

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

DREW ADAMS, et al.,

*Plaintiff,*

v.

THE SCHOOL BOARD OF ST. JOHNS  
COUNTY, FLORIDA,

*Defendant.*

**No. 3:17-cv-00739-TJC-JBT**

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**PLAINTIFF’S MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT’S  
MOTION FOR JUDICIAL NOTICE OF UNENACTED CONGRESSIONAL BILLS  
(SPECIFICALLY, EXHIBITS E, F, AND G TO THE MOTION)**

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Plaintiff Drew Adams (“Drew”), a minor, by and through his next friend and mother, Erica Adams Kasper (collectively, “Plaintiff”), and by and through their undersigned counsel, respectfully submits this memorandum in response to Defendant’s Motion for Judicial Notice. Specifically, Plaintiff opposes judicial notice of the unenacted congressional bills titled S.1006 “Equality Act;” S.1858 “Equality Act;” and S.439 “Student Non-Discrimination Act of 2015,” attached to Defendant’s Motion as Exhibits E, F, and G. Because Defendant dishonestly mischaracterizes these unenacted congressional bills and negative congressional history, Defendant’s Motion should be denied.

## ARGUMENT

As noted in its Motion, Defendant requests judicial notice of these unenacted congressional bills because the bills “make a distinction between sex and gender identity.” Mot. (Dkt. 106) at 6. *First*, Defendant grossly mischaracterizes and misrepresents the nature of these unenacted bills. The Equality Act explicitly defines “sex” to include “sexual orientation or gender identity.” *See* Ex. E (Dkt. 105-6) at 16, lines 7-11 (“The term ‘sex’ includes . . . sexual orientation or gender identity”); Ex. F (Dkt. 105-7) at 15, lines 11-15 (same). The Student Non-Discrimination Act seeks to create a new law to address the discrimination and harassment of lesbian, gay, bisexual, and transgender students. It does not speak in terms of sex discrimination nor does it seek to amend or clarify any existing law. *See generally* Ex. G (Dkt. 105-8). Put simply, none of the bills for which Defendant seeks judicial notice does not differentiate between sex and gender identity.

Defendant’s Request for Judicial Notice and accompanying argument, thus, represent a dishonest and disingenuous attempt to have to have the Court believe that these unenacted bills “make a distinction between sex and gender identity,” Dkt. 106 at 6—something that these bills clearly do not do—and then infer that, as a result of this alleged differentiation between sex and gender identity, discrimination based on gender identity is outside the scope of the protections against sex discrimination as codified in Title IX of the Education Amendments of 1972 (“Title IX”). This distinction is not supported by the bills themselves. To the contrary, some of the bills even define sex to include to include gender identity.

*Second*, it is improper for Defendant to request judicial notice of unenacted congressional bills for the purpose of inferring what Title IX means. The Supreme Court has

repeatedly cautioned that “subsequent legislative history” provides “a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law.” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). As such, judicial notice of the unenacted congressional legislation that Defendant grossly mischaracterizes for the purposes of interpreting Title IX is wholly improper.

The Court should deny Defendant’s Motion because: (1) the distinction between sex and gender identity that Defendant purports to intimate onto the unenacted bills does not exist and, at minimum, is subject to reasonable dispute and therefore not appropriate for judicial notice; and (2) courts have routinely held that legislative intent cannot be inferred from a failure to enact legislation.

Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts, and allows the court to judicially notice a fact “that is not subject to reasonable dispute” because it is “generally known within the trial court’s territorial jurisdiction,” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(a)–(b). While the existence of the unenacted bills are not subject to dispute, the inference that Defendant wishes the Court to draw from their contents is both dishonest and subject to reasonable dispute. Plaintiff’s position in this litigation is consistent with the position of other Court’s throughout this country, including the Eleventh Circuit that that discrimination based on gender identity, *i.e.*, transgender status, is a form of sex discrimination. *See Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (establishing as a matter of law that discrimination against transgender people is sex discrimination); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214

F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that conduct motivated by an individual’s “gender or sexual identity” is because of “gender,” which is interchangeable with “sex”). Because the Equality Act explicitly defines “sex” to include “sexual orientation or gender identity” and the Student Non-Discrimination Act does not speak in terms of sex discrimination, Defendant’s contention that the bills “make a distinction between sex and gender identity,” Dkt. 106 at 6, is certainly subject to reasonable dispute, and therefore the unenacted bills are inappropriate for judicial notice. *See* Fed. R. Evid. 201(b).

The Court should also deny Defendant’s motion because not only are the facts within reasonable dispute, but the inference Defendant wishes the court to draw has been repeatedly shunned by the Supreme Court and Courts of Appeal. Indeed, those courts have routinely held that legislative intent cannot be inferred from a failure to enact legislation stating that congressional inaction, noting that such inaction “lacks persuasive significance.” *Pension Benefit Guar. Corp.*, 496 U.S. at 650; *see also, e.g., Hillsboro Nat. Bank v. C.I.R.*, 460 U.S. 370, 397 n.33 (1983) (“The failure to enact the [tax] bill does not suggest that Congress intended that deductions under [a separate section] not be subject to recapture”); *Zuber v. Allen*, 396 U.S. 168, 185 (1969) (“Legislative silence is a poor beacon to follow in discerning the proper statutory route.”); *Bricker v. Rockwell Intern. Corp.*, 22 F.3d 871, 875 (9th Cir. 1993) (“[W]e must be reluctant to draw conclusions concerning congressional intent from the mere failure of bills to pass”); *Presidio Enterprises, Inc. v. Warner Bros. Dist. Corp.*, 784 F.2d 674, 687 (5th Cir. 1986) (“The Legislature acts by acting, not through inaction, and therefore

reliable conclusions as to legislative intent cannot be drawn from the failure of the Legislature to enact legislation”) (quotations omitted).

In short, Defendant’s proposed legal inference cannot be drawn from these unenacted bills regarding whether discrimination based on gender identity constitutes sex discrimination prohibited under Title IX. As such, the unenacted bills have no probative value in this case, and the court should deny Defendant’s Motion as to those documents.

**CONCLUSION**

WHEREFORE, based on the foregoing, Plaintiff respectfully requests that the Court deny Defendant’s Motion for Judicial Notice as to the unenacted congressional bills, attached to Defendant’s Motion as Exhibits E, F, and G.

Dated this 5th of December, 2017.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 5, 2017, the foregoing motion was filed electronically using the Court's ECF system, which will provide electronic notice to all counsel of record, including:

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