

Transgender Students and Sex-Segregated Facilities: Why School Leaders Might Rethink Litigation

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ABSTRACT

There have been at least ten court cases involving transgender students who have alleged that school districts have engaged in discriminatory practices when the students were not permitted to use the restroom that aligned with their gender identities. All of these cases have generally ended in a favorable outcome for the transgender students. Not every jurisdiction has examined this issue, however. Thus, some school districts do not have existing precedent to rely upon when creating school policy involving restroom access for transgender students.

This article examines a recent case involving a school district that continued to defend a lawsuit involving a transgender student who sought to use the restroom that aligned with his gender identity. The outcome of this 2019 federal district court decision was reasonably expected. First, the student in this case had already been granted a preliminary injunction by the district court in an earlier proceeding, allowing him to use the facilities that aligned with his gender identity. Also, only two years earlier, a federal circuit court of appeals, the decisions of which were binding in the student's state, also granted another transgender student's motion for a preliminary injunction in a case with similar facts. This article analyzes why a school district might pursue litigation even when the weight of the precedent appeared to be against it.

INTRODUCTION

Most organizations try to avoid costly and time-consuming litigation. In addition to cost and time, they might shun the negative publicity that sometimes accompanies lawsuits (Schwartz, 2015). Due to these concerns, it is not surprising that the majority of cases in the United States settle (see Allison, 1990) or that legal action is sometimes not pursued (see Galanter, 1974). As such, it could reasonably be assumed that organizations, including schools, would only pursue or defend lawsuits that were clearly in their best interests. And, that they would not engage in litigation when the weight of the precedent appeared to be against them. Band (2009), however, contends that some organizations might pursue litigation out of principle—even when it may defy common sense.

This article examines a recent case where school officials continued to defend a lawsuit even though the weight of the precedent appeared to be against them. To illustrate, an Indiana federal district court's decision in 2019 resulted in a favorable outcome for a transgender

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student who wanted to use sex-segregated school facilities that aligned with his gender identity (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2019). The outcome of this 2019 decision was reasonably expected. First, the student in this case had already been granted a preliminary injunction¹ in an earlier proceeding, allowing him to use the facilities that aligned with his gender identity (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018). In that 2018 proceeding, the district court stated that the student “clearly met” that he was likely to succeed on the merits of the case (p. 1036). Also, only two years earlier, the Seventh Circuit Court of Appeals, the decisions of which are binding in Indiana, also granted another transgender student’s motion for a preliminary injunction in a case with similar facts (*Whitaker v. Kenosha Unified School District*, 2017). The appellate court found that denying this transgender student access to facilities that aligned with his gender identity violated both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 (*Whitaker v. Kenosha Unified School District*, 2017). In fact, every court across the nation that has examined similar access cases that specifically involved a K-12 transgender student has generally ended in a favorable result for the transgender student (see Eckes & Lewis, 2019).

Nevertheless, the school district pursued this litigation, presumably costing tax payers thousands of dollars. In this study, the school district’s arguments for defending this lawsuit and the court’s ruling are analyzed. With a greater understanding of this area of law, school officials may rethink such actions and save their districts financial resources by avoiding unnecessary litigation. At the same time, as the research suggests, school districts will be working in the best interest of all students when transgender students are permitted to use sex-segregated facilities that align with their gender identities. In order to provide some necessary context, both earlier litigation involving transgender students and relevant literature are discussed.

¹ A court might grant a request for a preliminary injunction if the facts demonstrate that there will be irreparable injury or that loss will result before a full judgment on the merits takes place. The usual role of a preliminary injunction is to help preserve the status quo pending the outcome of litigation. However, the judge is also deciding whether there is a reasonable probability that the plaintiffs will prevail on the merits, and oftentimes the judge’s reaction to a preliminary injunction provides insight into to the entirety of the litigation (Eckes & Lewis, 2019). When seeking a preliminary injunction, the plaintiff must demonstrate that there is a likelihood of success on the merits; that there is a likelihood of suffering irreparable harm without preliminary relief; that the balance of equities favors preliminary relief; and that the injunction is in the public interest (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018).

CONTEXT: EARLIER LITIGATION

Other studies have reviewed the outcomes of related litigation involving access issues for transgender students in different jurisdictions (Eckes & Lewis, 2019; Fetter-Harrott, Decker, & Eckes, 2019). Table A provides an overview of each case outcome by jurisdiction, and unlike these earlier studies, Table A includes more recent cases. Cases involving higher education (see, e.g., *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 2015) or those that settled after the complaint was filed (see, e.g., *Doe v. Volusia Cnty. Sch. Bd.*, 2018) were not included in Table A.

Table A: Transgender Access Claims

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>N.H. v. Anoka-Hennepin</i> , 2019	State Court in Minnesota	State Constitution's Right to Due Process and Equal Protection	State court denied school district's motion to dismiss a transgender student's complaint.
<i>Grimm v. Gloucester Cnty. Sch. Bd.</i> , 2019	Fourth Circuit Court of Appeals (MD, SC, NC, VA, WV); Subsequent Federal District Court Included Here	Title IX and Equal Protection	District court denied the school district's motion for summary judgment; transgender student alleged Title IX and equal protection claim.
<i>M.A.B. v. Bd. of Educ.</i> , 2018	Federal District Court in Maryland	Title IX and Equal Protection	District court denied the school district's motion to dismiss the student's claims; student sufficiently plead a Title IX and equal protection claim. Student's motion for preliminary injunction denied without prejudice.
<i>Adams v. Sch. Bd.</i> , 2018	Federal District Court in Florida	Title IX and Equal Protection	District court found school official violated Title IX and Equal Protection Clause.
<i>Whitaker v. Kenosha Unified School Dist.</i> , 2017	Seventh Circuit Court of Appeals (Ill, IN, WI)	Title IX and Equal Protection	Affirming grant of transgender student's motion for a preliminary injunction.
<i>Evancho v. Pine-Richland Sch. Dist.</i> , 2017	Federal District Court in Pennsylvania	Title IX and Equal Protection	District court granted two transgender students' motion for a preliminary injunction on their equal protection claim. Did not decide Title IX issue. School district's

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Case Name	Court/Jurisdiction	Legal Claim	Outcome
			motion to dismiss denied.
<i>A.H. ex rel. Handling v. Minersville Area Sch. Dist., 2019</i>	Federal District Court in Pennsylvania	Title IX and Equal Protection	The school district's motion for summary judgment was denied for both the Title IX and equal protection claims (restroom on field trips).
<i>Bd. of Educ. v. U.S. Dep't of Educ., 2016</i>	Federal District Court in Ohio	Title IX and Equal Protection	Federal district court granted a transgender student's motion for a preliminary injunction. School district's subsequent motion for a stay was denied by the Sixth Circuit Court of Appeals (<i>Dodds v. U.S. Dep't of Educ.</i> , 2016).
<i>Doe v. Reg'l Sch. Unit 26, 2014</i>	Maine Supreme Court	Maine's Human Rights Act	State Supreme Court found that Maine's Human Rights Act was violated when a transgender student was not permitted to use the female restroom.

Including the *J.A.W. v. Evansville Vanderburgh Sch. Corp* decision in Indiana, at least ten (10) federal or state courts have addressed transgender student access issues and all have generally ended in a favorable result for the student. This table also demonstrates that not all jurisdictions have analyzed this matter. There continue to be lawsuits filed by transgender students with similar claims (see Associated Press, 2019). In addition to these ten (10) access-related cases, there have also been at least four (4) cases initiated by plaintiffs who were cisgender.² The cisgender students claimed that their constitutional right to privacy was violated when they shared a restroom with a transgender student. Table B includes these lawsuits. The four cases below specifically included a constitutional right privacy claim initiated by the plaintiffs. This litigation did not end in a favorable result for the cisgender students.

² Cisgender is defined as someone whose gender corresponds with their sex at birth.

Table B: Cisgender Privacy Claims

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>Doe v. Boyertown Area Sch. Dist.</i> , 2019	Third Circuit Court of Appeals (Delaware, New Jersey, Pennsylvania)	Constitutional right to privacy	District court did not find the policy violated cisgender students' privacy rights. Third Circuit Court of Appeals upheld this decision and U.S. Supreme Court denied cert.
<i>Students & Parents for Privacy v. United States Dep't of Educ.</i> , 2017	Federal District Court in Illinois	Constitutional right to privacy	District court did not find that cisgender students' right to privacy violated.
<i>Parents for Privacy v. Dallas Sch. Dist.</i> , 2018	Federal District Court in Oregon	Constitutional right to privacy	District court did not find that cisgender students' right to privacy violated.
<i>Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist.</i> , 2019	Federal District Court in Illinois	Constitutional right to privacy	District court did not find that cisgender students' right to privacy violated.

In addition to the cases outlined in Table A, the cases in Table B might also be considered a victory for transgender students' rights. For example, in *Doe v. Boyertown Area Sch. Dist.* (2018) four cisgender students in Pennsylvania challenged their school policy that allowed transgender students to use facilities that were consistent with their gender identity. The four students contended that the policy violated their constitutional rights of bodily privacy, among other claims. They filed a motion for a preliminary injunction seeking to prevent the school district from implementing its policy. The federal district court did not find that the policy violated the plaintiffs' constitutional privacy rights. The Third Circuit Court of Appeals upheld this decision (*Doe v. Boyertown Area Sch. Dist.* 2018).

The Third Circuit observed that even if one of the plaintiffs had been viewed by a transgender student in the restroom, it would not have resulted in a violation of the plaintiff's constitutional right to privacy. It stated: “[W]e decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no Court has ever done so” (p. 9). The circuit court also agreed with the district court that even if the plaintiffs had a constitutional right to privacy, the state had a compelling interest not to discriminate against transgender students and that the

school district's policy was narrowly tailored to achieve that interest. In May 2019, the U.S. Supreme Court declined to review the Third Circuit Court of Appeals' decision (*Doe v. Boyertown Area Sch. Dist.*, 2019).

At least two other federal district courts have examined constitutional rights to privacy claims initiated by cisgender students in similar contexts. Specifically, federal district courts in Illinois (*Students & Parents for Privacy v. United States Dep't of Educ.*, 2017; *Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist.*, 2019) and Oregon (*Parents for Privacy v. Dallas Sch. Dist. No. 2*, 2018) also ruled against the cisgender plaintiffs (see Eckes & Lewis, 2019).

CONTEXT: RELEVANT LITERATURE

Several studies suggest that transgender students experience discrimination in schools (Kosciw et al., 2015; Lewis & Eckes, 2019; Tunac De Pedro, Shim, & Bishop, 2019). Various reports demonstrate that transgender students have higher rates of bullying (Kosciw et al., 2015) and suicide (American Association of Suicidology, n.d.; Chen et al., 2019; Russell, Pollitt, Li & Grossman, 2018). And, bullying seems to occur at higher levels in schools with less inclusive climates (Hatzenbuehler, Birkett, Van Wagenen, & Meyer, 2014).

Likewise, transgender students can experience certain medical-related problems when they are denied access to restrooms that align with their gender identities (see Lewis & Eckes, 2019). According to the National Center for Transgender Equality, 59 percent of transgender people avoid using restrooms at school because they fear being harassed (James, Herman, Rankin, Keisling, Mottet, & Anafi, 2016; Kosciw et al., 2015), and, as a result, transgender students sometimes endure stool impaction and hemorrhoids (Schuster, Reisner, & Onorato, 2016). The World Professional Association for Transgender Health (2017) posits that when students who have been diagnosed with gender dysphoria are not permitted to use the restroom that aligns with their gender identity, it undermines the students' medical treatments. Szczerbinski (2016) similarly observed that separate restrooms may impair a student's ability to develop a healthy sense of oneself.

While the research has documented the negative affect non-inclusive policies have on transgender students, other studies noted the benefits that stem from a positive school culture (Lewis & Eckes, 2019). Wernick, Kulick, and Chin (2017) observed that bathroom safety in

high schools has been found to increase well-being for transgender students. Lewis and Eckes (2019) found that school leaders reported few problems when they have adopted inclusive restroom policies. Lewis and Eckes (2019) highlighted that school administrators from thirty-one (31) states explain the positive experiences for *all* students when transgender students were permitted to use the restroom that aligned with their gender identity. According to one administrator:

Our experience has been that the fears of the adults rarely play out. The students are very affirming and respectful of their classmates. Most of the reaction that I've ever encountered has been in response to people's fears, not the students' experiences. The students' experiences have been overwhelmingly positive. I have yet to be called into a situation to respond to an actual incident; I've only had to respond to fears, and the fears are unfounded. (Brief for School Administrators et al., 2017, p. 5, cited in Lewis & Eckes, 2019).

Based on the existing literature, it is reasonable to argue that when school officials engage in litigation to prohibit transgender students from accessing sex-segregated facilities that align with their gender identity, it may actually cause the students harm.

STUDY QUESTION

This article seeks to learn why school boards would defend litigation when there is already binding precedent that does not support their arguments. In order to explore this phenomenon, the following question is considered:

What arguments did the school district in the *J.A.W. v. Evansville Vanderburgh Sch. Corp.* case rely upon when defending the litigation that was initiated by a transgender student who was denied access to a restroom that aligned with his gender identity?

Research Design and Method

During the Obama administration, guidance was released from the U.S. Departments of Education and Justice in 2016 highlighting that transgender students should be permitted to use the restroom that aligns with their gender identity (U.S. Dep't of Educ., 2016). The Trump administration rescinded that guidance in February 2017 (Letter from Sandra Battle, 2017; U.S. Dep't of Educ., 2017) and has decided to stop investigating complaints made to the Office for Civil Rights that involve discriminatory practices and transgender students (Holden, 2018). The guidance that was rescinded was not legally binding but did send a symbolic message to school officials. Unlike the guidance document, court decisions are binding and their precedent

must be followed within a given jurisdiction. As such, legal research methods were used to examine the pleadings, briefs, and court decisions in the *J.A.W. v. Evansville Vanderburgh Sch. Corp.* decision (2018 & 2019) to understand the school district's rationale for pursuing this litigation.

Similar to historical research, legal research methods often involve identifying trends in the law through the examination of past actions or, in this case, decisions. Russo (2006) contends that legal research methodology is "a form of historical-legal research that is neither qualitative nor quantitative . . . it is a systemic investigation involving the interpretation and explanation of the law" (p. 6). These methods combine elements of legal reasoning with an evolutionary perspective on the genesis and development of particular judicial issues relevant to education because our understanding of the law continues to evolve through the adjudication of new cases (Beckham, Leas, Melear, & Mooney, 2005).

Employing legal research methods, the motion for preliminary injunction filed in the 2018 case and the subsequent proceedings from the 2019 decision were examined. Related primary legal sources directly connected to each case were also reviewed. Specifically, the complaint, findings of fact, and other court filings that were directly related to this case were analyzed. LexisNexis, a legal database, was used to retrieve these primary data sources.

In order to monitor the different arguments at issue, Russo's (2006) suggestions about how to dissect or analyze a legal opinion and his coding method that reviews the claim, outcome, and relied-upon precedent were used. Studying these various documents (e.g., court decisions, the complaint) allowed investigation of the interactions and discussions within and among the various case outcomes (see generally, Yin, 2014).

To be certain, there are some limitations involved with using this method. For example, qualitative research (e.g., interviews) may have uncovered additional reasons why the school district chose to defend this litigation. However, this study only gathered data from the legal filings.

BACKGROUND INFORMATION AND EARLIER PRECEDENT

Background Information

The facts involved in the *J.A.W.* case help set the context for this discussion. The case involves, J.A.W., an eighteen-year-old student, who began to identify as transgender when he was

eleven-years-old. In eighth grade, he started to present himself as a boy through his dress and haircut and requested that teachers refer to him by his male name. During his freshman year, he became uncomfortable with using the female restroom and locker room at his high school. When changing for gym class, he and another transgender male student began using the male locker room. The administration learned of this decision after a parent called to complain that two girls were using the boys' locker room. School officials told the transgender students to stop using the boys' locker room and offered another female locker room that was not being used. They were also given the option of using a gender-neutral, single-occupancy restroom in the nurse's office. According to J.A.W., the nurse's restroom was inconvenient because it was not near his classes (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018 and 2019; *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, Complaint, 2018).

During his sophomore year in 2016, J.A.W. informed the district's diversity officer that he was transgender and approached the principal with the new "Dear Colleague" letter that stated that transgender students should be able to use the restroom that aligned with their gender identity. School officials did not change policy or practice. It was explained that there was no official policy and that transgender students could use gender-neutral restrooms depending on the building and that a student's needs would be addressed on a case-by-case basis. J.A.W. restricted his fluid intake in order to avoid the schools' restrooms (Proposed Findings of Fact by IN ACLU, 2018). On a few occasions he used the girls' restroom, and he testified that the girls were uncomfortable because he appeared to be male.

Shortly before his junior year began, J.A.W. was diagnosed with gender dysphoria and began taking testosterone injections, which he did not specifically disclose to school officials (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018 and 2019). Also, during his junior year, after the 2017 decision from the Seventh Circuit was issued (*Whitaker v. Kenosha Unified School District*), J.A.W.'s attorney contacted school officials because he believed that his client was now entitled to use the boys' restroom. School officials refused to change their policy. J.A.W. therefore filed his complaint in February 2018 during his junior year.

Earlier Precedent

It is important to examine this Seventh Circuit case because the decision is binding in Indiana. In other words, a school district in Indiana would need to follow this court's decision. In

Whitaker v. Kenosha Unified School District (2017), a transgender student's motion for injunctive relief was granted after he challenged his high school's policy. The student, who had been diagnosed with gender dysphoria, had used the male restroom for six months without incident before the school changed course. Whitaker alleged that denying him access to the male restroom caused him depression, raised medical concerns, and that he contemplated suicide due to the stress he experienced. Whitaker filed a motion for preliminary injunction.

When affirming the grant of the preliminary injunction, the Seventh Circuit found that it would cause irreparable harm to deny the student access to the male restroom because the use of the boys' restroom was necessary for both his transition and his emotional well-being (*Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2017). The court was clear that the student sufficiently demonstrated a likelihood of success of his Title IX claim under a sex-stereotyping theory. When examining the Equal Protection Clause claim, the court also observed that because the school's classification was based on sex, heightened scrutiny applied and that school officials did not demonstrate an exceedingly persuasive justification for its policy. The court also held that issuing a preliminary injunction for the transgender student would not harm the privacy interests of the other students; the court noted that the school district's fears were "speculative" and "based upon conjecture" (p. 1052). It is also important to highlight that *Whitaker* was not a full decision of the merits of the case. After the appellate court upheld the district court's decision to grant the student's motion for a preliminary injunction, the district eventually settled with Whitaker for \$800,000 (Fortin, 2018).

FINDINGS

The outcome of the *J.A.W.* decision is discussed and the arguments that the school district relied upon when defending the litigation are presented. This information helps answer why a school district might pursue litigation when the precedent does not appear to be entirely favorable to its argument.

J.A.W. filed a motion for a preliminary injunction in February 2018. At the preliminary injunction hearing in 2018, the district's superintendent testified that *J.A.W.* could not use the male restroom because he was biologically female. He also stated that if *J.A.W.* would have legally changed his birth certificate to indicate he was male, then he could have used the boys' restroom. He explained, however, that even if the birth certificate was changed, he would not

be permitted to use the boys' restroom if his use of the male restroom caused a disruption.

The school district argued that the *Whitaker* decision was distinguishable. For example, school officials noted that in *Whitaker*, the transgender student presented two different expert reports that spoke to how the school policy specifically harmed the student, whereas in *J.A.W.*, the three expert reports submitted addressed harm to transgender students in general (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, Proposed Findings of Fact by Evansville, 2018). The school district also argued that *Whitaker* was not "a mandate requiring school corporations to allow unemancipated minors who profess to be transgender access to the restrooms of their choosing on the strength of nothing more than their own demands" (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018, p. 1036). School officials specifically contended that if they relied on students' subjective, internal sense of gender it would cause chaos. Thus, they needed an objective basis in order to decide whether to allow a student to use a restroom that aligned with his gender identity (e.g., a birth certificate) (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, Proposed Findings of Fact by Evansville, 2018).

The court agreed that *Whitaker* did not hold that schools are prohibited from requiring some evidence that access to the restroom is a medical necessity, but found the district's argument to be "irrelevant" (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018, p. 1036). This argument was irrelevant because the district's stance was that J.A.W. needed to obtain a birth certificate indicating that he is male before he could use the male restroom, which as the court observed, was likely legally impossible to do. Thus, the court found the current situation to be indistinguishable from *Whitaker* and, as such, J.A.W. established a likelihood of success on the merits under Title IX. Likewise, the court found that J.A.W. demonstrated a probability of success on his equal protection argument because the record presented to the court did not support that there was a student safety issue or that the need to prevent disruption is an exceedingly persuasive justification for the restroom policy. In 2018, the court entered a preliminary injunction, which allowed J.A.W. to use the male restroom (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018).

After the preliminary injunction was issued in 2018, the school district proceeded with a second motion to dismiss. J.A.W. pursued a partial motion for summary judgment, and the school district also filed a cross motion for summary judgment (*J.A.W. v. Evansville*

Vanderburgh Sch. Corp., 2019). J.A.W. continued to argue that his rights were violated under both Title IX and the Equal Protection Clause. The school district contended that it lacked notice that J.A.W. had been diagnosed with gender dysphoria. The court addressed both the Title IX and equal protection claims in 2019. Relying on the Seventh Circuit's *Whitaker* decision, the court granted J.A.W.'s motion for summary judgment in part and denied the school district's motion on the Title IX claim. According to the court, a violation occurred whether or not school officials knew that J.A.W. was affected by its policy. The court also found that the *Whitaker* decision put the district on notice that its practice was a form of sex discrimination that implicated the Equal Protection Clause. The court reasoned that the school district was not able to offer an exceedingly persuasive justification for its practice. Thus, the court granted J.A.W.'s motion for partial summary judgment and denied the district's motion. For both the Title IX and Equal Protection Clause claims, the court ruled that a jury needed to decide whether J.A.W. was entitled to damages (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018).

DISCUSSION

The school district relied on three main reasons for continuing to engage in the litigation instead of perhaps negotiating a settlement after J.A.W.'s motion for a preliminary injunction was granted in 2018. Specifically, the school district believed that this case was distinguishable from *Whitaker*, that there were privacy concerns involved, and that there was a lack of clarity in the law across the United States at the time of the litigation.

Distinguishing Whitaker

As discussed, the school district did try to distinguish the appellate court's *Whitaker* decision when it argued that J.A.W. did not inform or put the school district on notice that he was diagnosed with gender dysphoria, that he was undergoing hormone treatment, or that he raised concerns about the proximity of the gender-neutral restroom that had been made available to him. The court agreed that *Whitaker* suggests that there needs to be some evidence that there is a medical necessity involved. The court, however, noted that the school district learned about J.A.W.'s transition during the discovery period and at the earlier hearing for the preliminary injunction in 2018, and it was quite clear that J.A.W. looked like a boy.

Privacy and safety

The school district also asserted that it wanted to prevent disruption and protect the safety of transgender and cisgender students, but the privacy argument was already struck down in *Whitaker* when the court found this to be based on “sheer conjecture and abstraction” (*Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2017, p. 1052). The superintendent stated that allowing J.A.W. to use the boys’ restroom would cause disruption and that the parent body would object. As discussed in *Whitaker*, complaints from parents were found insufficient to deny transgender students their bathroom of choice. When specifically asked about complaints, the superintendent in J.A.W. recounted that a parent had called the school to say she was upset that her daughter shared a restroom with a transgender male. He stated:

Well, as recently as last month, in speaking to an administrator at—the day after the Monday after I was deposed, she referenced two situations that had occurred in the building where she is principal; had a parent, a mother, that called that was extremely upset because the daughter had been exposed to a transgender man that had gone into the restroom and she felt very—I think the words were scared, vulnerable and terrified. (p. 1038).

The court pointed out that the superintendent’s example actually supported J.A.W.’s position that he should be in a restroom with other male students. Thus, the school district’s own policy seemed to create the disruption. Interestingly, similar privacy arguments were made by school leaders in some of the access cases in Table A. Likewise, the courts also found these privacy arguments to be meritless (see, e.g., *Board v. Educ. v. U.S. Dep’t of Educ.*, 2016; *Evancho v. Pine-Richland Sch. Dist.*, 201, 2017, p. 293; *Grimm v. Gloucester Cnty. Sch. Bd.*, 2018, p. *41).

Lack of clarity in the law

As noted, the Seventh Circuit Court of Appeals, the decisions of which are binding in Indiana, had already upheld the district court’s decision to grant the transgender student’s preliminary injunction motion. After that proceeding, the school district settled with *Whitaker* for \$800,000. In 2017, the court observed:

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. . . . Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which

violates the Act (*Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2017, pp. 1049–50).

The school district in Indiana did correctly note that *certiorari* was pending in *Whitaker* until March 5, 2018. The court, however, found this to be irrelevant because the Seventh Circuit never issued a stay. In the 2019 district court's opinion, the court reasoned:

[t]he mandate issued in *Whitaker* on June 21, 2017, and the decision thus became binding on that date. EVSC [the school district in this case] thus should have known that it was required to confirm its practices to Seventh Circuit law as of that date" (pp. 16–17).

Despite the ruling being from the federal circuit court where the school was located, the school district still posited that it did not appear to "represent the state of the law across the United States" (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2018, p. 6). Table A, however, revealed that other courts found similar Title IX, equal protection, and/or state law violations when transgender students were prohibited from using sex-segregated facilities that aligned with their gender identities. To be fair, when the *J.A.W.* complaint was filed in February 2018, there were only three (3) federal courts and one (1) state court that had addressed this issue. All of those decisions; however, ended in a favorable result for the transgender student.

SUMMARY AND LIMITATIONS

Of course the school district in *J.A.W.* may have chosen to pursue this litigation because there was hope that the U.S. Supreme Court may reverse precedent in this circuit. A split among the federal circuit courts oftentimes invites U.S. Supreme Court review. Interestingly, though, there was not a split in the federal circuits on this issue as all courts that have examined this issue within the K-12 context have ended in a favorable result for the transgender student. There are other possible plausible explanations that may not have been revealed in the court documents. As Band (2009) observed, some parties initiate litigation out of principle; we do not know if this were the case in *J.A.W.*

Specifically, this study did not include interviews, which may have revealed other reasons why the school district pursued the litigation. For example, perhaps litigation was carried out because of the public perception of this issue in that particular community or other external demands. The record in the *J.A.W.* case suggested that there was pressure from some parents who were opposed to transgender students using restrooms that aligned with their gender identities, but the record may not have fully revealed these types of pressures that the

school district experienced. In sum, there may be a variety of reasons why a school district may pursue litigation when the precedent is not entirely in its favor (e.g., the religious beliefs of some of the school officials or the desire to invite Supreme Court review). Through the analysis of the court documents and cases, only reasons presented in the court filings were analyzed in this particular study.

CONCLUSIONS AND IMPLICATIONS FOR SCHOOL LEADERS

Many observers would likely agree that, when possible, costly litigation should be avoided in schools. This is especially true when the weight of the precedent does not seem to support the school district's argument and when its stance may actually harm students. Indeed, there are both legal and ethical considerations at play. While the court cases address many of the legal concerns, the research included earlier in this study highlighted important ethical considerations for school leaders.

There are now ten (10) cases involving access issues for transgender students in K-12 public schools that have ended in a favorable result for the student. In addition, there are four (4) cases where the cisgender students have been unsuccessful in their privacy arguments. It would be wise for school leaders to understand if there is precedent that addresses this issue within their specific jurisdiction. It would arguably not be a good use of taxpayer money to defend policies that prohibit transgender students from using restrooms that align with their gender identities in court if there is precedent in that jurisdiction suggesting that such policies are discriminatory.

Also, the number of states that have non-discrimination policies allowing transgender students to use the restroom of their choice continues to grow. There are currently twenty (20) states and the District of Columbia that provide protections based on sexual orientation and gender identity in places of public accommodations (Human Rights Campaign, 2019). Thus, there is guidance for school districts within these states. In states that prohibit such discrimination, school officials should allow transgender students to use restrooms that align with their gender identities.

If a state has not had any litigation or has not adopted a non-discrimination policy, it does not prevent the district from adopting inclusive policies. When contemplating these policies, school officials might consider learning more about the experiences of school

administrators in thirty-one (31) states and District of Columbia who adopted inclusive transgender-related policies without incident (see Brief for School Administrators from Thirty-One States, 2017). The school leaders in these states found that enacting inclusive policies for transgender students and sex-segregated facilities was in the best interest of *all* students (see Brief for School Administrators from Thirty-One States, 2017).

Further, as previous research indicates, transgender students have experienced greater levels of bullying, higher suicide rates, and other related medical concerns. Thus, beyond the legal requirements, school leaders have an ethical duty to care for all of their students. School districts should allow transgender students access to sex-segregated facilities that align with their gender identities. To choose otherwise wastes taxpayer money if it leads to litigation and harms the students they were hired to protect.

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