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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE 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,

Case No. 3:17-CV-01813-HZ
PLAINTIFF'S RESPONSE TO
U.S. DEFENDANTS' MOTIONS
TO DISMISS

Oral Argument Requested

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,

Defendants.

INTRODUCTION

It bears noting at the outset that the United States defendants have made no specific mention of, let alone asserted motions to dismiss, plaintiffs' APA claim (First Claim for Relief, Complaint ¶¶ 136-185), privacy claim (Second Claim for Relief, Complaint ¶¶ 187-206), parental rights claim (Third Claim for Relief, Complaint ¶¶ 208-220), RFRA claim (Fifth Claim for Relief, ¶¶ 249-255) or free exercise claim (Sixth Claim for Relief, ¶¶ 257-264). U.S. Defendants' Motion to Dismiss (Doc. #49). Instead, the federal defendants argue only that plaintiffs lack standing to bring this action against them. Motion, pp. 2, 7-12. In effect, despite an extensive record of U.S. Department of Education and U.S Department of Justice action over a period of years, federal defendants now argue: (a) they had nothing to do with "independent" adoption of the Student Safety Plan by Dallas School District, who is solely responsible to plaintiffs (Motion, pp. 1-2, 8, 10-11); and (b) they have withdrawn the Dear Colleague Letter from May 2016 (Ex. K to plaintiffs' Complaint) in

February of 2017 and the April 2014 Q & A document in September 2017 (Ex. H to Plaintiffs' Complaint. Motion, pp. 3, 4, fn 3 and 4. Those arguments miss the mark and should be rejected.

ARGUMENT

As the court knows, in evaluating motions against the sufficiency of a complaint, the court is to treat all allegations of material fact as true and construe them in the light most favorable to the pleader. *Erickson v. Pardus*, 551 US 89, 94 (2007). This is not the time to evaluate the factual merits of each party's position, as U.S. defendants invite the court to do.

The allegations in the complaint sufficiently allege that actions of the U.S. Defendants over a period of years played a role in Dallas School District's consideration and adoption of the Student Safety Plan.

Plaintiffs' complaint alleges: (1) that federal defendants unilaterally redefined "sex" to include "gender identity" for purposes of Title IX (Complaint, ¶¶ 1, 49-73); (2) that plaintiffs are directly impacted by the new "federal rule" *and* adoption of the Student Safety Plan (Complaint, ¶¶ 11, 27, 49-73); (3) that the federal defendants have exercised their authority to adopt the new legislative rule and to initiate enforcement actions against various school districts and the State of North Carolina (Complaint, ¶¶ 27-30, 32-34, 61-74); and (4) that in so doing, federal defendants have created a hostile environment and violated plaintiffs' privacy rights, parental rights, and religious rights under RFRA and the First Amendment (Complaint, ¶¶ 37-38, 43-49). Plaintiffs further allege that the Dallas

School District adopted the Student Safety Plan in response to action by the federal defendants and others (Complaint, ¶¶ 40, 75, 126).

The U.S. defendants may disagree with those allegations, but they are sufficient to satisfy pleading standards and withstand a motion to dismiss.

There is no confirmation the alleged “withdrawal” of the Dear Colleague Letter of May 2016 and removal of threatened enforcement action truly occurred, and most of the prior guidance and threats of enforcement by USDOE and USDOJ remain on their respective websites.

Defendants’ motion goes to great lengths to argue that four guidance documents (Exs. H-K attached to plaintiffs’ complaint) either said nothing about sex-segregated facilities or were withdrawn prior to the commencement of this lawsuit. Motion, pp. 3-4. The record on its face reflects something vastly different.

First, it bears noting the plethora of guidance documents disseminated across the country, especially between February 2014 and May 2016. While it may be true Exhibits H, I and J did not specifically address “sex-segregated facilities” (Motion, pp. 3-4), it is instructive to see that Exhibit H spent 53 pages addressing subjects pertinent to this case, including “hostile environment” and “student on student violence”, as well as mandated appointment of a Title IX coordinator for each school. *See, e.g.*, Ex. H-8. Exhibit I was a question and answer document about Title IX that addressed, among other things, the subject of “single-sex classes”, also implicated in the Student Safety Plan in this case. Ex. I-8. Exhibit J was a Title IX Resource Guide again addressing a variety of Title IX subjects and the mandate for Title IX coordinators. Ex. J-20. The record shows those documents are pertinent policy documents disseminated to school districts across the nation, including

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Dallas School District and allegedly supported the adoption of the rule redefining “sex” to include “gender identity” and enforcement of Title IX requirements against school districts like DSD. (Complaint, ¶¶ 33-34, 50-60, 61-75).

Second, even if Exhibit H was “withdrawn” in September 2017, and even if Exhibit K was “withdrawn” by a February 2017 “Dear Colleague Letter” (DCL), and even if pending cases similar to this action were-by defendants’ own admission- *voluntarily* dismissed (Motion, p. 5, emphasis added) following such withdrawals, none of these guidance documents has actually been removed from either the USDOE and USDOJ websites, as the federal defendants argue. Motion, pp. 12-13. *See* Caroline Janzen Decl., pp. 2-3. Federal defendants offer no explanation why “withdrawn” documents remain publicly available on their websites and retain apparent vitality.

At most, the “withdrawing” documents are a veritable lifeboat in a sea of more extensive guidance documents generated over a period of years that USDOE and USDOJ continue to represent as authoritative for public schools across America. Caroline Janzen Decl., p. 3. Moreover, Exhibit N to plaintiffs’ complaint does not take federal enforcement action off the table, but rather leaves it to investigation and adjudication on a case-by-case basis. Complaint, ¶¶ 33-34, 39. Ex. N. These matters are neither moot nor impair plaintiffs’ standing to present their claims.

The allegations of the complaint sufficiently establish all the elements of standing for plaintiffs to assert claims against the U.S. Defendants.

While U.S. Defendants correctly state the requirements for standing (Motion, p. 7), they are incorrect in their application of those requirements. They begin by arguing the

complaint does not allege that the Dallas School District's adoption of the Student Safety Plan was caused by guidance from Washington, DC (Motion, p. 7), which is patently false in that the complaint expressly alleges the influence of federal guidance and enforcement in the development of the Student Safety Plan. Complaint, ¶¶ 1, 27-30, 32-34, 39-40. They further opine that the court's decision will not lead the DSD to withdraw the Student Safety Plan. Motion, p. 7, which is beside the point; the issue is whether plaintiffs have properly stated claims against the federal defendants, not whether a co-defendant would alter its position.

Injury in Fact. The U.S. defendants do not challenge plaintiffs' allegations of injury, but instead deflect responsibility for any injuries to the Dallas School District. Motion, pp. 7, 8 ("Any injuries that plaintiffs may be suffering could be caused *only* by the Dallas School District and its Student Safety Plan") (emphasis added). They simply disclaim as implausible that adoption of the Student Safety Plan was caused by federal action with nothing other than self-serving argument. They misrepresent the allegations of the complaint against federal defendants as based only on the Student Safety Plan (Motion, p. 8) and reject out of hand – without authority- plaintiffs' allegations that their redefinition of "sex" to include "gender identity" was the "root cause" for adoption of the Student Safety Plan. *Id.* In reality, plaintiffs' allegations expressly implicate both federal action *and* the Student Safety Plan. Complaint, ¶¶ 1, 11 32-34, 39-40.

Injury Fairly Traceable. U.S. Defendants attempt to minimize their role by arguing that "plaintiffs' complaint appears to assert that the federal government somehow

compelled the Dallas School District to adopt its Student Safety Plan...” Motion, p. 8. Federal *guidance* documents are the focus of defendants’ argument, even as they expressly reference plaintiffs’ allegations based on federal *enforcement* actions. Motion, pp. 8-9. Moreover, they argue that plaintiffs must present “more particular facts” to demonstrate that federal action somehow influenced the conduct of the school district and others. Motion, pp. 9-10. It is disingenuous for these defendants to argue enforcement action against other public school districts had no coercive effect to motivate consideration of the Student Safety Plan in Dallas School District, and the precise impact of such action is a matter for discovery. Only through discovery will the parties know the full extent of involvement by the defendants and others in the creation and implementation of the Student Safety Plan and other policies, especially when the Student Safety Plan was devised and implemented without notice to students, parents or the community. *See* Complaint, ¶¶ 40, 75, 80 (“The Student Safety Plan described above was shared with other students in Student A’s PE class, but was not otherwise disclosed or discussed with District students or parents of District students.”)

It should also be noted that the Ninth Circuit cases federal defendants rely upon actually support plaintiffs’ position rather than defendants’. Motion, pp. 9-10. *See Mendia v. Garcia*, 768 F.3d 1009 (9th Cir. 2014)(*reversing* a trial court’s dismissal based on lack of standing); *National Audobon Society v. Davis*, 307 F.3d 835 (9th Cir.)(upholding associational standing for group plaintiffs, even where there was a chain of events by multiple parties leading to the alleged injury). Rather than plaintiffs engaging in

“speculation and guesswork” (Motion, p. 10), it is the federal defendants who are asking the court to accept unverified self-serving arguments.

Injuries not Redressable. Again, it is immaterial whether federal withdrawal of guidance documents – if that even occurred- would motivate DSD to withdraw the Student Safety Plan. *See* Motion, pp. 10-11. Discovery will determine all the input of the various defendants (and perhaps others) in the development and adoption of the Student Safety Plan. For now, it is sufficient that plaintiffs allege the impact of federal guidance and enforcement, and that the relief they seek is partially declaratory and injunctive, including the court requiring the federal defendants to remove guidance documents (some supposedly withdrawn, yet still posted publicly) from their websites and restraining them from unilaterally redefining “sex” to include “gender identity.” Complaint, ¶¶ 1, 27-30, 32-34, 39-40. Ex. K to Complaint, pp. 3-4. Complaint, Prayer for Relief, p. 63 ¶¶ B, C. Plaintiffs also seek damages and attorney fees for U.S. defendants’ past actions leading to this point.

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CONCLUSION

The U.S. Defendants invite the court to engage in factual determinations under the guise of standing arguments and overlook or misrepresent express allegations in the complaint contrary to their stated position. Moreover, their arguments are self-serving and conclusory, seeking to exonerate themselves by pointing the finger at the Dallas School District. The court should deny their motion to dismiss and allow discovery to proceed to develop the factual record more fully.

DATED this ~~29th~~ day of March, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on March 29th, 2018 I served the foregoing PLAINTIFF'S RESPONSE TO U.S. DEFENDANTS' MOTION TO DISMISS on the following via the indicated method(s) of service:

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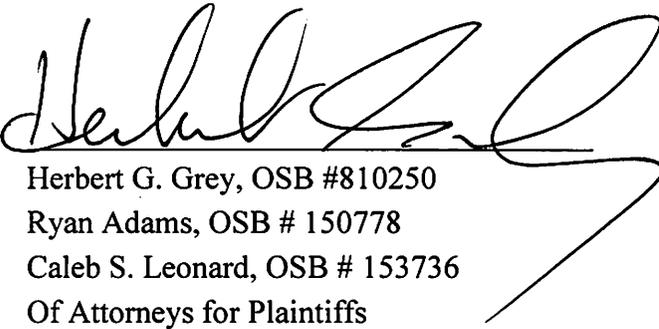
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_____ **MAILING** certified full, true and correct copies thereof in a sealed, first class postage-prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), and deposited with the U.S. Postal Service at Portland/Beaverton, Oregon, on the date set forth below.

 x **ELECTRONIC FILING** utilizing the Court's electronic filing system

_____ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.



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