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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,

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.

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

**PLAINTIFFS' RESPONSE TO ODOE
AND OFFICE OF THE GOVERNOR'S
PROPOSED AMICUS BRIEF IN
SUPPORT OF MOTIONS TO DISMISS**

Oral Argument Requested

SUMMARY OF RESPONSE

The Oregon Department of Education (“ODOE”) and Governor Kate Brown (collectively referenced hereinafter as “Proposed Amici” or “Amici”), add little to the motions to dismiss already filed by Defendant Dallas School District No 2 (hereinafter the “District”) and Basic Rights Oregon (hereinafter “BRO”). Proposed amici are attempting to input their own motion to dismiss disguised as an amicus brief after their previous successful motion to dismiss removed them as a party to this case. In addition to the following memorandum, plaintiffs incorporate and rely upon their responses to the District’s Motion to Dismiss and BRO’s Motion to Dismiss.

POINTS AND AUTHORITIES

Amicus briefs are appropriate “when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Heath v. Am. Express Travel Related Servs. Co. (In re Heath)*, 331 B.R. 424, 430 (9th Cir. Bankr. 2005), quoting *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997). “The classic role of *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).

ARGUMENT

A. Proposed Amici Add Nothing That Current Defense Counsel Cannot Provide.

ODOE and Governor Brown filed a successful motion to dismiss on December 13, 2017 and were subsequently dismissed from this proceeding. *See* Docket #9, 10, 11, and 16. Having removed themselves from this matter, they nevertheless wish again to be heard, now attempting to

re-enter and add yet another motion to dismiss disguised as an amicus brief. That is not the proper role of an amicus party.

The proper role of an amicus party is to inform the court and present legal authority that has not been introduced by the other parties. The current amicus brief filed does little in the way of fulfilling the role of the amicus party, mostly presenting arguments very similar to the District's and Basic Rights Oregon's previously-filed motions to dismiss. The only information added by proposed amici are studies discussing transgender students in schools, an unfair and premature attempt to interject "expert" evidence without properly qualified experts at the pleadings stage when the issue before the court is the sufficiency of the allegations in the complaint. The court should exclude such evidence under FRCP 12(d) to give all parties a "reasonable opportunity" to present pertinent material. The information added by proposed amici is neither law nor legal augment, and they do not have any additional "unique perspective" to assist the court in ruling on the pending motions. The only issue before the court at this time is whether plaintiffs have pled allegations sufficient to survive motions to dismiss, and injecting improper "expert" evidence does nothing to aid the court at this stage.

B. The Complaint Properly States a Claim for Violation of Oregon's Public Accommodation Law.

Proposed Amici argue that plaintiffs have not alleged any facts to show that they were "denied access to a public accommodation on account of their sex, sexual orientation or religion." Amicus Br. in Supp. of Mot. to Dismiss, page 9. However, plaintiffs have pled and sufficiently allege discrimination against them based on their own protected status of religion, sex, and sexual orientation. Complaint, ¶¶ 101-112, 116-121, 267-268. Whether the proposed amici agree with those allegations is immaterial at this stage.

Proposed Amici argue that the District's policy "requires equal access for all." Amicus Br.

in Supp. of Mot. to Dismiss, page 9. However, the District’s policy was adopted because of Student A’s unwillingness to share the same space with others of the same biological sex and demanding special accommodation. *See* Complaint, ¶¶ 78-82. Once Student A refused to be accommodated by being given access to single-use facilities, the District insists that the accommodations refused by Student A are an acceptable accommodation to Student Plaintiffs. *See* Complaint, ¶ 91. Plaintiffs take exception to the concept that trampling on the rights of all for the accommodation for one, while granting the same accommodation for all refused by the one, is not “equal access for all.”

C. The Complaint Properly States a Claim for Violation of Oregon’s Law Prohibiting Discrimination in Education.

As presented in the Proposed Amici’s brief and stated in case law, one definition of “discrimination” under ORS 659.850 is “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 age, disability, national origin, race, marital status, religion or sex.” *Nakashima v. Or. State Bd. of Educ.*, 344 Ore. 497, 508 (2008); *See also* Amicus Br. at page 10. This definition describes the “disparate impact” rule of ORS 659.580: the “fair in form but discriminatory in operation” language describes disparate impact discrimination; *i.e.*, a facially neutral policy that adversely effects a group that shares certain protected characteristics, such as race, sex, or religion.” *Id.* at 509; *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

Proposed Amici stand behind the District’s claim its policy is completely neutral and cannot be discriminatory *per se*. Amicus Br. at page 11. However, plaintiffs properly allege that Student Safety Plan, which was forced on students of the District (and arguably others), has led to discrimination based on sex, sexual orientation and religion. *See* Complaint, ¶¶ 101-112, 116-121, 273-274. Student Plaintiffs have properly pled that this “facially neutral” policy has in fact

adversely affected them and their educational opportunities based on their religion, sex and/or sexual orientation by forcing them to dress and undress in a manner that is violates their beliefs and values as male and female. *Id.* Plaintiffs' allegations that the District's policy is discriminatory under ORS 659.850 are legally sufficient.

D. The Complaint Properly States a Claim for Violations of Federal Law Against District.

Proposed Amici have no original thoughts or arguments on the federal claims, but simply point the court to the motions to dismiss filed by the District and BRO. Amicus Br. At pp. 11-12. Beyond that, their only contribution is to mischaracterize plaintiffs' requests for relief as discrimination against transgender students. Amicus Br. at pages 7 and 12. In truth, plaintiffs seek to ensure that all students are treated in the same way. As noted previously, the District's policy reflects a determination that Student A was not bound to accept the very same accommodations the District says all other objecting students must accept. Complaint, ¶¶ 79, 91.

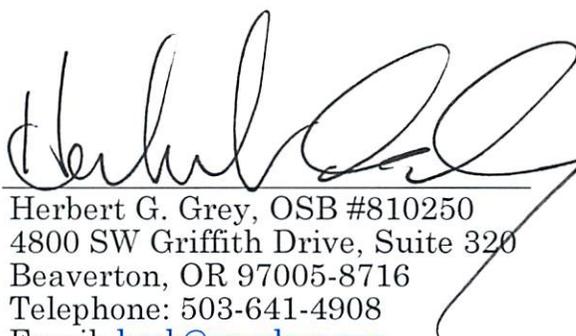
In addition to the arguments outlined in plaintiff's response to the District's and BRO's motions to dismiss, Plaintiffs will briefly respond to amici's Title IX argument that any relief granted would be itself a violation of federal law, and specifically Title IX for discriminating against transgender individuals. Amicus Br. At pp. 11-12. Title IX's express language (prior to the attempted redefinition of "sex" to include "gender identity") does not offer protection for transgender students, but does for Plaintiff students. As noted in U.S. Defendants' motion to dismiss (Motion, p. 5), there exists conflicting authority from federal trial courts (still being litigated) that should not be persuasive or binding on this court. The cases proposed amici point to from other jurisdictions do not help them because those rulings to date are limited to preliminary injunction decisions, and because there is conflicting authority, as some district courts have allowed preliminary injunctions. *See Texas v. United States*, No. 7:16-cv-54, 201 F. Supp. 3d 810,

(S.D. Tex. filed May 25, 2016), granting nationwide preliminary injunction, later withdrawn after withdrawal of federal guidance documents. U.S. Defendants' Motion to Dismiss, p. 5. They should not have any bearing on the sufficiency of plaintiffs' well-pled complaint in this case.

CONCLUSION

The issue at this stage in the case is simply whether plaintiffs' complaint sufficiently alleges actionable claims. The answer is clearly yes. Proposed Amici brief offers little, if anything, to aid this Court in its decision. Their arguments are largely regurgitations of arguments already presented in the District's and BRO's motion to dismiss and should fail for the same reasons.

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



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFFS' RESPONSE TO ODOE AND OFFICE OF THE GOVERNOR'S PROPOSED AMICUS BRIEF IN SUPPORT OF MOTIONS TO DISMISS on the following via the indicated method(s) of service:

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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.

DATED this 29th day of March, 2018.



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