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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PARENTS FOR PRIVACY; KRIS GOLLY
and JON GOLLY, individually [and as
guardians ad litem for A.G.]; LINDSAY
GOLLY; NICOLE LILLIE; MELISSA
GREGORY, individually and as guardian ad
litem for T.F.; and PARENTS RIGHTS IN
EDUCATION, an Oregon nonprofit
corporation,

Plaintiffs,

v.

DALLAS SCHOOL DISTRICT NO.2;
OREGON DEPARTMENT OF
EDUCATION; GOVERNOR KATE
BROWN, in her official capacity as the
Superintendent of Public Instruction; and
UNITED STATES DEPARTMENT OF
EDUCATION; BETSY DEVOS, in her
official capacity as United States Secretary of
Education as successor to JOHN B. KING,
JR.; UNITED STATES DEPARTMENT OF
JUSTICE; JEFF SESSIONS, in his official
capacity as United States Attorney General, as
successor to LORETTA F. LYNCH,

Case No. 3:17-cv-01813-HZ

UNOPPOSED MOTION FOR LEAVE TO
APPEAR AS AMICUS CURIAE

By Governor Kate Brown and the Oregon
Department of Education

Defendants,
and
GOVERNOR KATE BROWN and OREGON
DEPARTMENT OF EDUCATION,
Movants – Putative Amici.

LR 7-1(a) CERTIFICATION

Counsel for the State of Oregon certifies that she conferred in good faith with counsel for all parties on the instant motion for leave to appear as amicus curiae. The motion is unopposed; however, Plaintiffs and the State have agreed that Plaintiffs may file a brief in response to this motion.

MOTION

Governor Kate Brown and the Oregon Department of Education (collectively, “the State”) respectfully move for an order allowing it to appear as amicus curiae in this case.¹ If granted leave to appear as amicus, the State intends to submit the Proposed Amicus Curiae Brief attached to this motion.

MEMORANDUM IN SUPPORT

I. Introduction

The State has a strong interest in ensuring equal treatment of every student attending schools in Oregon. The State asks the Court to grant its motion for leave to appear as amicus because this case raises important legal and policy questions, particularly under Oregon law, that relate to the State’s ability to fulfill that responsibility. If granted leave to appear, the State will provide additional support for the Dallas School District No. 2’s (“the School District”) motion

¹ Governor Brown and the Oregon Department of Education (“ODE”) were defendants in this case for a short time, but were voluntarily dismissed by Plaintiffs after the State filed a motion to dismiss the claims alleged against it because they were barred by sovereign immunity. The State moves to appear as amicus now to assist the Court in resolving claims alleged against Dallas School District No. 2.

to dismiss and Basic Rights Oregon’s proposed motion to dismiss, which would assist the Court in analyzing the issues presented in this case.

II. Legal Standard

This Court “has broad discretion to appoint amici curiae.” *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Greater Hells Canyon Council v. Stein*, No. 2:17-cv-00843-SU, 2018 WL 438924, at *1 (D. Or. Jan. 16, 2018) (citing *Hoptowit*). The role of an amicus curiae is “assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.” *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). District courts often allow amicus curiae briefs from non-parties concerning legal issues that are of broad public interest, have potential ramifications beyond the parties directly involved, or upon which the amicus has unique information or perspective. *See, e.g., Greater Hells Canyon Council v. Stein*, 2018 WL 438924, at *1; *Cent. Or. Landwatch v. Connaughton*, 6:13-CV-02027-AA , 2014 WL 6893695, at *1 n.1 (D. Or. Sept. 5, 2014) (granting Oregon Water Resources Department’s motion to appear as amicus curiae). Further, there is “no rule that amici must be totally disinterested.” *Greater Hells Canyon Council v. Stein*, 2018 WL 438924, at *1 (quoting *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm’n.*, 801 F.2d 1120, 1125 (9th Cir. 1986)).

III. Argument

The State, through Governor Brown’s direction to ODE, has a unique interest in assisting the court in addressing the issues presented in this case. Oregon is home to over 1,200 public schools, organized into 197 school districts.

ODE exercises “administrative functions of the state relating to supervision, management and control of schools[.]” O.R.S. 326.111(3). Constitutionally, the Governor is Superintendent of Public Instruction, ODE’s chief administrator. Or. Const. art. VIII, §1. In that capacity, Governor Brown exercises “a general superintendence of school officers and the public schools.”

O.R.S. 326.310. By statute, this “general superintendence” includes “[a]ssist[ing] all district school boards and education service district boards in answering questions concerning the proper administration of the school laws[.]” O.R.S. 326.310(3). Pursuant to this statutory directive, ODE has issued legal guidance to local school districts directing them to treat transgender students consistent with their gender identity.

More generally, the Governor’s commitment and ODE’s mission is to foster equity and excellence for every learner through collaboration with educators, partners, and communities. Consistent with that mission, ODE provides support and guidance to local districts to ensure an educational environment that is safe and free from discrimination and harassment for all students. That includes promoting compliance with state and federal law.

Thus, the outcome of this case would have a significant impact on ODE and the students it serves, not just on the parties directly involved in the case. The case is also of broad public interest, as indicated by the motion to intervene filed by Basic Rights Oregon.

If granted leave to appear, the State will provide additional support to assist the Court in understanding why the District’s actions and policies regarding transgender students do not violate Oregon law. *See* O.R.S. 659A.403 (2017); O.R.S. 659.850 (2017).

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IV. Conclusion

For the reasons stated above, the State of Oregon respectfully requests that the Court grant its motion to appear as amicus curiae.

DATED March 19, 2018.

Respectfully submitted,

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Attorney General

s/ Carla A. Scott

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IN THE UNITED STATES DISTRICT COURT
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Education as successor to JOHN B. KING,
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JUSTICE; JEFF SESSIONS, in his official
capacity as United States Attorney General, as
successor to LORETTA F. LYNCH,

Case No. 3:17-cv-01813-HZ

PROPOSED AMICUS BRIEF IN SUPPORT
OF DEFENDANT DALLAS SCHOOL
DISTRICT'S MOTION TO DISMISS

By Governor Kate Brown and the Oregon
Department of Education

Defendants,
and
GOVERNOR KATE BROWN and OREGON
DEPARTMENT OF EDUCATION,
Movants – Putative Amici.

I. INTRODUCTION

Kate Brown and the Oregon Department of Education (collectively, “the State”) submit this amicus brief in support of the motion to dismiss filed by Defendant Dallas School District No. 2 (“the School District”) and the proposed motion to dismiss filed by Basic Rights Oregon.

The State has a strong interest in protecting all schoolchildren—including children who are transgender. The State’s interest in protecting this population is especially acute given its vulnerability to victimization: transgender students experience a heightened incidence of harassment and assault in schools and, as a result, tend to underperform academically, miss school more often due to safety concerns, have higher levels of depression, and are less likely to feel a sense of belonging. For this reason, and given the protected legal status of transgender people under both state and federal laws, the State wholeheartedly supports the School District in recognizing and treating transgender students consistent with their gender identity, and consistent with the law and principles of equality.

As set out in official ODE guidance to schools throughout Oregon, the State categorically disagrees with Plaintiffs regarding what constitutes best practices for creating an educational environment safe and free from discrimination and harassment, and how best to ensure that *every* student—including transgender students—has equal access to educational programs and activities. Transgender students should be allowed to use bathrooms and locker rooms consistent with their gender identity. The School District’s policies and practices treat all students equally by allowing them to use restrooms and locker rooms consistent with their gender identity and permitting all students—regardless of gender—to use private facilities if they choose. Plaintiffs’

request for an injunction prohibiting transgender students from using restrooms and locker rooms consistent with their gender identity should be rejected, as such an injunction would unlawfully discriminate against transgender students.

In short, the School District's policies and actions are not only consistent with, but are required, by Oregon and federal law. The State respectfully submits this amicus brief in support of that proposition. Governor Brown and ODE, as overseers of Oregon public schools, have a strong and manifest interest in the correct application of law to the issues presented in this case. This amicus brief offers additional factual and legal context and analysis to assist the Court in resolving those issues, particularly with regard to Plaintiffs' state law claims.

II. BACKGROUND

A. Transgender Students Face Serious Risks

The number of transgender youth (ages 13 to 17) in Oregon is estimated at 1,700.¹ Nationwide, transgender youth face extreme harassment and discrimination, particularly within the school environment.² Most often, schools are where gender-nonconforming youth first experience victimization and harassment, more so than any other context.³ Unfortunately, that is true for many transgender students in our state. Transgender students in Oregon have

¹ Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States*, Williams Institute, 5 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>.

² Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, Gay, Lesbian and Straight Educ. Network, xvi-xvii, 35-37 (2016), https://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report_0.pdf;

Nat'l Ctr. for Transgender Equality, *Issues: Youth & Students*, <https://transequality.org/issues/youth-students> (last visited Mar. 12, 2018) (noting that 75% of transgender youth feel unsafe at school).

³ Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychological Adjustment*, 46 *Developmental Psychol.* 1580, 1582 (2010), https://familyproject.sfsu.edu/sites/default/files/FAP_School%20Victimization%20of%20Gender-nonconforming%20LGBT%20Youth.pdf.

consistently reported experiencing a high degree of harassment and assault in schools due to their gender expression.⁴ Harassment of this kind has been documented to result in lower academic achievement among transgender students, as well as reduced educational aspirations.⁵ In particular, students who experience high levels of in-school victimization and discrimination have lower GPAs, are more likely to miss school due to safety concerns, have higher levels of depression, and are less likely to feel a sense of belonging.⁶

Because transgender youth face greater challenges and discrimination, it is imperative that schools and educators be equipped with the necessary resources to provide a safe and healthy learning environment. For instance, the CDC has stated that, “[b]ecause some LGBT youth are more likely than their heterosexual peers to experience bullying or other aggression in school, it is important that educators, counselors, and school administrators have access to resources and support to create a safe, healthy learning environment for all students.”⁷ Indeed, the federal government’s anti-bullying website proposes that, to make all students feel physically and emotionally safe, it is important to establish a safe environment at school: “Schools can

⁴ Gay, Lesbian and Straight Educ. Network, *School Climate in Oregon (State Snapshot)* (2017), <https://www.glsen.org/sites/default/files/Oregon%20State%20Snapshot%20-%20NSCS.pdf> (indicating that 60% of Oregon students report experiencing verbal harassment, 24% report experiencing physical harassment, and 11% report experiencing physical assault due to their gender expression);

Nat’l Ctr. for Transgender Equality and Nat’l Gay and Lesbian Task Force, *Findings of the National Transgender Discrimination Survey: Oregon Results* (2012), https://transequality.org/sites/default/files/docs/resources/ntds_state_or.pdf (indicating that 84% of K-12 students in Oregon reported harassment, 44% reported physical assault, and 13% reported sexual violence);

Or. Safe Schs. & Communities Coal., *Fifth Annual State of Safe Schools Report*, 2 (2016), https://www.oregonsafeschools.org/wp-content/uploads/OSSCC_Safe_Schools-B.pdf.

⁵ See Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools*, Gay, Lesbian and Straight Educ. Network, 25-26 (2009), <https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf>.

⁶ Kosciw et al., *supra* note 2, at 41; Nat’l Ctr. for Transgender Equality, *supra* note 2.

⁷ Ctrs. for Disease Control and Prevention, *LGBT Youth Resources* (Aug. 18, 2017), <https://www.cdc.gov/lgbthealth/youth-resources.htm>.

send a message that no one should be treated differently because they are, or are perceived to be, LGBT. Sexual orientation and gender identity protection can be added to school policies.”⁸

One of the most fundamental ways in which schools can provide a safe and welcoming environment for all students is by allowing transgender students to access to restrooms that match their gender identity.⁹ In Oregon, about 38% of transgender students report that they have been unable to use a school restroom that aligns with their gender.¹⁰ Such mistreatment and discrimination is detrimental to children and can have long-lasting effects. For instance, a survey of transgender adults revealed that people who experienced discrimination because of their transgender status in K-12 schools were more likely to experience negative outcomes as adults.¹¹ In particular, transgender adults who had suffered at least one negative experience in school were more likely to have attempted suicide, experienced homelessness, suffered from serious psychological distress, and were more likely to have engaged in sex work or drug sales than those who did not have a negative experience in school.¹² Thus, it is critical that schools implement policies, like allowing transgender students equal access to restrooms and facilities, to help create a safer and more inclusive environment for all students.

⁸ U.S. Dep’t. of Health and Human Servs., *LGBTQ Youth*, <https://www.stopbullying.gov/at-risk/groups/lgbt/index.html> (last visited Mar. 12, 2018).

⁹ Movement Advancement Project & Gay, Lesbian and Straight Educ. Network, *Separation and Stigma: Transgender Youth & School Facilities*, 2-5 (2017), <http://lgbtmap.org/file/transgender-youth-school.pdf>;

Asaf Orr et.al, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools*, 24-25 (2015), <http://assets2.hrc.org/files/assets/resources/Schools-In-Transition.pdf>.

¹⁰ Gay, Lesbian and Straight Educ. Network, *supra* note 4.

¹¹ See Movement Advancement Project & Gay, Lesbian and Straight Educ. Network, *supra* note 9, at 4.

¹² Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equality, 132 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

B. Amici’s Role in Protecting Transgender Students

ODE is the state agency “responsible for the administration and funding of K-12 public education in the state of Oregon, as well as enforcement of Title IX, §§ 1681-1688, and its implementing regulation at 34 C.F.R. part 106 for schools under its jurisdiction,” and Governor Brown is “the Superintendent of Public Instruction and highest ranking executive official at Oregon Department of Education” and the “final policymaker responsible for the operation and management of the ODE[.]” ECF#1 ¶¶ 24-25. In those capacities, Governor Brown and ODE have a unique interest and responsibility in ensuring that all students in Oregon are treated equally, particularly those that are most at risk of discrimination.

One of the primary ways in which ODE has played a role in protecting the rights of transgender students is by issuing its “Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students.” *See* ECF# 1 ¶ 24 (the “ODE Guidance”). The ODE Guidance, a copy of which is attached to Plaintiffs’ Complaint as Exhibit M-1, affirms the State’s policy and legal position that “[o]ne’s gender identity is an innate characteristic of each individual’s personality” that must be respected. ECF# 1, Ex. M-1, at 4. It further states that transgender students should be treated consistent with their gender identity and the same as any other boy or girl:

A student who says she is a girl and wishes to be regarded that way throughout the school day should be respected and treated like any other girl. So too with a student who says he is a boy and wishes to be affirmed that way throughout the school day. Such a student should be respected and treated like any other boy.

ECF# 1, Ex. M-1, at 4.

With respect to bathroom and locker-room use, the ODE Guidance recommends that “alternative accommodations, such as a single ‘unisex’ bathroom or private changing space, should be made available to students who request them, but should not be forced upon students, or presented as the only option,” and that transgender students should be allowed to use bathrooms and locker rooms consistent with their gender identity. ECF# 1, Ex. M-1, at 10-11.

The purpose of the ODE Guidance is to “suggest best practices and to provide a foundation for the educational community to build safe and supportive school cultures,” and is designed to “be used by school boards, administrators and other members of the educational community to guide development of school procedures and district policies related to transgender and gender nonconforming students.” ECF# 1, Ex. M-1, at 2.

C. Overview of Governor Brown and ODE’s Interest in This Case as Amici

This case, brought on behalf of various students and parents, challenges the School District’s actions and policies of allowing transgender students to use the bathroom and locker rooms that match their gender identity, and the various federal and State policies or guidance that support those actions. Among other things, Plaintiffs seek a permanent injunction restraining the School District from enforcing the Student Safety Plan and ordering it to permit only biological females to use the girls’ restrooms and locker room and only biological males to use the boys’ restrooms and locker room. ECF# 1, Prayer for Relief ¶ A. Plaintiffs’ demand would effectively require the School District to discriminate against Oregon school children based on their sexual orientation, in violation of Oregon and federal law.

The State strongly supports the School District in its policy of providing a safe and fair environment for all students, which is consistent with ODE’s own guidance. Governor Brown and ODE have an interest in providing its analysis to this court, due to the potential effect that a ruling from this Court could have on the State’s goal of providing a foundation for students to be treated in a safe and nondiscriminatory way in Oregon’s public schools. To be sure, the outcome of this case will affect school districts and students beyond those directly involved in this case. For those reasons, the State wishes to be heard on the matter.

III. THE CLAIMS ALLEGED AGAINST THE SCHOOL DISTRICT FAIL AS A MATTER OF LAW AND SHOULD BE DISMISSED

On a motion to dismiss for failure to state a claim, courts presume the truth of factual allegations in the complaint, and construe them in the light most favorable to the nonmoving

party. Fed. R. Civ. P. 12(b)(6); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (so stating). But the Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

As explained below and in the motions to dismiss filed by the School District and Basic Rights Oregon, the complaint fails to state any violation of Oregon or federal law. Indeed, it is the State’s position that the relief Plaintiffs seek—an injunction prohibiting transgender students from using restrooms and locker rooms consistent with their gender identity—would amount to discrimination against transgender students in violation of Oregon law as well as federal law.

A. The Complaint Fails to State a Claim for Violation of Oregon’s Public Accommodation Law (O.R.S. 659A.403)

In 2007, then-Senate Majority Leader Kate Brown introduced and the Legislature passed the Oregon Equality Act in an effort to expand protections for all Oregonians. *See* S.B. 2, 74th Legis. Assemb., Reg. Sess. (Or. 2007). The Act expanded the scope of Oregon’s public accommodation statute, O.R.S. 659A.403, specifically to prohibit discrimination on the basis of sexual orientation, and it amended the statutory definition of “sexual orientation” to include gender identity. *See* S.B. 2 §§ 1, 5. Accordingly, Oregon law now explicitly protects members of the public from discrimination on the basis of gender identity.

Thus, at present, O.R.S. 659A.403(1) requires places of public accommodation in Oregon to provide “full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or [except in certain cases] age[.]” “Sexual orientation” is now defined, in relevant part, as “an individual’s actual or perceived . . . *gender identity*, regardless of whether the individual’s gender identity, appearance,

expression or behavior differs from that traditionally associated with the individual's sex at birth." O.R.S. 174.100(7) (emphasis added).

To state a claim for discrimination in a place of public accommodation, Plaintiffs must allege facts sufficient to show that the School District denied Plaintiffs "full and equal accommodations, advantages, facilities and privileges" based on their sex, sexual orientation, or religion. O.R.S. 659A.403(1). Plaintiffs do not allege even one fact—nor could they—to show they were denied access to a public accommodation on account of their sex, sexual orientation or religion.

Rather, the School District's policy requires equal access for all. Consistent with the ODE Guidance, it provides that all students regardless of their sex, sexual orientation or religion may use facilities in accordance with their gender identity. ECF# 1, Exs. A, B. Indeed, Plaintiffs have not alleged that *they* are being treated any differently from other students or parents based on *their* sex, sexual orientation, or religion. *See Yoakum v. Wells Fargo Bank, Nat. Ass'n*, No. 09–1114–JE, 2011 WL 1541285, at *7 (D. Or. Mar. 30, 2011), *adopted by* No. CV 09–1114–JE, 2011 WL 1542542 (D. Or. Apr. 21, 2011) (to make out a *prima facie* case of discrimination under O.R.S. 659A.403 in federal court, a plaintiff must demonstrate that they belong to a protected class and were subjected to adverse treatment not applied to others under similar circumstances who were not in that class).

Plaintiffs ask this Court to order the School District to treat transgender students differently based on those students' gender identity, and that requested relief would itself violate Oregon's public accommodation law. *See* O.R.S. 659A.403(1); O.R.S. 174.100(7). Courts have previously indicated that a place of public accommodation violates O.R.S. 659A.403 when it excludes transgender people based on other peoples' desire not to share the same space. *See Blachana, LLC v. BOLI*, 273 Or. App. 806, 816-19, *adh'd to as modified on recons.*, 275 Or. App. 46 (2015) (bar violated O.R.S. 659A.403 by asking a social group including transgender people not return due to other patrons' perceptions and discomfort).

Further, as this Court has recognized, the “purpose of Oregon’s discrimination law is to remove ‘arbitrary standards’ and to ‘ensure the human dignity of all people within this state and protect their health, safety, and morals from the consequences of intergroup hostility, tensions, and practices.” *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1152 (D. Or. 2017) (quoting O.R.S. 659A.003). Plaintiffs’ claims and requested relief are plainly inconsistent with that stated purpose.

B. The Complaint Similarly Fails to State a Claim for Violation of Oregon’s Law Prohibiting Discrimination in Education (O.R.S. 659.850)

O.R.S. 659.850(2), provides, in relevant part, that a “person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity.” Discrimination under the statute “means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.” O.R.S. 659.850(1). This statute, which specifically protects persons in educational settings, is consistent with the Legislature’s stated interest in protecting student safety. For instance, the Legislature has found that “a safe and civil environment is necessary for students to learn and achieve high academic standards,” and that “[h]arassment, intimidation or bullying . . . , like other disruptive or violent behavior, are conduct that disrupts a student's ability to learn and a school's ability to educate its students in a safe environment.” O.R.S. 339.353(1).

To state a claim for discrimination in education, Plaintiffs must allege facts sufficient to show that an act of the School District either (1) “unreasonably differentiates treatment” or (2) “is fair in form but discriminatory in operation” based on their sex, sexual orientation or religion. O.R.S. 659.850(1). Under the first basis, disparate treatment discrimination refers to “a policy or practice that affirmatively treats some persons less favorably than others based on

certain protected criteria.” *Nakashima v. Bd. of Educ.*, 344 Or. 497, 509 (2008). Under the second basis, a practice that is “fair in form but discriminatory in operation,” refers to “a facially neutral policy that adversely affects a group that shares certain protected characteristics, such as race, sex, or religion.” *Nakashima*, 344 Or. at 509. In turn, “what is ‘discriminatory in operation’ depends on whether a practice or policy that disparately impacts a protected group is reasonably necessary to a program’s or activity’s successful operation or the achievement of its essential objectives.” *Id.* at 516.

Plaintiffs’ claims fail under either basis. The Complaint does not contain a single factual allegation showing that the School District has affirmatively taken adverse action against the Student Plaintiffs based on their sex, sexual orientation, or religion. Nor does the Complaint contain any facts that Student Plaintiffs are subject to differential treatment under the School District’s neutral policy. Simply put, student Plaintiffs are not being denied any facilities or privileges on account of a protected status. As the Complaint alleges, Student Plaintiffs have the option to continue to share fully and equally in school facilities or use a separate facility if they so choose. ECF# 1 ¶¶ 87, 91.

C. The Complaint Likewise Fails to State Any Violation of Federal Law Against the School District

The Complaint also alleges that the School District’s Student Safety Plan violates the various federal laws: namely, Title IX’s prohibition against discrimination on the basis of sex in any education program receiving federal assistance (Fourth Claim for Relief); the Student Plaintiffs’ fundamental right to bodily privacy (Second Claim for Relief) and the Parent Plaintiffs’ fundamental right to direct the education and upbringing of their children (Third Claim for Relief) under the Due Process Clause in the Fourteenth Amendment; and Plaintiffs’ First Amendment right to the free exercise of religion (Sixth Claim for Relief).

For the reasons set forth in the ODE Guidance at pages 9-11 and the motions to dismiss filed by the School District and Basic Rights Oregon, the Complaint does not plead any violation

of these federal laws. *See* Compl., Ex. M-1, at 9-11. Simply put, the Student Plaintiffs do not have a right under federal law to use school facilities to the exclusion of transgender students. *See generally Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324 (E.D. Pa. 2017) (denying plaintiffs' request for a preliminary injunction to enjoin defendant school district from permitting all students to use restrooms and locker rooms consistent with their gender identity); *Students v U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), *adopted by* No. 16-cv-4945, WL 6629520 (Dec. 29, 2017) (same). In addition, as explained thoroughly in Basic Rights Oregon's proposed motion to dismiss, not only do Plaintiffs fail to state a claim for a violation of Title IX, the relief they seek would violate that law because it would discriminate against transgender students.

V. CONCLUSION

The State respectfully asks this Court to decide the pending motions to dismiss consistent with the ODE Guidance, which is designed to prevent discrimination against any students in Oregon public schools based on well-established principles of equality and the law.

DATED March 19, 2018.

Respectfully submitted,

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