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United States District Court, N.D. Texas, Dallas Division.

Sheila. BEAL, et al., Plaintiffs,
v.
MIDLOTHIAN INDEPENDENT SCHOOL DISTRICT # 070908 OF ELLIS COUNTY, Texas, Molly Helmlinger, in her official capacity as Superintendent, and Does 1 through 50, Defendants.

No. Civ.A. 3:01–CV–0746L. | May 21, 2002.

Opinion

MEMORANDUM OPINION AND ORDER

LINDSAY, J.

***1** Before the court is Plaintiffs' Motion for Class Action Certification, filed July 17, 2001. Plaintiffs move for class certification under Fed.R.Civ.P. 23(b)(2). After having considered the motion, briefs, and the applicable law, the court grants in part and denies in part Plaintiffs' Motion for Class Certification, and dismisses Plaintiffs' effective accommodation claim for lack of standing.

I. ***Factual and Procedural Background***

Plaintiffs bring this action against Defendants Midlothian Independent School District ("MISD") and its Superintendent Molly Helmlinger, in her official capacity, alleging they (1) have been denied an equal opportunity to participate in interscholastic and other school sponsored athletics, and (2) have received unequal treatment and benefit in these programs. Plaintiffs contend the denial of equal participation and unequal treatment constitute gender discrimination in violation of (1) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.,* and (2) the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs seek declaratory and injunctive relief to remedy the effects of Defendants' alleged discriminatory conduct.

Plaintiffs are four students currently enrolled in the MISD. Plaintiff Amber Neely participates in softball; Plaintiff Allison Maloney participates in volleyball; Plaintiff Katie Maloney participates in volleyball, basketball, softball, and track; and Plaintiff Valerie Kay Emmett participates in softball and tennis. Plaintiffs propose to represent "all present and future female students enrolled at Midlothian Independent School District who participate, seek to participate, or are deterred from participating in interscholastic and/or other school-sponsored athletics at Midlothian Independent School District." Pls.' Compl. ¶ 18.

II. ***Analysis***

A. Title IX

Title IX proscribes gender based discrimination in education programs or other activities receiving federal financial assistance. *See Pederson v. Louisiana State Univ.,* 213 F.3d 858, 877 (5th Cir.2000). Specifically, Title IX provides

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving financial assistance....

20 U.S.C. § 1681(a). Section 902 of Title IX, 20 U.S.C. § 1682, authorizes agencies awarding federal financial assistance to promulgate regulations "ensuring that aid recipients adhere to § 901(a)'s mandate." *Pederson,* 213 F.3d at 877 (*quoting North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 514 (1982)). The applicable regulations provide

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

***2** 34 C.F.R. § 106.41(a) (1999). Title IX and the regulations promulgated thereunder recognize three major areas of compliance: (1) awarding of scholarships, 34 C.F.R. § 106.37(c); (2) participation opportunities

("effective accommodation"), 34 C.F.R. § 106.41(c)(1); and, (3) equivalence in treatment and benefits, 34 C .F.R. § 106.41(c)(2)-(10). *See Cohen v. Brown Univ.,* 991 F.2d 888, 897 (1st Cir.1993) (describing areas of regulatory compliance); 44 Fed.Reg. 71413, 71414 (1979) (same).

In their complaint, Plaintiffs contend Defendants failed to accommodate student interest and failed to provide equal treatment and benefits. Compliance in the area of effective accommodation is determined by a three-part test in which the court must consider, among other factors, "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Pederson,* 213 F.3d at 865 n. 4 (*quoting Boucher v. Syracuse Univ.,* 164 F.3d 113, 115 n. 1 (2d Cir.1999)).[1] Compliance in the area of equal treatment and benefits is assessed based on an overall comparison of the male and female athletic programs, including an analysis of a list of considerations provided by the applicable regulations. *Id.* (citation omitted).[2]

[1] Under the three-part test, the court must consider
(1) whether interscholastic and other school sponsored athletic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
(2) whether the members of one sex have been and are underrrepresented among interscholastic and other school sponsored athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
(3) whether the members of one sex are underrepresented among interscholastic and other school sponsored athletics and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.
44 Fed.Reg. at 71418.

[2] These factors include
(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.
34 C.F.R. § 106.41(c) (1992); *see also Cohen,* 991 F.2d at 897.

B. Standing

As an initial matter, the court addresses Plaintiffs' standing to assert their claims under Title IX. Although the parties have not raised the issue of standing, federal courts maintain the independent obligation to examine their own subject matter jurisdiction. *United States v. Hays,* 515 U.S. 737, 742 (1995); *Johnson v. City of Dallas,* 61 F.3d 442, 443–44 (5th Cir.1995). Plaintiffs bear the burden to allege facts demonstrating that they are the proper parties to bring their claims. *Id.* Moreover, the issue of standing presents a threshold matter the court must address before determining the propriety of class certification. 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS §§ 2.05–2.07 (3d ed.1992) (hereinafter, "NEWBERG") (noting standing issue is distinct from the capacity to represent a class under Fed.R.Civ.P. 23(a)). After reviewing Plaintiffs' Complaint, and the factual allegations contained therein, the court concludes that Plaintiffs lack standing to assert their effective accommodation claims.

Article III of the United States Constitution limits federal jurisdiction to actual cases and controversies. U.S. Const. art. III, § 2, cl. 1. The case or controversy limitation requires that a party have standing to invoke federal jurisdiction. *See Baker v. Carr,* 396 U.S. 186, 204 (1962). To establish standing, a plaintiff must satisfy three requirements: (1) that she suffered an "injury in fact;" (2) that a causal relationship exists between the injury and the challenged conduct; and, (3) that the injury will likely be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992); *see also Public Citizen v.. Bomer,* 274 F.3d 212, 217 (5th Cir.2001). With respect to the first requirement, a plaintiff must demonstrate the invasion of a legally protected interest which is "(a) concrete and particularized, and (b) actual or imminent." *Bomer,* 274 F.3d at 217 (*quoting Lujan,* 504 U.S. at 560 n. 1 (noting a "particularized injury" is one affecting the plaintiff in an individualized and personal way)).

***3** The Fifth Circuit considered the issue of standing in the context of a Title IX claim in *Pederson v. Louisiana State University.* 213 F.3d at 872. In *Pederson,* a group of female college students sued Louisiana State University ("LSU") asserting claims under Title IX for both effective accommodation and unequal treatment. The district court dismissed both claims for lack of standing. The Fifth Circuit reversed the dismissal of the plaintiffs' effective accommodation claim, holding that a party establishes standing under a Title IX effective accommodation claim by demonstrating "that she is 'able and ready' to compete for a position on the unfielded team." *Id.* at 871. The court affirmed the district court's dismissal of the unequal treatment claim because none of the named plaintiffs was a member of a varsity team, and thus did not personally suffer any injury due to LSU's allegedly unequal treatment of its varsity athletes. *Id.* at 872; *see also Boucher,* 164 F.3d at 120 (dismissing plaintiffs' equal treatment claims because none of the named plaintiffs was varsity athlete).

The court believes that Plaintiffs have alleged sufficient facts to maintain their Title IX unequal treatment claims. Plaintiffs have alleged that they currently participate in athletic activities sponsored by the school district and that the school district failed to provide them with comparable treatment and benefits. Pls.' Compl. ¶ 48. Specifically, Plaintiffs contend MISD funds interscholastic and other school sponsored athletics in a manner that discriminates against female athletes; provides male athletes with newer equipment and supplies; discriminates against female athletes with regard to meals and travel to games and practice sites; provides fewer opportunities to receive coaching; supplies inferior locker, practice, and competition facilities; and, provides unequal access to these facilities. *Id.* ¶ 49. Plaintiffs' standing to pursue their unequal treatment claims does not, however, automatically confer standing to pursue their effective accommodation claims. As the court explained in *Pederson,* "[s]tanding to challenge effective accommodation does not automatically translate into standing to challenge the treatment of existing varsity athletes." 213 F.3d at 872. The court holds that the converse is also true; that is, standing to challenge the treatment of existing athletes does not automatically translate into standing to challenge effective accommodation.

In this case, the court finds that Plaintiffs lack standing to bring Title IX effective accommodation claims. Plaintiffs failed to allege sufficient facts demonstrating they suffered an "injury in fact" or that Plaintiffs were "able and ready" to participate in an athletic opportunity not currently offered by the MISD. Instead, the factual allegations in the complaint indicate that each of the Plaintiffs already participates in interscholastic athletic activities. *See* Pls.' Compl. ¶¶ 11–14. The court is mindful that at the pleading stage "general factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing, *Lujan,* 504 U.S. at 561; however, where, as here, Plaintiffs offer *no* factual allegations, specific or general, that demonstrate an injury in fact, the court may dismiss the claim. *See Bomer,* 274 F.3d at 219 (dismissing claim for lack of standing, stating "[i]n the absence of substantive factual allegations of injury, only an abstract claim remains."); *Pederson,* 213 F.3d at 872. Other than one boilerplate, conclusory allegation made in reference to each student, Plaintiffs do not set forth any specific factual allegations that suggest Defendants failed to accommodate student interest in a nondiscriminatory manner.[3] Moreover, Plaintiffs provide *no* factual allegations to indicate any of the Plaintiffs were "able and ready" to compete in an athletic endeavor not currently offered by Defendants. Accordingly, the court dismisses Plaintiffs' effective accommodation claims for lack of standing because they do not satisfy the initial prong of the standing inquiry.

3 The only allegations Plaintiffs make with respect to their effective accommodation claims are as follows: "[Plaintiff's] opportunities to participate in interscholastic and other school sponsored athletics are not comparable to the opportunities afforded to boys who are similarly situated." Pls.' Compl. ¶¶ 11–14; and, "Midlothian Public Schools has [sic] violated Title IX by discriminating against female students ... by among other things, failing to provide equal opportunities for females to participate in interscholastic and other school-sponsored activities." *Id.* ¶ 42. Nowhere do Plaintiffs offer a single factual allegation that indicates the number of athletic opportunities for male and female students at Midlothian, the interest and abilities of the female students at Midlothian in general, or even the specific interest of the Plaintiffs in this case to participate in interscholastic athletic activities not offered by the school district. In short, Plaintiff have provided no factual allegations that indicate any of the named Plaintiffs has ever been denied an opportunity to participate in athletic programs or has ever been deterred from participating in athletic programs in the MISD.

C. Rule 23 Requirements

***4** Before a class may be certified, the court must conduct a "rigorous analysis" of the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See Castano v.*

American Tobacco Co., 84 F.3d 734, 740 (5th Cir.1996) (*citing General Tel. Co. v. Falcon,* 457 U.S. 147, 161 (1982)). Under Rule 23(a), a plaintiff must demonstrate that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, Plaintiffs must show that the defendants "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Plaintiffs have the burden of proving that these requirements are satisfied, *see Castano,* 84 F .3d at 740, and the court enjoys broad discretion in making class certification determinations. *Jenkins v. Raymark Indus., Inc.,* 782 F.2d 468, 471–72 (5th Cir.1986).

Plaintiffs propose to represent "all present and future female students enrolled at Midlothian Public Schools who participate, seek to participate, or are deterred from participating in interscholastic and/or other school sponsored athletics at Midlothian Public Schools." Pls.' Compl. ¶ 18. Because the court finds that Plaintiffs lack standing to assert their effective accommodation claims, the court believes Plaintiff's proposed class definition is too broad. *See O'Shea v. Littleton,* 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *see also* 1 NEWBERG § 2.06. In other words, a named Plaintiff cannot bring a claim on behalf of others who would have standing by virtue of their injury in fact if they were named as plaintiffs instead. *See* 1 NEWBERG § 2.06 (stating "[s]tanding cannot be acquired through the back door of a class action"). Accordingly, the court rejects Plaintiffs' class definition.

A court may, however, "construe the complaint or redefine the class" if the court finds "plaintiff's definition of the class ... unacceptable." 7A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1759, at 111–12 (1986). Based on the court's jurisdictional findings made above, and the foregoing Rule 23 analysis, the court certifies the following class:

> All current and future female students enrolled in the Midlothian Independent School District who participate or are deterred from participating in interscholastic and/or school sponsored athletics as a result of unequal treatment and/or the distribution of benefits.

***5** The court addresses the specific Rule 23(a) and (b)(2) requirements below.

1. Numerosity

Rule 23(a) requires Plaintiffs to demonstrate that joinder of all class members would be impracticable because of the numerosity of the putative class. The number of members in a proposed class is not determinative of whether joinder is impracticable. *See Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1038 (5th Cir.1981). Instead, "the proper focus is not on numbers alone," but on other relevant factors, including whether "the alleged class includes future and deterred [plaintiffs], [who are] necessarily unidentifiable. In such a case the requirement of Rule 23(a) is clearly met, for 'joinder of unknown individuals is certainly impracticable." *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1022 (5th Cir.1981) (citations omitted). Here, Plaintiffs seek to represent the rights of all female students in the MISD who are treated unequally because of their sex. Plaintiffs also allege that joinder is impracticable because members of the class who may suffer future injury are not capable of being identified at this time. Pls' Compl. ¶ 21. The court thus finds Plaintiffs have satisfied the numerosity requirement.

2. Commonality

The Plaintiffs next must demonstrate commonality. The test for commonality is not demanding. *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 625 (5th Cir.1999); *see also Forbush v. J.C. Penney Co.,* 994 F.2d 1101, 1106 (5th Cir.1993) ("The threshold of 'commonality' is not high.") (citations omitted). "The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is 'at least one issue, whose resolution will affect all or a significant number of the putative class members." ' *James v. City of Dallas,* 254 F.3d 551, 570 (5th Cir.2001), *cert. denied,* 122 S.Ct. 919 (2002) (*quoting Forbush,* 994 F.2d at 1106); *see also Lightbourn v. County of El Paso,* 118 F.3d 421, 426 (5th Cir.1997). "[A]llegations of similar discriminatory practices generally meet the commonality requirement." *Lightbourn,* 118 F.3d at 426.

Plaintiffs allege questions of law and fact that are common to the class, including whether the female students enrolled in the MISD are receiving unequal

treatment and benefits in comparison to the male students in the district, and whether these facts constitute discrimination in violation of Title IX and the Equal Protection Clause. Pls.' Compl. ¶ 22. A finding of liability against Defendants will turn on a single issue with respect to the entire class; namely, whether the benefits and the treatment afforded the Plaintiffs by the school district were distributed in a manner inconsistent with Title IX. *See, e.g., Communities for Equity v. Michigan High School Athletic Assoc.,* 192 F.R.D. 568, 572 (W.D.Mich.1999) (finding commonality element met in Title IX class action suit). The court thus finds Plaintiffs satisfied the commonality requirement of Rule 23(a).

3. Typicality

***6** Plaintiffs must also demonstrate that "the claims or defenses of the parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). The "typicality" requirement "focuses on the similarity between the named Plaintiffs' legal and remedial theories and the legal and remedial theories on those whom they purport to represent." *Lightbourn,* 118 F.3d at 426. Both the commonality and typically requirements "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon,* 457 U.S. at 157 n. 13. As a result, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Id.*

Plaintiffs contend that their claims are based on the same legal theory as the other class members' claims and that the claims arise from the same course of alleged discriminatory conduct by the Defendants. The court agrees. That there exists some factual distinction between the named Plaintiffs' claims and the claims of the class members is insufficient to extinguish typicality. *Lightbourn,* 118 F.3d at 426; *Communities for Equity,* 192 F.R .D. at 573. Accordingly, the court holds Plaintiffs satisfy the typicality requirement of Rule 23(a).

4. Adequacy of Representation

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class." "Differences between named Plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen,* 186 F.3d at 625–26. Additionally, the plaintiffs' attorney representing the class must be qualified, experienced, and generally able to conduct the proposed litigation. *See Gonzales v. Cassidy,* 474 F.2d 67, 73 n. 10 (5th Cir.1973) (citations omitted).

Defendants contend that counsel for Plaintiffs have not submitted evidence regarding the adequacy of the named Plaintiffs to represent the class or the ability of Plaintiffs' counsel to fund and prosecute this action.[4] Plaintiffs' counsel have described in some detail in the briefing papers their experience in conducting this particular type of litigation. Further, Plaintiffs and their counsel aver that they have committed the necessary funds to prosecute this action. The court believes this is all that is required under Rule 23(a) and Local Rules 23.2(b) and (c). The court thus finds Plaintiffs have satisfied Rule 23(a)(4).

[4] Defendants also contend that the named Plaintiffs cannot represent the putative class because they currently participate in athletic programs, and thus are not members of a class of female students who have allegedly been denied participation. Defendants concern in this regard is rendered moot by the court's holding on Plaintiffs' standing to assert the effective accommodation claim and the court's subsequent reformulation of the class definition.

5. Rule 23(b)(2) Requirements

Finally, Plaintiffs must satisfy the requirements of Rule 23(b)(2). Rule 23(b)(2) requires that the Defendants acted on grounds generally applicable to the class, thus making final injunctive or declaratory relief appropriate with respect to the class as a while. In this context, "[injunctive] relief rather than monetary damages must be the 'predominant' form of relief the plaintiffs pursue." *James,* 254 F.3d at 571 (citations omitted). In this case, Plaintiffs seek only injunctive and declaratory relief. *See* Pls.' Compl. ¶ 38. Accordingly, the court finds that Plaintiffs have satisfied the requirements of Rule 23(b)(2).[5]

[5] Defendants also maintain that certification is unnecessary in this case because disposition of this matter in favor of the named Plaintiffs would automatically accrue to the benefit of all the putative class members. The Fifth Circuit has not yet determined whether "necessity" may be a factor in class certification decisions, *see Pederson,* 213 F.3d at 867 n. 8; however, the court has indicated that the substantial risk of mootness creates a necessity for class certification in the Title IX context. *Id.; see also Cook v. Colgate,* 992 F.2d 17, 19 (2d Cir.1993) (vacating as

moot district court order of injunctive relief in Title IX case).

III. ***Conclusion***

***7** For the reasons stated herein, the court dismisses Plaintiffs' Title IX effective accommodation claims for lack of standing. The court further grants in part and denies in part Plaintiffs' Motion for Class Certification. The court certifies a class of female students enrolled in the Midlothian Independent School District as

> All current and future female students enrolled in the Midlothian Independent School District who participate or are deterred from participating in interscholastic and/or school sponsored athletics as a result of unequal treatment and/or the distribution of benefits.