

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

BRYAN VESELY,)	
)	
Plaintiffs,)	
)	
v.)	No. 2022-CV-02035
)	
ILLINOIS SCHOOL DISTRICT 45 and)	Honorable Edmond E. Chang
SUSAN HARDEK- VESELY)	
)	
Defendants.)	

**DEFENDANT ILLINOIS SCHOOL DISTRICT 45’s REPLY BRIEF
IN FURTHER SUPPORT OF IT’s MOTION TO DISMISS**

Defendant, ILLINOIS SCHOOL DISTRICT 45 (“Defendant District”), by and through its attorney, Nikoleta Lamprinakos of ROBBINS, SCHWARTZ, NICHOLAS, LIFTON & TAYLOR LTD., and for its reply in further support of its Motion to Dismiss states as follows:

I. INTRODUCTION

Plaintiff Bryan Vesely (“Plaintiff”) brings a two-count Complaint against both Defendant District and Susan Hardek-Vesely (“Defendant Hardek-Vesely”), his ex-wife and co-parent of their minor child (referred to by initials “A.V.”), for (1) violations of his constitutional right as a parent to direct the upbringing and education of his child under his control, pursuant to the Fourteenth Amendment and Article 1 of the Illinois Constitution, and for (2) civil conspiracy under Illinois law. In his conspiracy claim, Plaintiff alleges that District Defendant worked in concert with Defendant Hardek-Vesely to “promote or otherwise affirm” A.V.’s transition from male to female without Plaintiff’s consent. Plaintiff fails to adequately plead a cause of action against Defendant District and, as such, his Complaint should be dismissed in its entirety with prejudice.

A. Plaintiff Fails To Allege Conduct That Violates His State Or Federal Constitutional Rights

Plaintiff has alleged that Defendant District's policy of "affirming" his transgender child's social transition, by respecting their preferred pronouns and not objecting to their wearing dresses, violates his Fourteenth Amendment rights under the Constitution and his rights under Article 1 of the Illinois Constitution. As stated in Defendant District's Motion to Dismiss, courts apply the rational basis test to determine whether the government action at issue comports with due process, looking to whether there is a rational relationship to a legitimate state goal. In determining whether due process was sufficient, courts consider and balance three factors: (1) the private interest affected, (2) the risk of erroneous deprivation of the interest by using the procedure and the probable value, if any, of additional or substitute safeguards, and (3) the governmental interests involved. *In re R.D.*, 2021 IL App (1st) 201411, ¶ 19. Defendant District's motion cited to many cases demonstrating transgender students have a right to privacy in their status as transgender and their sex assigned at birth and several cases wherein the government has restricted the rights of parents in order to protect a child's wellbeing.

As a rebuttal, Plaintiff asserts that by "dismissing Plaintiff's claim for Defendant School District's violation of Plaintiff's fundamental parenting rights, this Court would, in effect, be limiting and reducing Plaintiff's fundamental right to direct the education and upbringing of his minor child." (Dkt. 28, pg. 7.) Plaintiff fails to recognize that his parental rights are not absolute and fails to put forth any argument against District Defendant's position that its "policy" of respecting A.V.'s gender identity fails the three due process factors. As he has not addressed each of these factors, he has waived any rebuttal argument and therefore Defendant District's Motion to Dismiss should be granted.

1. Plaintiff Cannot Show A Constitutional Deprivation By District Defendant Because His Constitutional Rights As A Parent Are Inherently Counterbalanced By The Identical Rights Of Co-Parent Defendant Hardek-Vesely.

Co-Defendant Hardek-Vesely has brought forth new information to Defendant District in her Motion to Dismiss: that Plaintiff is not the custodial parent of A.V. and their Parenting Agreement clarified which significant issues do and do not require agreed decision making. Docket No. 23. This information raises a new issue as to whether this Court has proper jurisdiction over Plaintiff's claims.

A court may entertain issues first raised in a response brief if justice and fairness require their consideration. (*Hux v. Raben*, 38 Ill.2d 223 (1967); *Brown v. Brown*, 62 Ill.App.3d 328, 19 Ill.Dec. 762 (1978); *Huber Pontiac, Inc. v. Wells*, 59 Ill.App.3d 14, 16 (1978).)

Plaintiff asserts his claims have federal jurisdiction because his primary claim is brought for violations that arise under federal law. (Dkt. 1, ¶9.) However, the Domestic Relations Exception divests federal courts of power to issue divorce, alimony, and child custody orders. *Ankenbrandt v. Richards*, 504 U.S. 689, 702 (1992). Divorce, alimony, and child custody decrees remain outside federal jurisdictional bounds. *Marshall v. Marshall*, 547 U.S. 293, 296 (2006). Plaintiff's claims require this Court to assess whether A.V.'s social transition falls within the category of issues for which agreed decision making is required, for which this Court does not have power to do. As such, if this Court is to find Plaintiff's claims should not be dismissed, this case should be removed to the appropriate state court, as justice and fairness would require. Alternatively, Defendant District asks this Court for leave to file a supplemental motion in order to give Plaintiff an opportunity to respond to this issue.

2. Plaintiff's Parental Rights Do Not Outweigh A.V.'s Well-Established Privacy Interests.

Plaintiff asserts that Defendant District's argument that his requests for relief would violate the Family Educational Rights and Privacy Act ("FERPA") is without merit because A.V. is not an "eligible student" as defined in the Act. (Dkt. 28, pg. 8.) However, FERPA additionally allows for a parent to request a school change their child's gender marker if they feel it is incorrect. 34 C.F.R. § 99.7(a)(2)(ii). A.V.'s gender identity is valid whether or not Plaintiff "approves" and FERPA does not require two parent consent. Therefore, Plaintiff's requests for relief would violate A.V.'s privacy rights under FERPA.

Although none of the cases cited in Defendant District's Motion directly address a transgender child's right to privacy over a parent's right to direct their upbringing, they are generally indicative of courts' willingness to restrict parental rights in order to protect the wellbeing of a child and a more protective stance courts take to protect the privacy rights of transgender individuals. Plaintiff has failed to address the issue of A.V.'s privacy rights and Defendant District's position that privacy protections in Illinois go "beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy..." *Kunkel v. Walton*, 179 Ill.2d 519, 537 (1997).

Plaintiff's reply is silent regarding Defendant District's position that the State has recognized that children as young as 12 possess privacy rights that outweigh parents' rights, such as access to their child's health records, evidenced by the Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq.*, which states that mental health records cannot be disclosed without the specific written consent of the parent(s)/guardian(s) *and* of the student, if the student is age 12 or older. 740 ILCS 110/4-5. The law requires written consent in a specific form to disclose those records, even to parents or guardians.

Furthermore, Defendant District cites to more than just non-regulatory administrative treatise to demonstrate that Plaintiff's requests for relief would violate the Illinois Human Rights Act, as Defendant District cited to the Act itself. The definition of "disability" under the Act has been found to encompass the physical and mental condition of gender dysphoria, which is a medical diagnosis. (Defendant District acknowledges that the term "disability" can have an overly harsh and derisive connotation and uses it only as the legal term which is used to define those individuals qualified for protection is "disability.") The Act not only prohibits discrimination based on gender dysphoria, but also requires Defendant District to reasonably accommodate a student's disability. By refusing to respect A.V.'s gender pronouns or somehow forbidding A.V. to wear a dress to school, Defendant District would be violating the Illinois Human Rights Act. Defendant District's "policy" of respecting A.V.'s gender identity fits squarely within all state laws on the issue and therefore Plaintiff's claims should be dismissed with prejudice.

Although Executive Order 2019-11 titled "Executive Order Strengthening Our Commitment to Affirming and Inclusive Schools," is not authoritative on this Court, it clearly demonstrates Defendant District's actions align with the State's position of "fostering school environments that are welcoming, safe, supportive, inclusive, and free of discrimination and harassment for all students," even if Plaintiff has taken a position against supporting his transgender child's gender identity and transgender status.

Plaintiff cites to *Lindsay v. Lindsay*, 257 Ill. 328, 341 (Ill. St. 1913), which held that "the rights of parents to the society of their offspring is inherent and should not violate that right upon slight pretext nor *unless it is clearly for the best interest of the child to do so.*" (emphasis removed and emphasis added). Plaintiff goes on to say that Plaintiff is in the best position to determine what is best for A.V. as it concerns A.V.'s gender. (Dkt. 28, pg. 14). The State's enactment of the Youth

Mental Health Protection Act clearly demonstrates that when parents are unsupportive of their children's mental health and gender identity, they are not the best person to make decisions regarding the same by limiting the mental health treatment parents can impose on their gay and transgender children. 405 ILCS 48/20.

In accordance with the aforementioned laws and regulations, District Defendant's policy requiring staff to refer to students by their preferred pronouns serves to protect A.V.'s privacy rights and mental and physical health. A.V.'s rights outweigh Plaintiff's parental rights and Defendant District requests this Court deny Plaintiff's requests for relief and dismiss his constitutional claims against Defendant District.

Plaintiff's response demonstrates his lack of understanding on gender issues and the ramifications of what he is asking this Court to impose on Defendant District, as he argues this case has nothing to do with A.V. being denied participation of the benefits of Defendant District. Based on current laws and legal precedents, Defendant District would be engaging in acts of discrimination based on sex if it chose to prohibit A.V. from wearing dresses or nail polish like other girls or it refused to refer to A.V. by the pronouns of choice.

3. District Defendant Has A Legitimate Interest In A.V.'s Interests And Well-Being.

In an attempt to rebut Defendant District's position that The Youth Mental Health Protection Act, 405 ILCS 48/1 ("YMHPA") establishes a clear precedent that the State has the ability to protect A.V.'s mental health over Plaintiff's parental rights, Plaintiff merely argues that the YMHPA is to protect transgender youth from change efforts, also known as conversion therapy, and "as conversion therapy is not at issue, YMHPA is irrelevant...". (Dkt. 28, pg. 14-15.) Plaintiff misses the general idea that the Act limits parental rights to control the upbringing of their

transgender children in order to protect the fragile mental health and well-being of our transgender youth.

Furthermore, Plaintiff incorrectly asserts that conversion is not at issue here. Without or without a medical or social transition, A.V. *is* transgender and has requested to be referred by female pronouns and a new name. (Dkt 1, ¶35.) By refusing to allow the District to refer to A.V. by the preferred pronouns and name, Plaintiff is requiring the District to “dead name” A.V. and treat her as if she was a boy. Plaintiff has suggested that A.V. “can learn to find comfort with their biological sex” through “psychotherapy to help identify and address the underlying causes of the dysphoria.” (*Id.* ¶18). The Youth Mental Health Protection Act, 405 ILCS 48/1 *et seq.* defines “conversion therapy” as “any practices or treatments that seek to change an individual’s sexual orientation [which includes gender-related identity]...including efforts to change behaviors or gender expression...” Asking the District to do anything other than affirm A.V.’s new gender identity, is essentially asking the District to refuse to recognize A.V. by their gender identity, ban A.V. from wearing dresses and nail polish and dead name A.V. All of these fall under conversion efforts to change A.V.’s behaviors and force her to present as a boy, for which she is not. Therefore, the YMHPA is a relevant example of the State’s prior exercise of control over and limiting parental rights in order to protect its legitimate interest in transgender youth’s wellbeing and Plaintiff’s claims should be dismissed with prejudice.

4. District’s Actions are Aligned with Protections Under the Americans with Disabilities Act.

Plaintiff incorrectly asserts that disability is not at issue here. (Dkt. 28, pg. 15.) Defendant District has cited to *Williams v. Kincaid*, 45 F.4th 759, 769 (4th Cir. 2022) to show that gender dysphoria is a “disability” under the ADA. Plaintiff asserts *Williams* does not apply because it has nothing to do with a minor, a student at a public school, or a father’s fundamental constitutional

right to direct the education and upbringing of his own minor child. Although the case involved an incarcerated adult, the holding relating to classifying gender dysphoria was in no way limited to that context. As Plaintiff's only argument against *Williams* is that it is not factually similar to the case at bar, he has failed to rebut Defendant District's position that A.V.'s gender dysphoria is protected under the ADA and his claims should be dismissed.

B. Plaintiff Fails To Allege A Cause Of Action For Civil Conspiracy

A civil conspiracy claim under Illinois law requires that a plaintiff allege facts establishing “(1) the existence of an agreement between two or more persons (2) to participate in an unlawful act or a lawful act in an unlawful manner, (3) that an overt act was performed by one of the parties pursuant to and in furtherance of a common scheme, and (4) an injury caused by the unlawful overt act.” *Lewis v. Lead Indus. Ass’n*, 2020 IL 124107, 1053 (Ill. 2020). Plaintiff fails to show that the Defendant District engaged in an unlawful act or in an unlawful manner and has not identified what wrongful “overt act” Defendant District performed in furtherance of a scheme to deprive him of his constitutional rights. Plaintiff has alleged that the district allowed A.V. to be referred to by preferred pronouns over his express objection. Plaintiff does not cite to any law or case precedent requiring both parents' consent for a student be to referred to by their preferred pronouns.

Plaintiff Cites to *Glover v. Vill. of Oak Lawn*, No. 00 C 2515, 2000 U.S. Dist. LEXIS 18155, at *11 (N.D. Ill. Dec. 13, 2000) and *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 66 (Ill. S. Ct. 1994) in an attempt to show that he has sufficiently plead a cause of action for conspiracy. Defendant District will address each case individually.

Plaintiff asserts that in *Glover*, the court found that a single paragraph alleging that an officer “conspired with other, unknown officers and village officials to deprive plaintiff of her constitutional rights in accordance with the policy of stopping, searching, and issuing traffic

citations to people of color” was adequate to state a claim of conspiracy. (Dkt. 28, pg. 16.) However, *Glover* analyzes the pleading standard for a 1983 claim under a conspiracy theory. Plaintiff has not brought a 1983 civil conspiracy claim. He has brought state law civil conspiracy claims. Therefore, *Glover* is misplaced and not applicable to Plaintiff’s claims.

Plaintiff cites to *Adcock* to show that “[a] conspiracy can also be ‘established from circumstantial evidence and inferences drawn from evidence, coupled with commonsense knowledge of the behavior of persons in similar circumstances.’” However, Plaintiff has not alleged any facts or “circumstantial evidence” tending to show there was an unlawful overt act done by District Defendant or that there was an agreement between District Defendant and Hardek-Vesey. Plaintiff merely allege that the Hardek-Vesely and the District independently supported the child’s gender identify and did not act unlawfully in doing so. There are no allegations that they met to discuss the child’s gender identity. There are no allegations that they developed a plan of any sort relating to the child’s gender identity. Without any additional allegations which suggest even the bare minimum relating to the elements of a conspiracy, the claim cannot withstand a motion to dismiss. The mere fact that Defendant District and Hardek-Vesely support A.V.’s gender identity does not in any way draw an inference of a conspiracy. As Plaintiff has failed to sufficiently plead any facts to support his claim for conspiracy, his claim should be dismissed with prejudice.

C. Plaintiff’s State Law Claims Are Barred By The Local Government And Governmental Employees Tort Immunity Act

Plaintiff alleges Defendant District is not entitled to immunity under the Local Government and Governmental Employees Tort Immunity Act because the Act does not apply to claims brought under Article 1 of the Illinois Constitution, however this is simply untrue. See *Mellott v.*

Sprague, 334 F. Supp. 3d 916 (C.D. Ill. 2017)(holding under the Illinois Tort Immunity Act, officers were entitled to immunity on claims under Illinois Constitution.)

1. The Defendant District Is Entitled To Immunity Under 745 ILCS 10/2-103 For Any Alleged Failure To Enforce Obligations Imposed By Law.

Plaintiff again argues that the Illinois Tort Immunity Act does not apply to claims brought under Article 1 of the Illinois Constitution. Plaintiff's assertions are, again, simply incorrect. *See Rozsavolgi v. City of Aurora*, 2016 IL App (2d) 150493, holding "The Tort Immunity Act encompasses constitutional claims, including those brought under the Human Rights Act." S.H.A. Const. Art. 1, § 19; S.H.A. 745 ILCS 10/2–101; 775 ILCS 5/1–101 *et seq.*

Plaintiff cites to *People v. Howard*, 228 Ill. 2d 428, 436-37 (Ill. S.Ct. 2008) to argue "the Illinois constitution is the supreme law of the land and every citizen is bound to obey it and every court is bound to enforce its provisions." However, *Howard* did not involve any immunity and did not include any analysis whatsoever of the Illinois Tort Immunity Act. However, "[t]he purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government." *Van Meter v. Darien Park District*, 207 Ill.2d 359, 368, (2003). By providing immunity, the legislature sought to prevent public funds from being diverted from their intended purpose to the payment of damages claims. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill.2d 484, 490 (2001). The immunities afforded under the Tort Immunity Act serve as affirmative defenses, which, if properly raised and proven, bar a plaintiff's right to recovery. *Zimmerman v. Village of Skokie*, 183 Ill.2d 30, 43–44, (1998). The Tort Immunity Act does not permit for public entities to circumvent the constitution, but instead prevents public funds from being diverted to the payment of damages for liability arising out of the operation of government and, when properly raised and proven, bars a plaintiff's right to recovery. As the

Illinois Tort Immunity Act bars recovery to Plaintiff's state law claims, they should be dismissed with prejudice.

2. To The Extent That Plaintiff's Claims Are Based On The Acts Or Omissions Of District School Employees, Defendant District Is Also Entitled To Immunity Under 745 ILCS 10/2-109, As Its Employees Are Themselves Immune Pursuant To 745 ILCS 10/2-201.

Plaintiff's only argument against the application of immunity under 745 ILCS 10/2-109 and 10/2-201 is that they do not apply to his constitutional claims. Again, this argument is incorrect. *Oxford Bank & Tr. & Fifth Ave. Prop. Mgmt. v. Vill. of La Grange*, 879 F. Supp. 2d 954 (N.D. Ill. 2012) held that Illinois Local Governmental and Governmental Employees Tort Immunity Act provided immunity to a public entity for claims brought under the Illinois Constitution. Plaintiff failed to address Defendant District's remaining argument as to why the immunity applies and therefore waived his ability to do so.

3. Defendant District Is Entitled To Immunity From Plaintiff's Claim For Punitive Damages.

Plaintiff's argument against immunity for punitive damages is the same as he asserted for Defendant District's other immunities; that it does not apply the claims for constitutional violations. However, municipalities are not liable to pay punitive or exemplary damages for claims brought in violation of plaintiff's constitutional rights. *Newell v. City of Elgin*, 34 Ill.App. 3d 719 (1976). Plaintiff's assertion is once more incorrect, and this Court should strike Plaintiff's request for punitive damages against Defendant District.

II. CONCLUSION

WHEREFORE, Defendant, ILLINOIS SCHOOL DISTRICT 45, respectfully requests that this Honorable Court dismiss this action as against it in its entirety with prejudice and grant any other legal and/or equitable relief to which it is entitled.

Respectfully submitted,

ILLINOIS SCHOOL DISTRICT 45

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, a true and correct copy of the foregoing Defendant, Illinois School District 45's Reply in Further Support of its Motion to Dismiss was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Nikoleta Lamprinakos
Nikoleta Lamprinakos
Defendants' Attorney