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Dallas School District No. 2

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

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

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

REPLY MEMORANDUM IN  
SUPPORT OF DEFENDANT DALLAS  
SCHOOL DISTRICT NO. 2'S MOTION  
TO DISMISS PURSUANT TO FRCP  
12(b)(1) AND FRCP (12)(b)(6)

SESSIONS, in his official capacity as United States Attorney General, as successor to LORETTA F. LYNCH,

Defendants.

Defendant Dallas School District No. 2 (the “District”) respectfully submits the following reply memorandum in further support of its motion to dismiss.

**I. Plaintiffs’ claim for an alleged violation of a constitutional right to privacy should be dismissed.**

Despite the allegations in the complaint and their arguments in opposition to the District’s motion to dismiss, the plaintiffs seek to assert a fundamental right to exclude transgender people from common facilities. This purported right does not exist. Assuming, however, that plaintiffs are actually asserting the right formulated in their complaint – that is, the right to be free from government-compelled intimate exposure to the opposite biological sex – plaintiffs have not alleged that District policies infringed upon that right.

**A. The United States Constitution does not give plaintiffs a fundamental right not to share common facilities with transgender students.**

The District’s opening brief explained that properly framed, plaintiffs were attempting to assert a nonexistent fundamental right: the alleged right not to share facilities with transgender students. Dkt. 31, Defendant Dallas School District No. 2’s Motion to Dismiss (“Mot.”) at 5-6. The District then pointed to two recent cases, *Students & Parents for Privacy v. United States Department of Education* and *Doe v. Boyertown Area Sch. Dist.*, which have recently considered and rejected the existence of such a right. *Id.* at 6. The plaintiffs’ response does not make any

attempt to critically assess the reasoning in these cases, or otherwise offer any authority for the proposition that they have a fundamental right to exclude transgender people from common spaces.

**B. The District has not infringed on plaintiffs' alleged privacy rights.**

Plaintiffs' response features four cases in support of their contention that they have a fundamental right to be free from government-compelled intimate exposure to the opposite sex, and that this purported right was violated by the District. Dkt. 41, Plaintiff's Response to Dallas School District's Motion to Dismiss ("Response") at 5. Each case arose out of starkly different facts, and each is distinguishable on a number of other grounds.

Plaintiffs first cite *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135 (9th Cir. 2011), a case resolved under the Fourth Amendment. Byrd was a male pretrial detainee at a county jail. *Id.* at 1136. Jail officials ordered a search of Byrd's housing unit. *Id.* There was no emergency. *Id.* A female cadet searched Byrd, even though male officers were available. Byrd was forced to strip down to his underwear. The female cadet used her hand to move Byrd's genitals. She then "placed her hand at the bottom of Byrd's buttocks and ran her hand up to separate the cheeks while applying slight pressure, to search for contraband inside his anus." *Id.* at 1137. Given all of these circumstances, the Ninth Circuit concluded that the strip search was unreasonable under the Fourth Amendment. *Id.* at 1147.

Here, in contrast, plaintiffs do not allege that the District has done anything that implicates their Fourth Amendment privacy interests. Their claims are premised solely on the substantive due process clause of the Fourteenth Amendment. Moreover, the facts alleged here could not be more different than those presented in *Byrd*. An involuntary strip search which

involves touching of an inmate's genitals is not remotely similar to allowing students to access facilities that correspond to gender identity.

Plaintiffs also cite *York v. Story*, 324 F.2d 450 (9th Cir. 1963); however, *York*, is of no analytical assistance to the case at bar because the court characterized the right at issue there as “the security of one’s privacy against arbitrary intrusion by the police,” and held that it was violated when a police officer insisted upon taking completely unnecessary nude photographs of a female crime victim, in sexually provocative positions, and then disseminated those pictures amongst his police officer colleagues. *Id.* at 455. Compelling a crime victim to take unnecessary nude photographs which are later circulated is a significantly more substantial privacy violation than what plaintiffs contend might occur here: if they do not elect to use a single-use facility, plaintiffs may end up using a facility in the proximity of a transgender student.

Likewise, plaintiffs find no substantive support in their citation to *Caribbean Marine Services, Inc. v. Baldrige*, 844 F.2d 668 (9th Cir. 1988). *Caribbean Marine* involved tuna fishermen and a practice of catching tuna that resulted in the deaths of porpoises, which often swim with tuna. *Id.* at 670. The fishermen sought to enjoin a governmental order requiring placement of female observers on their boats to monitor fishing activity. *Id.* They claimed that because male crew members often bathed and performed bodily functions in view of their cabin mates, allowing female observers would violate the fishermen’s constitutional privacy rights. *Id.* at 671.

The Ninth Circuit reversed the district court’s grant of a preliminary injunction in favor of the fishermen, finding that the fishermen failed to establish an imminent threat of irreparable

harm, and that the district court had failed to consider and weigh the government's and public's interest in promoting nondiscriminatory hiring practices. *Caribbean Marine*, 844 F.2d at 674-678. Relevant here, neither the district court nor the Ninth Circuit reached the merits of the constitutional privacy claim. *Id.* at 674. Thus, *Caribbean Marine* lends no support for plaintiffs' argument that they have a fundamental right to avoid a government-compelled "risk" of intimate exposure, or that the District's policies infringe upon that purported right.

Finally, plaintiffs cite a portion of the Sixth Circuit's opinion in *Blau v. Fort Thomas Public Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005). *Blau* involved a substantive due process challenge to a public school dress code. In support of their argument, the plaintiffs cited a district court case from New Hampshire, *Bannister v. Paradis*, 316 F. Supp. 185 (D.N.H. 1971), which had invalidated a school's prohibition on wearing blue jeans. *Blau*, 401 F.3d at 394-395. *Bannister*, in turn, relied heavily on language from the Supreme Court's decision in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891). *Id.* The Sixth Circuit pointed to a quote from *Union Pacific*, in fact the same quote plaintiffs' rely on here, to illustrate the perils of taking language from cases out of context: "Quite plainly, forcing someone to 'lay bare the body' to a surgical procedure is not the same thing as forcing a middle-school student to wear certain types of clothes to school." *Blau*, 401 F.3d at 395. *Blau* does not support plaintiffs' claims.

Plaintiffs have not alleged facts to show that the District has compelled them to expose themselves to persons of the "opposite biological sex." *Byrd* involved an involuntary strip search, which included touching of genitals. *York* involved a crime victim submitting to involuntary and unnecessary nude photographs which were then circulated. The facts alleged

here are not remotely similar to those cases. The plaintiffs can use the “segregated lockers, showers and restroom facilities” within the main sex-segregated locker rooms and restrooms at Dallas High School or they can use private facilities. *See* Complaint ¶¶ 91, 99. The District’s policies do not infringe on plaintiffs’ alleged privacy rights.

**II. Plaintiffs’ claim for an alleged violation of the fundamental right to direct the care, education, and upbringing of their children should be dismissed.**

Plaintiffs fail to state a claim for an alleged violation of a fundamental right to direct the upbringing of their children for the simple reason that in the Ninth Circuit, the parental right “does not extend beyond the threshold of the school door.” *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209 (9th Cir. 2005).

In their response, plaintiffs have cited to a line of Supreme Court cases which establish that parents have a fundamental liberty interest in the right to direct the education and upbringing of their children. Response at 6-7. Identifying the existence of a Constitutional right is not the same as defining and setting the parameters of that right. *Cf. Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1042-1043 (9th Cir. 2000). It is in that latter exercise that plaintiffs’ arguments fall short.

The authority which finds that parents have a fundamental right to control their children’s education means either of two things. First, that the state cannot compel parents to send their children to a public school. Conversely, the state’s ability to prohibit parents from sending their children to private school, parochial school, home-schooling them, and so on, is constrained. Thus, parents generally have a right to send their children to a school other than a public school.

*Fields*, 427 F.3d at 1204, 1207 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). Second, and relatedly, the state cannot broadly prohibit parents from teaching their children any one topic in particular absent a very good reason. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923).

On the other hand, the right parents have to control how they would like their children to be educated “does not extend beyond the threshold of the school door.” *Fields*, 427 F.3d at 1207. Once parents decide to send their children to a public school, they have no constitutionally-protected right to “direct *how* a public school teaches their child,” including:

the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or...a dress code[.]

*Id.* at 1206. As the foregoing demonstrates, and contrary to plaintiffs’ arguments, Response at 8, the limitation on the parental right announced in *Fields* does not relate solely to matters of curriculum. Plaintiffs’ claim for an alleged violation of parents’ rights to control the upbringing of their children should be dismissed.

The parental claim based on the Needs Assessment should also be dismissed. In the opening motion, the District explained that plaintiffs could not state a claim for a violation of their parental rights on the basis of the La Creole Middle School needs assessment because *Fields* explicitly rejected such a claim, and because the plaintiffs did not allege facts sufficient to hold the District liable, under *Monell*, for this alleged constitutional violation. Mot. at 9-11. Plaintiffs concede the *Monell* issue but ask this Court to ignore *Fields* because, they argue, *Fields* did not take into account certain provisions of the Family Education Rights and Privacy Act (“FERPA”) and the Protection of Public Rights Act (“PPRA”). The complaint does not

make claims under FERPA or the PPRA, so those claims are not before the Court at this time. Notwithstanding, such claims are not likely actionable. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 276-291 (2002) (FERPA does not provide a private right of action, and thus cannot be enforced through section 1983).

**III. The plaintiffs' Title IX hostile environment claim should be dismissed for failure to state a claim.**

In its opening motion, the District set forth the five elements of a Title IX hostile environment claim. Mot. at 12. The District then showed that the complaint failed to allege facts to establish two of those five elements. *Id.* at 12-13.

**a. Plaintiffs do not allege harassment "based on sex."**

The District's first argument is that plaintiffs have not properly alleged facts to show that they are suffering sexual harassment or harassment based on sex. The District cited a case in support of that argument. Mot. 12 citing *Students & Parents for Privacy v. United States Department of Education*. The plaintiffs neither address this authority nor provide any of their own. Plaintiffs' failure to plead facts to meet this threshold requirement requires dismissal of their Title IX claim.

**b. Plaintiffs do not allege harassment that is "severe, pervasive, and objectively offensive."**

The District's second argument is that notwithstanding the failure above, plaintiffs failed to allege harassment that is "severe, pervasive, and objectively offensive." The District's opening motion noted that the allegations in the complaint do not come close to meeting the standards set forth in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) or other cases

finding conduct that meets *Davis*'s standards. Mot. at 12-15. The plaintiffs' response offers no authority to the contrary.

The District then predicted, accurately, that plaintiffs would ask this Court to find that a transgender student's use of school facilities that corresponds to that student's gender identity is *per se* severe, pervasive, and objectively offensive. Mot. at 13. The District pointed to a case from the Eighth Circuit which rejected this theory in the context of a Title VII hostile environment claim. Despite plaintiffs' attempts to distinguish its facts, the reasoning in *Cruzan* shows why it bars plaintiffs' Title IX claim.

Plaintiffs emphasize that in *Cruzan*, the district court noted that the complaining female teacher had "the option to use the female faculty restroom used by [the transgender female teacher] or using other restrooms in the school not used by [the transgender female teacher]." See Response at 10 citing *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 969 (D. Minn. 2001). However, the "other restrooms," the court noted (but plaintiffs here do not), included "a private unisex restroom." *Cruzan*, 165 F. Supp. 2d at 968.

*Cruzan* does not say that the hostile environment inquiry turns on a numerical comparison between the number of facilities (a) available to both cisgender and transgender people, on the one hand and (b) those available to complaining cisgender people and which transgender people are excluded from, on the other. Rather, the point of *Cruzan* is that a harassment claim does not lie where, as here, everyone has access to single-user restrooms, and where the allegations in the complaint allege nothing more than "harassment" based on the "mere presence" of a transgender person in a multi-user facility. *Cruzan v. Special School Dist. No. 1.*, 294 F.3d 981, 984 (8th Cir. 2002).

Finally, plaintiffs assert that the reasoning in *Cruzan* was rejected in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007). *Etsitty* involved Title VII and equal protection claims brought by a transgender female employee, who was fired when she told her employer that she would be using the women’s restroom. Her employer fired her in part because it claimed her restroom usage might create liability for the employer and generate concerns from the public. Relying on *Cruzan*, the employee argued that she had shown that her employer’s stated reason for firing her – potential liability – was pre-textual. The court was not persuaded, stating that even if it adopted *Cruzan*, “it would say nothing about whether [the employer] was nevertheless genuinely concerned about the possibility of liability and public complaints.” *Id.* at 227. *Etsitty*, a pretext case, therefore, offers no support for plaintiffs’ position respecting hostile environment claims.

Plaintiffs have offered no authority to support their contention that the “mere presence” of a transgender person in a common school facility meets the standards set forth in *Davis* to establish a Title IX harassment claim. For this reason, and because they fail to show that any claimed harassment is based on sex, plaintiffs’ Title IX claim should be dismissed.

**c. Plaintiffs have abandoned their comparable facilities claim, but even if not, they fail to state a claim.**

In their Title IX claim, the plaintiffs allege that the accommodations that the District has offered them somehow violated Title IX. Complaint ¶¶ 245-246. The District explained that plaintiffs’ could not bring a Title IX claim based on the District’s offer to accommodate them. Mot. at 14. By that the District meant that plaintiffs who are permitted to access multi-occupancy facilities but opt not to use them, and instead use single-use facilities, cannot state a

Title IX claim by alleging that the single-use facilities are not comparable to the multi-occupancy facilities. *See id.*

Plaintiffs appear to abandon the comparable facilities claim. Response at 12 (“Comparable facilities are not the issue in this case, but rather *who* uses *which* facilities.”). Plaintiffs go on, however, to rhetorically question “[w]hy it is permissible to compel plaintiffs and others to use alternative facilities, and it’s not permissible to do so with Student A[.]” Response at 13. Of course, that is not what plaintiffs allege is occurring in the District. The District has not “compelled” plaintiffs to use single-use facilities by barring them from multi-use facilities. Rather, plaintiffs argue that they may “feel compelled” to use single-user facilities. Response at 13 (arguing that “some people, including plaintiffs, may also feel compelled to use those single-use facilities” (emphasis added)). These are two different things. Plaintiffs have the option to use the multi-user facilities or single-use facilities which provide additional privacy.<sup>1</sup>

#### **IV. Plaintiffs have not stated a free exercise claim.**

Plaintiffs’ complaint does not state a free exercise claim based on the Student Safety Plan.

##### **A. The Gollys do not have standing to bring a free exercise claim.**

The Gollys do not have standing to bring a free exercise claim to challenge the Student Safety Plan. The Student Safety Plan applies to Dallas High School. Because the Gollys do not

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<sup>1</sup> Plaintiffs’ response denies that the District has offered to accommodate students who request additional privacy. The allegations in plaintiffs’ complaint respecting these issues are located in paragraphs 91 and 245.

have a child at Dallas High School, they lack standing to challenge the Student Safety Plan on free exercise grounds.

The plaintiffs assert that other unnamed members of Parents for Privacy “are similarly concerned about the impacts of their children, whether religiously motivated or not.” Response at 13. These unarticulated religious concerns are not found in the complaint, and thus cannot be considered. Moreover, plaintiffs are incorrect to suggest that the free exercise clause of the First Amendment gives them a vehicle to challenge concerns that are not motivated by religion.

*Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972).

**B. The District’s policies do not violate the free exercise clause.**

Plaintiffs claim that the Student Safety Plan is not neutral and generally applicable. The error in plaintiffs’ argument is that they interpret the terms “neutral” and “generally applicable” in the ordinary, everyday sense instead of recognizing and analyzing how those terms have been defined in free exercise jurisprudence.

A law is neutral and generally applicable if it does not aim to “infringe upon or restrict practices because of their religious motivation,” and if it does not “in a selective manner impose burdens only on conduct motivated by religious belief[.]” *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533, 543 (1993). There are no allegations in the complaint to suggest that the Student Safety Plan was implemented to infringe on plaintiffs’ religious practices. And, the complaint does not allege, and the plaintiffs do not argue, that the District selectively enforces the Student Safety Plan against conduct motivated by religious beliefs. Because the Student Safety Plan was instituted for completely secular reasons, and is neutral with respect to religion, the free exercise claim fails.

Plaintiffs argue that the Student Safety Plan is subject to strict scrutiny under the hybrid-rights analysis because they have alleged multiple fundamental rights arising under the First and Fourteenth Amendments. “[T]o assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated – that is, a fair probability or likelihood, but not a certitude of success on the merits.” *Miller v. Reed*, 176 F.3d 1202, 1207 (1999). Plaintiffs contend that the Student Safety Plan violates privacy and parental rights under the Fourteenth Amendment. But as explained in sections II. and IV. *supra*, it does not. Accordingly, strict scrutiny does not apply. *Id.* (“a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of violation of another alleged fundamental right[.]”)

Plaintiffs’ free exercise claim should be dismissed.

**V. Plaintiffs’ allegations fail to state claims under ORS 659.850 and ORS 659A.403.**

Plaintiffs fail to state a claim for violations of Oregon’s antidiscrimination laws. Plaintiffs do not allege that they have been treated differently based on their sex, sexual orientation, religion, or other protected characteristic. *See Mot.* at 17 (stating requirements under ORS 659.850 and 659A.403).

Plaintiffs argue that “[t]rue nondiscrimination would take the form of granting everyone the same accommodation[.]” *Response* at 16. Yet, that is what they allege the District has done in this case: any student who does not wish to use a common facility may use a single-use facility or the teacher’s lounge. *See Complaint* ¶ 91.

## CONCLUSION

For the reasons given above, the District respectfully requests that the Court dismiss all of the claims in plaintiffs' complaint.

DATED: March 26, 2018.

MERSEREAU SHANNON LLP

*s/ Peter R. Mersereau*

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