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 CROSS-MOTION FOR SUMMARY JUDGMENT

The Evansville Vanderburgh School Corporation ("EVSC"), submits this Reply Brief in Support of its Cross-Motion for Summary Judgment.

I. Introduction

In 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 ("Plaintiff's Response" or "Response"), Plaintiff asserts that despite the fact that his mother enrolled him in EVSC schools as a girl, he was legally entitled to access the boys restrooms at school based on nothing more than his own declaration that he is in fact a boy, and that "neither notice nor proof of status are required[.]" Dkt. No. 97 at 6-7. He now demands money damages. As explained in EVSC's Combined Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment ("EVSC's Brief") and this reply, Plaintiff's rights under Title IX and the Equal Protection Clause were not violated, and he is therefore not entitled to damages.

1. EVSC has addressed Plaintiff's equal protection claim.

In his Response, Plaintiff claims that "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." Dkt. No. 97 at 17. Even a cursory review of EVSC's Brief reveals this statement to be untrue. The main focus of EVSC's Brief was whether and when Plaintiff's right to use the boys' restrooms accrued—it is EVSC's position that no such right could have possibly accrued until after the end of Plaintiff's junior year and prior to this Court's entry of the preliminary injunction permitting him such access. This argument applies with equal force to Plaintiff's Title IX and Equal Protection claims, and EVSC clearly argued as much. Dkt. No. 96 at 2, 7-10. Plaintiff is not entitled to judgment in his favor on the Equal Protection claim on the basis of waiver.

2. It is undisputed that Plaintiff's mother never requested that he be permitted to use the boys' restrooms at school.

Plaintiff claims that "EVSC does not dispute the record evidence that, on multiple occasions prior to the commencement of litigation, [Plaintiff's] mother discussed the restroom issue with EVSC officials." Dkt. No. 97 at 12. Plaintiff is incorrect; EVSC emphatically disputes this misleading characterization of the evidence.

In his Response, Plaintiff mentions a "conversation" he claims his mother had with EVSC administrators concerning Plaintiff's restroom access. As an initial matter, it is far from clear that Plaintiff has personal knowledge that any such conversation actually took place. The only evidence Plaintiff has cited in support of the assertion that such a conversation took place is a short excerpt from his own deposition in which he testified that his mother called the North High School Principal following Plaintiff's conversation with him regarding the now-rescinded "Dear Colleague" letter, and that Plaintiff believed the conversation had to do with his restroom access. Dkt. No. 50-1 at 57-58. EVSC Superintendent Dr. David Smith testified that Plaintiff's

mother had a conversation with the principal of North High School, but that the principal did not recall what they talked about. Dkt. No. 50-2 at 15.

Plaintiff also claims that during his freshman year, he and his mother met with an EVSC social worker to discuss his discomfort using the girls' locker room, but he cites no evidence in support of this assertion. Dkt. 97 at 10-11. Nevertheless, EVSC notes that in his deposition, Plaintiff testified that in the eighth grade, he spoke to a school social worker regarding his discomfort in the girls' locker room and that his schedule was changed as a result. Dkt. No. 50-1 at 19-20. There is no indication that Plaintiff's mother was present for that conversation. Instead, Plaintiff testified that his mother "talked to the office." *Id.* at 19. Regardless, Plaintiff has not claimed that his mother requested he be permitted access to the boys' locker rooms or restrooms at that time. EVSC is unaware of any other relevant conversations Plaintiff claims his mother had with EVSC administrators or teachers.

Conspicuously absent from Plaintiff's Response is any description of the content of his mother's alleged conversations with EVSC officials and what, if anything, she requested of them. Plaintiff has admitted that his mother never asked EVSC to permit him to use the boys' restrooms at school. Dkt. No 61 at 15. Dr. Smith testified that EVSC received no such request from Plaintiff's mother and that she never complained to EVSC regarding its handling of Plaintiff's requests. Dkt. No 50-2 at 15; Dkt. No 61 at 26-27, 35, 58. The fact that Plaintiff's mother made no such request speaks volumes; it was reasonable for EVSC to view her silence as an indication that she did not support Plaintiff's requests for access to the boys' restrooms at that time.[1]

[1] Indeed, even Plaintiff testified that his mother had been "on and off supportive" of his gender transition. Dkt. No. 50-1 at 67.

3. To recover damages, Plaintiff must establish a violation of his rights.

Plaintiff also seems to suggest that he is not required to establish that he had a statutory or constitutional right to access the boys' restrooms. According to Plaintiff, he need only establish that EVSC's policy (or, more accurately, its unwritten practice) was discriminatory. In support, he quotes *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1049-50 (7th Cir. 2017), out of context for the proposition that "it is the policy itself which violates the Act."[2] Again, as already noted in EVSC's Brief, the court in *Whitaker* considered whether the plaintiff was entitled to preliminary injunctive relief—damages were not in issue. Consequently, *Whitaker* cannot be read to support the proposition that Plaintiff can recover damages based solely on the existence of a discriminatory policy, without also showing that the policy violated his rights. Indeed, if this Court accepts Plaintiff's reasoning in this regard, there would be no principled reason to limit recovery to transgender students. If the mere existence of a bad policy is enough to entitle a plaintiff to damages even in the absence of any showing that the policy violated the individual plaintiff's rights, then any student could recover damages based on any bad policy. This is, of course, not the law. Any entitlement to damages must flow from a violation of Plaintiff's rights.

4. *Whitaker* supports EVSC's argument that some "threshold showing" is required to trigger the rights established in *Whitaker* for transgender children.

Plaintiff argues that EVSC could not lawfully require him to present any evidence of his transgender status—his mere announcement that he is transgender was legally sufficient to entitle him to access the boys' restrooms. Plaintiff also claims that EVSC failed to cite authority

[2] Plaintiff also cites *Hayden v. Greensburg Cmty. Sch. Corp*., 743 F.3d 569, 583 (7th Cir. 2014), but he develops no argument based on that case. EVSC nevertheless notes that *Hayden* does not support the proposition for which Plaintiff cites it. In that case, a student was kicked off of the basketball team for refusing to comply with a discriminatory grooming policy. In other words, he established a violation of his rights resulting from the policy; the court did not award damages based on the mere existence of a discriminatory policy.

or case law to support its argument that schools may require students to present some evidence of their transgender status prior to granting their requests for access to restrooms inconsistent with the sex their parents have reported to the school. EVSC, however, has drawn this argument directly from *Whitaker*, as explained in EVSC's Brief.

Plaintiff also claims that even if he had made such a threshold showing, he would not have been permitted to access the boys' restrooms. He goes so far as to claim that "it is undisputed that even if [Plaintiff'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 [Plaintiff] to be biologically male." Dkt. No. 97 at 12. He also asserts that "the evidence is clear that even if [Plaintiff] 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." *Id.* at 12-13.

Plaintiff has, again, failed to cite anything in the record supporting these wildly speculative (and vigorously disputed) assertions. The fact of the matter is that EVSC received no such evidence or requests. Plaintiff asks this Court to imagine a completely different set of facts and hold EVSC liable for damages based on his ideas of how EVSC would have responded. It is impossible to determine in hindsight how EVSC would have handled this case had it received relevant medical information or if there had been significant parental involvement. EVSC's willingness to accommodate Plaintiff's other requests—such as calling him by his chosen name rather than his legal name and referring to him by masculine pronouns—suggest far more responsiveness than Plaintiff is willing to acknowledge.

As Dr. Smith testified, EVSC has no written policy concerning restroom access for transgender students, and this is the first time EVSC has had to confront this issue. Dkt. No. 61 at 37, 51-52. The law regarding the rights of transgender students is in its earliest developmental

stages. In the absence of clear legislative guidance, EVSC, like numerous other public school corporations across the country, is grappling with how to translate case law into viable school policies. As this case so clearly illustrates, this is no simple task. But this Court is not being asked to determine whether EVSC developed a good policy. It is being asked to determine whether Plaintiff's rights under Title IX and the Equal Protection Clause were violated. As explained in EVSC's Brief, neither Title IX nor the Equal Protection Clause prohibit schools from requiring a threshold showing before permitting children who declare that they are transgender access to restrooms inconsistent with the sex their parents have reported to the school.[3]

5. Plaintiff did not make the necessary threshold showing.

Plaintiff also argues that even if some threshold showing may be required, he made such a showing. The basis for this claim is unclear. Plaintiff takes issue with EVSC's argument that Plaintiff merely announced that he is a boy, but his only response is that he "informed EVSC on multiple occasions that he is transgender." Dkt. No. 97 at 12. Plaintiff has made no attempt to explain why the fact that he made more than one announcement that he is a transgender boy should change the analysis in any way. Plaintiff also faults EVSC for not requesting medical information to establish his transgender status, but he has cited nothing to support a conclusion that Title IX or the Equal Protection Clause places the burden on EVSC to do so.

6. Plaintiff's argument by analogy to race-segregation is based on a false equivalency.

Plaintiff claims that a requirement of some "threshold showing" before a child must be treated for the purposes of restroom access as a sex other than that reported to the school district

[3] This Court may take judicial notice of the fact that during the briefing period, the Indiana Bureau of Motor Vehicles has administratively adopted a non-binary choice for "sex" on its driver's license applications. An individual wishing to claim "x" must provide the bureau with an amended birth certificate or, as here, a supporting medical diagnosis before the new status will be granted.

by the child's parent would result in "untenable consequences[.]" Dkt. No. 97 at 9. Plaintiff does not explain what those consequences might be. Instead, he merely repackages an analogy to racial segregation he made in his proposed Surreply to Defendant's Reply Brief in Support of Second Motion to Dismiss. Dkt. No. 92-2 at 6-7. Specifically, he suggests that EVSC's rationale would mean that if a school "had a policy refusing to allow black children into the restroom . . ., 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." Dkt. No 97 at 9.

Despite best efforts, EVSC has been unable to make sense of this analogy. As an initial matter, it is undisputed that EVSC has never refused Plaintiff access to a restroom at school. Through the end of his junior year, Plaintiff was permitted to use the girls' restrooms and a gender-neutral restroom in the nurse's office. During his senior year, Plaintiff was permitted to use the boys' restrooms. Thus, an analogy to a policy barring certain students from the restroom altogether is specious and of no relevance here.

More fundamentally, it is plainly unlawful for schools to segregate restrooms on the basis of race, but it is plainly lawful for schools to segregate restrooms on the basis of sex. The question at issue is when, if ever, EVSC was required by Title IX and the Equal Protection Clause to classify Plaintiff as a boy for the purposes of restroom access. As argued in EVSC's brief, *Whitaker* acknowledged that some "threshold showing" may be required to change a child's sex classification from female to male or vice versa.

Further, Plaintiff's argument overlooks the inherent difference between race and transgender status. Unlike race, being transgender by definition involves a change—a *transition*—from one status to another. Social role transition, which Plaintiff seems to acknowledge is a prerequisite to a transgender student's right to access sex-segregated spaces

consistent with his or her gender identity, is a process that does not happen overnight. Moreover, regardless of the child's wishes, it is the right of a transgender child's parent to decide whether social role transition is medically, psychologically, and developmentally appropriate. Simply put, Plaintiff's analogy is unpersuasive sophistry because it compares apples to oranges.

7. It is Plaintiff's position that would result in "untenable consequences."

Further, if the possibility of undesirable consequences dictates the outcome in this case, EVSC should prevail. If schools are to continue providing separate boys' and girls' restrooms and locker rooms—as they are required to do by Indiana law[4]—they must be permitted to exclude boys from the girls' restrooms and vice versa. Plaintiff has never directly challenged the lawfulness of separate restrooms for boys and girls; instead, he argues Title IX and the Equal Protection Clause require schools to define "boy" and "girl" in terms of currently professed and subjective gender identity as opposed to anatomical sex and/or the sex reported to the school district by the child's parents. But if schools are required to simply accept students' declarations of their gender identity without parental consent or supporting evidence, schools will be stripped of the ability to enforce their rules regarding restroom and locker room access. In effect, schools will no longer be able to maintain separate facilities for boys and girls.

Plaintiff seeks to minimize this concern by noting that he has "consistently lived in accordance with his gender identity (a fact of which EVSC was undisputedly aware) since eighth grade." Dkt. No. 97 at 9. But even this position recognizes the importance of something beyond a mere declaration, i.e., EVSC's purported awareness that Plaintiff had been living "in accordance with his gender identity" for some length of time.

[4] *See* 410 Ind. Admin Code § 6-5.1-5(s) (requiring schools to provide separate restrooms and locker rooms for each sex).

As to EVSC's awareness that Plaintiff had been living "in accordance with his gender identity," Plaintiff makes no attempt to explain what exactly that means. Although Plaintiff has requested to be called by his chosen masculine name and masculine pronouns and he has adopted stereotypically male dress and grooming habits, it is undisputed that his birth certificate and driver's license (obtained in October 2017) list his legal name and show his sex as female. Dkt. No. 50-1 at 109.

To the extent Plaintiff has suggested that he must be permitted access to the boys' restrooms because he looks stereotypically male, the problems inherent in requiring schools to take such an approach are obvious. As an initial matter, Plaintiff has admitted that he has not always "looked male." According to Plaintiff, he "didn't pass" during his freshman year, meaning he "looked female" because he had not yet "medically transitioned." Dkt. No 50-1 at 87, 105. Plaintiff did not begin hormone replacement therapy until his junior year of high school. Dkt. No. 17-1 at 3. It is unclear when the hormones began to take effect, and it is impossible to determine in retrospect at what point Plaintiff crossed the line between appearing female to appearing male.

Regardless, it would be unseemly (and almost certainly unlawful) for school personnel to make restroom assignments based on their perceptions of individual students' outward appearances. Many cisgender individuals present themselves in a manner that challenges gender norms, and transgender people may not always have an appearance consistent with their gender identity. The only workable solution is to allow schools to rely on some objective criteria such as birth certificates, passports, immigration documents, medical records, and other enrollment documents provided by parents as a proxy for gender. *Whitaker* does not prohibit such an approach—at most, it may require schools, under certain circumstances and in consultation with

parents, to deviate from their default reliance on such documentation in order to address the medical and psychological needs of individual transgender students. Here, Plaintiff's mother never asked EVSC to take that step. Tellingly, she has refused to be a party to this lawsuit.

8. Plaintiff's Spending Clause analysis supports EVSC's argument.

Finally, Plaintiff dismisses EVSC's alternative argument with respect to the Title IX claim based on the Spending Clause, claiming that EVSC had "ample notice" that the conduct at issue could subject it to liability. It is worth noting that Plaintiff's argument in this regard makes no mention of the relevant statutory language. Rather, it relies solely on case law, and all but two of the cases cited are federal district court decisions. Reliance on such case law is insufficient because it "untethers notice from the statute." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 192, 125 S. Ct. 1497, 1515 (2005) (Thomas, J., dissenting).

Regardless, the case law Plaintiff cites does nothing to advance his position on the Spending Clause issue. In *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 301 (W.D. Pa. 2017), the court found that the question of whether Title IX required schools to permit transgender students to access the restrooms consistent with their gender identities was "so clouded with uncertainty" that the plaintiffs could not make the minimal showing necessary to establish likelihood of success on the merits of that claim. Thus, *Evancho* supports EVSC's position.

Further, *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 744 (E.D. Va. 2018); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704 (D. Md. 2018); *Parents for Privacy v. Dall. Sch. Dist. No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018), *appeal pending*, and *Doe v. Baylor Univ.*, 336 F. Supp. 3d 763 (W.D. Tex. 2018), were all decided after this litigation was commenced and

therefore cannot establish that EVSC had notice prior to that time. Moreover, the recentness of this case law underscores the fact that the law in this area is in its infancy.

The remaining cases Plaintiff cites for the proposition that EVSC had sufficient notice that its restroom policy could violate Title IX did not address Title IX and had nothing to do with restroom access for transgender students. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017); *Ge v. Dun & Bradstreet*, No. 6:15-cv-1029-Orl-41GJK, 2017 U.S. Dist. LEXIS 9497 (M.D. Fla. Jan. 24, 2017); *Roberts v. Clark Cnty Sch. Dist*., 215 F. Supp. 3d 1001 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn*., 172 F. Supp. 3d 509 (D. Conn. 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc*., 542 F. Supp. 2d 653 (S.D. Tex. 2008).

Although courts will often look to Title VII cases when interpreting Title IX, such cases are not relevant to a school's notice of its potential liability under Title IX. But even if this Court is inclined to consider Title VII case law in determining whether EVSC had adequate notice, the results in such cases have not been uniform. *See, e.g., Ulane v. E. Airlines*, 742 F.2d 1081 (7th Cir. 1984) (holding that Title VII does not prohibit discrimination against transgender people). Further, to the extent Plaintiff suggests that the mere existence of the "sex-stereotyping" theory of sex discrimination should have put EVSC on notice that its conduct might violate Title IX, Plaintiff cannot reasonably dispute that *Whitaker* represents a novel application of that theory, if not an outright extension thereof. *See Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 339 (5th Cir. 2019) (Ho, J., concurring) (describing flawed reasoning behind application of the sex-stereotyping theory to a Title VII claim alleging disparate treatment based on transgender status, noting that "sex stereotyping is actionable only to the extent it provides evidence of favoritism of one sex over the other").

The only case Plaintiff has cited that could possibly be said to give EVSC notice of a potential Title IX violation is *Whitaker,* which was decided near the end of Plaintiff's sophomore year. A petition for certiorari remained pending in that case until March 5, 2018—after this litigation was commenced. *See Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker,* 138 S. Ct. 1260 (2018) (dismissing petition for writ of certiorari). Under these facts and circumstances, Plaintiff cannot establish that EVSC had the requisite clear and unambiguous notice that its conduct might violate Title IX.

Conclusion

The undisputed material facts in this case establish that EVSC did not violate Plaintiff's rights under Title IX or the Equal Protection Clause when it denied his unilateral demands for access to the boys' restrooms based on nothing more than his declaration that he is a boy, made in the face of his mother's declaration, made at the time of his enrollment, that he is a girl. EVSC is entitled to judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 14th day of March, 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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