore. 2018), *appeal pending*, No. 18-35708 (9th Cir. 2018) (in action challenging a high school's policy allowing transgender students to use restrooms, locker rooms, and showers matching their gender identities the court concluded that "[a] court order directing the District to require students to use only facilities that match their biological sex or to use gender-neutral alternative facilities would violate Title IX").

Moreover, J.A.W. himself notified EVSC of the Obama Administration's "Dear Colleague" letter, issued on May 13, 2016, in which the Departments of Justice and Education provided their guidance that Title IX and its regulations prohibit sex discrimination on the basis of gender identity, including discrimination based on a student's transgender status.[3] EVSC represents that it reviewed that letter with its counsel and determined that it would not follow the letter's guidance.

Ample case law from the analogous Title VII context also put EVSC on notice that sex stereotyping was a recognized form of sex-based discrimination. *See Hively v. Ivy Tech Comty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017) (recognizing gender discrimination in violation of Title VII when an adverse employment action is taken on the basis of an employee's failure to conform to sex stereotypes); *see also Valentine Ge v. Dun & Bradstreet, Inc.*, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, 2016 WL 6986346 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008). As noted in *Whitaker*, the Seventh Circuit and other courts often look to Title VII in construing Title IX, and as the above cases demonstrate, courts have long recognized transgender individuals as subject to the coverage of Title VII. *See Whitaker*, 858 F.3d at 1047.

[3] That the guidance was later withdrawn is not relevant to EVSC's notice as to potential liability.

In light of all of these events, spanning several years prior to this litigation, EVSC had ample notice from a variety of sources that its denial of J.A.W.'s access to the boys' restroom could subject it to liability under Title IX. The evidence is undisputed that EVSC had an official policy that banned J.A.W. from the bathrooms that were consistent with his gender identity, and that policy was predicated on treating him differently because of gender non-conformance. This policy renders EVSC liable for damages under Title IX. *See, e.g., Doe 12 v. Baylor Univ.*, 336 F. Supp. 3d 763, 774 (W.D. Tex. 2018) ("The first avenue for claims under Title IX is based on an institution's official policy of 'intentional discrimination.'").

* * * * *

For all of these reasons, and for the reasons articulated in J.A.W.'s brief in support of his Motion for Summary Judgment, J.A.W. requests that the Court grant his Motion as to the Title IX claim and deny EVSC's Cross-Motion as to that claim.

II. J.A.W. is entitled to summary judgment on his equal protection claim, both on the merits and because EVSC has waived any argument in opposition

J.A.W. has also moved for summary judgment on his equal protection claim and supported that Motion with citations to legal authority and admissible evidence. (Dkt. 88 at 26-32). In its Cross-Motion for Summary Judgment, EVSC appears to request that it be granted summary judgment as to J.A.W.'s equal protection claim, stating that there are no genuine disputes of material fact as to whether J.A.W.'s rights were violated. (Dkt.

95 at 1). In its supporting brief, however, EVSC makes no argument as to the equal protection claim at all—either in opposition to J.A.W.'s Motion or in support of its own.[4]

As to J.A.W.'s Motion on this claim, well-established case law makes clear that the failure to respond to an argument constitutes waiver. *See, e.g., Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010). And as the summary judgment standard makes clear, the "non-moving party bears the burden of specifically identifying the relevant evidence of record, and the court is not required to scour the record in search of evidence to defeat a motion for summary judgment." *Castelino v. Rose-Hulman Inst. of Tech.*, No. 2:17-cv-139-WTL-MJD, 2019 WL 367623, at *1 (S.D. Ind. Jan. 30, 2019) (citing *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001)). EVSC has neither responded to J.A.W.'s legal arguments in support of summary judgment, nor pointed to admissible evidence to defeat such a Motion. Likewise, EVSC has provided no legal argument or citations to admissible evidence in support of its Motion for Summary Judgment as to the equal protection claim. *See* Fed. R. Civ. P. 56(c)(1); S.D. IN L. R. 56(h).

To the extent that there is any need to respond to EVSC's non-articulated argument, J.A.W. reiterates here the arguments raised in his brief in support of summary judgment. (Dkt. 88 at 26-32). Regardless of what level of scrutiny applies to evaluate EVSC's actions, there is simply no evidence to support EVSC's proffered justifications for

[4] The only substantive discussion of equal protection appears in footnote 3 of EVSC's brief, in which EVSC contends only that *Whitaker*'s discussion of the equal protection claim was "likely dicta." (Dkt. 96 at 9).

prohibiting J.A.W.'s access to the boys' restroom—fear of disruption and concerns regarding safety. Indeed, the undisputed record evidence establishes that J.A.W. physically presents as male, and unsurprisingly, female students have expressed discomfort with him using the girls' restrooms. Moreover, there is no record evidence indicating that J.A.W. poses a threat to any other student.

For these reasons, J.A.W requests that the Court grant his Motion as to his equal protection claim and deny EVSC's Cross-Motion as to that claim.

Conclusion

There are no disputed issues of material fact in this case. EVSC has engaged in intentional discrimination against J.A.W. in violation of both Title IX and the Equal Protection Clause. J.A.W. requests that the court enter partial summary judgment against EVSC, finding it liable for J.A.W.'s damages. J.A.W. further requests that the court set a trial to determine the amount of his damages.

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