

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

**DREW ADAMS, a minor, by and through
his next friend and mother, ERICA
ADAMS KASPER,**

Plaintiff,

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

DISPOSITIVE MOTION

v.

**THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,**

Defendant.

_____ /

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 12(b)(6) and M.D. Fla. Loc. R. 3.1, hereby moves to dismiss Count II of the Complaint with prejudice. [Doc. 1].¹ In support hereof, Defendant states as follows:

BACKGROUND

1. Plaintiff filed his Complaint on June 28, 2017, alleging Defendant violated his rights under the Equal Protection Clause of the Fourteenth

¹ Defendant will be filing a separate Answer addressing Count I of the Complaint by no later than August 22, 2017.

Amendment (Count I) and Title IX of the Educational Amendments of 1972 (“Title IX”)(Count II) by discriminating against him based on his gender identity. [Doc. 1 at pp. 19-23, ¶¶65-83].

2. This Motion seeks dismissal of Plaintiff’s Title IX claim.

3. Based solely on the four corners of the Complaint, Plaintiff is unable as a matter of law to state a cause of action under Title IX. Further, the Court’s dismissal should be with prejudice, because Plaintiff is unable to plead a cause of action as a matter of law or allege facts sufficient to state a cause of action under Title IX.

WHEREFORE, Defendant respectfully requests the entry of an Order dismissing Count II of Plaintiff’s Complaint with prejudice, the return of Defendant’s costs and attorneys’ fees if determined appropriate, together with any other relief this Court deems just and proper.

MEMORANDUM OF LAW

A. Motion to Dismiss Standard

Since the Court is well-versed in the standards applicable to a motion to dismiss, Defendant will only provide a brief overview. To evaluate the merits of Defendant’s Motion, this Court must view the allegations of the Complaint in the light most favorable to Plaintiff, consider the factual allegations of the

Complaint as true, and accept all reasonable inferences. See, Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994). “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” Fourth Tee, LLC v. Axis Surplus Ins. Co., Case No. 8:12-CV-1249-T-17TGW, 2013 WL 593832, at *1 (M.D. Fla. Feb. 15, 2013).

B. Summary of Allegations

Plaintiff is a minor student at Allen D. Nease High School (“Nease”) located in the St. Johns County School District. [Doc. 1 at ¶¶1, 4]. Plaintiff’s birth certificate identifies him as a female, and he is biologically a female. [Doc. 1 at ¶¶20, 34]. However, Plaintiff self-identifies as a male (i.e. his “gender identity” as opposed to his sex). [Doc. 1 at ¶¶20, 22-23].

Plaintiff claims he has been discriminated against by Defendant, because he has not been given access to boys’ bathrooms at Nease. [Doc. 1 at ¶¶2, 81-82]. He claims this violates Title IX because, under his theory, the term “sex” in Title IX “includes, but is not limited to discrimination based on gender, gender nonconformity, transgender status, gender expression, and gender transition.” [Doc. 1 at ¶¶3, 78].²

² Plaintiff fails to explain what “but is not limited to” means in his proposed definition of “sex” under Title IX, thereby leaving his definition ambiguous.

C. Argument and Authority - Sex Under Title IX Does Not Mean Gender Identity

To state a cause of action under Title IX, Plaintiff must allege as follows: “(1) that [h]e was excluded from participation in, denied benefits of, or subjected to discrimination in an educational program; (2) that the exclusion *was on the basis of sex*; and (3) that the [D]efendant receives federal financial assistance.” Palmer ex rel. Palmer v. Santa Rosa County, Fla., Sch. Bd., Case No. 3:05CV218/MCR, 2005 WL 3338724, at *4 (N.D. Fla. Dec. 8, 2005)(emphasis added).

Plaintiff claims he has been subjected to discrimination on the basis of sex, because Defendant has refused to allow him to use the boys’ bathrooms at Nease. He has advanced a theory that “on the basis of sex,” as used in Title IX and its implementing regulations includes, among several other things, “gender identity.” According to Plaintiff, “sex” is based on an adolescent’s individual feelings, feelings that are not immutable and may be fluid.³

Plaintiff’s claim that sex under Title IX also means gender identity effectively asks that this Court ignore precedent requiring courts to look at the intent behind a statute at the time it was created. See, Thomas Jefferson Univ. v.

³ Plaintiff’s position that “sex” is determined by a person’s internal feelings is also at odds with individuals who may not identify as any sex, thus further obliterating the intent of Title IX and §106.33.

Shalala, 512 U.S. 504, 512 (1994). Title IX was created because Congress was concerned about discrimination against women in education. Neal v. Bd. of Trustees of California State Universities, 198 F.3d 763, 766 (9th Cir. 1999). That is precisely why Title IX expressly prohibits discrimination *on the basis of sex* in educational programs receiving federal financial assistance. 20 U.S.C. §1681; 34 C.F.R. §106.31; see also, Palmer ex rel. Palmer v. Santa Rosa County, Fla., Sch. Bd., Case No. 3:05CV218/MCR, 2005 WL 3338724, at *4 (N.D. Fla. Dec. 8, 2005)(emphasis added).

There is no question that “sex” under Title IX and §106.33 does not encompass “gender identity” or an individual’s feeling of their gender. See, Texas v. United States, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016), order clarified, 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (holding, “the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth.”); Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (holding, “the term ‘on the basis of sex’ in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex”).

With respect to separating bathrooms under Title IX, there is a regulation implementing Title IX directly on point that permits Defendant to separate bathrooms based on sex. Specifically, §106.33, which was adopted by the United States Department of Education (“DOE”), expressly permits educational institutions to provide “*separate toilet, locker room, and shower facilities on the basis of sex...*” 34 C.F.R. §106.33 (emphasis added).

The DOE’s current interpretation of Title IX and §106.33 also refutes Plaintiff’s argument that “on the basis of sex” includes “gender identity.” On February 22, 2017, DOE issued a Dear Colleague letter stating that its prior guidance equating gender identity to sex under Title IX and §106.33 failed to “explain how the position is consistent with the express language of Title IX.” [Doc. 41-7 at Ex. 10]. As such, DOE concluded, “in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.” [Id.]. Thus, not even the federal agency responsible for enforcing Title IX and §106.33 supports Plaintiff’s theory that “gender identity” means “sex” under Title IX and §106.33.

Plaintiff’s approach to defining “sex” effectively abolishes any recognition that biological males and females are different and adds language to the regulation that does not exist. See, Carcaño v. McCrory, 203 F. Supp. 3d

615, 642 (M.D.N.C. 2016). See also, United States v. Virginia, 518 U.S. 515, 550 n.19 (1996)(“Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements...”); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981)(“this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”).

In sum, Title IX does not say what Plaintiff wants it to say. There is no binding case law supporting Plaintiff’s position under Title IX, and DOE has specifically refused to extend the definition of “sex” in Title IX and §106.33 in the manner with which Plaintiff seeks to do through his claim. To the contrary, the greater weight of the case law, legislative intent, and recent DOE guidance make clear that “sex” under Title IX and §106.33 does not encompass “gender identity.” This Court should decline Plaintiff’s invitation to expand existing law under Title IX and §106.33 in order to allow him to state a cause of action in this case.⁴

⁴ Allowing Plaintiff’s Title IX claim to proceed based on his definition of “sex” would result in a complete dismantling of §106.33. Specifically, students in educational institutions would also be permitted to use locker rooms and showering facilities based on their own self-identified sex. This was clearly not the intent behind Title IX and §106.33 at the time they were passed and is counter to DOE’s current guidance.

D. Conclusion

Based on the foregoing, Plaintiff is unable to state a cause of action under Title IX. As such, Count II of the Complaint should be dismissed with prejudice.

Dated this 18th day of August, 2017.

Respectfully submitted,

/s/ Terry J. Harmon

TERRY J. HARMON

Trial Counsel

Florida Bar Number: 0029001

tharmon@sniffenlaw.com

ROBERT J. SNIFFEN

Florida Bar Number: 0000795

rsniffen@sniffenlaw.com

MICHAEL P. SPELLMAN

Florida Bar Number: 937975

mspellman@sniffenlaw.com

KEVIN KOSTELNIK

Florida Bar Number: 0118763

kkostelnik@sniffenlaw.com

SNIFFEN & SPELLMAN, P.A.

123 North Monroe Street

Tallahassee, Florida 32301

Telephone: (850) 205-1996

Facsimile: (850) 205-3004

Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that on this 18th day of August, 2017, a true and correct copy of the foregoing was electronically filed in the United States District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Terry J. Harmon _____
TERRY J. HARMON