

**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,

v.

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

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

Defendant.

_____ /

**DEFENDANT'S SUPPLEMENTAL BRIEF REGARDING ITS UNWRITTEN
BATHROOM POLICY**

Defendant, **the School Board of St. Johns County, Florida** in accordance with the Court's January 15 and 19, 2018, Orders [Docs. 159, 164], hereby submits its Supplemental Brief Regarding its Unwritten Bathroom Policy.

INTRODUCTION

The Court has concerns that Plaintiff's constitutional challenge to the School Board's unwritten bathroom policy may not be ripe, because the policy may not have been the subject of public input and final decision by the School Board. [Doc. 159]. The School Board submits that issues regarding the constitutionality of its bathroom policy are ripe for review for the reasons stated herein. Alternatively, even if Plaintiff's constitutional challenge is not ripe for review, Plaintiff's claim under Title IX of the

Education Amendments of 1972 is independently capable of being adjudicated and dismissed by the Court.

RELEVANT FACTS FOR PURPOSES OF THIS BRIEF¹

OCR Investigation, the Lawsuit and Subsequent Public Meetings

1. Plaintiff filed a complaint with the U.S. Department of Education’s Office for Civil Rights (“OCR”) in November of 2015. *T. I P. 259-260, 16-25, 1-25.*

2. On March 30, 2016, in response to Plaintiff’s OCR complaint, the District fervently opposed Plaintiff’s position and asserted its bathroom policy was legal and authorized under Title IX. *T. III P. 74-75 L. 16-25, 1-12; D. Ex. 40.* School Board members were sent copies of the response. *T. III P. 74-75 L. 16-25, 1-12; D. Ex. 40.*

3. In May of 2016, in response to a joint publication from OCR and the U.S. Department of Justice (“DOJ”)(“2016 Guidance”), then-superintendent Dr. Joseph Joyner released an official statement on behalf of the District stating that the District did not agree with the 2016 Guidance; instead, the District asserted that its practice of providing gender-neutral bathrooms for transgender students was lawful and reasonable. *T. III P. 75-78 L. 19-25, 1-25, 1-24; D. Ex. 84, 106A.*

4. On February 22, 2017, OCR and DOJ withdrew the 2016 Guidance. *D. Ex. 106B, 237.*

¹ Citations to the trial transcript will be to the volume, page(s) and line number(s). For example, Volume 2, pages 16-17, lines 1-25 and lines 1-5 will be cited as *T. II P. 16-17 L. 1-25, 1-5*. Citations to the parties’ exhibits will be noted as either *P. Ex.* or *D. Ex.*

5. This lawsuit was filed on June 28, 2017. [Doc. 1].

6. On July 11, 2017, just two weeks after Plaintiff initiated this lawsuit, the School Board held a regularly scheduled public meeting during which five individuals expressed their opinions about transgender bathroom rights during the public comment portion of the meeting, including their disagreement with not permitting students to use the bathroom consistent with their gender identity.² During the meeting, the School Board expressed that it was committed to following the law by respecting the rights of all students; however, it could not discuss the matter further due to pending litigation.³

7. On November 14, 2017, the School Board held a shade meeting in accordance with F.S. §286.011 (8) to discuss this case.⁴

The Unwritten Bathroom Policy and Written Best Practices

8. The School Board does not formally adopt a policy and engage in rule-making for each law to which it adheres. *T. III P. 46-47 L. 25, 1-4.*

9. Unlike policies, procedures and best practices are not required to be adopted through the statutory rule-making process. *T. III P. 43-44 L. 25, 1-15.*

10. The School Board provides sex-segregated bathrooms in accord with Title IX, meaning boys must use the boys' bathrooms and girls must use the girls'

² <http://www.stjohns.k12.fl.us/board/wp-content/uploads/sites/11/2017/03/2017-7-11-School-Board-Meeting-minutes-1.pdf> (last visited January 25, 2018). See also, <https://vimeo.com/225272890> (31:13 through 45:28)(last visited January 25, 2018)

³ <https://vimeo.com/225272890> (45:00 through 45:28)(last visited January 25, 2018)

⁴ <http://www.stjohns.k12.fl.us/events/event/school-board-meeting-4/> (last visited January 25, 2018).

bathrooms. *T. II P. 149 L. 8-13, P. 227 L. 6-24; T. III P. 11-12 L. 22-25, 1-2, P. 34-35 L. 20-25, 1-3, P. 44-45 L. 20-25, 1-18.* The policy is unwritten. *T. III P. 45 L. 16-18.* It has been the School Board's policy for as long as anyone can remember, and it separates boys and girls as those terms have been traditionally defined. *T. III P. 45-46 L. 19-25, 1-23, P. 99-100 L. 20-25. 1-5.*

11. Frank Upchurch, Esq., the School Board's attorney, was able to trace the policy back to at least the early 1950s. *T. III P. 45-46 L. 16-25, 1-7.* Likewise, Sallyanne Smith testified that in her 17 years as an employee with the District, students of one biological sex were never permitted to use the bathroom of the opposite biological sex. *T. II P. 149-150 L. 14-15, 1-8; P. 181 L. 2-6.*

12. The School Board's long-standing custom and practice creates an expectation of privacy among students and their parents that the two biological sexes will not share or infringe on each other's privacy in school bathrooms. *T. III P. 67 L. 12-20.* The policy has been successful. *T. II P. 248-249 L. 25, 1-7.*

13. The unwritten policy is enforced through the student code of conduct. *T. II P. 227-228 L. 6-25, 1-15.* If students of one sex go into the bathroom of the opposite sex, it would be considered misconduct warranting possible discipline under the student code of conduct. *T. II P. 228 L. 4-18; T. III P. 36 L. 10-15.*

14. The sex of a student is determined at registration through enrollment materials. *T. II P. 205 L. 10-23.* When a student enrolls, he or she is required to submit

a number of documents, including a Student Information/Entry Form, a Home Language Survey, a School Entry Health Exam document, and a birth certificate. *T. II P. 229-234; D. Ex. 142-145.* The District determines a student's sex by reviewing all of these documents. *T. II P. 234 L. 14-23.* Once a student enrolls and identifies their sex in enrollment documents, the student is treated consistent with the sex in their enrollment materials for purposes of bathroom use. *T. II P. 234-235 L. 24-25, 1-2.* This method of determining student sex has not been a problem. *T. III P. 54-55 L. 9-25, 1-4.* The District accepts at face value the sex of students as represented in enrollment documents unless or until it is put on notice that there is an issue. *T. III P. 53 L. 5-22.*

15. In or around August or September of 2015, the District's Executive Cabinet⁵ finalized the written Best Practices ("Best Practices"). *T. II P. 242-243 L. 20-25, 1-11, P. 246-247 L. 6-25, 1-3.* The Best Practices were created to provide guidance to teachers and staff and apply to all students. *T. II P. 247 L. 4-7; T. III P. 110 L. 4-21.*

16. The Best Practices provide students access to a gender-neutral bathroom or the bathroom matching their biological sex. *T. II P. 199 L. 5-20; D. Ex. 33.*⁶ It did/does not change the School Board's unwritten bathroom policy. *T. II P. 247 L. 13-16; T. III P. 61 L. 6-13.*

⁵ The Executive Cabinet is comprised of the Superintendent, Assistant or Associate Superintendent, and Directors. *T. II P. 169 L. 4-10.* The Executive Cabinet met weekly to discuss various situations and initiatives. *T. II P. 237-238 L. 22-25, 1-2.*

⁶ This provision is also consistent with Cathy Mittelstadt's actions prior to the development of the Best Practices when she served as a principal. *T. II P. 228-229 L. 16-25, 1-5.*

17. The Best Practices do not prohibit transgender students from using the bathroom that matches their gender identity; rather, it is the School Board's unwritten, long-standing policy of assigning bathrooms on the basis of sex. *T. III P. 97 L. 4-11*.

ARGUMENT AND AUTHORITY

A. The School Board's Unwritten Bathroom Policy

The School Board has separated bathrooms based on the two biological sexes for as far back as anyone can remember. Trial testimony traced the District's widespread practice back to the early 1950's and established that the District has been providing sex-segregated bathrooms consistent with the 1974 Federal Regulation adopted by DOE which permits educational institutions to "provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. §106.33 (emphasis added).⁷ The District has enforced this policy through the application of the student code of conduct.

B. The School Board's Bathroom Policy is a Long-Standing, Widespread Custom or Practice Under §1983

School boards, like other public entities, can be held liable under §1983 if they have a policy or custom that causes injury to a plaintiff. Florida Family Ass'n, Inc. v.

⁷ Plaintiff agrees that the School Board may utilize the provisions set forth in 34 C.F.R. §106.33 to provide sex-segregated bathrooms. See, Doc. 22 at p.20, n. 10 ("A Title IX regulation permits schools to maintain 'comparable' separate restrooms for boys and girls. 34 C.F.R. §106.33. [Plaintiff] does not challenge that regulation; to the contrary, he seeks only equal access to the boys' restrooms permitted by that regulation.")

Sch. Bd. of Hillsborough County, 494 F. Supp. 2d 1311, 1322 (M.D. Fla. 2007). “A policy is an officially promulgated policy....[a] custom is ‘a practice that is so settled and permanent that it takes on the force of law.’” (internal citations omitted). Id. at 1323. To establish a “practice” or “custom,” as opposed to a promulgated policy, the following must be proven:

...it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom or policy.

Church v. City of Huntsville, 30 F.3d 1332, 1345 (11th Cir. 1994).

The School Board’s unwritten bathroom policy is ripe for review in this case, because it is a custom that is so widespread that it has the force of law under §1983. Monell v. Dep’t of Soc. Services of City of New York, 436 U.S. 658, 690–91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)(“although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments... may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body's official decisionmaking channels”); Bd. of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 137, 137 L. Ed. 626 (1997)(“an act performed pursuant to a ‘custom’ that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to

have the force of law”); Denno v. Sch. Bd. of Volusia County, Fla., 218 F.3d 1267, 1277 (11th Cir. 2000)(“In order for the Board to be held liable under the custom or practice prong of Monell, Denno must demonstrate that a custom or practice of banning the Confederate flag at high schools within the school district is so well-settled and pervasive that it assumes the force of law”); Cox v. McCraley, 993 F. Supp. 1452, 1456 (M.D. Fla. 1998)(“a custom may only give rise to municipal liability if it is so entrenched and long-standing that it carries the force of law”); Cuesta v. Sch. Bd. of Miami-Dade County, Fla., 285 F.3d 962, 966 (11th Cir. 2002).

As the evidence at trial reflected, the School Board’s unwritten policy of separating bathrooms based on biological sex has been a persistent and widespread practice for as far back as anyone can remember. Testimony from Ms. Smith, Mr. Upchurch, and Ms. Mittelstadt established that the District has never permitted students to use a bathroom that differs from their biological sex (except for gender-neutral bathrooms). Denying Plaintiff’s request to use the boys’ bathrooms was not a random act or isolated incident; instead, it was based on the District’s long-standing and enforced practice. Finally, the School Board has actual or constructive knowledge of these customs as demonstrated by the fact that it was informed in March of 2016 of the District’s position with respect to Plaintiff’s claim before OCR, then-Superintendent Dr. Joyner released a public statement in May of 2016 reiterating the District’s position on bathroom use, the School Board held a public meeting on July 11, 2016, during

which the School Board's practices were addressed by members of the public, and the School Board held a shade meeting on November 14, 2017, in regard to this case.

C. Plaintiff has Not Initiated a Rule Challenge

Plaintiff's lawsuit only contains actions under Title IX and the Equal Protection Clause. Plaintiff has not initiated a rule challenge under Florida law. See, F.S. §120.56. Thus, any arguments as to whether Defendant's unwritten policy is in accord with Florida's Administrative Procedure Act are not before this Court.

D. The School Board's Adherence to §106.33 Does Not Require Rulemaking

For the past several decades, it has been unnecessary for the School Board to engage in formal rulemaking to memorialize its long-standing unwritten bathroom policy or to define the word "sex," because there has never been confusion or disagreement as to whether "sex" under Title IX and §106.33 meant anything other than biological sex.⁸ While Plaintiff's argument in this case is premised on a recent phenomenon that the term "sex" under Title IX and §106.33 allegedly means something other than biological males and biological females, the School Board is simply unaware of any legal requirement mandating that it engage in rulemaking to define the unambiguous term "sex" in Title IX and its implementing regulations.

⁸ Trial testimony established that Defendant's unwritten bathroom policy was a custom in the District at least as early as the 1950's – which predates the adoption of Florida's Administrative Procedure Act. Administrative Procedure Act, ch. 74-310 (1974).

E. In the Event Plaintiff's Constitutional Challenge is Not Ripe for Review, Plaintiff's Title IX Claim Should Still be Dismissed

The School Board submits that Plaintiff's constitutional challenge to its unwritten policy is ripe for adjudication by this Court; nonetheless, if the Court were to decide otherwise, Plaintiff's Title IX claim still remains ripe for review. Based on the arguments set forth in the various pleadings and other filings in this action [Docs. 54, 63, 64, 116, and 138.1], in addition to the School Board's Post-Trial Proposed Findings of Fact and Conclusions of Law, the School Board respectfully submits that this Court should dismiss Plaintiff's cause of action under Title IX.

Dated this 2nd day of February, 2018.

Respectfully submitted,

/s/ Terry J. Harmon

TERRY J. HARMON

Trial Counsel

Florida Bar Number: 0029001

tharmon@sniffenlaw.com

/s/ Robert J. Sniffen

ROBERT J. SNIFFEN

Florida Bar Number: 0000795

rsniffen@sniffenlaw.com

/s/ Michael P. Spellman

MICHAEL P. SPELLMAN

Florida Bar Number: 937975

mspellman@sniffenlaw.com

/s/ Kevin C. Kostelnik

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 St. Johns County School Board

CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of February, 2018, a true and correct copy of the foregoing was electronically filed in the U.S. 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