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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,)

vs.)

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

Defendants.)

and)

BASIC RIGHTS OREGON,)

Defendant-Intervenor.)

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MARCO A. HERNANDEZ

UNITED STATES DISTRICT COURT JUDGE

No. 3:17-cv-01813-HZ
May 23, 2018
Portland, Oregon

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P R O C E E D I N G S

THE COURT: Good afternoon. Please be seated.

THE CLERK: Your Honor, we're here today for oral argument in the matter of Parents for Privacy, et al. versus Sessions, et al., Case No. 17-cv-1813.

Counsel, please state your appearances for the record.

MR. ADAMS: Good morning, Your Honor. My name is Ryan Adams for the plaintiff.

MR. LEONARD: Good morning, Your Honor, my name is Caleb Leonard for the plaintiff.

MR. GREY: Herb Grey for plaintiff.

MS. PLASS: Beth Plass for the Dallas School District.

MR. MERSEREAU: Peter Mersereau for the Dallas School District.

MR. BICKFORD: James Bickford for the federal defendants.

MS. SCOTT: Carla Scott for amici Governor Brown and the Oregon Department of Education. Also here today is Dustin Buehler, Governor Brown's deputy general counsel.

MR. ARKLES: And Gabriel Arkles for Defendant-Intervenor Basic Rights Oregon.

I also have here with me my co-counsel. Would you like them to state their appearances as well?

1 THE COURT: Why not. There are a lot of people here.

2 MS. MEDLEY: I'm Shayna Medley of behalf of the
3 defendant-intervenor.

4 MR. SANDS: Good afternoon, Your Honor. Darin Sands
5 from Lane Powell on behalf of the defendant-intervenor.

6 MS. BENEDICK: Kelsey Benedick from Lane Powell on
7 behalf of defendant-intervenor.

8 MS. SIMON: And Kelly Simon on behalf of
9 Defendant-Intervenor Basic Rights Oregon.

10 THE COURT: Well, welcome everybody. Thank you for
11 being here this afternoon and participating in oral argument
12 on this Parents for Privacy case.

13 I have in my head how I want this organized, but I
14 didn't know if the parties had conferred among themselves and
15 have your own plan of attack for this afternoon.

16 MR. MERSEREAU: We did, Your Honor. For the record,
17 again, I'm Peter Mersereau on behalf of the Dallas School
18 District.

19 We have conferred amongst ourselves regarding the
20 order of argument subject, of course, to the Court's
21 preference, but this is what we came up with; and that is that
22 we would argue in this order, which basically follows the
23 caption: The School District would argue first, then Basic
24 Rights Oregon, then the State, then the plaintiffs on those
25 respective arguments, then the federal defendants, and then

1 plaintiffs again. That would be our proposal.

2 THE COURT: Is that agreeable to the plaintiffs?

3 MR. GREY: Your Honor, Herb Grey for the plaintiffs.
4 I believe it may be -- that's the basic order we agreed upon,
5 but I think it would be good if the plaintiffs had a chance to
6 speak to each set of motions in between.

7 THE COURT: That's fine. It will help me keep track
8 of what's going on as well.

9 (Pause) Oh, The Oregonian wants to know if they can
10 use a laptop. Who is here from The Oregonian?

11 You just want to use that in order to type out the
12 process instead of handwriting out the process?

13 UNIDENTIFIED SPEAKER: Yes.

14 THE COURT: You won't be using the Internet and
15 sending materials out as they're happening?

16 UNIDENTIFIED SPEAKER: No, just note taking.

17 THE COURT: You got it.

18 UNIDENTIFIED SPEAKER: Thank you.

19 THE COURT: You're welcome.

20 Who would think The Oregonian would be interested in
21 something like this?

22 THE CLERK: There is another media --

23 THE COURT: That's fine. If you want to do the same
24 thing, I'm good with that.

25 That's not the order I would want to do things in,

1 but it doesn't matter to me. We can take them up in whatever
2 order you want. So let's go with the School District first.

3 I'll give you an opportunity to respond in between,
4 to the extent you need to respond.

5 MR. MERSEREAU: Thank you, Your Honor.

6 On behalf of the Dallas School District, I'm Peter
7 Mersereau, and I would like to add these arguments to the
8 arguments advanced in our papers. And I wish to be clear, I'm
9 speaking exclusively on behalf of the Defendant School
10 District in this case. You, as you know, have many parties
11 and intervenors before you. Each has filed its own papers and
12 each will address those arguments separately today, but I
13 speak exclusively on behalf of the School District.

14 Your Honor, we are here, and the motion before you is
15 a motion to dismiss the plaintiffs' Complaint and certain
16 parties. The Dallas School District, for many years, has had
17 a long-standing policy of nondiscrimination, specifically
18 including nondiscrimination based on gender identity.

19 The document in focus primarily in this case is a
20 safety plan, marked as Exhibit A to plaintiffs' Complaint,
21 that was promulgated by the District in the fall of 2015 in
22 implementation of the overall nondiscrimination policy that I
23 mentioned previously.

24 The Safety Plan provides, in pertinent part, that a
25 certain transgender male student, identified in these

1 pleadings as Student A, shall have access to the locker rooms
2 and restrooms that are consistent with that student's gender
3 identity. That is the plan. That is the document that is in
4 focus in plaintiffs' Complaint and forms the basis of
5 constitutional and statutory challenges as pled in the
6 Complaint.

7 Now, I'd like -- we have raised and organized our
8 motion into eight separate motions, three of which have been
9 conceded. And perhaps, for the record, it would be helpful to
10 note which those are. The first motion is to dismiss Lindsay
11 Golly on the grounds she lacks standing. That is conceded.

12 The second motion is to dismiss Plaintiff Nicole
13 Lillie on the grounds that there are no allegations on behalf
14 of that plaintiff in the Complaint. That motion has been
15 conceded.

16 And the third motion is to strike the claims of
17 plaintiffs A.G. and T.F. for compensatory damages, since no
18 such claims are pled. That motion has been conceded, with an
19 understanding there will be an attempt to replead, if
20 appropriate.

21 That leaves five substantive motions directed towards
22 the claims in this Complaint against the School District. And
23 what I would like to do is organize this argument in the
24 sequence of the arguments set forth in our brief. And the
25 first argument, Your Honor, addresses the claim for relief

1 based on the Fourteenth Amendment, which is a substantive due
2 process claim based on an alleged privacy right under these
3 circumstances.

4 It is our position that no such privacy right exists
5 under the facts pled in this Complaint and that this Court can
6 determine that as a matter of law, as have two recent District
7 Courts in, respectively, Illinois and Pennsylvania, which are
8 cited in our brief and not discussed at all by Mr. Grey in his
9 pleadings.

10 In *Washington v. Glucksberg* the Supreme Court
11 recently summarized earlier Supreme Court decisions which
12 have, in fact, recognized privacy rights under the Fourteenth
13 Amendment that are actionable under a substantive due process
14 claim. Those include, in various cases, these rights: the
15 right to marry, the right to have children, the right to
16 direct the upbringing of one's children, marital privacy, the
17 right to use contraception, the right to bodily integrity, and
18 the right to abortion. Conspicuously missing from that
19 summary in the *Glucksberg* case is any right not to encounter
20 transgender students in locker rooms or restrooms.

21 In response to our argument, the plaintiffs cited
22 four cases in support of the claims that such a privacy right
23 exists in this case; and we ask the Court to pay close
24 attention to those cases, because we have read them, and we
25 believe none of them provides any support for the plaintiffs'

1 argument and several of them actually strongly support the
2 District's argument.

3 Here are some examples, Your Honor. The plaintiffs
4 cite the case of *Byrd v. Maricopa County Sheriff* in support of
5 this substantive due process privacy right claim. That case
6 was not a substantive due process claim, did not involve the
7 Fourteenth Amendment, but instead was based on an unreasonable
8 search and seizure claim under the Fourth Amendment. The case
9 involved a strip search in a prison, clearly involving, among
10 other things, bodily integrity, invasive conduct, and what
11 have you. The case is not at all on point here.

12 In *York v. Story*, a second case cited by the
13 plaintiffs, the defendant police department took nude photos
14 of a crime victim, who then brought a claim under the
15 Fourteenth Amendment against the police department, who had
16 not only taken the photos, but disseminated them internally.
17 The theory in that case revolved around the security of one's
18 privacy against arbitrary intrusion by the police; again, not
19 at all representative of the facts in our case.

20 Thirdly, *Caribbean Marine Services v. Baldrige*, this
21 was a case where a group of fishermen on a tuna boat sought
22 injunctive relief against the government, preventing the
23 government's requirement that female observers be on the boat
24 to observe regarding fishing activities. The fishermen argued
25 their privacy rights were violated. Remarkably, in the Ninth

1 Circuit, Your Honor, that Court reversed the trial court
2 finding in favor of those plaintiffs who were alleging a
3 violation of a privacy right, and yet the plaintiffs cite that
4 case in support of their argument here. It stands for
5 precisely the opposite finding.

6 And, finally, and most troubling of these four cases,
7 none of which is discussed in any detail in order to give the
8 Court assistance, but most troubling is the final case of *Blau*
9 *v. Fort Thomas Public School District*. That is a Sixth
10 Circuit 2005 opinion dealing with a challenge to a school
11 district's dress code. And in that case the Sixth Circuit
12 rejected the request for injunctive relief and, in so doing,
13 criticized the party before it for quoting from an 1891 United
14 States Supreme Court case a portion that was totally out of
15 context, in a case challenging the dress code. And in that
16 Sixth Circuit opinion, the Court specifically stated that it
17 is unwise and dangerous for advocates to excerpt portions of
18 cases without describing the context and thereby misleading
19 the Court.

20 In our case plaintiffs cite that Sixth Circuit
21 decision as follows, for the proposition that the same
22 language was -- from that 1891 decision was cited by the Sixth
23 Circuit to support its ruling. The Sixth Circuit did
24 precisely the opposite. And I'll leave it to my colleague to
25 explain why that recitation of that case was put in that

1 brief, which is the exact opposite of the case holding.

2 In all events, none of the four cases cited by the
3 plaintiffs support their claim to a privacy right under the
4 Fourteenth Amendment under these circumstances. It is clear,
5 Your Honor, that the plaintiffs are asking this Court to
6 create from whole cloth a privacy right that protects
7 individuals from encountering transgender students in a locker
8 room or restroom. Every Court that we could find that has
9 addressed this issue, most recently the two District Court
10 decisions that I mentioned, has rejected that notion. We
11 think, as a matter of law, you should do the same.

12 And if, hypothetically, the Court were to find or
13 some Court were to find such a property interest under the
14 Fourteenth Amendment, we have also argued, Your Honor, that
15 there are insufficient allegations in this Complaint to
16 suggest that the Dallas School District violated any such
17 property interest. In paragraphs 91 and 99 of the Complaint,
18 it is specifically pled that private facilities are made
19 available to all students, including those who might object to
20 encountering transgender students in the facilities that are
21 made available to everybody.

22 There are no allegations in this Complaint that any
23 student, much less the ones identified in the caption, has in
24 fact encountered a transgender student and had anything other
25 than a normal encounter or experience. There simply are no

1 allegations suggesting that any such purported privacy right
2 was, in fact, violated.

3 Your Honor, the next claim relates to the parental
4 right to raise their children. We believe this case is
5 controlled by the *Fields* decision in the Ninth Circuit. This
6 is not a claim -- or this is not a policy where the School
7 District, by passing the Student Safety Plan identified in
8 Exhibit A, is in any manner impairing the rights of any
9 parents to raise their children at home. *Fields* is clear --
10 this is *Fields v. Palmdale School District* -- that when it
11 comes to not just curricular issues, but other issues, that
12 particular property interest, that particular right under the
13 Fourteenth Amendment, stops at the schoolhouse door.

14 And it's not just curricular matters. It's these as
15 well, according to *Fields*: the school curricula, the hours of
16 the school day, school discipline, the timing and content of
17 examinations, the individuals hired to teach at the school,
18 the extracurricular activities offered at the school, or a
19 dress code. All of those things are within the discretion of
20 the School District's jurisdiction once the children cross
21 through that door. And in no manner does this policy instruct
22 or tell any of these families how they are to raise their
23 children at home or any such thing.

24 We think, as a matter of law, the Court can conclude
25 that that particular claim, which is one of the *Glucksberg*

1 privacy rights, hasn't been violated in this case, as a matter
2 of law, at least as pled currently.

3 The next motion addresses the Title IX claim in this
4 case, Your Honor. Basically this is a claim under Title IX
5 that by passing this policy -- that is, the safety code, the
6 Safety Plan -- the School District has created a sexually
7 hostile environment for these plaintiffs. That requires two
8 components for a sufficient pleading. One is that there has
9 been discrimination or harassment because of sex; and, two,
10 that the harassment has been sufficiently severe and pervasive
11 to meet the requirements of the *Monroe* case. Neither of those
12 elements has been satisfactorily pled in this case.

13 Addressing the first one, there is simply no
14 plausible way that one can read these allegations in the
15 Complaint and argue that there has been discrimination or
16 harassment because of sex. All students are treated the same
17 under this policy.

18 And as to the pervasiveness and severity, again I go
19 back to what I mentioned a moment ago. There are no
20 allegations not only that harassment has been severe or
21 pervasive, but there are no allegations of harassment to
22 begin with. There are no incidents pled that one of the
23 individuals is deemed to be harassing, much less pervasive or
24 severe.

25 Again, we encourage the Court ultimately to focus on

1 the extensive analysis and opinions in these two recent
2 District Court cases on this issue of pervasiveness and
3 severity within the Title IX context. It's exactly the same
4 as the case at bar.

5 Your Honor, the next motion to address is the free
6 exercise claim under the First Amendment. Again, there simply
7 is nothing, either in the Safety Plan or in the allegations in
8 this Complaint, that in any way suggest that the Dallas School
9 District is commenting upon, criticizing, or in any way
10 addressing the religious preferences of any of these
11 plaintiffs or any other families. There's just no other way
12 to say this: There's just no basis for this free exercise
13 claim in this case, either as pled or as argued in the
14 plaintiffs' papers.

15 And then, finally, Your Honor, the motion that we've
16 denominated as motion No. 8 addresses dependent claims under
17 the Oregon nondiscrimination statutes. These are essentially
18 mirror images of the federal constitutional issues that we've
19 addressed. And for the reasons advanced in our papers, the
20 same rationale applies in support of our motions to dismiss
21 those claims as well.

22 That's the argument we have on behalf of the Dallas
23 School District, Your Honor.

24 Thank you.

25 THE COURT: Thank you.

1 MR. GREY: Your Honor, I'd like to address each of
2 the various motions that were recited by Mr. Mersereau. And I
3 will just state for the record that he correctly recited our
4 agreement on the first three motions that were presented.

5 THE COURT: Okay.

6 MR. GREY: As the Court considers the various
7 motions, there are several key threshold issues that the Court
8 needs to consider. The first is whether the Student Safety
9 Plan, which is attached as Exhibit A to the Complaint, applies
10 only to Student A or whether it's intended to have broader
11 application in implementing school district policy.

12 The second threshold question is whether or not the
13 use of the word "sex" in Title IX also includes gender
14 identity. And both of those questions have significant impact
15 on the Court's consideration of these motions.

16 Beyond that, everything is related to the scope of
17 the rights, particularly the privacy and parental rights
18 matters that Mr. Mersereau talked about.

19 So in addressing the privacy issue, as cited in our
20 memorandum, the *Griswold* case back in, I believe, 1962 said
21 that privacy rights are older than the Bill of Rights. And
22 the primary case that the School District relies upon in
23 saying there is no generalized privacy right is the *Katz v.*
24 *United States* case, which is a Fourth Amendment case that
25 talked about a reasonable expectation of privacy for a

1 defendant who was using a phone booth where there was a
2 recording device placed.

3 As Mr. Mersereau pointed out, some of the authorities
4 that deal with this area arise out of the Fourth Amendment,
5 but it's unclear to me why the -- why the *Katz* case, which is
6 a Fourth Amendment case, can justify the proposition for which
7 it's cited.

8 Beyond that, the School District has several policies
9 of its own which are pertinent here. Exhibit F attached to
10 our memorandum is -- or attached to the Complaint, excuse
11 me -- is a policy that addresses privacy matters, and also
12 Exhibit G talks about harassment and bullying types of
13 questions. And in each one of those, the policy makes clear
14 that reasonable fear -- that there needs to be consideration
15 given to reasonable fear of students and, in the case of
16 Exhibit G, their psychological well-being.

17 Beyond that, Title IX and the regulations that go
18 with it make clear that it's perfectly permissible to have
19 sex-segregated facilities. And that law, as far as we know,
20 remains good law.

21 And with respect to the *Blau v. Fort Thomas* case, I
22 would concede that it's a dress code case, which is not really
23 what we're talking about here. But, again, the principle
24 that's recited there remains something that's -- that has
25 continuing vitality, whether or not the Sixth Circuit panel

1 thought it applied in that case or not.

2 As far as the parental rights motion, District
3 Policy AD, which is Exhibit C attached to the Complaint, talks
4 about the shared responsibility with parents for the growth
5 and development of students, which suggests that the District,
6 at least on paper, takes seriously the role and the
7 involvement of parents.

8 The proposition that is advanced by the School
9 District, that the *Fields* case is the end of the conversation,
10 I think states the matter too broadly. While it does say that
11 the *Meyer-Pierce* right does not extend beyond the schoolhouse
12 door, there's reason to question whether it's really that
13 expansive or not.

14 And one of the cases cited in our memorandum is the
15 *Barnette v. West Virginia* case from 1943, where it was made
16 clear that parents had the right to object to their students
17 being compelled to say the Pledge of Allegiance. And so it's
18 clear that there are limitations on what the Ninth Circuit
19 said in the *Fields* case and that it's -- it's going too far to
20 say that parents have no rights whatsoever beyond the
21 schoolhouse door.

22 And one of the remarkable things in the argument
23 advanced by the School District is the reference that if
24 parents are not happy with the conditions for their children's
25 education at Dallas High School -- or anywhere else, for that

1 matter -- that they can simply choose to go elsewhere and have
2 their children educated elsewhere. That may be factually
3 true, but I doubt that it's something that would generally be
4 stated openly with respect to LGBT students or any other
5 student, for that matter. "Go elsewhere" is simply not a
6 reasonable alternative.

7 With respect to Title IX, as I indicated, the
8 threshold question here, which is hotly debated in courts
9 around the country, is whether sex also includes gender
10 identity. And Mr. Mersereau is correct that there are the two
11 District Court decisions, but the Court should also take into
12 consideration the *Texas v. U.S. Department of Education* case,
13 which is cited at page 5 of our response to the amicus motion,
14 which said definitively that sex does not include gender
15 identity. And there's also additional evidence in the record
16 concerning decisions made in 2017 to the effect that the
17 Department of Education and the U.S. Department of Justice
18 will not be advancing or enforcing that particular
19 interpretation.

20 The *Cruzan* case, which was cited by both parties,
21 as pointed out in our responding memorandum, has been
22 criticized in the *Etsitty* case, the *Etsitty v. Utah* case, and
23 it was distinguished from the *Davis v. Monroe County* case as
24 well.

25 And I think it's important to keep in mind, as we

1 talk about these cases, that while there are a lot of
2 similarities between Title VII and Title IX, the rules are
3 somewhat different with respect to employment matters that
4 arise under Title VII, which is what the *Cruzan* case dealt
5 with, and what occurs in Title IX.

6 The severe, pervasive, and objectively offensive
7 standard that was referenced in the School District's
8 memorandum strikes me as something that's difficult to discern
9 because what is objectively offensive to somebody is really a
10 subjective determination in itself. And to the extent that
11 that may vary from person to person, I think it would be
12 improper for the Court to decide, as a matter of law, that the
13 situation before it is somehow objectively offensive, when the
14 plaintiffs have made clear that they have disagreements with
15 that.

16 With respect to the free exercise claim, the basis of
17 the School District's argument here is that the -- the Student
18 Safety Plan is a neutral law of general applicability. And
19 it's pretty clear from the record that it's not necessarily a
20 neutral law nor is it generally applicable.

21 At the outset of my argument, I pointed out that the
22 Court needs to determine whether the student safety policy is
23 applicable only to Student A or whether it's intended to be
24 more broadly applicable. And it's pretty clear from the
25 record that that student safety policy was the subject of

1 some -- at least one school board meeting, where people in the
2 community expressed their displeasure with it. And so we can
3 assume that the school board in some fashion has ratified
4 that, which means that perhaps it extends beyond Student A,
5 but that's not really clear at this point.

6 So if it's limited to Student A, then it's not
7 something that's generally applicable. And to the extent that
8 the plaintiffs have argued -- the Gollys in particular have
9 argued that this infringes their free exercise of religion, it
10 cannot be justified on a rational basis standard.

11 And I would also point out that there are a number of
12 allegations in the Complaint which address why it is the
13 School District's statement that there's nothing to indicate
14 that this has impacted the free exercise of their religion for
15 the Golly family, when it points out that it's contrary to the
16 teaching of their kids at home -- and to the extent that
17 something happens at school which works at cross-purposes with
18 that, the Gollys have every right to say that that's
19 interfering with their free exercise of religion.

20 THE COURT: Have any of the Gollys actually
21 encountered the situation that you're most concerned about,
22 and that is a transgender student in either a bathroom or a
23 shower or anything like that?

24 MR. GREY: Not to this point, Your Honor.

25 THE COURT: Have any of the plaintiffs encountered

1 that?

2 MR. GREY: Not to my knowledge.

3 THE COURT: Does that matter?

4 MR. GREY: Well, again, what we're saying is that
5 even the District's own policies say that we need to be
6 mindful of the reasonable fears and the psychological
7 well-being of students. And if the Student Safety Plan is
8 intended to extend beyond Student A, then arguably that is
9 policy which means that anybody that comes on the school
10 campus would be able to avail themselves of whichever
11 facilities they choose to, which means the members of the
12 community who come for an event --

13 THE COURT: The harm that you're describing isn't
14 harm that has been realized as a result of somebody
15 encountering somebody. The harm that you're describing is the
16 risk that that might happen.

17 MR. GREY: Correct, which we have alleged. And I
18 believe the allegations are sufficient to --

19 THE COURT: So your response to my question is: It
20 doesn't matter that an encounter has not ever occurred between
21 any of the plaintiffs and a transgender student in the
22 facilities that you're most concerned about, which are showers
23 and bathrooms.

24 MR. GREY: I would say that that's -- that's correct.
25 And I believe it's going too far to say that there has to have

1 been some sort of an event already that may be traumatic to
2 somebody, whether it's one of the plaintiffs or someone else,
3 before there's any -- any ability to -- to respond to this
4 Student Safety Plan.

5 THE COURT: Thank you.

6 MR. GREY: I would also point out that the *Fields*
7 case that the School District relies upon expressly did not
8 address any First Amendment issues. They expressly reserved
9 those for another time.

10 So if the policy in question is not neutral or
11 generally applicable, then strict scrutiny applies, and the
12 School District is required to show that they have adopted the
13 most -- the least expansive way of trying to accomplish a
14 legitimate government purpose.

15 And our memorandum goes into the hybrid rights
16 analysis, which I don't think I need to belabor beyond what's
17 stated in our memo.

18 As far as the dependent state claims, Your Honor, our
19 understanding from the briefing is that the School District is
20 basically acknowledging that Dallas High School and other
21 district facilities would be places of public accommodation
22 and that there needs to be appropriate consideration given
23 to -- to the plaintiffs and others, because those statutes
24 protect not only gender identity and sexual orientation, but
25 also sex and religion and a variety of other protected

1 classes.

2 And I will just acknowledge for the Court that the
3 rights under state law are more expansive than they are under
4 federal law. The *Powell v. Bunn* case that the School District
5 relies upon I don't think really is apposite here, because
6 that was a situation where everybody was subjected to the same
7 thing, and the stated justification in the briefing by the
8 School District is that the Student Safety Plan was adopted to
9 support a student as opposed to everybody. So I think it
10 makes clear that there is a difference between what occurred
11 in the *Powell* case and what's being advanced here by the
12 School District.

13 And my final comment is that the *Klein* and
14 *Masterpiece* cases, which are referenced in the briefing, are
15 matters which are still being reviewed. And while I would
16 acknowledge at this point that the decisions would tend to
17 favor the School District, particularly the *Masterpiece* case,
18 that is pending a decision by the U.S. Supreme Court by the
19 end of June, which I don't know that anybody knows what's
20 going to happen there. But in any event, those matters are
21 still under review.

22 So that's all the argument I have, unless the Court
23 has any questions.

24 THE COURT: I do not.

25 Did you have anything else you wanted to respond?

1 MR. MERSEREAU: Just a couple of follow-up points,
2 Your Honor.

3 In response to your inquiry, we think that it does
4 matter. It goes to the core of justiciability in this case.
5 What you have are a series of allegations that suggests there
6 is a risk of what is alleged to be a problematic encounter.
7 But who is to say, without the event actually taking place,
8 that student A.G. might just encounter Student A or some other
9 transgender student and, lo and behold, conclude, "That wasn't
10 so bad."

11 And until you have facts before you that such an
12 encounter has taken place and is proved to be damaging or
13 harmful, setting aside whether there is a legal claim that
14 arises out of that encounter, we don't think that basic
15 justiciability requirements have been met in this case.

16 As to the scope of the policies that are addressed
17 by Mr. Grey, we certainly agree that all of those policies
18 that are marked in Exhibits D through F attached to the
19 Complaint are standard school policies that protect the
20 interests of clients and staff. There's no dispute that the
21 District has passed those and does take seriously those
22 concerns.

23 THE COURT: So they're meant to extend beyond
24 Student A.

25 MR. MERSEREAU: Yes. There's no question about that,

1 Judge. I mean, if the question were asked of the School
2 District whether another transgender came aboard and asked
3 about those same policies, they'd be extended. It's the
4 nondiscrimination policy of the District that gives rise to
5 the Safety Plan. Those are the core, and gender identity is
6 one of them. We're not going to run from that at all.

7 THE COURT: One of the things that plaintiffs
8 referred to -- and I don't remember exactly where in the
9 briefing that they referred to it -- was this possibility that
10 not only are students going to be -- transgender students are
11 going to be permitted to use facilities of choice, but also
12 transgender adults would be permitted to use facilities of
13 choice.

14 Do you have any response to that? Does it matter?

15 MR. MERSEREAU: I don't think it matters. And I
16 don't think -- you know, the policies that are before you on
17 this record and the allegations relate to student policies,
18 not patrons, not adults coming in. I believe the policies
19 would be consistent with students and adults, but the fact is,
20 the ones we're dealing with here relate to the District's
21 jurisdiction of its students and the policies adopted to deal
22 with students. And, frankly, we don't think it really
23 matters.

24 And as for the umbrage expressed by Mr. Grey about
25 the supposition that the District is arguing that if the

1 students don't appreciate or like this policy, families can
2 simply take them out of school and go elsewhere, that is a
3 complete misreading of the arguments that we made in our
4 brief, respectfully.

5 The argument was raised -- the point was raised to
6 underscore the argument that we're making, that these policies
7 do not impact how families decide to bring their children up,
8 how they wish to deal with religion within their families,
9 that those are all personal family decisions to be made, and
10 the School District's policies are not impacting those as
11 well. This is not by any means, in fairness, an invitation to
12 those families to pull their children out of school if they
13 don't like the policy. Nothing could be further from the
14 truth, and that's not our argument.

15 THE COURT: Thank you.

16 I don't remember who is next.

17 MR. ARKLES: It was me, Your Honor. I'll use the
18 podium, if that's all right.

19 THE COURT: Sure.

20 MR. ARKLES: So, again, I'm Gabriel Arkles with the
21 ACLU, representing Defendant-Intervenor Basic Rights Oregon.
22 And we have a number of members of Basic Rights Oregon here in
23 the front row, including (indiscernible) --

24 THE COURT REPORTER: Excuse me. Including --

25 THE COURT: I don't think your mic is on.

1 THE COURT REPORTER: "We have a number of members of
2 Basic Rights Oregon here in the front row, including" --

3 MR. ARKLES: -- including members of the Fierce
4 Families group and a number of parents of transgender children
5 in school.

6 I will endeavor not to repeat my friend,
7 Mr. Mersereau. But it is true, Your Honor, that the
8 allegations in this Complaint boil down just to this: that
9 for the better part of the last three school years, the School
10 District has permitted a transgender boy to use the boys'
11 restrooms and locker rooms with his peers.

12 Permitting transgender boys to use boys' facilities
13 and transgender girls to use girls' facilities is a common
14 practice throughout the United States. Thousands of school
15 districts do it without any problem. And some school
16 districts that haven't permitted transgender students to use
17 facilities that match their gender identity have been found
18 liable under Title IX or the Equal Protection Clause or both,
19 and that's for good reason.

20 And to understand that, it helps to take a step back
21 for just a moment to understand what it means to be
22 transgender. So as other Courts have held and as a consensus
23 in the medical community reflects, every person has both an
24 assigned sex at birth and a gender identity. The assigned sex
25 at birth is when a baby is born and somebody glances between

1 that baby's legs and says, "It's a boy" or "It's a girl."

2 And gender identity is the persistent internal,
3 deeply held sense of self in terms of gender. So if you
4 would, it's saying, "I am a boy" or "I am a girl." And for
5 most people, those two are the same. Most people who are
6 assigned a male sex at birth have a male gender identity.
7 It's only transgender people for whom that is different. We
8 have a gender identity that is different from the sex that we
9 were assigned at birth.

10 There's a medical consensus that the best thing for
11 everyone is to permit people to live in accordance with their
12 gender identity. To do otherwise can cause serious physical
13 and mental harm. It also would single out transgender people
14 for different treatment from everyone else. So to tell a
15 transgender boy that "You cannot use the boys' facilities" is
16 to say that there is something so different and so wrong about
17 who you are, about your gender, that you have to be kept
18 separate from your peers. It interferes with education and it
19 can have terrible consequences, including increased risk of
20 suicide.

21 When the School District here chose not to
22 discriminate against a transgender student, it did the right
23 thing, and it certainly violated no law. No Court has held
24 that there is a constitutional right to exclude transgender
25 people from the common areas of restrooms and locker rooms.

1 No Court has held that being transgender transforms the
2 ordinary use of a restroom or locker room into an act of
3 sexual harassment. And no Court has held that a school
4 district must cater to the preferences of every student and
5 parent within its district, even if some of those preferences
6 are based in sincerely held religious beliefs.

7 In terms of privacy, a transgender boy using a boy's
8 restroom or locker room violates no one's privacy. The Ninth
9 Circuit has acknowledged a constitutional right to bodily
10 privacy, but that's a right that prevents the government from
11 forcing somebody to expose the intimate parts of their body to
12 others.

13 But here, the School District requires students to
14 change for gym, but doesn't require anyone to change
15 completely or to change even partially in front of other
16 people. According to the allegations in the Complaint, there
17 are restroom stalls in the locker areas that people may use.
18 According to the allegations in the Complaint, there are
19 additional single-occupancy facilities available, such as a
20 staff lounge in the nurse's office for people who want even
21 more privacy than that. Nobody is compelled to show the
22 intimate parts of their body to anyone in the school district.
23 And without allegations to the contrary, there can be no
24 violation of the right to bodily privacy.

25 As Mr. Mersereau pointed out, in the only two cases

1 that have reached the merits of a claim like this one, the
2 Courts have roundly rejected the idea that it is a violation
3 of anyone's right to privacy to give transgender people access
4 to facilities consistent with their gender identity.

5 And, in fact, even since this -- in the short time
6 since this case was briefed to when it has been argued, a
7 number of courts have held -- or at least two District Courts
8 have held that it was a violation of transgender people's
9 rights not to be able to use the facilities consistent with
10 their gender identity in school. That's the *Grimm* case, which
11 is back in District Court in Virginia, and *M.A.B.*, which is in
12 the District Court in Maryland.

13 In terms of sexual harassment, as Mr. Mersereau
14 stated, there cannot be a claim for sexual harassment without
15 allegations of acts of sexual harassment that are severe,
16 pervasive, and objectively offensive. And the objectively
17 offensive standard is an objective one, not a subjective one.
18 Certainly on a motion to dismiss, we wouldn't question any of
19 the subjective feelings of the plaintiffs. But it has to be
20 something that rises to the level of something that would be
21 objectively offensive.

22 The only allegations here are that a transgender boy
23 has used a locker room in the exact same way that other boys
24 have: He's changed his clothes for gym. To rule that as
25 objectively offensive, you would have to say that being

1 transgender transforms using the facilities in the exact same
2 way everyone else does into an act of sexual harassment.

3 And in the cases that all sides have briefed, there
4 is simply nothing even approaching this sort of thing that has
5 counted as sexual harassment. What we see in these cases is
6 forcible touching, repeated gender-based taunts, threats and
7 physical intimidation, sometimes outright sexual abuse and
8 statutory rape. To equate a transgender person just going to
9 the bathroom with those types of acts is unsupported and
10 frankly offensive.

11 Their claims under state law are no more availing.
12 In fact, while Title IX and the Equal Protection Clause also
13 prohibit discrimination against transgender people, Oregon has
14 gone so far -- as I expect the State will make clear -- to
15 explicitly and directly say that transgender people may not be
16 excluded from places of public accommodation or from places of
17 education. And in the *Blachana* case, it was made clear by the
18 Court of Appeals in Oregon that it is a violation of state law
19 to exclude transgender people from a place of public
20 accommodation, even if it's because there are other people who
21 don't want to share that space with them. To rule in favor of
22 the plaintiffs here, it would be to flip the meaning of
23 Oregon's nondiscrimination law exactly on its head.

24 Additionally, to Mr. Grey's point about whether
25 gender identity is included in sex, it is true that not all

1 Courts have reached that question yet, but in the Ninth
2 Circuit they have. *Schwenk v. Hartford* has made it clear that
3 discrimination against transgender people is a form of sex
4 discrimination. In that case, the Ninth Circuit said that an
5 earlier decision, *Holloway*, had been overruled by
6 *PriceWaterhouse*. *Holloway* adopted essentially the distinction
7 between sex and gender that the plaintiffs offer here. And in
8 *Schwenk* the Court said that's just no longer good law after
9 *PriceWaterhouse*, that has made it clear that discrimination on
10 the basis of sex includes discrimination on the basis of sex
11 stereotypes, about our assumptions based on what it means to
12 be a man or a woman.

13 And, in fact, discrimination against transgender
14 people also violates the Equal Protection Clause. There
15 again, even in the short time between the briefing and our
16 argument today, have been at least four Courts that have held
17 that discrimination against transgender people is subject to
18 at least heightened scrutiny. That's the *Grimm* and *M.A.B.*
19 cases I mention. It's also within other District Courts in
20 the Ninth Circuit, *F.V. v. Barron* and *Karnoski v. Trump*.

21 In *Karnoski* the Western District of Washington
22 actually held that transgender people are a suspect class and
23 that discrimination against us is subject to strict scrutiny
24 and that's because transgender people are a discrete and
25 insular minority, we have a characteristic that we cannot

1 change and that does not interfere with our ability to
2 contribute to society, and because there's a long history,
3 continuing into the present day, of discrimination and
4 violence against transgender people.

5 To force a transgender student out of facilities that
6 match his gender is a form of discrimination. The plaintiffs
7 suggest that it would be acceptable to force a transgender
8 student to use a single-occupancy facility, but in fact it's
9 very different to tell someone that you may not use communal
10 facilities, but you are the only one who is banished from
11 those facilities and must, under penalty of school discipline,
12 use a facility that is separate from everyone else, that there
13 is something so unacceptable about you that you're not allowed
14 to be around your peers in restrooms or locker rooms.

15 That's very different from saying anyone may use
16 single-occupancy facilities if they want more privacy, if they
17 feel uncomfortable for any reason in communal facilities.

18 What the School District has done here is
19 appropriate. They have said everyone may use the facilities
20 that match their gender identity and everyone may use
21 single-occupancy facilities should they want additional
22 privacy. That is consistent with the law. It violates no
23 one's privacy, and it violates no law in terms of
24 discrimination. Everyone is treated the same. Everyone has
25 the access to facilities.

1 In terms of free exercise, Mr. Grey has made some
2 arguments that this is not a neutral and generally applicable
3 policy, but it is in the free exercise sense. There is
4 nothing to indicate that the nondiscrimination policy in
5 general or the Student Safety Plan in particular was targeted
6 at religious beliefs or that it treats religious behavior
7 motivated for religious reasons and behavior motivated by
8 secular reasons differently. Without allegations that this
9 was directly targeting religion in some way, then under *Smith*,
10 it's subject only to rational basis review, which it would
11 easily pass.

12 Also, as became clear earlier, there are also no
13 allegations that the School District has actually made anyone
14 do anything that conflicts with their religious beliefs. That
15 would still be okay under *Smith*, so long as it was generally
16 applicable and neutral. But actually it doesn't appear that
17 anyone has ever been forced to share a facility with a
18 transgender person if that would conflict with their beliefs.
19 There have always been single-occupancy facilities that are
20 available to people if they don't want to do that, for
21 whatever reason.

22 THE COURT: Is that necessary, by the way?

23 MR. ARKLES: So I don't believe that it is necessary,
24 no, Your Honor. If the School District --

25 THE COURT: So it's not necessary, but it's helpful

1 to your argument.

2 MR. ARKLES: That's right. I mean, I think it's a
3 great thing to do, for the School District to do. I mean, it
4 takes very seriously the concerns that people may have, and it
5 removes us even further from a possible constitutional
6 violation.

7 But no, the School District is free to enforce a
8 neutral policy, so long as it's not targeting religion. It
9 isn't required to make separate facilities for that reason.

10 In fact, even if -- in fact, even if this were
11 subject to strict scrutiny, it would survive strict scrutiny.
12 Discrimination on the basis of sex is a compelling government
13 interest, as the Supreme Court has held. And there's no way
14 to uphold that interest while still discriminating against
15 transgender people. And if you're not letting transgender
16 people use the facilities like other students, then that's
17 what you're doing, you're discriminating, and so you can't
18 serve that interest. That makes the Student Safety Plan
19 narrowly tailored, even though it's actually really only
20 subject to rational basis scrutiny.

21 I won't speak much on the parental rights claim. I
22 believe Mr. Mersereau essentially covered it. I'll just note
23 that -- on the point that people can go to other schools, I
24 think the reason why that came up at all is because that's
25 really the right that has been acknowledged in the Supreme

1 Court in the *Meyer-Pierce* cases. And even in those cases,
2 they said the right to parent does not mean that schools
3 can't -- that the government can't make reasonable regulations
4 of schools. There is no language there that narrowed it
5 solely to curricular issues, as *Fields* -- as *Fields* has
6 acknowledged in the Ninth Circuit and which is binding here.

7 In conclusion, to accept the plaintiffs' claims would
8 be to twist the meaning of all of these different legal
9 doctrines. It would twist the right of privacy to mean that
10 people have a right to exclude people from public spaces if
11 they're uncomfortable with them being around. It would twist
12 the right of equality to say that not discriminating against
13 transgender people somehow discriminates against others. And
14 it would twist the meaning of free exercise by forcing the
15 School District to enforce the religious beliefs of a few
16 parents and students on all students rather than being neutral
17 as to religion.

18 Thank you very much.

19 THE COURT: Thank you.

20 MR. LEONARD: Caleb Leonard for the plaintiffs, Your
21 Honor.

22 First of all, I would like to thank Basic Rights
23 Oregon for their description of the situation we have, the
24 scenario running across the country and kind of the issues
25 they're bringing up, not just in this court but in courts

1 everywhere. And he has -- they have brought up some excellent
2 points on those issues.

3 However, this -- this hearing today is very narrow on
4 what we're actually dealing with and what we're actually
5 talking about. It's narrowed to whether or not the
6 allegations pled, if true -- which at this stage they're
7 assumed as true -- would meet the cause of action that we've
8 asked for. That's all we're actually dealing with, that's all
9 we're actually looking at, is whether or not the allegations
10 alleged are sufficient.

11 Both sides have argued essentially that the right of
12 privacy is either very diminished or nonexistent. They've
13 based that primarily on cases that -- excuse me -- we've used
14 that look at when the Courts, the Ninth Circuit and others,
15 have really said the right of privacy, the issue is there, and
16 those were typically in some sort of prison or parolee or some
17 other situation where a government agent directly and very
18 invasively violated someone's privacy.

19 However, it extends beyond that. It extends beyond
20 being harmed, being touched, being, you know, photographed.
21 If there's a right to privacy, then there's a right to
22 privacy. And Courts have said that you have a right to, you
23 know, not be viewed, your intimate parts not be viewed by an
24 individual of another gender, if that exists. And it does, in
25 fact, exist. And individuals who have that happen or could

1 have that happen, that's a violation of their right, of that
2 fundamental right.

3 Now, there has been some discussion here as to
4 whether or not it matters that they were actually seen, if
5 someone took a picture of them, if anything like that has
6 happened. Our argument, as Mr. Grey has said, is that it
7 doesn't. The fact that they haven't been viewed at this time
8 doesn't mean that the violation hasn't occurred.

9 We've also alleged in our Complaint multiple issues
10 with the plaintiff students, who are anxious, have fear, which
11 gives them an inability to concentrate in class, other
12 problems that derive from this violation of privacy which have
13 been alleged and are in fact there. You know, those are
14 damages, those are fears, those are the harm that's happened
15 to these people as a result of the violation of privacy.

16 And that goes to the argument that, you know, an
17 actual act of harassment must have occurred before the
18 harassment -- or before the right to privacy can exist.
19 Essentially their argument tends to be if something hasn't
20 happened, someone cannot say, "My right has been violated," if
21 it in fact has been.

22 I would like to point out just real quick the mention
23 of accommodations. They've discussed that all of these issues
24 would be cured, essentially, or are cured -- you know, if in
25 fact there is any discrimination, it's been taken care of by

1 there being single-sex bathrooms or a student lounge. We've
2 alleged in our Complaint that some of those facilities aren't,
3 you know, quite up to snuff, so to speak. One doesn't have
4 showers. The other ones are very far away from the
5 classrooms.

6 And if they move forward on that argument, we have
7 no problem with accommodations. In fact, we would like
8 accommodations for everyone. Everyone can use these
9 facilities if they choose not to use the other ones. And, you
10 know, if a transgender student is not comfortable with using
11 the restroom or the shower of their biological gender, they
12 can of course use these other ones. That would be our
13 proponent -- or our argument as to what the actual
14 accommodation should be as opposed to the situation we have
15 now.

16 And our argument is that saying that these other
17 bathrooms exist and that cures any potential problem or any
18 potential violation, we think -- our argument is that it's
19 just not -- it doesn't stand up strong enough.

20 THE COURT: Can I ask you a question?

21 MR. LEONARD: Yes, Your Honor.

22 THE COURT: Your perspective -- well, let me ask you
23 this. I know that sometimes people that are transgender go
24 through the process where they have medical procedures done to
25 reassign their, I guess -- I don't know whether to call it

1 their biological -- I don't know what the right word is for
2 that, but you know what I'm talking about. They get
3 reassigned to become the other sex in both ways, biologically
4 and in their heads.

5 If the policy said that people who have reassignment
6 surgeries were allowed to use now the facilities that they see
7 in their -- that they believe they are, would you and your
8 group have a problem with that?

9 In other words, someone who has gone through the
10 process of reassignment, would you have a problem with that?

11 MR. LEONARD: I don't have a direct answer for you at
12 this time. Good question.

13 THE COURT: And the reason I raise that question is
14 because as I understand it, in their heads and in their
15 hearts, transgenders are -- they're boys, even though
16 biologically they may have been born as girls. They are all
17 of that completely. And does it really take surgery in order
18 for them to use the facility that they believe they are?

19 MR. LEONARD: Well, I think -- if I may, I think that
20 would go to the -- you know, the individuals who are sharing
21 that facility with them. I mean, if all the plaintiff
22 students didn't have a problem with it, we wouldn't be here.
23 You know, if all the plaintiff students didn't have a problem
24 with that, we wouldn't be here.

25 As a result, my answer is I have no idea. If I get a

1 case like that, I'll let you know.

2 THE COURT: Yeah.

3 I think that it goes to the point that your colleague
4 made, and that is: How do we look at sex? Is it simply how
5 you were born biologically or is it more than that? That's a
6 problem that I will have to wrestle with ultimately.

7 But anyway, I interrupted you. Go ahead.

8 MR. LEONARD: I think that's all I have for this. I
9 believe the State is about to respond on a part of their
10 motion, and then I may respond to that directly.

11 THE COURT: Let me see if Basic Rights Oregon or the
12 ACLU has anything more.

13 MR. ARKLES: Yes, Your Honor.

14 THE COURT: And I hope I didn't offend anybody by my
15 questions.

16 MR. ARKLES: Not at all, Your Honor.

17 So I'm just going to briefly respond to the point
18 about the anxiety that the plaintiffs have alleged.

19 So one thing that I think is important to keep in
20 mind is that this Student Safety Plan has been in place for
21 Student A's entire high school career, so that means since
22 almost the beginning of his freshman year, until now, the very
23 end of his senior year. So if there were going to be problems
24 that were going to arise from this, one might expect that they
25 would have come up at some point in the last three years.

1 Speculation alone is not enough. I certainly
2 wouldn't fault anyone for having anxieties about sexual
3 harassment in the world that we live in. But transgender
4 people using facilities is just not the right -- it's just not
5 the right target for that.

6 The thing that they particularly seem to fear is a
7 transgender adult using a facility consistent with their
8 gender identity. If the Court would indulge me, that means
9 that they would be deeply concerned if I went to Dallas School
10 District and I used a men's room, because I was assigned
11 female at birth and I have a male gender identity. In fact, I
12 don't believe anybody would be particularly alarmed, and I'm
13 saying that based on 20 years of using the men's room with
14 nobody being particularly alarmed.

15 There is no bright line rule that could be created
16 that will keep people who have the exact same body parts
17 segregated in restrooms. It is simply not feasible, unless
18 there are genuine violations of people's privacy by actually
19 checking their body parts before entering a restroom, which I
20 don't think anyone here would want.

21 I'll also just acknowledge that -- so to the extent
22 that the plaintiffs think that our depiction of the right to
23 privacy is too narrow, I think that in some ways it's actually
24 broader than theirs. So I would think that in *York v. Story*
25 there would be a violation of the right to bodily privacy even

1 if the police officer -- even if the victim there had been a
2 man. I think that a police officer taking photographs of a
3 nude assault victim for no legitimate government purpose, over
4 the person's objection, and then handing them around the
5 office, would violate the constitutional right to privacy,
6 even if they were not of a different gender. Forced exposure
7 is a serious issue when it's done by the government.

8 But, again, what the plaintiffs seem to want here is
9 not to be free from forced exposure, but to be able to go into
10 the common area of a communal facility, take off their
11 clothes, but veto anyone who they feel uncomfortable with
12 being in that facility with them. That does not rise to the
13 level of a constitutional right.

14 Thank you.

15 THE COURT: Thank you.

16 Who is next?

17 MS. SCOTT: Carla Scott from the Oregon Department of
18 Justice for Governor Brown and the Oregon Department of
19 Education. I'll be very brief.

20 The Department of Education is the state agency
21 responsible for the administration of K-through-12 public
22 education in Oregon, and Governor Brown is the final
23 policymaker responsible for the operation and management of
24 the Department of Education.

25 Governor Brown and the Department of Education have a

1 unique interest in the correct application of Oregon law and a
2 particular interest here because of the potential effect that
3 a ruling from this Court could have on the State's goal of
4 providing a foundation for students to be treated in a safe,
5 nondiscriminatory way in Oregon public schools. The outcome
6 of this case will affect school districts and students beyond
7 those directly involved in this case.

8 One of the primary ways in which the Department of
9 Education has played a role in ensuring nondiscrimination in
10 public schools is by issuing a guidance document entitled
11 "Creating a Safe and Supportive School Environment for
12 Transgender Students." That guidance document is an exhibit
13 to the Complaint in this case. The guidance sets out the
14 State's policy and legal position that one's gender identity
15 is an innate characteristic of each individual's personality
16 that must be respected. It further states that transgender
17 students should be treated consistent with their gender
18 identity and the same as any other boy or girl.

19 With respect to bathroom and locker room use, the
20 guidance recommends that alternative accommodations, such as a
21 single unisex bathroom or private changing space, should be
22 made available to students who request them. But that option
23 should not be forced upon any student or presented as the only
24 option. Transgender students should be allowed to use
25 bathrooms and locker rooms consistent with their gender

1 identity. The School District's policies here are consistent
2 with the Department of Education's guidance.

3 I'll speak briefly about the state law claims that
4 are pleaded in the Complaint. The Complaint alleges a
5 violation of Oregon's public accommodation law, but it fails
6 to state a claim for violation of that law. To state such a
7 claim, plaintiffs must allege facts to show that the School
8 District denied plaintiffs full and equal accommodations,
9 advantages, facilities, and privileges based on their sex,
10 sexual orientation, or religion.

11 But the Complaint doesn't allege any facts to show
12 that the plaintiffs were denied access to a public law
13 accommodation on account of their sex, sexual orientation, or
14 religion. Rather, the Complaint makes clear that the School
15 District's policy requires equal access for all. Consistent
16 with the Department of Education's guidance, the School
17 District provides that all students, regardless of their sex,
18 sexual orientation, or religion, may use facilities in
19 accordance with their gender identity or may use a single-sex
20 facility if they choose.

21 Plaintiffs simply have not alleged that they are
22 being treated any differently from other students based on
23 their sex, sexual orientation, or religion. Rather, the
24 Complaint asks this Court to order the School District to
25 treat transgender students differently based on their gender

1 identity; and the State's position is that request for relief
2 would violate Oregon's public accommodation laws.

3 The Complaint similarly fails to state a claim for
4 violation of Oregon's law prohibiting discrimination in
5 education. To state such a claim, plaintiffs must allege
6 facts sufficient to show that an act of the School District
7 either unreasonably differentiates treatment or is fair in
8 form, but discriminatory in operation, again, based on their
9 sex, sexual orientation, or religion.

10 Plaintiffs' claims fail under both bases. Again, the
11 Complaint simply does not contain a single factual allegation
12 showing that the School District has taken any adverse action
13 against the student plaintiffs based on their sex, sexual
14 orientation, or religion.

15 The student plaintiffs are not being denied any
16 facilities or privileges on account of any protected status.
17 Like transgender students, the student plaintiffs have the
18 option to continue to share fully in communal facilities or to
19 use single-sex facilities.

20 The State supports the School District's arguments in
21 this case and also those advanced by Basic Rights Oregon and
22 asks that the Complaint be dismissed.

23 THE COURT: Thank you.

24 MR. LEONARD: I'll just respond very briefly, Your
25 Honor.

1 THE COURT: Sure.

2 MR. LEONARD: First of all, our position is that
3 instead of creating the plan that is implemented based on the
4 policy that counsel spoke of a moment ago, our argument would
5 be that the accommodation should be the single-sex bathroom,
6 or single-use bathroom -- I apologize -- for anyone, for
7 everyone. You know, if they weren't comfortable using this
8 facility, they have an alternative facility down the street or
9 just down the hall, and that should be what everyone is able
10 to have, instead of the plan that they ended up putting into
11 place.

12 THE COURT: It should be how it's always been, right?

13 MR. LEONARD: Yes, Your Honor.

14 THE COURT: Okay. Thank you.

15 Anything else?

16 MS. SCOTT: No.

17 THE COURT: Who is next?

18 MR. BICKFORD: I think I'm up, Your Honor.

19 I'll follow my microphone.

20 Good afternoon, Your Honor. James Bickford for the
21 federal defendants.

22 Your Honor, the School District twice here today has
23 said that its Student Safety Plan is an implementation of, at
24 one time, the School District's nondiscrimination policy; and,
25 I believe another time, the nondiscrimination policy gives

1 rise to the Student Safety Plan. It's the federal defendants'
2 position that that's true. It's obvious from the allegations
3 in the Complaint that it's true.

4 And for that reason, there is no reasonable basis on
5 which this Court could find that the plaintiffs have
6 adequately pled that the injuries they claim to have suffered
7 were fairly traceable to any challenged actions by the federal
8 defendants or likely to be redressed by any relief this Court
9 could order against the federal defendants.

10 THE COURT: Basically what you're telling the Court
11 is you didn't have anything to do with any of this.

12 MR. BICKFORD: That's correct, Your Honor. Just let
13 us go home, Your Honor. It's a beautiful city, but -- and I
14 think if the Court would turn to the Complaint, you can see
15 from the allegations that there are many factual allegations
16 that tend to show that the School District adopted the Student
17 Safety Plan because it thought it was a good idea and no
18 allegations that would tend to show that the School District
19 adopted the Safety Plan because it believed itself to be
20 somehow compelled by the federal government.

21 The plaintiffs allege that the principal of Dallas
22 High School explained the policy and threatened to punish
23 students who protested it -- that's the Complaint at 87 and 91
24 to 92; that the School District defended the Student Safety
25 Plan at three separate school board meetings, from

1 December '15 to February 2016; invited speakers they said were
2 gender identity experts, all of who supported the Student
3 Safety Plan. That's at 93.

4 And then at paragraph 109, the plaintiffs allege that
5 the District has -- and I quote -- "through various
6 announcements to the students at Dallas High School and
7 through board and community meetings on gender identity
8 conveyed the message that any objection to the Student Safety
9 Plan will be viewed by district administration as intolerance
10 and bigotry."

11 That is simply not the description of a school
12 district that believes it is acting under heavy federal
13 pressure and wishes it could do something else. For that
14 reason, the federal defendants have moved to dismiss for lack
15 of standing.

16 And the Ninth Circuit has held that to survive the
17 motion to dismiss, the plaintiffs must allege sufficient facts
18 plausibly establishing each element of the standing inquiry.
19 That's *Native Village of Kivalin v. ExxonMobil*, 696 F.3d at
20 867.

21 The elements to which we have pointed most
22 particularly are causation and redressability. I think it is
23 clear and I believe it's -- would be common ground with the
24 plaintiffs, although they're free to correct me, that all of
25 the injuries they allege here flowed directly from the School

1 District's adoption of its Student Safety Plan, and so their
2 case as to causation or traceability against the federal
3 defendants is that somehow there is federal action that in
4 turn caused the School District to adopt that Student Safety
5 Plan.

6 The Ninth Circuit has held in that circumstance, when
7 you are alleging that government action caused some other
8 actor to take action that in turn caused the injury, that more
9 particular facts are needed to show standing. The plaintiff
10 must offer facts showing that the government's -- in this
11 case, the federal government -- unlawful conduct is at least a
12 substantial factor motivating the third parties -- in this
13 case, the School District's actions -- and that plaintiffs
14 must make that showing without relying on speculation or
15 guesswork about the third parties -- in this case, the School
16 District's motivation. That's all out of *Mendia v. Garcia*,
17 768 F.3d (indiscernible) at page 1013.

18 THE COURT REPORTER: Counsel, I couldn't hear.
19 Please repeat.

20 MR. BICKFORD: 768 F.3d 1009 at page 1013.

21 My apologies.

22 So not only must the plaintiffs show that the
23 injuries they claim to be suffering here are fairly traceable
24 to federal action, the Ninth Circuit has imposed a somewhat
25 heightened pleading standard, which the plaintiffs have not

1 come close to satisfying.

2 They have various conclusory allegations in the
3 Complaint that either federal guidance policies or federal
4 enforcement actions were in the mind or somehow forced the
5 School District to do what it did, but no actual facts alleged
6 that would tend to show that.

7 THE COURT: From your perspective, as I recall, in
8 responding to the "Dear Colleague" letters, you pointed out to
9 the Court that the "Dear Colleague" letters, if you just look
10 at them in sequence, could not have been an influencing factor
11 on the part of the District to adopt the policy.

12 And you also say, "By the way, the last 'Dear
13 Colleague' letter says we don't" -- or "aren't expecting what
14 we said before" I guess would be a better way to put it.
15 "What we said before doesn't apply anymore."

16 MR. BICKFORD: So perhaps it would be helpful to walk
17 through the timeline.

18 THE COURT: Well, before you get to that -- and I
19 know I'm just kind of paraphrasing, but basically there were
20 expectations regarding -- I don't know if it specifically
21 addressed transgender students off the top of my head, but
22 basically the last letter, "Dear Colleague" letter, said those
23 are not the policies of the federal government anymore.

24 MR. BICKFORD: Okay. So I believe Your Honor is
25 referring to two separate "Dear Colleague" letters, one issued

1 in May of 2016 and the other issued in February of 2017. They
2 are both exhibits to the Complaint.

3 And the -- I'm going to paraphrase, which is always
4 dangerous, but I'll try and get it right. The May 2016 letter
5 essentially said that Title IX requires school districts to
6 adopt a policy of the sort that the Dallas School District has
7 adopted here. And then the February 2017 letter withdrew the
8 May 2016 "Dear Colleague" letter and said -- and I'm just
9 going to quote from it -- "The Departments" -- that is, the
10 Departments of Justice and Education, which jointly signed
11 it -- "believe that there must be due regard for the primary
12 role of the states and local school districts in establishing
13 educational policy. In these circumstances, the Department of
14 Education and the Department of Justice have decided to
15 withdraw and rescind the above-referenced guidance
16 documents" -- including the May 2016 letter -- "in order to
17 further and more completely consider the legal issues
18 involved. The Departments thus will not rely on the views
19 expressed within them," "them" being those guidance documents,
20 including the May 2016 letter.

21 Now, I would point out that the May 2016 letter came
22 out six months after the School District adopted its Student
23 Safety Plan in November 2015 and therefore cannot have been
24 the cause of the adoption of the plan in 2015.

25 There were three guidance documents to which

1 plaintiffs point in their Complaint that preceded the School
2 District's adoption of its Student Safety Plan, but one of
3 those documents has also been rescinded for reasons unrelated
4 to this case, and none of those documents spoke to the use of
5 sex-segregated facilities by transgender students.

6 THE COURT: Does the fact that there was -- I think
7 you said it was a 2017 letter --

8 MR. BICKFORD: Yes, Your Honor.

9 THE COURT: -- withdrawing the earlier letter, does
10 that make any difference?

11 MR. BICKFORD: We think as to redressability, it
12 should factor into the Court's reasoning, that to find
13 standing for the plaintiffs, the Court would have to find not
14 only that the School District's actions were fairly traceable
15 to federal actions, but also that the plaintiffs' injuries
16 could be redressed by relief against the federal defendants.

17 As the plaintiffs allege in their Complaint, the
18 School District has not in any way changed its policy in the
19 15 months since this earlier "Dear Colleague" letter was
20 withdrawn, and we think that suggests fairly strongly that
21 anything you could tell the federal government would not cause
22 the School District to change its Student Safety Plan. And if
23 nothing you could tell the federal government would cause the
24 School District to change its Student Safety Plan, plaintiffs'
25 alleged injuries can't be redressed.

1 THE COURT: The plaintiffs also point out to the
2 Court that the federal government continues to publish the
3 "Dear Colleague" letters, including the one that was
4 withdrawn, on its website.

5 MR. BICKFORD: Respectfully, Your Honor --

6 THE COURT: Does that matter?

7 MR. BICKFORD: I think the answer is no, it doesn't
8 matter. And the facts aren't quite as plaintiffs suggest.

9 The plaintiffs attached a lengthy declaration to
10 their opposition brief, which seemed to memorialize a web
11 search of the sites of the Department of Education and the
12 Department of Justice. They found copies of each of the
13 withdrawn guidance documents at issue here, which are
14 prominently marked on the first page "archival information,"
15 which is to say that these documents were once in force and
16 are no longer in force and have been marked so that no one can
17 be confused as to whether or not they are in force.

18 But plaintiffs suggest, with no basis that they've
19 alleged, that somehow these documents that have been very
20 publicly withdrawn and are posted for posterity and for
21 reference, but with markings suggesting that they have been
22 very publicly withdrawn, that somehow their presence on the
23 website in that form gives rise to some injury. And I suppose
24 that I'll allow plaintiffs to explain how that could be so,
25 but it's not clear to me.

1 THE COURT: Thank you.

2 MR. BICKFORD: If I could briefly, Your Honor, just
3 turn to the 12(b)(6) argument, which we have as well --

4 THE COURT: Go ahead.

5 MR. BICKFORD: All of plaintiffs' claims -- and there
6 are five against the federal government -- flow from the
7 existence that they allege of a rule somehow promulgated by
8 the federal government that requires policies of the sort that
9 the School District has adopted here. But we, for reasons
10 similar to our arguments as to standing, don't think that the
11 plaintiffs have adequately alleged the existence of any such
12 rule.

13 And I would simply note that in the cases where they
14 cite a particular document for the substance of the rule they
15 allege -- for instance, at page 32 of the Complaint -- the
16 document that they cite is the May 2016 letter, which has been
17 withdrawn by the February 2017 letter, and they have no -- no
18 citation after February 2017 to any document that would
19 suggest the existence of such a rule or that the rule was in
20 place at the time they filed their Complaint.

21 THE COURT: Thank you.

22 MR. BICKFORD: Thank you, Your Honor.

23 THE COURT: For plaintiff?

24 MR. ADAMS: Thanks, Your Honor. My name is Ryan
25 Adams for the plaintiff. And I appreciate the arguments put

1 forth to the Court by my colleague from New York, but as it
2 comes to no surprise to the Court, we would respectfully
3 disagree.

4 To the "Dear Colleague" letter from May of 2016,
5 specifically, you know, I think the argument comes down to
6 whether or not, you know, the federal government was the cause
7 of some of the allegations in the Complaint. And we would say
8 that it is. You know, I think that the language that opposing
9 counsel used -- and I'm sure he'd clarify if he'd like -- is
10 that this "Dear Colleague" letter from 2016 requires the
11 adoption of Title IX policies. And the alleged threat there
12 would be that without the adoption of those policies, the
13 federal funding would be either substantially diminished or
14 taken away completely.

15 And so I think, you know, speaking from the
16 plaintiffs' perspective, that there certainly is or are
17 allegations made, you know, that would substantiate our
18 Complaint and prevail over a motion to dismiss. And as I'm
19 sure the Court knows, *Erickson*, a 2007 case, says that the
20 allegations in the Complaint are taken as true at the motion
21 to dismiss stage; and that's where we obviously are right now.
22 So I don't believe that there are --

23 THE COURT: Well, yeah, but they're saying, "Look,
24 you're going to have to give us some allegation that the
25 School District actually relied on that letter, that they

1 responded to that letter. And there's been no allegation that
2 the School District did anything in response to that, other
3 than a blind allegation with no facts to support it."

4 MR. ADAMS: And I see the Court's question there, and
5 I think that it's a little bit disingenuous of the federal
6 government to say, "Hey, we're going to threaten you with
7 removing Title IX funding, but we don't want to be involved in
8 the litigation side of it. So if you don't do it, we're going
9 to remove the Title IX funding; but if you do do this and
10 somebody brings a challenge, not our problem."

11 And I think that's essentially what's happening here,
12 and that's why we respectfully disagree with counsel's
13 position on that.

14 Does that answer your question, Your Honor?

15 THE COURT: Sure.

16 MR. ADAMS: I think, you know, to address really the
17 last thing -- and I'm going to be pretty brief here. To
18 address the question of whether it matters that the May 2016
19 "Dear Colleague" letter has been withdrawn, I think from a
20 legal perspective here, I don't think that it does. You know,
21 notwithstanding the fact that it is still on the website, it
22 matters -- or it doesn't matter, because we have alleged that
23 the harm has already occurred. And that's our -- that would
24 be our argument and/or position on that.

25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. BICKFORD: If I could just briefly, Your Honor --

3 THE COURT: Of course.

4 MR. BICKFORD: Let me shuffle back to the microphone.

5 So I would just emphasize to the Court that the
6 plaintiffs have pointed again to the May 2016 letter, which
7 was issued six months after the School District adopted its
8 policy, could not have caused the adoption of the policy that
9 had been in effect for six months. And we think it is strange
10 to suggest that a withdrawn document could give rise to
11 standing to challenge -- that the federal government, having
12 once issued a document, is forever susceptible to suit on its
13 basis, notwithstanding the fact that the document was
14 withdrawn and has been withdrawn for the last 15 months.

15 And if I could, Your Honor -- and obviously if
16 plaintiffs care to respond -- I'd meant earlier to point the
17 Court, to the extent that you're thinking about the sort of
18 allegations that might get plaintiffs there as to causation, I
19 would point the Court to *Privacy Matters*, which is a similar
20 Complaint filed in the District of Minnesota. We cited it in
21 our Complaint. It's Case 16-civil-3015. It has been
22 dismissed.

23 But if the Court looks at paragraphs 102 through
24 about 112 of that Complaint, the Complaint alleges essentially
25 that that school district became aware of the enforcement

1 action in the Illinois school district that plaintiffs mention
2 in their Complaint; that the Illinois school district sent a
3 series of documents to the Minnesota school district; that the
4 Minnesota school district announced the new policy, similar to
5 the one at issue here, in an e-mail that said that the federal
6 government's legal findings against the Illinois school
7 district, quote, serve as the baseline for the Minnesota
8 school district's decision.

9 In short, we challenged the adequacy of those
10 allegations as well, but they're certainly much closer to
11 something that would suggest that a school district had in
12 mind threat of federal enforcement when it adopted its policy,
13 as opposed to what's been alleged here and what you've heard
14 from the District today, which is that this is the School
15 District's own policy, adopted of its own volition.

16 Thank you very much, Your Honor.

17 THE COURT: Thank you.

18 Anything else?

19 I have a couple questions for the parties of things
20 that were just kind of sitting on the table that have not yet
21 been addressed.

22 One was the plaintiffs had alleged in part of the
23 Complaint mention of a survey that took place within the
24 school district. I didn't hear anything about the survey, and
25 I was just wondering what's going on with that portion of the

1 Complaint.

2 MR. GREY: Your Honor, if you look at our brief in
3 response to the School District's motion to dismiss, I
4 acknowledged that we had not properly pled -- let me get
5 my --

6 THE COURT: I remember that much.

7 MR. GREY: I agreed with part of what -- what was set
8 forth in the School District's motion, but felt that we should
9 have the right to either revise the allegations or perhaps we
10 may choose to remove them entirely.

11 THE COURT: Okay. And so for purposes of an opinion
12 that gets issued, I will say that the School District has
13 conceded the motion to dismiss as regards the survey,
14 whichever one that one is, with -- and asked for leave to
15 amend.

16 MR. GREY: Correct.

17 THE COURT: That's your position. Okay.

18 Do you agree?

19 MR. MERSEREAU: Agreed, Your Honor.

20 THE COURT: All right.

21 And then in the Complaint itself, there's also a
22 request for injunctive relief. And I think what happened is
23 the Court got caught up in the motions to dismiss and all the
24 briefing and didn't pay any attention to the fact that there
25 had been a request for a preliminary injunction in the

1 Complaint, as I recall. And so that's still sitting out
2 there. And I know the school year is about over, and maybe
3 that's why we haven't been paying attention to that part of
4 the Complaint.

5 Is there anything you want to address with regards to
6 that?

7 MR. GREY: Well, Your Honor, all I would say is we
8 gave consideration to a motion for a preliminary injunction.
9 Frankly, the law and the cases have been moving around so much
10 that -- and there was some delay in getting even to this
11 point, because it's been six months since we filed the
12 Complaint, actually. So --

13 THE COURT: Well, I just wanted to make sure that --
14 I didn't know whether you had spent any time thinking about
15 this. My preference would be simply to deal with the motions
16 to dismiss. After the motions to dismiss, we can get back
17 together and figure out what to do regarding the injunctive
18 relief.

19 MR. GREY: I think that's the right answer, Your
20 Honor.

21 THE COURT: That's acceptable to the plaintiff. Does
22 that work for everybody else?

23 MR. MERSEREAU: On behalf of the District, I think it
24 does.

25 I would encourage the Court, from an analytical

1 standpoint, to view our arguments as addressing one of the
2 elements for injunctive relief; and that is likelihood of
3 success on the merits. If you look at those two cases --

4 THE COURT: If you win, there's not going to be an
5 injunction.

6 MR. MERSEREAU: Precisely my point, Your Honor.

7 THE COURT: Does that work for everybody else?

8 MR. ARKLES: No objection, Your Honor.

9 THE COURT: And for the State as well?

10 MS. SCOTT: No objection.

11 THE COURT: Okay. Then those were all the kind of
12 pieces that were left on the table that I wanted to make sure
13 we addressed.

14 Let me just make sure that there isn't anything else
15 that I haven't thought of that my clerk may have.

16 (The Court and the law clerk confer off the record.)

17 THE COURT: Is there anything else from the
18 plaintiffs' perspective that we need to address?

19 MR. GREY: No, Your Honor.

20 THE COURT: From defense?

21 MR. MERSEREAU: Not for the District, Your Honor.

22 MR. ARKLES: No, Your Honor. Thank you.

23 MS. SCOTT: No, Your Honor.

24 MR. BICKFORD: No, Your Honor.

25 THE COURT: Thank you.

1 This matter will be taken under advisement as of
2 today. I will do my best to get you a decision as quickly as
3 I can, but I also need to pay due regard to the issues that
4 have been put forth by the parents, families, and the
5 defendants in this case.

6 Thank you very much. We are in recess.

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9 (Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Nancy M. Walker

9-26-18

NANCY M. WALKER, CSR, RMR, CRR
Official Court Reporter
Oregon CSR No. 90-0091

DATE

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