Case No. 18-35708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

DALLAS SCHOOL DISTRICT NO. 2; OREGON DEPARTMENT OF EDUCATION; GOVERNOR KATE BROWN, in her official capacity as SUPERINTENDENT OF PUBLIC INSTRUCTION; 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-Appellees.

On Appeal from the United States District Court for the District of Oregon, Portland Division, No. 3:17-cv-01813-HZ
The Honorable Marco A. Hernandez

EXCERPT OF RECORD VOLUME III

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PORTLAND DIVISION

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Plaintiffs,

v.

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

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

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

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Plaintiffs have not stated a free exercise claim.

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

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

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

[1] Plaintiffs' response denies that the District has offered to accommodate students who request additional privacy. The allegations in plaintiffs' complaint respecting these issues are located in paragraphs 91 and 245.

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

The plaintiffs assert that other unnamed members of Parents for Privacy "are similarly concerned about the impacts of their children, whether religiously motivated or not." Response at 13. These unarticulated religious concerns are not found in the complaint, and thus cannot be considered. Moreover, plaintiffs are incorrect to suggest that the free exercise clause of the First Amendment gives them a vehicle to challenge concerns that are not motivated by religion. *Wisconsin v. Yoder,* 406 U.S. 205, 215-216 (1972).

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

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

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

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

Plaintiffs' free exercise claim should be dismissed.

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

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

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

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CONCLUSION

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

DATED: March 26, 2018.

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DISTRICT OF OREGON

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Plaintiffs,

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

Proposed Defendant-Intervenor Basic Rights Oregon's
MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

REQUEST FOR ORAL ARGUMENT

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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.

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I. LR 7-1 CERTIFICATE OF COMPLIANCE

Counsel for Proposed Defendant-Intervenor Basic Rights Oregon ("BRO") certify that they have conferred in good faith with counsel for the parties regarding the issues presented by this Motion to Dismiss. Counsel for Defendants did not object. Plaintiffs never responded to Intervenor's inquiry to meet and confer.

II. MOTION

Proposed Defendant-Intervenor moves to dismiss Plaintiffs' Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The basis for this Motion are set forth in the accompanying memorandum.

III. MEMORANDUM

A. Introduction.

Plaintiffs have sued Dallas School District No. 2 (the "School District") and various federal officials and agencies[1] because the School District permits a boy who is transgender ("Student A") to use locker room and restroom facilities with other boys in Dallas High School. If the School District were to withhold permission for Student A to use facilities with other boys, it would discriminate against him on the basis of sex and transgender status in violation of the Constitution, federal law, and state law, and it would put him at risk of harm.

Proposed Defendant-Intervenor Basic Rights Oregon ("BRO") is a not-for-profit organization committed to ensuring lesbian, gay, bisexual, transgender, and queer (LGBTQ) Oregonians live free from discrimination. *See* Mot. to Intervene. BRO works throughout the state of Oregon to ensure that transgender students have safe, non-discriminatory environments in which to go to school. BRO submits this brief in support of its motion to dismiss Plaintiffs' Complaint.

Plaintiffs ask this Court to declare that the Student Safety Plan designed to prevent discrimination and bullying against Student A violates their right to privacy, free exercise, and

[1] Originally, Plaintiffs also sued Governor Kate Brown and the Oregon Department of Education, but those defendants are no longer parties to this action.

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parental authority, and as well as Title IX and state anti-discrimination law. [2] They ask this Court to order the School District to ban boys who are transgender from boys' restrooms and locker rooms, and girls who are transgender from girls' restrooms and locker rooms. If Plaintiffs prevail, transgender students will be barred from the facilities used by all other students of their gender, and forced to use separate facilities that other students may *choose* to use, but that only transgender students will be *required* to use. This stigmatizes transgender students by singling them out and isolating them from their peers. It sends a message that the mere presence of transgender students in the facilities used by their peers is unacceptable. Transgender youth are already highly vulnerable to harassment, bullying, violence, and suicide. *See Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (denying motion to dismiss where mother claimed her transgender son died by suicide following repeated, deliberate use of pronouns "she" and "her" for him by hospital staff); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324 (E.D. Pa. 2017) (quoting expert testimony that "[p]eer reviewed research demonstrates that as many as 45% of gender dysphoric adolescents have had thoughts of suicide compared to 17% in this age group); *Whitaker By Whitaker*, 858 F.3d at 1051 ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity"); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) ("transgender people as a class have historically been subject to discrimination").

The School District's practice concerning single-sex facilities does not violate any law; to the contrary, as several courts have recognized, it is the policy and practice sought by Plaintiffs that would violate Title IX and state law, as well as the Equal Protection Clause.

B. Factual Background.

Based on the allegations in the Complaint, Plaintiffs are two organizations and seven

[2] While Plaintiffs are incorrect that the federal guidance regarding transgender students issued in or prior to 2016 violated the Administrative Procedure Act, Religious Freedom Restoration Act, U.S. constitution, or any other law, BRO will not address those claims as the federal government withdrew that guidance in 2017. Compl. ¶ 39.

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individuals, some of whom are students or parents of students in the School District. They object to the Student Safety Plan created by the School District to ensure that Student A may safely participate in school activities. The Student Safety Plan acknowledges Student A as "a transgender male expressing the right to access the boy's locker room at Dallas High School." Pls. Ex. A. It goes on to state that staff will receive training and instruction, that teachers will teach about anti-bullying and harassment, that the PE teacher will be first to enter and last to leave the locker room, and that Student A's locker will be in direct line of sight of the PE teacher in the coach's office. *Id*. The Student Safety Plan also states that Student A may use restrooms consistent with his identity, i.e., boys' restrooms, and lists several "Safe Adults" with whom he may share concerns. *Id*.

Students must change their clothes before and after PE class in Dallas High School. Compl. ¶ 98. There are no allegations that students undress completely or see one another's genitals while changing their clothes. There are no allegations that students are required to shower together or at all, or that students typically take showers at school, or that any of the plaintiffs wish to take showers at school. There are no allegations that students must change clothes in common areas rather than in stalls. The principal of the School District offered use of a staff lounge if students wished to change in complete privacy outside of a multi-occupancy locker room. Compl. ¶ 91. The School District is also building more facilities with more privacy options. Compl. ¶ 81. There are no allegations that Student A has ever done anything harmful to anyone at all, inside restrooms and locker rooms or outside of them, other than simply using the restroom and locker room at the same time and in the same manner as other boys.

C. Argument.

Plaintiffs have not stated a plausible claim upon which relief may be granted. A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While courts must accept factual allegations as true, they should not

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"assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (internal citations and quotation marks omitted). Nor do "unwarranted inferences" suffice to defeat a motion to dismiss. *Id.* Because Plaintiffs have not alleged sufficient facts that would plausibly entitle them to relief under the law, their claims should be dismissed with prejudice. *See Iqbal*, 556 U.S. at 679.

1. The School District's practices and student safety plan do not violate the fundamental right to privacy. Plaintiffs have failed to state a claim that the School District's actions have violated their fundamental right to bodily privacy. Plaintiffs are asserting a new right under the Due Process Clause that has never been recognized by any court in this country, and should not be recognized now: the right to exclude other people from common spaces.

The Fourteenth Amendment may, in some instances, include a "privacy interest in remaining free from involuntary viewing of private parts of the body by members of the opposite sex." *Caribbean Marine Services Co., Inc. v. Baldwin*, 844 F.2d 668, 677 (9th Cir. 1988). However, a violation of this interest has typically only been found where a government official gratuitously photographed or touched the genital area of someone with a different gender. *See e.g.*, *Byrd v. Maricopa Cty. Sheriff's Dep't*, 629 F.3d 1135, 1142 (9th Cir. 2011) (finding cross-gender search unreasonable where, despite availability of male officers and lack of emergency, a female cadet conducted a search of a man that included having him strip to his underwear, using her hand to move his testicles and scrotum, and placing her hand in between his buttocks to search his anus); *York v. Story*, 324 F.2d 450, 452 (9th Cir. 1963) (finding that female crime victim stated a claim for violation of her privacy rights where male police officer took pictures of her in the nude for no legitimate reason over her objection and circulated those pictures among other officers).

A government official viewing the completely naked body of a person of a different gender against their will, even in the absence an emergency, does not always constitute a violation of privacy. *See Grummett v. Rushen*, 779 F.2d 491, 494 (9th Cir. 1985) (finding no privacy violation where female guards viewed male prisoners infrequently or from a distance while they dressed,

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used the toilet, showered, or underwent searches, even without applying lesser scrutiny based on the plaintiffs' status as prisoners). Furthermore, where cross-gender viewing of genitals may be avoided simply through inconvenience, there is no privacy violation; nor do privacy considerations necessarily trump anti-discrimination interests. *See Caribbean Marine Services Co., Inc.*, 844 F.2d at 677 (finding the district court abused its discretion in failing to consider the "strong governmental and public interest in nondiscriminatory hiring practices" when granting preliminary injunction to stop a plan in which women would join men in cramped quarters with common toilets and showers).

Here, Plaintiffs have alleged no facts to suggest they have ever been forced to expose their genitals to any government official, much less any student, of any gender. They have not alleged that they must undress completely to prepare for PE. When they partially undress, they may do so in latching toilet stalls. The possibility of brief, accidental glimpses of someone through a gap in a toilet stall partition simply does not rise to the level of a violation of the constitutional right to privacy. But students concerned about the possibility of such glimpses may use the school's unisex facilities. (ECF 1, ¶ 91.) Plaintiffs have not alleged that the school permits anyone look over or under toilet stalls, or that anyone in the School District has ever done so or threatened to do so, of any gender.

In *Students & Parents for Privacy*, a federal district court in Illinois denied a motion for a preliminary injunction in a case with facts nearly identical to this one. The district court adopted the magistrate judge's Report and Recommendation, which explained:

> There is no reason why a student who does not want to do so would have to take off clothing or reveal an intimate part of his or her body outside of the private stalls. Inside the stalls, there is no meaningful risk that any part of a student's unclothed body would be seen by another person. Therefore, these protections almost entirely mitigate any potential risk of unwanted exposure either by or to any Student Plaintiff.

Students & Parents for Privacy v. U.S. Dep't of Educ., No. 16-cv-4945, 2016 WL 6134121, at *29 (N.D. Ill. Oct 18, 2016) ("Students R&R") (internal citation omitted); *see also Students &*

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Parents for Privacy, 2017 WL 6629520, at *6 ("[T]he restrooms at issue here have privacy stalls that can be used by students seeking an additional layer of privacy, and single-use facilities are also available upon request. Given these protections, there is no meaningful risk that a student's unclothed body need be seen by any other person."); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 290-91 (W.D. Pa. 2017) (rejecting the school district's argument that the policy implicated any actual privacy concerns at all "given the actual physical layout of the student restrooms at the High School," which meant that "anyone using the toilets or urinals at the High School is afforded actual physical privacy from others"); *Bd. of Educ. of Highland Local Sch. Dist. v. U. S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (finding no evidence that allowing transgender girl to use girls' facilities "would infringe upon the privacy rights of any other students"). Again, no Student Plaintiffs are compelled to change in front of other students. Moreover, those seeking additional privacy may change in private bathroom stalls or the staff lounge. (ECF 1, ¶ 91.). What they may not do is exclude students from common facilities that match their gender identity simply because they are transgender.

Plaintiffs allege that their right to privacy is violated by the mere "risk" of being in the presence of boys who are transgender in the boys' facilities, or girls who are transgender in the girls' facilities. ECF 1, ¶ 190. But the mere presence of transgender people in the common areas of these facilities do not violate any fundamental right deeply rooted in this nation's history and tradition. No court in this country has recognized a fundamental right to exclude others from common spaces. In fact, many courts have recognized that the presence of transgender students in common restrooms or locker rooms does *not* infringe anyone's constitutional right to privacy. *Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418, at *55 (E.D. Pa. Aug. 25, 2017) ("[H]igh school students … have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs"); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *2 (N.D. Ill. Oct. 18, 2016) (same); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 290 (W.D. Pa. 2017)

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(presence of a girl who is transgender in a girl's school bathroom did not demonstrate "any threatened or actually occurring violations of personal privacy"); *Board of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 876 (S.D. Ohio 2016) ("Highland") (school district's policy preventing a girl who was transgender from using a girl's bathroom was not substantially related to the district's interest in student privacy); *see also Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting cisgender female prisoner's claim that housing a transgender female prisoner with her violated her right to privacy).

Although Plaintiffs try to shoehorn their claimed right into the constitutional right to bodily privacy, what they are really doing is asking this Court to establish a new fundamental right has never been recognized by any court in this country, and should not be recognized now: the right to exclude people from common spaces.

2. The School District's practices and Student Safety Plan do not violate Title IX. Plaintiffs have not pled sufficient facts to support a claim of discrimination on the basis of sex under Title IX. On the contrary, they seek injunctive relief that would violate Title IX by discriminating against transgender students.

a. Plaintiffs have not alleged facts that, if true, would support a finding of discrimination on the basis of sex. To sustain a sexual harassment claim under Title IX, Plaintiffs must establish that they were students at a school receiving federal funds, that they experienced harassment based on sex, and that the harassment was "so severe, pervasive, and objectively offensive" that it "deprive[s] the victim of access to the educational opportunities or benefits provided by the school." *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). Imputed liability requires deliberate indifference to sexual harassment of which the institution has actual knowledge. *Oona R.-S by Kate S. v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998) (holding that Title IX imposes on schools a "duty to take reasonable steps to remedy a known hostile environment"); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

Plaintiffs do not allege that any student, teacher, administrator, or staff member has ever

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engaged in any sexually harassing conduct against any of them. Rather, they advance a novel claim—that a plan that allows a transgender student to use facilities that accord with his gender identity, in and of itself, creates "a sexually harassing hostile environment" sufficient to state a claim under Title IX. (ECF 1, ¶¶ 226, 227.) It does not.

No court has ever held that permitting transgender students to use bathrooms and locker rooms consistent with their gender identity is the equivalent of sexual harassment. Such a conclusion would require finding that simply being transgender transforms the ordinary use of a bathroom or locker room into an act of harassment. The "mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases." *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *32 (N.D. Ill. Oct. 18, 2016); *see also Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418, at *67 (E.D. Pa. Aug. 25, 2017); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (rejecting female employee's claim that a transgender female co-worker's use of the women's restrooms constituted sexual harassment).

To the extent Plaintiffs seek to rely on 34 C.F.R. § 106.33, that reliance is misplaced. The regulation states that schools "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." This regulation permits, but does not require, single-sex facilities. It does not permit, much less require, that schools force transgender students out of the facilities that will be most consistent with their gender identity, health, safety, or dignity.

The Student Safety plan to which Plaintiffs object does not permit sex-based discrimination or harassment. It does not say that girls may be treated differently or worse than boys, that sexual harassment of students will be tolerated, or that school officials will abstain from taking action against students, teachers, or staff who discriminate against or harass people on the basis of sex. In fact, the opposite is true. The Student Safety Plan and School District policies Plaintiffs cite

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take a strong stance against sex-based discrimination, including harassment. *See* Pl. Ex. A ("All Teachers will take time to teach about anti-bullying and harassment"); (ECF 1-1, p. 4) ("The district prohibits discrimination and harassment on any basis protected by law, including but not limited to, an individual's perceived or actual * * * sex [or] sexual orientation."); Pl. Ex. C-1 "("Every student of the district will be given equal educational opportunities regardless of … sex") Pl. Ex. D ("Sexual harassment is strictly prohibited and shall not be tolerated."); Pl. Ex. E ("Inservice training on sexual harassment and sexual violence will be developed by the District and made available to all district employees and students"); Pl. Ex. G ("Harassment, intimidation or bullying and acts of cyberbullying by students, staff and third parties toward students is strictly prohibited.").

Further, the conduct Plaintiffs allege—allowing transgender students to use single-sex facilities that accord with their gender—does not target Student Plaintiffs on the basis of sex. *See* 20 U.S.C. § 1681; *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324 (E.D. Pa. 2017) (permitting boys who are transgender to use boys' facilities and girls who are transgender to use girls' facilities does not discriminate on the basis of sex "because the School District treats both male and female students similarly"). Plaintiffs have not alleged that Student Plaintiffs are being treated differently from others, or that they are being singled out based on their sex, or that they are being harassed because they do to do not match sex stereotypes. According to the facts as stated in the Complaint, like any other students, Student Plaintiffs are permitted to use a multi-occupancy restroom and locker room consistent with their gender identity; like any other students, if they do not wish to do so, they may use a single-occupancy facility; and like any other students, they are entitled to protection against sexual harassment and bullying. The substance of Plaintiffs' claims appears to be not an objection to Student Plaintiffs receiving different or worse treatment than other students, but to transgender students receiving equal treatment. That is not a violation of their rights under Title IX.

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b. The injunctive relief Plaintiffs seek would discriminate on the basis of sex. Instead of remedying sex discrimination, the injunctive relief Plaintiffs seek, which would bar transgender students from access to restrooms and locker rooms consistent with their gender identity, would violate Title IX and the Equal Protection Clause. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050, 1053-54 (7th Cir. 2017) (Title IX and equal protection); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (equal protection); *Highland*, 208 F. Supp. 3d at 874-77 (equal protection).

The First, Sixth, Seventh, Ninth, and Eleventh Circuits have recognized that discrimination against a transgender individual is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution. *See Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 Fed. App'x 492, 493 (9th Cir. 2009) (holding that under Title VII and Title IX "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men and women"); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000); *Whitaker*, 858 F.3d at 1051; *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000).

A person's transgender status is an inherently sex-based characteristic. The incongruence between gender identity and gender designated at birth is what makes a person transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination on the basis of "sex." *See Schwenk*, 204 F.3d at 1201-1203 (finding discrimination on the basis of gender interchangeable with discrimination on the basis of sex for purposes of federal discrimination statutes); *see also Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), reconsideration denied, No. 215CV00388JADPAL, 2016 WL 6986346 (D. Nev. Nov. 28, 2016); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

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Discrimination against people because they have undergone a gender transition is also inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also discrimination against people who convert from Judaism to Christianity. *Cf. Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes discrimination against people who have undergone a gender transition from the gender designated for them at birth. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy); *Glenn*, 663 F.3d at 1314 (firing employee because of her "intended gender transition" is sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14-CV-00583-SWW, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (same).

In addition, discrimination against people because they are transgender is sex discrimination because it inherently rests on sex stereotypes and gender-based assumptions. As the Supreme Court recognized in *Price Waterhouse v. Hopkins*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. 228, 251 (1989) (plurality); *see also Kastl*, 325 Fed. App'x at 493; *Schwenk*, 204 F.3d at 1201-1203 (finding that "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one" and holding that this constitutes prohibited sex discrimination). By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. Indeed, "a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316; *accord Whitaker*, 858 F.3d at 1048; *Dodds*, 845 F.3d at 221; *see also Schwenk*, 204 F.3d at 1201-1203. "[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is … discrimination on the basis of sex as interpreted by *Price Waterhouse*." *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *accord G.G. v. Gloucester County Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) (explaining

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that discrimination against a transgender boy, who does "not conform to some people's idea about who is a boy," is discrimination on the basis of sex); *see also Schwenk*, 204 F.3d at 1201-1203 (noting that transgender individuals are inherently gender nonconforming in their "outward behavior and inward identity" and holding that "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden"); *Kastl*, 325 Fed. App'x at 493 ("[T]ransgender individuals may state viable sex discrimination claims on the theory that the perpetrator was motivated by the victim's real or perceived non-conformance to socially-constructed gender norms."); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574-75 (6th Cir. 2004) (discriminating based on a person's failure to "act and/or identify with" one's sex assigned at birth is discrimination on the basis of sex); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("Because the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping."); *Schroer*, 577 F. Supp. 2d at 305 (discrimination against an "inherently gender-nonconforming transsexual" is sex discrimination).

As the Seventh Circuit recently explained: "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Whitaker*, 858 F.3d at 1049. Indeed, "the most obvious example" of a Title IX violation is "the overt, physical deprivation of access to school resources." *Davis*, 526 U.S. at 650; *cf. Snyder ex rel. R.P. v. Frankfort-Elberta Area Sch. Dist.*, No. 1:05-CV-824, 2006 WL 3613673, at *1-2 (W.D. Mich. Dec. 11, 2006) (finding that requiring Black elementary school student to use separate restroom in response to harassment from others deprived her of "equal access to restroom facilities").

Physical exclusion carries a powerful stigma that marks transgender students as unfit to use the same facilities as others. "[I]t is humiliating to be segregated from the general population." *G.G.*, 853 F.3d at 729 (Davis, J., concurring). Our laws have long recognized the "daily affront

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and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). "[D]iscrimination itself, … by stigmatizing members of the disfavored group[,] … can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 729 (1984); *cf. J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (explaining that when a juror is excluded based on gender "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that refusal to recognize marriages of same-gender couples "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition").

In the context of transgender students and separate-sex facilities, this exclusion can also cause other harms. *See Evancho*, 237 F. Supp. 3d at 294 (finding irreparable harm where girls who are transgender were marginalized through being prohibited from using girls' rooms, "causing them genuine distress, anxiety, discomfort and humiliation"); *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 878 (finding irreparable harm where girl who is transgender was not permitted to use a girl's room, singling her out and exacerbating her mental health conditions); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 728 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), *and vacated and remanded*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017) (describing evidence of daily psychological harm and repeated urinary tract infections resulting from boy who is transgender not being permitted to use boys' rooms); *Whitaker By Whitaker*, 858 F.3d at 1041 (describing harm to boy who is transgender from not being permitted to use boys' rooms, including fainting due to dehydration, stress-related migraines, and suicidal thinking).

Thus, far from violating Title IX, the School District has done what is necessary to comply with Title IX and the Equal Protection Clause. Plaintiffs have not stated a claim for which relief

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may be granted.

3. Plaintiffs' Oregon discrimination claims fail for similar reasons as their Title IX claim. Plaintiffs have failed to allege facts sufficient to state a claim that the School District's actions violate Oregon's prohibition against discrimination in education, Or. Rev. Stat. Ann. § 695.850, or public accommodation laws, Or. Rev. Stat. Ann. § 659A.403. Plaintiffs state that they have suffered discrimination based on their sex, sexual orientation and religion because they have been "deprived of the right to utilize restrooms, locker rooms and showers without encountering persons of the opposite biological sex." (ECF 1, ¶¶ 267-68). Plaintiffs further allege discrimination in education because they have not been "provid[ed] reasonable accommodations based on the health and safety needs of plaintiffs and others coming on school premises." (ECF 1, ¶ 273). The Complaint is devoid of any facts sufficient to show discrimination under either law. To the contrary, the Complaint alleges numerous facts that show Student Plaintiffs are not receiving different or worse treatment than other students. Rather, Plaintiffs' Complaint seeks relief that would perpetrate the very harm Oregon's anti-discrimination laws seek to prevent—discrimination based on sex and gender identity against Student A now and other transgender students in the future.

Plaintiffs ask the court to order that Student A, or any other transgender person, be excluded from school facilities used by Student Plaintiffs. Such action by the School District, if taken, would violate Oregon anti-discrimination laws.[3] Oregon's protections from discrimination based on sexual orientation include protections from discrimination based on gender identity. Or. Rev. Stat. Ann. § 174.100 (defining sexual orientation as "actual or perceived heterosexuality,

[3] While it is true that a federal court possesses the power to remedy constitutional violations through injunctive relief that violates otherwise valid state laws, Plaintiffs fail to plead facts sufficient to show a federal constitutional harm, nor does their pleading show how the discriminatory relief sought is essential to remedying the alleged harms. *See, Stone v. City & Cty. of San Francisco*, 968 F2d 850, 862 (9th Cir 1992), *as amended on denial of reh'g* (Aug. 25, 1992) (otherwise valid state laws or court orders cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme).

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homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth"). Both Oregon's education nondiscrimination law and Oregon's public accommodation nondiscrimination law prohibit discrimination against transgender people. Or. Rev. Stat. Ann. § 659.850 (defining and prohibiting discrimination in education); Or. Rev. Stat. Ann. § 659A.403 (prohibiting discrimination in public accommodations). If the School District excluded Student A from using the boys' bathroom because he is transgender, it would be a prima facie case of discrimination under Oregon law. Nothing about Student Plaintiffs' purported harm due to the alleged discomfort or fear they experience changes that.

a. Plaintiffs have not alleged facts that, if true, would support a finding of discrimination in education. In order to state a claim for discrimination in education, Plaintiffs must allege facts sufficient to show that an act of the School District either (1) "unreasonably differentiates treatment" or (2) "is fair in form but discriminatory in operation" based on their sex, sexual orientation or religion. *See* Or. Rev. Stat. Ann. § 659.850(1); *see also Nakashima v. Oregon State Bd. Of Educ.*, 344 Or. 497, 185 P.3d 429 (2008) (interpreting § 659.850's differential treatment language as prohibiting "a policy or practice that affirmatively treats some persons less favorably than others based on certain protected criteria"). Under the second theory, an act with discriminatory impact is only prohibited when it is not "reasonably necessary to a program's or activity's successful operation or the achievement of its essential objectives." *Nakashima v. Oregon State Bd. Of Educ.*, 344 Or. 497, 515-16, 185 P.3d 429, 440 (2008). Section 659.850 only provides for "reasonable accommodation of an individual based on the health and safety needs of the individual" in the context of dress codes or policies.

The Complaint lacks a single factual allegation showing that the School District has taken adverse action against the Student Plaintiffs based on their sex, sexual orientation, or religion. Nor does the Complaint contain any facts that Student Plaintiffs are subject to differential treatment. Student Plaintiffs are not being denied any facilities or privileges. The Complaint alleges facts to

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the contrary: Student Plaintiffs have the option to (1) continue to share fully and equally in school facilities, or (2) use a separate facility if they so choose. There is no denial, difference, or disparity. Like all other students, Student Plaintiffs are allowed access to facilities consistent with their gender identity; like all other students, they may use a single-occupancy facility if they prefer; and like all other students, they are entitled to protection against sexual harassment and bullying. If anything, the School District has provided all students an additional advantage on the same terms as all other students.

Student Plaintiffs do not have a right to use school facilities to the exclusion of transgender students. *See*, *Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418, at *67 (E.D. Pa. Aug. 25, 2017); *see also id.* at 55 ("[H]igh school students … have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs.). Discomfort with sharing spaces with transgender people is not a cognizable harm under Oregon's anti-discrimination laws.

Student Plaintiffs also fail to allege facts sufficient to show they were entitled to any accommodation based on their health and safety. The health and safety accommodation in § 659.850 (1) is rarely litigated and scant case law is available to guide this court's decision. However, the language of the statute itself suggests that the provision is limited to the review of discriminatory dress code policies. *See* Or. Rev. Stat. § 659.850 (1) ("'Discrimination' does not include enforcement of an otherwise *valid dress code or policy*, as long as the code or policy provides, on a case-by-case basis, for *reasonable accommodation of an individual based on the health and safety needs of the individual*.) (emphasis added); *State ex rel. Appling v. Chase*, 224 Or 112, 116, 355 P2d 631, 633 (1960) (finding that when language of statute is plain and understandable, then legislative intent must be gathered from the language used); *see also*, Oregon Senate Bill 2, Staff Measure Summary at 1 (Mar. 12, 2007) ("Allows employers to enforce *valid dress codes* and policies if the employer provides reasonable accommodations when necessitated by the health and safety needs of the individual."). Student Plaintiffs' complaints arise out of their

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objection to sharing school facilities with transgender people, not dress codes. To the extent an accommodation is required under Oregon law,[4] the School District provided a sufficient one—use of the staff lounge. (ECF 1, ¶¶ 91, 79).

b. Plaintiffs have not alleged facts that, if true, would support a finding of discrimination in a place of public accommodation. In order to state a claim for discrimination in a place of public accommodation, Plaintiffs must allege facts sufficient to show that the School District denied Plaintiffs "full and equal accommodations, advantages, facilities and privileges" based on their sex, sexual orientation or religion. Or. Rev. Stat. Ann. § 659A.403.[5] Plaintiffs again fail to allege even one fact that shows they were denied access to a public accommodation, nor is there any fact showing a denial based on their sex, sexual orientation or religion.

According to the Complaint, the School District policy requires just the opposite. It provides that all students regardless of their sex, sexual orientation or religion may use facilities in accordance with their gender identity. (ECF 1, Ex. A) Providing equal access to school facilities for transgender students does not make the facilities limited or unequal for all other students. Such a finding would be absurd. Oregon courts have made clear that a place of public accommodation violates § 659A.403 when it excludes transgender people based on other peoples' desire not to share the same space. *See Blachana, LLC v. Oregon Bureau of Labor & Industries,* 273 Or. App. 806, 819, 359 P.3d 574, 581 (Or. App. 2015) (affirming agency finding that a bar violated § 659A.403 when it requested a social group primarily comprised of transgender people not return to the bar due to other patrons' perception that when the social group was present, it was a bar for transgender people). Plaintiffs have not alleged that they are being treated any differently from other students or parents based on sex, sexual orientation, or religion.

[4] Section 659.850 does not include an independent religious accommodation requirement. *Nakashima*, 344 Or. at 511-12 (rejecting the notion that § 659.850 adopted a duty of reasonable accommodation of religion akin to that in Title VII).

[5] To the extent Plaintiffs fail to state a claim against the School District under § 659A.403, Plaintiffs' claim that School District has aided or abetted in any discrimination as prohibited by § 659A.406 is also deficient. Plaintiffs have not alleged any acts prohibited in § 659A.409.

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c. The relief Plaintiffs seek is discriminatory under Oregon law. As explained above, the relief sought by Plaintiffs would cause the very harm prohibited under Oregon law by discriminating against transgender students. Plaintiffs' claims attempt to turn Oregon's anti-discrimination laws on their head by alleging that the School District is required to exclude Student A because he is transgender. No such right exists in Oregon law or cases applying anti-discrimination laws. This is no surprise because Oregon's anti-discrimination laws were created to *allow access to education and places of public accommodation regardless of gender identity*. Oregon Senate Bill 2, Staff Measure Summary at 1 (Mar. 12, 2007) ("WHAT THE MEASURE DOES**: . . .** Defines 'sexual orientation' to mean an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth. Establishes that a person may not discriminate based on an individual's sexual orientation with regard to employment, housing, public accommodations, public services, public education, adult foster homes and foster parenting, among other things. Declares that the opportunity to obtain employment, housing and use public accommodations, free of discrimination based on sexual orientation, religion, age, race, color, sex, national origin, or marital status, is a civil right. Allows an individual who has experienced discrimination based on sexual orientation to bring a civil action for injunctive relief, damages and attorney fees.").

When actions are taken to exclude transgender people based on others' unwillingness to share the same space, those actions are discriminatory. *See*, *Blachana*, 273 Or. App. at 819, 359 P.3d at 581 (finding a violation of Oregon's public accommodation law when a bar excluded transgender people it blamed for reduced patronage). Treating Student A differently by banning him from boys' restrooms and locker rooms would discriminate against him because his gender identity does not match his assigned sex at birth; it would carry out precisely the evil the legislature intended to prevent. Accordingly, Plaintiffs' discrimination claims based on Oregon law should be dismissed for failure to state a claim upon which relief can be granted.

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4. The District's policies and actions do not violate the fundamental right to parent children. Parent Plaintiffs have failed to state a claim that their Fourteenth Amendment right to direct the education and upbringing of their children has been infringed upon by the Student Safety Plan. No case law suggests that the fundamental right to parent encompasses a right to send one's children to school absent the presence of transgender students in common areas of restrooms and locker rooms. Moreover, such a rule would violate the Equal Protection Clause, as explained in section II(B). Second, Plaintiffs have failed to state a claim that their fundamental right to parent was infringed upon by the distribution of a student survey.

a. The Student Safety Plan does not violate the right to parent. Plaintiffs allege the Student Safety Plan violates their parental liberty rights by infringing on their right to "instill moral standards and values" into their children, which include using public school facilities such as restrooms and locker rooms without the presence of transgender students. It is clear from precedent in the Ninth Circuit and others that the Fourteenth Amendment encompasses "no such specific right." *Fields v. Palmdale School District*, 427 F.3d 1197, 1203 (9th Cir. 2005).

The Supreme Court has held the Due Process Clause of the Fourteenth Amendment encompasses a parental liberty right. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a Nebraska law prohibiting teaching of foreign language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down Oregon's compulsory attendance law). However, this right is not exclusive or absolute. *Fields*, 427 F.3d at 1204. The Ninth Circuit has made clear that "*Meyer, Pierce,* and their progeny 'evince the principle that the state cannot prevent parents from choosing a specific educational program,' but they do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense." *Id.* at 1206 (quoting *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995)). *See also Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (holding parents did not have a fundamental right to exempt student from school dress code). The Court concluded "the *Meyer–Pierce* right does not extend beyond the threshold of the school door," and thus parents

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have no constitutional right to force the state to run its public schools in accordance with their particular moral or religious beliefs. *Fields*, 427 F.3d at 1207.

Parents have the right to remove their students from Dallas County schools, but "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished." *Id.* at 1206. Plaintiffs have no fundamental right to prohibit the School District from allowing transgender students to use facilities consistent with their gender identity because of their own personal moral or religious opposition. Therefore, they have failed to state a claim for relief under the Fourteenth Amendment against the Student Safety Plan.

b. The student survey did not violate the right to parent. Plaintiffs have also failed to state a claim under the Fourteenth Amendment with respect to the student survey. They allege La Creole Middle School administered a survey to students about "personal and family matters" without parental notice or consent. They allege the survey asked questions pertaining to such topics as the sufficiency of school and food supplies at home, drug and alcohol use, suicide, sexual orientation, and gender identity.

The Ninth Circuit in *Fields* made clear that schools may conduct surveys that inquire into personal matters, including "exposure to early trauma" or "aggression and verbal abuse." 427 F.3d at 1200 n.1. Numerous courts have also upheld school programs that "educate children in sexuality and health" without parental notification or consent. *Id.* at 1207. *See, e.g., Parents United for Better Sch., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 275 (3d Cir. 1998) (rejecting parental liberty challenge to school condom distribution program without parental notification); *Doe v. Irwin*, 615 F.2d 1162, 1168-69 (6th Cir. 1980) (state operation of a birth control clinic that distributed contraceptives to minors without parental consent did not violate parental liberty). Plaintiffs allege their students understood the survey as mandatory, while school officials later informed them it was voluntary. Either way, many courts have upheld programs pertaining to sexual health even when mandatory. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134

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(2d Cir. 2003) (upholding mandatory health classes); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir.1995) (upholding compulsory sex education assembly program).

The Ninth Circuit made clear that administration of school surveys, including those distributed to children pertaining to personal family and sexual matters, do not infringe upon a fundamental right, whether it be privacy or parental liberty. *Fields*, 427 F.3d at 1208. Therefore, any such actions by the School District would be subject only to rational basis review. *Id.* There can be no question that "the broad aims of education" or "the state's interest as *parens patriae*" would satisfy this level of review. *Id.* at 1210. Under the Ninth Circuit's precedent, Plaintiffs have failed to state a claim for relief that the administration of the survey violated their fundamental rights.

5. The Student Safety Plan does not infringe on the free exercise of religion. Certain plaintiffs allege that the School District has violated their right to free exercise of religion. However, they have failed to allege any specific facts showing a plausible infringement on observation of their religious beliefs. Had Plaintiffs made such allegations, the Student Safety Plan would still only be subject to rational basis review, because it is a neutral, generally-applicable policy. But even if the Student Safety Plan were subject to strict scrutiny, it would survive that scrutiny, because it is narrowly tailored to serve the compelling government interests of student safety and non-discrimination.

a. The facts alleged in the Complaint do not plausibly support an infringement of any plaintiff's ability to practice their religion in any respect. The Plaintiffs have not alleged sufficient facts to support the claim that the Student Safety Plan interferes with their freedom to practice their religion. No plaintiff has alleged that the Student Safety Plan has forced them to "affirm[] a repugnant belief," penalized them for their religious beliefs, or "impede[d] the observance" of an aspect of their religion. *Sherbert v. Verner*, 374 U.S. 398, 402, 404, 83 S. Ct. 1790, 1793, 1794 (1963). The only specific plaintiffs alleged to have sincerely held religious beliefs regarding restroom and locker room use are Kris Golly, Jon Golly, and their

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children, Lindsay Golly and A.G. *See* Compl. ¶ 120. None of the four currently attend Dallas High School. Lindsay is a former student, and A.G. may attend in the future. *See* Compl. ¶ 16. None of the four have alleged that they have ever been compelled to do anything against their religious beliefs, or prevented from doing something required by their religious beliefs.

Assuming that sharing the common areas of public restrooms or locker rooms with a girl who was transgender would interfere with Lindsay's or her parents' religious practices, there are no allegations that such an event has ever occurred or is likely to occur in the future. In fact, Plaintiffs have alleged that the Student Safety Plan only gives one boy who is transgender permission to use boys' locker rooms and restrooms. *See* Compl. ¶ 261. There are no allegations that there was ever a girl who was transgender who attended Dallas High School while Lindsay did, much less that Lindsay ever met a girl who was transgender at Dallas High School, in or out of girls' locker rooms or bathrooms. Even if there were, Lindsay had the option of using the staff lounge or other single-occupancy facility if her religion required her to have complete privacy. *See e.g.* Compl. ¶ 91 (asserting that the principal offered the unisex staff lounge for changing to those students with objections to the Student Safety Plan); ¶ 79 (asserting that unisex restroom, locker room, and shower facilities are accessible in Dallas High School through the main office). Lindsay no longer attends Dallas High School.

A.G. is in eighth grade. Compl. ¶ 16. The court may take judicial notice of the fact that Dallas High School serves grades 9 to 12, as noted on the school's publicly available web site. *See* https://www.dallas.k12.or.us/dallas-high-school. A.G. and Student A do not attend school together now. There are no allegations that Student A will continue to attend Dallas High School next year, or that A.G. and Student A will ever attend the same school at the same time. Even if there were, A.G. could use the staff lounge or another single-occupancy facility if his religious beliefs required him to have complete privacy.

To the extent the Gollys object to the possibility that teachers informed Lindsay of the anti-bullying and anti-harassment policy or Student Safety Plan while she attended Dallas High School,

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they do not state a cognizable claim. "[T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently." *Parker v. Hurley*, 514 F.3d 87, 105 (1st Cir. 2008); *see also Mozert v Hawkins County Bd. of Educ*., 827 F.2d 1058 (6th Cir. 1987) (public school requiring study of evolution does not burden objecting family's free exercise rights); *Beattie v. Line Mountain Sch. Dist*., 992 F. Supp. 2d 384, 394 (M.D. Pa. 2014) (female student could not be excluded from wrestling team to protect students against "the perceived psychological and moral degradation accompanying coeducational wrestling"); *Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (female student could not be excluded from wrestling team based on "student and parent objections based on moral beliefs").

To the extent that other plaintiffs beside the Gollys have concerns about the free exercise of their religious beliefs, those facts have not been plausibly or specifically alleged. To the extent that plaintiffs seek to claim that the Student Safety Plan may infringe on other people's religious liberty, they do not have standing to do so. Accordingly, no plaintiffs have standing to seek injunctive relief on this claim, nor has any Plaintiff asserted sufficient facts to state a claim for which relief may be granted.

b. The Student Safety Plan is neutral and generally applicable because it does not target religion. As the Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (internal quotation marks omitted). A law that is neutral and generally applicable is constitutionally permissible if it is rationally related to a legitimate government interest. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Plaintiffs claim that the Student Safety Plan is not generally applicable because it is a plan for one student. Compl. ¶ 261. This assertion reflects a misunderstanding of the term "generally

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applicable." "Generally applicable" means that the government action is not "specifically directed at" a religious practice. *Employment Division*, 494 U.S. at 878. To make that determination, the Supreme Court has looked at whether the government enforces a law "in a selective manner" to "impose burdens only on conduct motivated by religious belief" and not on similar conduct motivated by other reasons. See *Lukumi*, 508 U.S. at 543; *see also Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 701–02 (9th Cir.), reh'g granted, opinion withdrawn on other grounds, 192 F.3d 1208 (9th Cir. 1999), and on reh'g, 220 F.3d 1134 (9th Cir. 2000) ("Underinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something more sinister."); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1082 (9th Cir. 2015) ("The mere existence of an exemption that affords some minimal governmental discretion does not destroy a law's general applicability").

Plaintiffs have alleged no facts that could plausibly support a claim that the Student Safety Plan targets any particular religious group or religious practice, that it has been enforced selectively against people engaging in religiously-motivated conduct, or that it has as its "object" the "suppression" of anyone's free exercise of religion. *Employment Division*, 494 U.S. at 878. No facts alleged suggest that the school district implemented the policy to infringe on religious practices or beliefs. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (finding that IRS policy barring racial discrimination does not "prefer[] religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden").

The Student Safety Plan was explicitly "aimed to support all students." Exhibit A. The Student Safety Plan only directly speaks to the conduct of staff, administrators, and teachers, and uses the term "all" for the categories of people it addresses. While the Student Safety Plan does not directly apply to students, it can be read to imply that students may not stop Student A from using the boys' restrooms or locker rooms, and that no student may harass or bully anyone. To that extent, it affects all students equally, regardless of their religious beliefs or lack thereof. Unlike in *Lukumi*, where "almost the only conduct subject to [the challenged ordinances was] the religious

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exercise of Santeria church members," 508 U.S. at 535, the Student Safety Plan has no exceptions or carve-outs that indicate its provisions are actually intended to apply solely to members of one or more religious group.

The Student Safety Plan is generally applicable, and any burden on religious practice incidental. As such, strict scrutiny does not apply. Furthermore, the "hybrid-rights" exception does not apply because Plaintiffs have not asserted any companion constitutional claims for which they can demonstrate a "fair probability or a likelihood … of success on the merits. *Miller v. Reed,* 176 F.3d 1202, 1207 (9th Cir. 1999). Therefore, rational basis applies, and the Student Safety Plan easily meets that threshold.

c. Even if strict scrutiny applies, the Student Safety Plan is narrowly tailored to serve the compelling government interests of safety and non-discrimination. Even if Plaintiffs' had alleged sufficient facts to show that their religious exercise were in some way restricted and even if the Student Safety Plan were not generally applicable, the Student Safety Plan would survive strict scrutiny. It is narrowly tailored to the compelling government interests of promoting student safety and eliminating discrimination on the basis of sex and transgender status.

Protecting student safety is a compelling government interest. *See e.g. Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (finding that university had a compelling interest in the health and wellbeing of its students); *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995) (finding that school district had a compelling interest in campus safety). Likewise, the Supreme Court has recognized repeatedly that the government has a compelling interest "of the highest order" in "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 104 S. Ct. 3244, 3253 (1984); *see also id.* at 628 (discrimination "cause[s] unique evils that government has a compelling interest to prevent"); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 n.5 (1988) (recognizing the "State's 'compelling interest' in combating invidious discrimination"); *Bd. of Directors of Rotary*

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Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 (1987); *Bob Jones Univ.*, 461 U.S. at 604. Likewise, anti-discrimination laws and policies ensure "society the benefits of wide participation in political, economic and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

The School Safety Plan is narrowly tailored to serve both of these interests. The only alternative—not permitting Student A to use facilities with other boys solely because he is transgender—would perpetrate the very harms the School District sought to avoid. It would compromise Student A's safety and well-being, and it would discriminate against him on the basis of sex and transgender status. *See Section* II. Avoiding discrimination against Student A furthers the government's compelling interest in ending the "stigmatizing injury" of discrimination as well as "the denial of equal opportunities that accompanies it." *Roberts*, 468 U.S. at 625; *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."). Other components of the Student Safety Plan, such as putting Student A's locker in line of sight of the PE teacher, having the PE teacher be the first one in and last one out of the locker room, and teaching students about anti-bullying and harassment, further demonstrate the precise tailoring of the Student Safety Plan to student safety needs.

The School District also sought to accommodate other students through continuing to permit them to use multi-occupancy restrooms and locker rooms precisely as they had always done, as well as permitting them to use single-occupancy facilities if they preferred. In fact, the School District went even further, preparing for construction to provide additional options. Compl. ¶ 81. Religious objections can be accommodated by providing additional privacy options to those who seek them, but when "sincere, personal opposition" to sharing common areas with transgender people becomes official school policy, "the necessary consequence is to put the imprimatur of the [school] itself on an exclusion that soon demeans or stigmatizes those whose

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own liberty is then denied." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). The School District had no other way to serve its paramount interest in the safety and dignity of all students than to permit Student A to use restrooms and locker rooms with other boys.

D. Conclusion.

For the foregoing reasons, BRO's motion to dismiss should be granted.

DATED: February 20, 2018

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

PARENTS FOR PRIVACY; KRIS GOLLY and JON GOLLY, individually and as guardians ad litem for A.G.; LINDSAY GOLLY; NICOLE LILLIE; MELISSA GREGORY, individually and as guardian ad litem for T.F.; and PARENTS RIGHTS IN EDUCATION, an Oregon nonprofit corporation,	Case No. 3:17-CV-01813-HZ PLAINTIFF'S RESPONSE TO BASIC RIGHTS OREGON'S MOTIONS TO DISMISS Oral Argument Requested

Plaintiffs,

v.

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

Defendants.

LR 7-1 CERTIFICATION

Plaintiffs acknowledge the efforts of local counsel for Basic Rights Oregon ("BRO") to confer regarding the subject motions, and that some members of plaintiff's legal team became aware of such efforts. However, plaintiffs note that efforts to confer failed, and plaintiffs' counsel did not respond to attempts to confer, due to miscommunications, largely because emails were sent to incorrect email addresses, compromising efforts to confer in a timely manner. Local counsel Darin Sands and Herb Grey have since communicated with each other and acknowledged shared responsibility for breakdowns during efforts to confer.

SUMMARY OF ARGUMENT

Because BRO's motions and arguments are largely duplicative of the motions and arguments of defendant Dallas School District, plaintiffs rely upon and incorporate their

contemporaneous response to Dallas School District's companion motions to dismiss. What distinguishes BRO's motions from the Dallas School District's motions are overt admissions, unsupported statements and arguments openly putting the interests of Student A and other transgender students ahead of plaintiffs and other students:

1. Proposed intervenor BRO openly acknowledges "is a not-for-profit organization committed to ensuring lesbian, gay, bisexual, transgender and queer (LGBTQ) Oregonians live free from discrimination." BRO Motion, p. 1. Accordingly, its interests are primarily, if not solely, in the rights of "LGBTQ Oregonians";
2. Proposed intervenor BRO does not actually represent any students in the Dallas School District, including Student A. BRO Motion to Intervene, pp. 3,4 7;
3. Many of BRO's arguments allege discrimination "based on sex" against Student A and other unidentified transgender students, but BRO categorically rejects plaintiffs' arguments that other students at Dallas High School are or can be discriminated against "based on sex" (or other protected classifications) by the District's Student Safety Policy. *See* BRO Motion, pp. 7-8, 15;
4. BRO argues, without authority, that "transgender status is an *inherently* sex-based characteristic." BRO Motion, p. 10;
5. BRO argues that transgender students suffer from "distress, anxiety, discomfort, humiliation", but seek dismissal of student plaintiffs' claims for experiencing the same issues as "not a recognizable harm" as a result of the Student Safety Plan. *See* BRO Motion, pp. 13, 16;

6. BRO simultaneously advances the argument student plaintiffs have not alleged a right to accommodation for health and safety reasons, and in the same paragraph quotes ORS 659.850(1), "As long as the code or policy provides, on a case by case basis, for reasonable accommodations based on the health and safety of the individual." BRO Motion, p. 16;
7. BRO speaks of "equal access" for transgender students not making facilities limited or unequal for other students (BRO Motion, p. 17), but says other students can use unisex facilities or the staff lounge (BRO Motion, pp. 9, 16) – an accommodation they apparently reject for transgender students;
8. BRO speaks of "exclusion" of transgender students (never made clear) and the unwillingness of other students to share intimate spaces, but it denies that other students may lawfully feel excluded when forced to share such intimate spaces with transgender students. BRO Motion, p. 18;
9. BRO consistently relies on authorities from other jurisdictions, including inapposite cases involving adult employment and prison settings as appropriate guidance for public school settings. BRO Motion, pp. 9, 10, 17-18;
10. BRO explicitly states that parents may remove their students from Dallas schools if they object to the Student Safety Plan (BRO Motion, p. 20), but they would presumably reject the idea that transgender students may similarly choose to remove themselves if they deem the educational environment less than welcoming;

11. BRO asserts the Student Safety Plan, which it helped the school district to craft (BRO Motion to Intervene, p. 3) is "aimed to support *all* students", but then acknowledges that students *may not stop Student A* from using facilities of Student A's choice (BRO Motion, p. 24) (emphasis added); and
12. BRO claims "The School District had *no other way* to serve its paramount interest in the safety and dignity of *all* students…" (BRO Motion, p. 28) (emphasis added).

ARGUMENT

BRO seeks to dismiss plaintiffs' entire complaint under FRCP 12(b)(6) (BRO Motion, p. 1), but then assert specific motions against various claims. In addition to incorporating their opposition to the Dallas School District's similar motions to dismiss, plaintiffs will address the specific bases concerning each claim below.

The School District's Practices and Student Safety Plan Do Not Violate the Fundamental Right to Privacy.

BRO implicitly acknowledges that privacy is a fundamental right, and in the next breath relies on cases out of context from workplace and prison settings to discount the same right of bodily privacy in this case. BRO Motion, p. 4. Its argument is that no allegation of students undressing or exposure of genitals, and that students can choose to go to stalls or unisex facilities. *Id.* What is not stated is why transgender students could not similarly avail themselves of the same alternatives BRO expects other students to use.

Additionally, BRO alleges that "[p]laintiffs are asserting *a new right* under the Due Process Clause that has *never been* recognized by any court in this country, *and should not be recognized now*: the right to exclude other people from common spaces." BRO Motion, p. 4 (emphasis added). BRO is trying to sell the idea that public facilities have never been, and cannot be, segregated on the basis of anatomical sex. This assertion is preposterous.

The right to bodily privacy has long been recognized in the Ninth Circuit as a fundamental right which falls under the right of personal privacy:

> We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.

York v. Story, 324 F.2d 450, 455 (9th Cir. 1963). That right to privacy includes a "privacy interest in remaining free from involuntary viewing of private parts of the body by members of the opposite sex." *Caribbean Marine Services Co., Inc. v. Baldwin*, 844 F.2d 668, 677 (9th Cir. 1988). This clearly established right was violated by the SSP in its implementation.

BRO is actually advocating that a prisoner's diminished expectation of privacy regarding the viewing their genitals by members of opposite biological sex, is the appropriate legal standard that should govern the expectation of privacy for our teenagers and children. *See* BRO Motion, p. 4. The law says otherwise. See *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489, 491 (6th Cir. 2008) ("[t]he students had a fundamental constitutional right to be free from forced exposure of their persons to strangers of the

opposite sex."). The law is also otherwise in the case of parolees. In *Sepulveda v. Ramirez*, 967 F.2d 1413 (9th Cir. 1992) the Ninth Circuit Court of Appeals held that a male officer insisted watching a female parolee give a urine sample in the bathroom violated the Parolee's right to bodily privacy protected by the 4th Amendment. The court held that the "constitutional rights of parolees are even more extensive than those of inmates." *Sepulveda v. Ramirez*, 967 F.2d at 1416. The moment a prisoner becomes a parolee, the standard BRO wants to apply to teenagers at school becomes inappropriate.

The School District's Practices and Safety Plan Do Not Violate Title IX.

Plaintiffs' properly allege that they are experiencing harassment on the basis of sex because they are required to disrobe in front of someone of the opposite biological sex, and that being forced to disrobe in the presence of the opposite biological sex is harassment. Complaint, ¶¶ 79, 91, 226-246. However, not all the alleged harm comes from transgender students. As Ryan T. Anderson explains, "Predators will use the cover of gender-identity-based rules or conventions to engage in peeping, indecent exposure, and other offenses and behaviors." (internal citations omitted). Ryan T. Anderson, "A Brave New World of Transgender Policy", 41 Harv. J.L. & Pub. Pol'y 309, 329.

BRO denies that any discrimination against plaintiffs "based on sex" has occurred within the meaning of Title IX. BRO Motion, pp. 7-8. In fact, BRO claims the Student Safety Plan does not permit sex-based discrimination or harassment. BRO Motion, p. 8. Both arguments are disingenuous, and they do not define what those terms actually mean. Nor is there any explanation why granting Student A or other transgender students the right

to use unisex facilities or the teacher's lounge constitutes discrimination "based on sex", but affording the same alternatives to other students is not similarly discrimination "based on sex." BRO Motion, p. 9. *See also* BRO Motion, pp. 18, 20.

Even worse, BRO incorrectly attributes- without evidence- motives to plaintiffs that do not exist and are not supported in the record:

> "The substance of Plaintiffs' claims appears to be not an objection to Student Plaintiffs receiving different or worse treatment than other students, but to transgender students receiving equal treatment.

BRO Motion, p. 9. Mischaracterization cannot masquerade as legal argument.

Plaintiffs' Oregon Discrimination Claims Fail for the Same Reasons as Their Title IX Claim.

Once again, BRO attributes motives and purposes to plaintiffs that are not true, asserting without foundation that:

> Plaintiffs' Complaint seeks relief that would perpetuate the very harm Oregon's anti-discrimination laws seek to prevent- discrimination based on sex and gender identity against Student A now and other transgender students in the future.

BRO Motion, p. 14. Nothing could be further from the truth, and its own arguments betray its double standard.

In reality, BRO argues plaintiffs and other students should accept the same "equal" accommodations Student A was unwilling to accept as "equal", and presumably other transgender students would be unwilling to accept. BRO Motion, pp. 15, 16. How that constitutes impermissible "exclusion" for transgender students when it's legally permissible for other students is never made clear.

All of this is secondary to the key point: Title IX does not offer protection for discrimination against transgender students. While there is conflicting authority developing from other jurisdictions, the court in *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676-677 (W. Dist. Penn. 2015) held:

> Title IX's language does not provide a basis for a transgender status claim. On a plain reading of the statute, the term "on the basis of sex" in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex. *See Etsitty*, 502 F. 3d at 1222. The exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited.

Id. at 676-677.

Plaintiffs Have Not Alleged Facts That, If True, Would Support a Finding of Discrimination in Education

BRO argues there is no evidence of adverse action against plaintiffs based on their sex, sexual orientation or religion. BRO Motion, p. 15. They go on to deny plaintiffs' entitlement to any accommodation for health and safety reasons (BRO Motion, p. 16), even though they argue Student A and other transgender students- if any- require accommodations for health and safety reasons. BRO Motion, p. 2.

Plaintiffs Have Not Alleged Facts That, If True, Would Support a Finding of Discrimination in a Place of Public Accommodation.

All of BRO's arguments are couched in terms of "equal access." BRO Motion, p. 17. There is no explanation why school policy and facilities prior to the Student Safety Plan did not offer equal access, or how access is "equal" if the same accommodations to single-use facilities offered to, and ultimately rejected by, Student A must be acceptable

for all other students. The Student Safety Plan was devised because Student A asserted an unwillingness to share the same space with others of the same biological sex and demanded accommodation, but BRO is unwilling to admit other students should have the same opportunity. BRO Motion, p. 18.

The District's Policies and Actions Do Not Violate the Fundamental Right to Parent.

As an initial matter, it is evident BRO concedes that the right to parent one's children is a fundamental right. BRO Motion, p. 19. BRO then relies on a curriculum case, *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005), to argue parent plaintiffs have no right to decide whether their children must share intimate spaces with members of the opposite biological sex beyond choosing to send their students to a different school. BRO Motion, p. 20. That argument fails for the same reason articulated in plaintiffs' response to DSD's motion to dismiss. Response to DSD Motions to Dismiss, pp. 7-9.

The Student Safety Plan Does Not Infringe on the Free Exercise of Religion.

BRO asserts there are no specific facts alleged to support violation of free exercise rights. BRO Motion, p. 21. The record says otherwise. Complaint, ¶¶ 120, 208-219.

BRO's argument, like the school district's, is based on the neutral law of general applicability principle and the standards of review from *Employment Division v. Smith*, 494 U.S. 872 (1990). BRO Motion, pp. 21-26. Their arguments fail for the same reasons plaintiffs articulate in their opposition to school district motions and will not be repeated here. *See* Response to DSD Motions to Dismiss, pp. 13-15. However, some of BRO's arguments deserve special attention.

BRO argues that "The Student Safety Plan was explicitly 'aimed to support *all* students'" (Complaint, Ex. A), but in the next sentence makes a telling admission:

> While the Student Safety Plan does not directly apply to students, it can be read to imply that *students may not stop Student A [or presumably any other transgender student] from using the boys' restrooms or locker rooms…To that extent, it affects all students equally*, regardless of their religious beliefs or lack thereof.

BRO Motion, p. 24 (emphasis added). In truth, it affects all students other than Student A equally. Additionally, those statements from the same paragraph appear to be *non sequiturs*.

BRO also argues that narrow tailoring is evident from the Student Safety Plan stated course to put Student A's locker in the line of sight for the PE teacher, effectively meaning that the male PE teacher and Student A are alone and out of sight of other students. BRO Motion, p. 26. Whether it is truly narrow tailoring is debatable, but it remains to be seen whether any ethical or responsible educator would advocate for such a scenario.

As noted above (*Supra*, p. 5), BRO closes with another startling statement:

> "The School District had *no other way* to serve its paramount interest in the safety and dignity of *all* students than to permit Student A to use restrooms and locker rooms with other boys.

BRO Motion, p. 27 (emphasis added). It is evident the school district could find another way "to serve its paramount interest in the safety and dignity of all students": it could make the same accommodations to any student who requests to use single-use facilities or the teacher's lounge, preserving the privacy, dignity and safety of most students who willingly use the group facilities.

CONCLUSION

BRO's motions to dismiss fail for the same reasons that the Dallas School District's motions should fail, and BRO adds nothing to the legal arguments beyond plainly evident self-serving advocacy that places the interests of transgender students ahead of other students and parents. "Nondiscrimination" is a two-way street BRO prefers not to travel.

DATED this 6th day of March, 2018.

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PARENTS FOR PRIVACY; **KRIS GOLLY** and **JON GOLLY**, individually [and as guardians ad litem for A.G.]; **LINDSAY GOLLY**; **NICOLE LILLIE**; **MELISSA GREGORY**, individually and as guardian ad litem for T.F.; and **PARENTS RIGHTS IN EDUCATION**, an Oregon nonprofit corporation, Plaintiffs,	Case No. 3:17-cv-01813-HZ Proposed Defendant-Intervenor Basic Rights Oregon's **REPLY IN SUPPORT OF MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

REPLY IN SUPPORT OF MOTION TO DISMISS

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.

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I. INTRODUCTION

Plaintiffs' claims should be dismissed. They have failed to plead facts to support the claims they have brought or to identify any case law to support their characterization of the relevant law. Rather than confront the fatal flaws of their Complaint and the arguments contained in Basic Rights Oregon's ("BRO") Motion to Dismiss, Plaintiffs resort to characterizing the law as they wish it were rather than what courts across the country have said it is.

II. ANALYSIS

A. Plaintiffs Cannot Identify Facts or Law to Support a Privacy Claim.

Plaintiffs assert that "BRO implicitly acknowledges that privacy is a fundamental right, and in the next breath relies on cases out of context from workplace and prison settings to discount the same right of bodily privacy in this case." (Pls.' Resp. to Basic Rights Oregon's ("BRO") Mot. to Dismiss at 5, ECF No. 43.) Plaintiffs mischaracterize BRO's position.

BRO does not acknowledge that a right to exclude people from common spaces is included in any recognized constitutional right to privacy, for students or any group of people.[1] Plaintiffs have not identified any court that has recognized such a right. Indeed, as explained in BRO's Motion, courts that have been presented with similar bodily privacy claims by student plaintiffs seeking to exclude transgender students from bathroom and locker room facilities have rejected them. *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *29 (N.D. Ill. Oct 18, 2016) ("Students R&R") ("There is no reason why a student who does not want to do so would have to take off clothing or reveal an intimate part of his or her body outside of the private stalls. Inside the stalls, there is no meaningful risk that any part of a student's unclothed body would be seen by another person. Therefore, these protections almost entirely mitigate any potential risk of unwanted exposure either by or to any Student Plaintiff.") (internal

[1] Plaintiffs' assertion that BRO "is actually advocating that a prisoner's diminished expectation of privacy is the appropriate legal standard that should govern the expectation of privacy for our teenagers and children" has no basis. (Pls.' Response at 6.) In fact, in the primary prison case BRO cited, the court did not rely on a diminished expectation of privacy. *See Grummett v. Rushen*, 779 F.2d 491, 496 n.4 (9th Cir. 1985). No one, whether prisoner or parolee, worker or student, has a constitutional right to exclude others from common spaces.

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citation omitted); *see also Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2017 WL 6629520, at *6 (N.D. Ill. Dec. 29, 2017) ("[T]he restrooms at issue here have privacy stalls that can be used by students seeking an additional layer of privacy, and single-use facilities are also available upon request. Given these protections, there is no meaningful risk that a student's unclothed body need be seen by any other person."); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 290-91 (W.D. Pa. 2017) (rejecting the school district's argument that the policy implicated any actual privacy concerns at all "given the actual physical layout of the student restrooms at the High School," which meant that "anyone using the toilets or urinals at the High School is afforded actual physical privacy from others"); *Bd. of Educ. of Highland Local Sch. Dist. v. U. S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (finding no evidence that allowing transgender girl to use girls' facilities "would infringe upon the privacy rights of any other students"). Plaintiffs make no effort to distinguish those cases, nor could they.

Of the five cases Plaintiffs rely on to support the existence of such a right to exclude, three involve claims arising from situations where plaintiffs' naked bodies were involuntarily viewed by government officials. The fourth is a Ninth Circuit opinion *reversing* a district court preliminary injunction that denied women equal access to fishing vessels based on allegations of "privacy" violations made by male crew members concerned that they may have to expose themselves to the women if they were required to share facilities with them on a boat. The fifth is a case where the Sixth Circuit *rejected* a claimed due process right to be exempt from a dress code banning blue jeans. None support the existence of a right to exclude transgender students from common spaces, particularly in the absence of any allegations that students must undress in any common areas.

For instance, *York v. Story* involved allegations by an assault victim that a male police officer, over her protest, required her to have photographs taken of her naked body after she came into a police station to report the assault. 324 F.2d 450, 452 (9th Cir. 1963). The photographs were not required for the underlying investigation and were subsequently distributed throughout

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the police department after the victim was told they were destroyed. *Id.* The court concluded that the "photographing of one's nude body, and the distribution of such photographs to strangers," in this context constituted an arbitrary invasion of the victim's privacy. *Id.* at 455. There are no allegations remotely similar in this case.

Similarly, *Brannum v. Overton County School Board* involved a claim that school officials installed video equipment that recorded, stored, and permitted access to images of middle school students changing their clothes in a locker room without their knowledge in violation of the students' Fourth Amendment rights. 516 F.3d 489, 491 (6th Cir. 2008). There are no Fourth Amendment claims in this case, nor does this case involve any allegation that any student was subject to involuntary exposure of their undressed bodies. *Brannum* is not only non-binding but also inapposite.

In *Supulveda v. Ramirez*, the Ninth Circuit concluded that a male parole officer entering the bathroom stall of a female parolee who was unclothed from the waist down and urinating violated plaintiff's privacy rights. 967 F.2d 1413, (9th Cir. 1992). The court relied on, among other things, the fact that the officer's view of the parolee was compelled. *Id.* at 1416. Again, there are no allegations that any student was required to undress or urinate in view of others, let alone under the conditions or power dynamics involved in that case.

Curiously, Plaintiffs cite to *Caribbean Marine Services Co., Inc. v. Baldwin* for the proposition that the right to privacy includes a "privacy interest in remaining free from involuntary viewing of private parts of the body by members of the opposite sex."[2] 844 F.2d 668, 677 (9th Cir. 1988); (Pls.' Resp. to BRO Mot. to Dismiss at 6.) This case involves no involuntary exposure of private parts of the body because no student is required to disrobe in common spaces. The Ninth Circuit in *Baldwin* rejected arguments that granting women equal access to a ship where crew

[2] The full quote of the court is as follows: "Some courts have held that the privacy interest in remaining free from involuntary viewing of private parts of the body by members of the opposite sex should not impair employment rights unless the threatened invasion of privacy is serious and there are no means by which both interests can be reasonably accommodated." *Id.* at 677.

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members "enjoy little or no privacy with respect to intimate bodily functions" and undressing violated any constitutional or statutory interest in privacy. *Id.* at 671, 676. Instead, the court concluded that claims to privacy violations were speculative. *Id.* at 675-75. Further, to the extent the alleged privacy harms could be "minimized by taking reasonable steps to prevent the threatened intrusion," the alleged privacy claims would be "reduced to no more than a claim of inconvenience." *Id.* at 676, 678. Inconvenience, the court explained, does not justify the denial of equal employment opportunities. *Id.* The same is true here with regard to Plaintiffs' attempt to deny transgender students equal access to school facilities.

Finally, Plaintiffs cite to *Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005), as an example of a case where courts have "expressly acknowledged the right to bodily privacy in the context of schools." (Pls.' Resp. to Dallas School District's ("DSD") Mot. to Dismiss at 5, ECF No. 41.) *Blau* involved free expression and substantive due process challenges to a school dress code. *Id.* at 385, 387. The Sixth Circuit rejected those claims. *Id.* at 388-96. Ironically, the very quote relied on by Plaintiffs from that case was a quotation the Sixth Circuit used to chide the *Blau* plaintiffs for taking language from cases out of context. *Id.* at 395 (describing "the perils of failing to anchor broad language to the context in which it was written"). The actual language about being "compel[led] to lay bare the body, or to submit to the touch of a stranger, without lawful authority" is originally from *Union Pacific Railway v. Botsford*, 141 U.S. 250, 252 (1891), where the Supreme Court ruled that the common law did not permit a defendant to require a plaintiff in a tort case to undergo a surgical examination. That decision is no longer good law. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665, 115 S. Ct. 2386, 2396, 132 L. Ed. 2d 564 (1995); *Boswell v. Schultz*, 2007 OK 94, ¶ 7, 175 P.3d 390, 393; *Privee v. Burns*, 46 Conn. Supp. 301, 305, 749 A.2d 689, 693 (Super. Ct. 1999). *Blau* in no way supports Plaintiffs' privacy claims in this case.

Put simply, the cases relied on by Plaintiffs do not support the right to exclude they assert in this case. Plaintiffs concede that they have failed to allege that they have been forced to expose

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their bodies to any government official, let alone student, of any gender. Nor have they alleged that they were involuntarily videotaped or photographed while unclothed. The absence of such allegations is fatal to their privacy claim, and it should be dismissed.

B. Plaintiffs Cannot Articulate How the School District's Practices and Student Safety Plan Violate Title IX.

BRO's Motion to Dismiss makes two Title IX arguments: (1) that plaintiffs have failed to state a claim under Title IX because they have not alleged "harassment" as defined by the statute; and (2) granting Plaintiffs the declaratory relief they seek would, in itself, violate Title IX. (BRO Mot. to Dismiss at 7-13, ECF No. 30.) Plaintiffs conflate the two and, in so doing, address neither.

1. Plaintiffs have not adequately alleged a violation of Title IX. As noted in BRO's Motion to Dismiss, to sustain a sexual harassment claim under Title IX, Plaintiffs must establish that they experienced harassment based on sex, and that the harassment was "so severe, pervasive, and objectively offensive" that it "deprive[s] the victim of access to the educational opportunities or benefits provided by the school." *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). Plaintiffs only response to that is that they "are experiencing harassment on the basis of sex because they are required to disrobe in front of someone of the opposite biological sex, and that being forced to disrobe in the presence of the opposite biological sex is harassment."[3] (Pls.' Resp. to BRO Mot. to Dismiss at 7.) Putting aside the fact that Plaintiffs' Complaint does not allege that they are "required" to disrobe in front of anyone in the locker room, let alone a transgender student, this argument is unsupported by any case law. Plaintiffs, not surprisingly, do not cite to any case law to support their contention that the mere presence of a transgender student in a bathroom or locker room constitutes harassment based on sex. As noted in BRO's Motion to Dismiss, the courts that have addressed arguments similar to Plaintiffs' have rejected them

[3] Plaintiffs also contend, via a quote of a law review article, that "Predators will use cover of gender-identity-based rules or conventions to engage in peeping, indecent exposure, and other offenses and behaviors." (Pls.' Resp. to BRO Mot. to Dismiss at 7 (quoting Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J.L. & PUB. POL'Y 309, 329 (2018)).) Importantly, their Complaint makes no allegations that any such activity has occurred in the school in question. It is therefore irrelevant to this Motion.

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squarely. *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *32 (N.D. Ill. Oct. 18, 2016) (The "mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases."); *see also Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418, at *67 (E.D. Pa. Aug. 25, 2017); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (rejecting female employee's claim that a transgender female co-worker's use of the women's restrooms constituted sexual harassment).

Plaintiffs largely ignore the above cited cases. The only case they even attempt to distinguish is *Cruzan* by arguing that the plaintiff asserting the failed Title IX claim in that case had access to many restrooms that the transgender teacher at the school did not. (*See* Pls.' Response to DSD's Mot. to Dismiss at 10-11.) However, the availability of alternative restrooms for the plaintiff in *Cruzan* is analogous to the facts here—Student Plaintiffs have the alternative of using a single-occupancy facility on campus if they are uncomfortable at the prospect of sharing a restroom with a transgender student. The other facts the court relied on are also identical to the facts here: the policy was not directed at the plaintiff, and that the transgender person in question did not "engage[] in any inappropriate conduct other than merely being present in the * * * restroom." *Cruzan*, 294 F.3d at 984.

Plaintiffs also contend that *Cruzan* is inapplicable because it involved claims of workplace harassment rather than harassment in the school setting, citing *Davis v. Monroe Cty. Bd. Of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996). (*See* Pls.' Response to DSD's Mot. to Dismiss at 11.) *Davis*, however, does not change the fact that Plaintiffs have failed to allege behavior that rises to the level of harassment under Title IX in any setting. *Davis*, in keeping with the facts supporting harassment claims in other settings, involved fondling, attempted fondling, sexually suggestive rubbing, and offensive language. *Davis*, 74 F.3d at 1188-89. In fact, the harassing student was eventually charged with and pled guilty to sexual battery. *Id.* at 1189. The conduct at issue was thus extreme and readily distinguishable from the conduct at issue in this case.

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Finally, Plaintiffs contend that the relevant holding in *Cruzan* was rejected by the Tenth Circuit in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007). There, the employee-plaintiff, who was a bus operator for the Utah Transit Authority ("UTA"), informed her boss that she would begin transitioning and using the women's restroom instead of the men's restroom. *Id.* at 1219. UTA ultimately fired the plaintiff, citing as its reasons "the possibility of liability for UTA arising from Etsitty's restroom usage" and "UTA's inability to accommodate her restroom needs." *Id.* Plaintiff filed suit against UTA, alleging unlawful gender discrimination in violation of Title VII and the Equal Protection Clause. *Id.* The court stated that even assuming it adopted the rule from *Cruzan*, "it would say nothing about whether UTA was nevertheless genuinely concerned about the possibility of liability and public complaints [resulting from a transgender employee using public women's restrooms while on her bus routes]. The question of whether UTA was legally correct about the merits of such potential lawsuits is irrelevant." *Id.* at 1227. Thus, the issue in *Etsitty* was completely different than that here and in *Cruzan*—whether UTA fired Etsitty for a legitimate as opposed to discriminatory reason, versus whether a transgender person's use of the restroom corresponding to his or her gender identity creates a hostile work or school environment.

In the absence of case law to support their position, Plaintiffs fall back on this assertion: "Nor is there any explanation why granting Student A or other transgender students the right to use unisex facilities or the teacher's lounge constitutes discrimination 'based on sex,' but affording the same alternatives to other students is not similarly discrimination 'based on sex.'" (Pls.' Resp. to BRO Mot. to dismiss at 7-8.) BRO does not argue that granting any student, transgender or not, the option to access single-occupancy bathrooms constitutes discrimination based on sex. Discrimination by sex occurs when transgender boys are denied access to facilities that all other boys may use because they are transgender. Plaintiffs attempt to compare transgender students who are denied access to the multi-occupancy facilities available to other students to Student Plaintiffs, who have access to those facilities but *opt not to use them* because of their own privacy

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concerns. These are not comparable situations. No school policy bans Student Plaintiffs from accessing the multi-occupancy restrooms and locker rooms used by other students. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), and vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017) (Davis. J., concurring) ("For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students.").

2. Plaintiffs' fail to respond to the argument that the injunctive relief they seek would discriminate on the basis of sex. Faced with extensive precedent from the Ninth Circuit, as well as the Sixth, Seventh, and Eleventh Circuits, holding that discrimination against a transgender individual is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution, Plaintiffs simply assert, without explanation and without any effort to distinguish the cases cited by BRO, that "Title IX does not offer protection for discrimination against transgender students." (Pls.' Resp. to BRO Mot. to Dismiss at 9.) The sole support provided for that decision is a district court case from the Western District of Pennsylvania, *Johnson v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676-677 (W.D. Penn. 2015). *Johnson* is neither binding nor persuasive authority for this Court for all of the reasons provided in BRO's Motion. (*See* BRO Mot. to Dismiss at 10-14.)[4]

C. Plaintiffs' Response Mischaracterizes Oregon's Anti-Discrimination Law.

Under Oregon law, discrimination in education occurs when the act of a school (1) "unreasonably differentiates treatment" or (2) "is fair in form but discriminatory in operation" on the basis of age, disability, national origin, race, marital status, religion, sexual orientation, or sex. ORS 659.850(1). Plaintiffs argue that the discomfort they experience around sharing the

[4] In fact, in response to DSD's Motion to Dismiss, Plaintiffs concede that "district court decisions from Illinois and Pennsylvania" are not persuasive to this court. (Pls.' Resp. to DSD's Mot. to Dismiss at 5.)

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common spaces of restrooms and locker rooms with transgender students compels denial of equal access to transgender students. But that discomfort is not due to discrimination based on any protected characteristics. As such, it does not implicate ORS 659.850.

Plaintiffs further argue that the Student Safety Plan (the "Plan") results in discrimination in the form of differential treatment of Student Plaintiffs. (Pls.' Resp. to Def. DSD's Mot. to Dismiss at 15.) In particular, Plaintiffs argue that the accommodation offered them—an accommodation based on their discomfort as opposed to their protected class status—should instead apply to transgender students. (Pls.' Resp. to BRO Mot. to Dismiss at 8; Pls.' Resp. to DSD Mot. to Dismiss at 15.) But as discussed in Point B, supra, allowing Plaintiffs the *choice* to use separate single-user facilities does not constitute discrimination of any kind, while *mandating* that transgender students use separate single-user facilities (and excluding them from the multi-occupancy facilities other students are permitted to use) does constitute unlawful discrimination based on sex and gender identity. Student Plaintiffs are electing an accommodation rather than following the School District's neutral policy that treats all students the same way. *See Powell v. Bunn*, 341 Or. 306, 316 (2006) (finding no discrimination occurred where "all children were treated in precisely the same way"). What Plaintiffs propose is a policy that would permit some students to use the bathroom corresponding with their gender identity, but would prohibit transgender students from doing so. Plaintiffs' proposed policy would thus violate ORS 659.850 by unreasonably differentiating treatment of transgender students, which amounts to discrimination on the basis of sex and gender identity.

Plaintiffs assert that their desired exclusion of transgender students would not amount to unlawful discrimination because Title IX fails to offer protection from discrimination for transgender students. Plaintiffs both misrepresent protection of transgender students under Title IX (*see supra* Sections B.1 and B.2; *see also* BRO Mot. to Dismiss at 7-13) and fail to explain the interaction of Title IX and ORS 659.850. Moreover, Plaintiffs ignore Oregon's protection against discrimination based on gender identity. ORS 174.100(7). Finally, Plaintiffs fail to allege any

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action by the School District against Student Plaintiffs that is based on their sex, religion, or another protected status as required by ORS 659.850. Accordingly, Plaintiffs fail to state a claim under Oregon anti-discrimination law.

D. Plaintiffs' Public Accommodation Claim Is Unsupported by Their Allegations or the Law.

To allege discrimination in a place of public accommodation, Plaintiffs must allege that the School District denied Plaintiffs "full and equal accommodations, advantages, facilities, and privileges * * * without any distinction, discrimination, or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status, or age." ORS 659A.403(1). Such discrimination is "on account of" a protected status if it is "by reason of" or "because of" that protected status. *Klein v. Or. Bureau of Labor and Industries*, 410 P.3d 1051, 1061 (Or. App. 2017) ("[B]y its plain terms, [ORS 659A.403] requires only that the denial of full and equal accommodations be causally connected to the protected characteristic or status * * * ."). Therefore, Plaintiffs must allege that the School District's Plan denies them full and equal accommodation *because of* their sex, sexual orientation, religion, or other protected characteristic.

Plaintiffs argue that the School District's policy denies them full and equal access, taking issue with Student A's alleged rejection of the accommodation offered to Student Plaintiffs. (Pls.' Resp. to BRO Mot. to Dismiss at 9-10.) Plaintiffs, however, fail to allege that the School District's policy denies them equal access *on account of* their religion, sex, sexual orientation, or other protected characteristic. Rather, the accommodation provided to Student Plaintiffs is due to their *discomfort* with sharing a bathroom with transgender students. Student Plaintiffs are not being forced to use single-occupancy facilities because of any protected characteristic of theirs. Indeed, they are not being forced to use single-occupancy facilities at all; they are *choosing* to do so. (*See* Compl. ¶¶ 79, 91.) Student Plaintiffs are thus allowed to use the group restroom corresponding with their gender identity like all other students, or to instead choose to use a single-occupancy facility. On the other hand, Student Plaintiffs seek to *require* Student A to use a bathroom

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inconsistent with his gender identity—unlike all other students—or a single-occupancy facility. Such a requirement would amount to discrimination on the basis of Student A's sex and gender identity in contravention of Oregon law. ORS 174.100(7); ORS 659A.403(1); *Blachana, LLC v. Or. Bureau of Labor & Industries*, 273 Or. App. 806, 819 (Or. App. 2015). Because Plaintiffs fail to allege any facts tending to show the School District enacted the Plan in order to deny Plaintiffs equal access on account of their religion, sex, sexual orientation, or other protected status, this claim should be dismissed.

E. The Right to Parent Does Not Include the Right to Dictate the Operation of Public Schools.

Parents generally have a right to be free of government interference with how they raise and care for their children.. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). That right does not include a right to dictate the operation of public schools. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005).

In *Fields v. Palmdale School District*, a case involving sexual education, the Ninth Circuit held that "parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students." *Id.* at 1200. The court so held after determining that "no such specific right can be found in the deep roots of the nation's history and tradition or implied in the concept of ordered liberty." *Id.* at 1203-04. Though parents can control their children's education by selecting their preferred educational forum free from state interference, once a parent decides where to send his or her children for schooling, the parent's "fundamental right to control the education of their children is, at the least, substantially diminished." *Id.* at 1206.

Plaintiffs argue that *Fields* is inapposite to this case as it involves "matters of curriculum." (Pls.' Resp. to DSD Mot. to Dismiss at 8.) The Ninth Circuit did not so limit its ruling:

> While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day,

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> school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.

Id. at 1206 (emphasis in original) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005)) (internal quotation marks omitted). The court recognized that "[s]chools cannot be expected to accommodate the personal, moral or religious concerns of every parent" because such a requirement would "not only contravene the educational mission of the public schools, but also would be impossible to satisfy." *Id.* Accordingly, the court found that the Due Process Clause "does not vest parents with the authority to interfere with a public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise." *Id.* at 1206. Such authority is exactly what Plaintiffs seek the Court to provide them in this case.

Plaintiffs rely heavily on *Troxel v. Granville*, a case that addressed the right of parents to control the custody of their children. (Pls.' Resp. to BRO Mot. to Dismiss at 8); 530 U.S. 57 (2000). Unlike *Fields*, however, *Troxel* did not address the boundary between home and school, but rather was limited to the issue of state interference with a parent's custody decision regarding third-party petitions by non-parents for visitation with the children. *Id.* Accordingly, *Troxel* does not control the case at hand.[5]

F. Plaintiffs Cannot Articulate a Free Exercise Claim.

Although the First Amendment protects the free exercise of religion, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion

[5] Moreover, in *Troxel*, the Supreme Court criticized the Washington statute at issue for subjecting a parent's decision regarding third-party visitation to review by the court and failing to give any deference or weight to the parent's decision. *Id.* at 67, 69. Here, the School District has deferred to Plaintiffs' requests that their children not share facilities with transgender students by making available to Student Plaintiffs single-occupancy facilities. What the School District has refused to defer to are Plaintiffs' requests that the District discriminate against transgender students in violation of Oregon and federal law in order to accommodate Plaintiffs' personal, moral, or religious concerns.

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prescribes (or proscribes)." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). A law is generally applicable if the government action is not "specifically directed at" a religious practice. *Id.* at 878. A law may target religious practice, and thus fail to satisfy the generally applicable standard, if the government enforces the law "in a selective manner" against conduct motivated by religious belief or the law's purpose is to suppress free exercise of religion. *Church of Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993); *Emp't Div.*, 494 U.S. at 878. A neutral law of general applicability is subject to rational basis review. *Lukumi*, 508 U.S. at 531.

Plaintiffs assert that the Plan is not a neutral law of general applicability because it was adopted to support a single student, Student A. (Compl. ¶ 261; Pls.' Resp. to BRO Mot. to Dismiss at 11; Pls.' Resp. to DSD Mot. to Dismiss at 13.) As noted in BRO's Motion to Dismiss, Plaintiffs misunderstand the meaning of "generally applicable." (BRO Mot. to Dismiss at 23-24.) Plaintiffs do not address BRO's argument on the meaning of "generally applicable," and cite no law to support an alternative interpretation of the term.

Further, Plaintiffs in no way connect the Plan's support of Student A with any infringement of their free exercise of religion, other than bald assertions that the Plan forces Plaintiffs to "choose between the benefit of a free public education and violating their religious beliefs." (Compl. ¶ 253.) In fact, Plaintiffs fail to allege that the Plan was motivated by a desire to suppress free exercise of religion, or that the Plan targets a specific religion or religious practice, or that school officials selectively enforce the Plan against religiously motivated conduct. Accordingly, Plaintiffs fail to offer any basis for their contention that the Plan is not neutral or generally applicable and, thus, subject to strict scrutiny.

Plaintiffs also argue that a hybrid rights analysis requires strict scrutiny in this case. (Pls.' Resp. to DSD Mot. to Dismiss at 15.) However, in *Employment Division v. Smith*, the Court found no hybrid situation when considering "a free exercise claim unconnected with any communicative activity or parental right." *Emp't Div.*, 494 U.S. at 882. Here, Plaintiffs do not allege infringement

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of a communicative activity affecting both free exercise of religion and free speech and/or association rights. Plaintiffs do allege infringement of a parental right, but, as discussed above, fail to allege any facts to support such a claim, and it accordingly fails as a matter of law. *See San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004) (finding no hybrid rights claim where free speech claim did not have a fair probability of success). As a result, strict scrutiny does not apply.

But even if strict scrutiny did apply, it would be satisfied here because it serves a compelling government interest and is narrowly tailored to serve the same for the reasons articulated in BRO's Motion. (BRO Mot. to Dismiss at 25-27.)

Plaintiffs offer only two responses to these arguments, neither of which accurately recites the allegations in their Complaint or addresses the substance of BRO's arguments. (Pls.' Resp. to BRO Mot. to Dismiss at 11.) First, they allege that the Plan is somehow not narrowly tailored because it ensures that the PE teacher can see Student A's locker, but an "ethical or responsible educator" would not allow a "male PE teacher and Student A" to be "alone and out of sight with other students." Of course, there is no allegation that any teacher is to be alone and out of sight with other students.

Second, Plaintiffs state that the School District could more narrowly tailor the safety and dignity needs of all students by "mak[ing] the same accommodations to any student who requests to use single-use facilities or the teacher's lounge." (Pls. Resp. to BRO Mot. to Dismiss at 11.) Ironically, according to the facts as alleged in the Complaint, that is precisely what the School District has done. It has permitted boys, including a transgender boy, to use multi-occupancy boys' restrooms and locker rooms; it has permitted girls to use multi-occupancy girls' restrooms and locker rooms; and it has permitted any student "who requests to use single-use facilities or the teacher's lounge" to do so. (*See* Compl. ¶ 79, 81, 91.) If this outcome would truly be satisfactory to the Plaintiffs, it has already been accomplished.

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III. CONCLUSION

For the foregoing reasons, BRO respectfully requests that its Motion to Dismiss be granted.

DATED: March 20, 2018

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PARENTS FOR PRIVACY; **KRIS GOLLY** and **JON GOLLY**, individually [and as guardians ad litem for A.G.]; **LINDSAY GOLLY**; **NICOLE LILLIE**; **MELISSA GREGORY**, individually and as guardian ad litem for T.F.; and **PARENTS RIGHTS IN EDUCATION**, an Oregon nonprofit corporation, Plaintiffs,	Case No. 3:17-cv-01813-HZ Proposed Defendant-Intervenor Basic Rights Oregon's **MOTION TO INTERVENE AS DEFENDANT AND MEMORANDUM IN SUPPORT** **REQUEST FOR ORAL ARGUMENT**

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.

I. LR 7-1 CERTIFICATE OF COMPLIANCE

Counsel for Proposed Defendant-Intervenor Basic Rights Oregon ("BRO") certify that they have conferred in good faith with counsel for the parties regarding the issues presented by this Motion to Intervene as Defendant. Counsel for Defendants did not object. Counsel for Plaintiffs never responded to Intervenor's inquiry to meet and confer.

II. MOTION

BRO moves for leave to intervene as defendant in this matter by permission under Fed. R. Civ. P. 24(b)(1). Counsel for movants sought consent for this motion from the existing parties. Defendant Dallas School District No. 2 (the "District"), however, does not object to Movant's request for leave to intervene.

In this case, the District was sued by Parents for Privacy, Parents Rights in Education, and individual parents with students in the District, because the District implemented policies to address discrimination and harassment against transgender students, including by allowing transgender students to use school restroom and locker facilities that correspond with their gender identity.

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Movant BRO is a non-profit organization committed to ensuring LGBTQ Oregonians live free from discrimination. BRO advised the Oregon Department of Education on the creation of safe and supportive policies for transgender students, which the District adopted and Plaintiffs challenge in this case. BRO has many members who are transgender students in public school in Oregon and members who are parents of transgender students. BRO's members have directly experienced the need for policies like the ones implemented in Dallas.

Permissive intervention is appropriate because BRO's defense presents questions of law in common with the main action, as it relates directly to the legality of the District's policies that Plaintiffs challenge. The motion is timely, and will not unduly delay or prejudice the adjudication of the rights of the original parties.

WHEREFORE, for these reasons and those set forth in the accompanying Memorandum in Support, Basic Rights Oregon respectfully requests that this Court grant this Motion and permit them to intervene as defendants in this action.

III. MEMORANDUM

A. Factual Background.

Dallas School District No. 2 ("the District") is a public school district in Dallas County, Oregon, comprised of three elementary schools, one middle school, one high school, and one alternative school serving eleventh and twelfth grade students.

On November 15, 2015, the District adopted the Student Safety Plan, which allows a transgender student to access sex-separated facilities that correspond with his gender identity. (Pls.' Compl., ECF 1, Ex. A).

On November 13, 2017, Plaintiffs brought this action against the District and other parties challenging the Student Safety Plan and other actions by the District as violations of the Constitution, federal, and state law. Plaintiffs ask the Court to enjoin the District from enforcing the Student Safety Plan and declare that the Plan infringes on Plaintiffs' constitutional rights.

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Movant Basic Rights Oregon ("BRO") is a non-profit organization whose mission is to advocate for the equality of all LGBTQ Oregonians. (Herzfeld-Copple Decl. ¶¶ 1, 5.) BRO has spent over 20 years advocating for legal protections for the LGBTQ community in Oregon. (*Id*. at ¶ 7.) These efforts include championing the Oregon Safe Schools Act, which provides state-level anti-bullying protections for LGBTQ students, and working with the Oregon Department of Education ("ODOE") to advise on the creation and implementation of nondiscrimination policies for LGBTQ students in Oregon public schools. (*Id*. at ¶¶ 12, 15.)

In the spring of 2016, BRO advised ODOE on the creation of education guidelines for school districts to create a safe and supportive environment for transgender students. (*Id*. at ¶ 15.) These guidelines, which Dallas County adopted, provide the framework for the policies and actions challenged by Plaintiffs in this case. (*Id*. at ¶ 15.) BRO has worked directly with LGBTQ students in Dallas County, including engaging in conversations with members of the Dallas High School GSA and advocacy on behalf of an individual transgender student experiencing discrimination. (*Id*. at ¶ 17, 21.)

The Fierce Families Group is a program within BRO that convenes transgender youth and their families to engage in creating safe and affirming communities for transgender individuals in Oregon. These families have lobbied and advocated for safe and supportive policies that protect transgender students in public schools. (*Id*. at ¶ 16; Yeager Decl. ¶ 5; Staub Decl. ¶ 3.) These individuals can speak directly to the necessity of having school policies that treat transgender students as the gender they are. (Yeager Decl. ¶¶ 8-11; Staub Decl. ¶ 12.) They have also experienced the tragic consequences of bullying and harassment that follow when the school environment is not safe. (Staub Decl. ¶¶ 8, 9.) BRO seeks leave to intervene as a defendant in this case to ensure that the interests of transgender students in Oregon are adequately represented.

B. Argument.

1. Basic Rights Oregon satisfies the Ninth Circuit's standard for permissive intervention. Permissive intervention is warranted under Fed. Rule Civ. Pro. 24(b)(1)(B). In

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considering whether to allow permissive intervention, the Ninth Circuit considers whether there is 1) an independent ground for jurisdiction; 2) a timely motion; and 3) a common question of law and fact between movant's claim or defense and the main action. *See, e.g., Freedom from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir.1992)).

a. There is no basis for denying intervention on the grounds of jurisdiction because movant is a defendant-intervenor. An independent ground for jurisdiction is required where permissive intervention could be used to inappropriately enlarge, or strategically destroy, the subject matter jurisdiction of the federal courts. *Freedom from Religion Foundation, Inc.*, 644 F.3d at 843. The Ninth Circuit has held the jurisdictional requirement is not a factor when, as here, proposed intervenors are defendants in a case involving a federal question, given that there is no risk that their participation would change the court's jurisdiction. *Id.* at 844 (citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1917 (3d ed. 2010)) ("In federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant"). Basic Rights Oregon seeks to intervene as a defendant in this case, which is predicated on federal question jurisdiction rather than diversity of citizenship. Thus, there is no basis to exclude Basic Rights Oregon on the grounds of jurisdiction.

b. The motion is timely, and intervention would not delay or prejudice existing parties. Basic Rights Oregon is filing this motion to intervene by the due date for the filing of the District's responsive pleading, and is simultaneously filing its own proposed motion to dismiss. *See, e.g., U.S. v. Brooks*, 164 F.R.D. 501, 503 (D. Or. 1995) (finding motion to intervene timely where filed seven months after service of the initial complaint, where no trial date was set and no discovery or significant negations between the parties had begun). Further, the District does not object to intervention by BRO. Finally, there is no reason to believe intervention by BRO will unduly delay discovery or prejudice any proceedings in this case.

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c. Basic Rights Oregon's defenses share common issues of law and fact with the main action. The Court may exercise its discretion to grant permissive intervention where there is a common question or law or fact between the applicant's defense and the main action. *See, e.g., U.S. v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002). Plaintiffs challenge the legality of the Dallas County School District's Student Safety Plan for an individual student, which adopts the approach that Basic Rights Oregon advocated for with the Oregon Department of Education. BRO has also advocated for the creation of similar nondiscrimination protections for transgender students in school districts throughout the state of Oregon. The legal issues presented in this case ask whether those policies violate the Constitution, federal, and state law as Plaintiffs allege. BRO's defenses will squarely address the legality of the Student Safety Plan, and argue that Plaintiffs' requested relief would violate the Constitution and federal law.

Unlike intervention as of right, permissive intervention does not require a "personal or pecuniary interest" in the subject of the litigation. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2011) (finding Rule 24 "requires only that [the intervenor's] claim or defense and the main action have a question of law or fact in common" and thus "[c]lose scrutiny of the kind of interest of the intervenor is * * * especially inappropriate" (quoting 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1911, 357–63 (2d ed.1986))) (abrogated on other grounds by *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011)). However, the Ninth Circuit has sometimes considered "whether the intervenors' interests are adequately represented by other parties" as a factor in deciding whether to exercise their discretion to grant permissive intervention. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009) (quoting *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir.1977)). To the extent the Court chooses to consider this factor, it weighs in favor of permitting BRO to intervene. The resolution of Plaintiffs' claims will bear directly on the lives of BRO student members in Oregon public schools and directly impact BRO's ability to advocate for other transgender students in the state. BRO seeks to intervene to show that the relief requested by

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Plaintiffs would violate Title IX and the Equal Protection Clause. BRO is specifically concerned with the wellbeing of transgender students in Oregon. It is possible that the interests of the District and BRO could become adverse. The relief requested by Plaintiffs will directly impact the lives of transgender students in the state, and only with BRO's intervention will their interests be adequately protected. Furthermore, granting the motion to intervene may avoid future duplicative lawsuits by transgender and gender non-conforming students whose rights could be abridged by relief granted to Plaintiffs in this case.

C. Conclusion.

BRO has an interest in defending the policies and practices of the District challenged by Plaintiffs. BRO is an organization dedicated to the safety and equality of LGBTQ people in Oregon, including transgender students in public schools. BRO members who are transgender students and the parents of transgender students have a personal stake in the need for policies like the one BRO worked to implement in Dallas. These individuals have the most to lose, and are best poised to articulate why the relief Plaintiffs seek would violate their legal rights. BRO seeks to intervene so that voices of transgender students in Oregon and their families may be heard and their interests protected. BRO respectfully requests that this Court grant them leave to intervene and advance this defense.

DATED: February 20, 2018

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

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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,	Case No. 3:17-cv-01813-HZ DECLARATION OF AMY HERZFELD-COPPLE IN SUPPORT OF BASIC RIGHTS OREGON'S MOTION TO INTERVENE

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.

I, Amy Herzfeld-Copple, declare as follows:

1. I am a resident of Milwaukie, Oregon. I am the Co-Executive Director of Basic Rights Oregon ("BRO").

2. I submit this declaration in support of BRO's motion to intervene, in order to explain BRO's interest in this litigation.

3. BRO is an Oregon nonprofit founded in 1996 and is tax-exempt under Section 501(c)(4) of the Internal Revenue Code. The affiliated Basic Rights Education Fund ("BREF") was formed in 1999 and is tax-exempt under Section 501(c)(3) of the Internal Revenue Code.

4. BRO has over 450 active volunteers; 4,700 individual donors; and 82,000 supporters.

5. BRO works to ensure that all lesbian, gay, bisexual, transgender and queer ("LGBTQ") Oregonians experience equality. BRO is dedicated to ensuring that all lesbian, gay, bisexual, transgender, and queer Oregonians live free from discrimination, are treated with dignity and respect, and have a strong political presence. BRO is the primary policy advocacy organization for LGBTQ Oregonians.

6. In particular, BRO is dedicated to supporting and empowering LGBTQ youth in Oregon. BRO recognizes that LGBTQ youth are the future leaders for equality and social justice—for the LGBTQ population and beyond. BRO's dedication to LGBTQ youth also stems from their vulnerable position in society. For example, according to a report by the Williams Institute, LGBTQ youth make up 40 percent of the youth population experiencing homelessness, despite the fact that LGBTQ youth comprise only 10 percent of the general youth population.[1] Family rejection on the basis of sexual orientation and gender identity was the most frequently cited factor contributing to LGBTQ youth homelessness. Nearly 70 percent of LGBTQ homeless youth have experienced family rejection and more than half have experience abuse in their family.[2] Moreover, LGBTQ youth experiencing homelessness are more likely to experience victimization and mental health issues. Relative to other homeless youth, 58 percent of service providers report that transgender homeless youth have worse physical and mental health.[3] Nearly two-thirds of LGBTQ homeless youth clients have mental health issues and more than half have histories of alcohol and substance abuse.[4] About 40 percent of LGBTQ homeless youth have been subject to sexual exploitation and sexual assault.[5]

7. LGBTQ students are far more likely to be subject to discrimination in schools leading to poorer education outcomes. For example, according to a report by GLSEN, over 80 percent of LGBTQ students reported that their school engaged in LGBTQ-related discriminatory policies or practices, with two-thirds saying that they personally experienced this anti-LGBTQ discrimination.[6] Over 50 percent of transgender students report being prevented from using their

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[1] The Palette Fund, True Colors Fund, and the Williams Institute, Serving Our Youth: Findings from a National Survey of Services Providers Working with Lesbian, Gay, Bisexual and Transgender Youth Who Are Homeless or At Risk of Becoming Homeless, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf
[2] *Id.* at 9.
[3] *Id.* at 10.
[4] *Id.*
[5] *Id.*
[6] GLSEN, The 2015 National School Climate Survey: The experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools at xviii (2016) avail. at xvii,

preferred name or pronoun and 60 percent of transgender students had been required to use a bathroom or locker room that did not match their gender identity.[7] This systemic and continuous discrimination and harassment in educational settings leads to poorer educational outcomes for LGBTQ students. LGBTQ students who experience higher levels of victimization because of their gender expression where almost three times as likely to have missed school in the past month; had lower GPAs; were twice as likely to report that they did not plan to pursue and post-secondary education; were more likely to have been disciplined at school; and had lower self-esteem and school belonging and higher levels of depression.[8]

8. According to a survey of the National Center for Transgender Equality ("NCTE") and the National Gay and Lesbian Task Force ("NGLTF"), 83 percent of transgender students in grades K-12 in Oregon reported harassment, 44 percent reported experiencing physical assault and 13 percent reported experiencing sexual violence.[9] Nationwide, 31 percent of harassment of transgender and gender nonconforming students comes from teachers or staff.[10] The harassment these young people experienced caused 15 percent to leave school settings.[11] In the same report, NCTE and NGLTF found that whereas only 1.6 percent of the general population reports attempting suicide, 41% of transgender and gender nonconforming survey respondents reported attempting suicide.[12] That number increases when the population is younger[13] and when people reported experiencing harassment or assault from teachers or school staff.[14]

9. BRO has spent over 20 years securing legal protections for the LGBTQ community in Oregon. These victories include strengthening nondiscrimination laws; creating safer schools

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https://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report_0.pdf
[7] *Id.*
[8] *Id.* at xviii.
[9] Oregon specific data.
https://transequality.org/sites/default/files/docs/resources/ntds_state_or.pdf
[10] Full report at 33. https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf
[11] *Oregon data, supra note 1.*
[12] Full Report at 3.
[13] Full report at 82.
[14] Full report at 45.

through policy change and enforcement, and training members of school communities, teachers and administrators; increasing access to transgender-inclusive health care; banning so-called conversion therapy for LGBTQ youth; and, winning the freedom to marry in Oregon. BRO's programs prioritize the most marginalized LGBTQ communities like LGBTQ youth, who face high rates of homelessness, bullying and suicide.

10. BRO works with Oregon Department of Education ("ODE") staff leaders to advise on policies ensuring nondiscrimination for LGBTQ students in Oregon's public schools. For example, BRO successfully requested the adoption of policies allowing transgender youth to maintain academic records that accurately reflect their name and gender.

11. Even in Oregon, where the rights of transgender students are protected by statute and case law, BRO is routinely contacted by parents and students experiencing discrimination or harassment in schools after a student identifies as transgender. BRO supports these transgender youth and their families who contact BRO for resources and intervention when they are being mistreated in Oregon schools. BRO will act as an intermediary with (ODE) personnel and elected officials to achieve a quick remedy and ensure enforcement of state law and ODE guidelines.

12. Despite numerous federal and state laws that protect LGBTQ students, including the First Amendment of the U.S. Constitution, Article I, sec. 8 of Oregon Constitution, Title IX[15], Oregon Equality Act,[16] Oregon's Safe Schools Act[17] and Oregon Department of Education Guidance[18], transgender students still suffer disproportionate amounts of bullying, harassment and negative developmental outcomes when compared to their peers.[19] The adoption of LGBTQ-

[15] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et. seq.
[16] Oregon Equality Act, SB 2 (2007).
[17] Oregon Safe Schools Act, HB 2599 (2009).
[18] Oregon Department of Education, Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students (May 5, 2016) avail. at http://www.ode.state.or.us/groups/supportstaff/hklb/schoolnurses/transgenderstudentguidance.pdf.
[19] *See* Declaration of Amy Herzfeld-Copple in Support of Motion to Intervene ¶¶ 6-8.

inclusive policies in schools at a local level has a significant impact on preventing and addressing violence against LGBTQ students.

13. For over a decade, BRO has prioritized LGBTQ youth in their work and achieved a number of policy changes that reflect their goal of ensuring that all students in Oregon are safe regardless of their sexual orientation or gender identity.

14. In 2007, BRO championed the Oregon Equality Act which prohibits discrimination based on sexual orientation and gender identity in employment, housing, public accommodations, and other settings, including public schools.[20] This bill required the State Board of Education and State Board of Higher Education to establish rules that ensured Oregon public schools did not discriminate based on sexual orientation and gender identity.

15. In 2009, BRO championed the Oregon Safe School's Act to expand state-level anti-bullying protections to cover LGBTQ students.[21] This law added protections for LGBTQ students from harassment, intimidation or bullying and required school districts to establish harassment, intimidation and bullying policies and procedures for responding to reports of harassment, intimidation and bullying.[22] The law also encouraged school districts to provide training to staff relating to the prevention of, and appropriate response to, acts of harassment, intimidation and bullying.[23]

15. In 2010, a gay student teacher was removed from a student teaching placement in a Beaverton School District middle school. Beaverton is Oregon's third largest school district. BRO worked with the superintendent, senior school administrators and staff to update school policies regarding the "discussion of controversial topics" policy and non-discrimination policies for students, faculty and staff. BRO also facilitated and made referrals for various staff training on LGBTQ issues.

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[20] Oregon Equality Act, SB 2 (2007).
[21] Oregon Safe Schools Act, HB 2599 (2009).
[22] *Id.*
[23] *Id.*

16. On May 21, 2015, Oregon became the third state to pass a ban on so-called conversion therapy for LGBTQ youth when Governor Kate Brown signed the *Youth Mental Health Protection Act*, which prohibits conversion therapy for youth under the age of 18 by licensed mental health providers. BRO led the efforts to pass the act and had endorsements from more than 30 organizations, including all major health care and social service professional associations in the state.

17. In November 2015, Dallas City Councilman Mickey Garus made threatening comments about transgender youth on his Facebook page. Garus' comments inspired anti-trans sentiments and endangered students, such as 14-year-old transgender boy and Dallas High School student, Elliot Yoder. BRO mobilized community support for transgender students in the Dallas School District, circulating a petition in support of Elliot, which gathered 1,100 signatures from Oregonians in 29 counties. BRO organized affirming testimony from parents and townspeople at several Dallas School Board meetings.

18. In December of 2015, BRO organized a convening between community members and school administration in response to Portland-based private Multnomah University's application for a Federal Title IX waiver, requesting the right to ban LGBTQ students on religious grounds. During this convening, transgender people of faith shared their experiences with the university's administrators and faculty. BRO organized a petition calling on the school to withdraw their request, which gathered nearly 650 signatures. BRO also organized a letter from area faith leaders to Multnomah University authorities entreating them to treat their LGBTQ students with dignity and respect.

19. In the spring of 2016, BRO advised ODE staff on the creation of education guidelines to school districts to ensure a safe and supportive school environment for transgender students. Adopted in May 2016, these education guidelines ensure that all students, including those who are transgender, can learn and succeed in school without fear of bullying, harassment or

isolation. These guidelines, adopted by the Dallas School District are the framework for the policies at issue in this case.

20. In 2017, BRO launched its Fierce Families program for parents and family members of transgender youth who want to educate their colleagues, neighbors and friends on what life is like for transgender people. Fierce Family members have lobbied legislators, shared their stories with Members of Congress, and spoken up for their kids at press conferences and community events.

21. In 2017, BRO presented trainings for teachers, counselors and administrators on transgender student inclusion to eight school districts throughout Oregon.

22. BRO seeks to intervene in this litigation because the outcome will have significant consequences for transgender students in Oregon. Protecting the rights of transgender students is central to BRO's mission and BRO's past and current advocacy work. The policy challenged by Plaintiffs in this case is the product of years of advocacy and organizing by BRO, both in Oregon's capitol and in schools across the state. As discussed above, BRO's work defending transgender students and their ability to access facilities that match their gender identity across the state and in this very school district has been extensive. Moreover, BRO represents both students and parents who would be directly impacted by a finding for Plaintiff in this case. *See* Decl. of Christine Staub In Support Of Basic Rights Oregon Motion to Intervene; Decl. of Colleen Yaeger In Support of Basic Rights Oregon Motion to Intervene.

23. Based on my conversations with BRO staff involved with organizing efforts in Dallas, I understand that there are several students at Dallas High School who identify as transgender or gender non-conforming, at least one of whom uses the single-sex restroom and/or locker facilities that correspond with his gender.

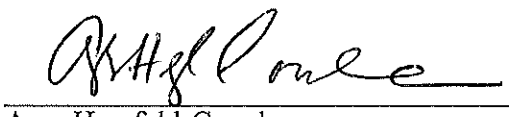
24. Regardless how many students take advantage of Dallas School District's practice of permitting transgender students to access facilities consistent with their gender, the existence of

the practice is an essential component in establishing a safe and inclusive space for transgender students at Dallas High School.

25. I make this declaration from my own knowledge of the facts and circumstances set forth above. If necessary, I could and would testify to these facts and circumstances.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: February 20, 2018



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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

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

Plaintiffs,

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

DECLARATION OF COLLEEN YEAGER IN SUPPORT OF MOTION TO INTERVENE

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.

I, Colleen Yeager, declare as follows:

1. I am a resident of Portland, Oregon.

2. I submit this declaration in support of Basic Rights Oregon ("BRO")'s motion to intervene, in order to explain my interest in this litigation as a BRO supporter, volunteer, and donor.

3. My family and I have been supporters of BRO since 2013. We have made monthly contributions to BRO since 2016 to support the work they do on behalf of LGBTQ Oregonians.

4. Our family has also participated in phone banking and major gifts fundraising for BRO, lobbied our state legislature for transgender anti-discrimination protections, and marched in the Pride Parade with BRO.

5. In 2017, we joined BRO's Fierce Family Group, which seeks to engage family members in creating safe and affirming communities for transgender individuals in every corner of Oregon.

6. I am the mother and legal guardian to a seven-year-old son.

7. My son is transgender. While he was assigned the sex female at birth, he knew from a very young age that he was a boy. He started emphatically verbalizing his gender to us around

age five, though the signs were there for at least two years prior, including gender expressions consistent with that of being a boy, but sadly, also depression, aggression, and self-harm.

8. My son is in second grade in the Portland Public Schools system. His school has been amazing, and has recognized him as the boy he is since day one, including allowing him to use the boys' restrooms like the rest of the boys in his class. I cannot imagine how difficult our lives, and most importantly, my son's life, would be if they had not been supportive.

9. The support from my son's teachers and administrators has been instrumental in allowing him to be himself at school, and to focus on his learning, which had suffered dramatically during his first year of school due to his depression. His Kindergarten teacher supported him in coming out to his classmates, who have largely been affirming and supportive in response.

10. Transgender kids are some of the most vulnerable children there are. In addition to support from their families, support from their school is everything. They spend five days a week, seven hours a day in that community, and need to feel human.

11. When districts do not have inclusive policies, it sends a strong message to students' peers that they are being singled out as different. It is critical that transgender students like my son are able to participate in school as the gender they are, like the rest of their peers.

12. I make this declaration from my own knowledge of the facts and circumstances set forth above. If necessary, I could and would testify to these facts and circumstances.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: February 20, 2018

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DISTRICT OF OREGON

PORTLAND DIVISION

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

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

DECLARATION OF CHRISTINE STAUB IN SUPPORT OF BASIC RIGHTS OREGON'S MOTION TO INTERVENE

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.

I, Christine Staub, declare as follows:

1. I am a resident of Portland, Oregon.

2. I submit this declaration in support of Basic Rights Oregon ("BRO") Motion to Intervene, in order to explain BRO's interest this litigation.

3. I became a supporter of and volunteer for Basic Rights Oregon ("BRO") in 2015, shortly after my daughter, Adi, came out to our family as transgender. My husband, Lon Staub, and I have been regular donors to BRO since 2015. We are members of BRO's Equality Circle major giving program, which recognizes donors giving $1,200 or more annually. We are also members of BRO's Fierce Family Group, which seeks to engage family members in creating safe and affirming communities for transgender individuals in every corner of Oregon.

4. In 2017, we partnered with BRO to create and promote The Adi Staub Transgender Leadership Fund. This fund is dedicated to supporting transgender rights throughout Oregon. Gifts to the Adi Staub Transgender Leadership Fund support Basic Rights Education Fund's transgender justice programming including policy efforts to remove barriers to transgender inclusion in health care and education; providing scholarships for transgender youth to attend our annual statewide

leadership summit; our leadership development program Catalyst for transgender and gender nonconforming Oregonians; providing workplace and community Transgender Justice 101 trainings throughout the state; and continuing BRO's statewide outreach so that all transgender Oregonians are celebrated and supported in every community in the state. The Adi Staub Transgender Leadership Fund raised over $63,000 in 2017.

5. My daughter, Adi, was 16 when she came out. She was attending high school in the Portland Public Schools District at Grant High School. Adi entered school a straight-A student and had a strong group of friends. After a health class video profiled a transgender teen, Adi finally understood the conflict she experienced since birth. Though a doctor assigned her to the male sex at birth, Adi knew that her honest and authentic self was female. Her longtime dreams of being a woman finally made sense to her.

6. With the help and support of BRO, our family was able to connect with other families who were raising transgender students. And through BRO, Adi was able to connect with peers who shared her experiences and to find purpose in advocating for those peers.

7. Adi did not anticipate that coming out to friends and family would have any adverse effects. For Adi, coming out gave her newfound hope, excitement and optimism for being able to live as her true self. Her courage in coming out inspired our family. She stood up in her classes and asked that others begin to accept her as "Aditi" or "Adi," a transgender woman, whose name meant "free and limitless" in Sanskrit.

8. Unfortunately, not everyone around Adi responded to her with the acceptance and support that she needed and expected. Over the next two years, Adi faced significant hardships at school. She lost a number of friends. Many teachers, students, and staff repeatedly misgendered her, despite her requests to be acknowledged with her true gender identity. Even in our family sessions with high-school faculty, she was repeatedly misgendered despite our consistent modeling and coaching. In addition, students repeatedly refused to call her Adi, instead using her name assigned at birth. She became the target of violent words and bullying, including being subjected

to anti-transgender graffiti. She stopped feeling safe at school. Her attendance and grades began to drop.

9. On July 24, 2017, the pain that came from others' negative reactions to her as an out transgender student became too great, and Adi decided to end her life. Our family will never be the same because of what my daughter experienced in her school as a transgender girl.

10. I have learned that Adi is not alone in her experiences, and that both harassment of transgender students and suicide among transgender people is sadly common.

11. Policies that protect transgender students and make them feel welcome at school are truly life-saving. When schools do not take affirmative steps to protect young people like Adi, kids are seriously hurt and sometimes lives are lost. I want all kids to feel safe at school. And I want transgender students to be celebrated, not merely tolerated. That is why I dedicate my time and resources to supporting BRO, an organization I know to be invested in making safety a reality for all students.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: February 20, 2018

Christine Staub

Christine Staub

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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

OBJECTION TO PROPOSED-DEFENDANT BASIC RIGHTS OREGON'S MOTION TO INTERVENE

Oral Argument Requested

OBJECTION

The Plaintiffs object to the motion to intervene submitted by proposed Defendant Basic Rights Oregon (BRO), on the grounds that they have not met the requirements for Permissive Intervention under FRCP 24(b) or federal case law. Their intervening will unnecessarily complicate the action, they have no standing to make their claims, they would be adding claims to the current actions which do not exist, and any interest they have in this matter is being adequately advocated by the District. At most BRO should be an amicus party.

POINTS AND AUTHORITIES

"Permissive intervention is a two-stage process. First, the district court must decide whether one of the grounds for such intervention exists. If this threshold requirement is met, the court must then exercise its discretion in deciding whether intervention should be allowed." *Silver v. Babbitt*, 166 F.R.D. 418, 433 (1994), quoting, *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977).

Under FRCP 24(b) the courts may permit intervention "where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *League of United Latin Am. Citizens v. Wilson,* 131 F.3d 1297, 1308, (9th Cir. 1997).

The courts have listed several additional factors that are to be considered when determining whether or not to grant a motion to intervene, including: the nature and extent of the would-be intervenors' interests; their standing to raise relevant legal issues; the legal position they seek to advance and its probable relation to the merits of the case; whether the intervenors' interest are adequately represented by other parties; and whether intervention will prolong or unduly delay the litigation. *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977).

ARGUMENT

A. Basic Rights Oregon Does Not Satisfy the Necessary Standard for a Permissive Intervention.

BRO has not met the three basis factors, identified above, for intervention under FRCP 24(b).

1. Independent Ground for Jurisdiction.

As the 9th Circuit Court of Appeals has stated, "Permissive intervention ordinarily requires independent jurisdictional grounds." *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). BRO has argued that this factor is irrelevant in this case because it only applies to factors that would "enlarge inappropriately the jurisdiction of the district courts." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011), see also *Proposed Def. Mot. to Intervene*, at 5. However, BRO mischaracterized the holding in that case. The reason jurisdiction did not apply in that case was that the issue was a federal question, and the intervenor was "not raising new claims." *Id.* at 844.

The same is not true in this current case, however, BRO is raising new claims. BRO is claiming that this action is discriminatory against members of the LGBTQ community. In fact, BRO's entire reason for intervening is that they allege the complaint is discriminatory against the LGBTQ community, and as such BRO must be there to defend them. See *Proposed Def. Mot. to Intervene*, at 7. At no time has the Plaintiff asked for relief to discriminate against the LGBTQ community. There is not a named defendant who is part of the LGBTQ community or a member of BRO. BRO admits by omission in their motion to intervene that they do not have a member in the District that will be affected by any new or additional policies. See *Proposed Def. Mot. to Intervene*, at 3,4, and 7. BRO is doing more than simply wishing to obtain status as a defendant but is instead attempting to advocate additional claims that are not part of this action and have

never been a part of this action.

One of the supplemental elements that the court looks at with deciding a motion to intervene is "their standing to raise relevant legal issues." *Spangler*, 552 F.2d at 1329. BRO does not have standing to raise these issues. BRO states in their motion that they have "many members who are transgender in public school." See *Proposed Def. Mot. to Intervene*, at 3. However, they have made no allegation in their motion that they have any members currently in the Dallas School District No. 2 (the "District"), or that they or any of their members are part of this action or related to this action in any way. They claim that because this case has an element affecting the LGBTQ community that BRO has standing. BRO has not presented any arguments as to why they should be granted intervention when they have no standing to be a party.

2. Timely Motion.

For a motion to intervene to be accepted it must be timely. "As with motions for intervention as of right, a finding of untimeliness defeats a motion for permissive intervention." In determining timeliness under Rule 24(b)(2), we consider precisely the same three factors - the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay. In the context of permissive intervention, however, we analyze the timeliness element more strictly than we do with intervention as of right. *League of United Latin Am. Citizens*, 131 F.3d at 1308.

BRO has filed their motion within the timeframe that is typically allowed for a motion to intervene. However, contrary to BRO's assertion, the analysis does not end there. BRO states off hand, with no supporting argument, that no undue delay or prejudice will result from their intervention. Plaintiffs disagree with that assertion. BRO hopes to make the entire Oregon LGBTQ community a party to this case and argues that Plaintiffs are directly discriminating against them by bring this suit, which is simply incorrect. As an intervenor, BRO complicates the issues, which

will be prejudicial to the parties, and will delay discovery by adding parties and actions that should not be included with this case. At most, BRO might qualify as an Amicus party.

While BRO may have submitted their motion within an acceptable timeframe, the other two factors the court evaluates for timeliness weighs against them. As the 9th Circuit has stated "in the context of permissive intervention, however, we analyze the timeliness element more strictly than we do with intervention as of right." *Id.* Because the question of timeliness encompasses all three of the above identified factors, and not just when the motion was submitted, under the strict analysis required by the court, BRO has not shown timeliness.

3. Common Question of Law and Fact and Prolonging Litigation.

BRO argues in their motion to intervene that their defense shares a common issue of law and fact with the main action. Plaintiffs disagree. The primary argument and defenses that BRO presents, are arguments that Plaintiffs' claims for relief discriminate against members of the LGBTQ community. This argument morphs and skews the claims presented and the relief sought by the Plaintiffs.

Several of the supplemental factors that the court looks at when evaluating a motion to intervene are: (1) the legal position they seek to advance and its probable relation to the merits of the case; (2) whether intervention will prolong or unduly delay the litigation; and (3) whether the intervenors' interest is adequately represented by other parties. *Spangler*, 552 F.2d at 1329.

Each of these supplemental questions weighs in favor of Plaintiffs. The legal position that BRO wishes to advance is that the Plaintiffs are in fact discriminating against members of the LGBTQ community. That is their primary argument, and by their own admission their entire reason for intervention. See *Proposed Def. Mot. to Intervene*, at 4. This directly leads into the question of whether the intervention will prolong and unduly delay the litigation. Adding question and issues that were not pleaded and are not part of the original claim will prolong and unduly

delay litigation, because additional discovery would have to be completed, a reply will likely have to be completed when BRO's motion to dismiss fails and they later submit an answer, and further motions may result from BRO's attempt to complicate and morph the issues in the Complaint. Both of these factors weigh in favor of Plaintiffs.

A. Movant's Position is Adequately Represented by the District.

An additional factor to consider is whether "the intervenors' interest is adequately represented by other parties." *Spangler*, 552 F.2d at 1329. In this case they absolutely are. The Ninth Circuit has laid out three factors to evaluate this issue. "Three factors should be considered in this regard: (1) Are the interests of a present party in the suit sufficiently similar to that of the absentee such that the legal arguments of the latter will undoubtedly be made by the former; (2) is that present party capable and willing to make such arguments; and (3) if permitted to intervene, would the intervenor add some necessary element to the proceedings which would not be covered by the parties in the suit?" *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977).

The District has filed a motion to dismiss that more than adequately covers any issue that should be dealt with in this case and will more than adequately represent the LGBTQ community's interest. The arguments put forth in BRO's own motion to dismiss are largely duplicative of the District's motion. Nothing presented by BRO to date shows that the District is unable to represent BRO's interest or is unwilling to do so. In fact, based on the largely duplicative motions to dismiss, just the opposite is clear. The District is defending the plan that BRO helped put into place and has made very similar arguments in their motion to dismiss as BRO. It is apparent from the pleadings that the District has similar interests and is willing and able to make any necessary arguments. As such, the first two factors show that there is no need for BRO to intervene in this case. BRO is also not attempting to bring in some necessary element that would not otherwise be covered. Every necessary element of this case is covered by the District. The only thing that BRO brings to this

case is adding duplicative and unnecessary litigation.

BRO's own motion indicates the District currently represents their position. See *Proposed Def. Mot. to Intervene*, at 7. BRO simply states with no basis, that "it is possible that the interests of the District and BRO could become adverse." *Id.* (emphasis added). Such a statement, without support, does not provide any proof or argument that the interests of BRO are not adequately and completely represented by the District. In fact, BRO is not arguing that their interest is not adequately represented; they simply indicate that it is conceivable at some point in the unknown future the District's interests and their own could become adverse. See *Proposed Def. Mot. to Intervene*, at 7. This factor clearly weighs in favor of Plaintiffs and based on the current record the interests of BRO are more than adequately represented by the District.

CONCLUSION

BRO should not be allowed to intervene in this action. They have not met the threshold requirements to be allowed intervention by the court. They must show that they have independent jurisdictional grounds to intervene in this case, which they have not done. Their motion was not timely, not because of when it was submitted, but rather because it will expand delay discovery, confuse the issues, and be prejudicial to the parties. The questions, assertions, and defenses that BRO may purport are so outside the scope of the initial claim that it should not be allowed in. They are attempting to bring in additional irrelevant claims and are attributing to Plaintiffs intentions and actions that do not in fact exist.

If the court grants BRO's motion to intervene it will unnecessarily complicate the issues of this case, cause undue delay, and be prejudicial to the parties. Even if the court were inclined to decide that perhaps BRO had met the threshold requirement for intervention, this Court should still deny intervention under its discretion. Most importantly however, any relevant issues are being fully and adequately represented by the District. For these reasons the Plaintiffs respectfully

requests that this Court deny the Motion to Intervene by Basic Rights Oregon.

DATED this 6TH day of MARCH, 2018.

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PARENTS FOR PRIVACY; **KRIS GOLLY** and **JON GOLLY**, individually [and as guardians ad litem for A.G.]; **LINDSAY GOLLY**; **NICOLE LILLIE**; **MELISSA GREGORY**, individually and as guardian ad litem for T.F.; and **PARENTS RIGHTS IN EDUCATION**, an Oregon nonprofit corporation, Plaintiffs,	Case No. 3:17-cv-01813-HZ Proposed Defendant-Intervenor Basic Rights Oregon's **REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT** **ORAL ARGUMENT REQUESTED**

REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT

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.

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I. INTRODUCTION

Basic Rights Oregon (BRO) has met the requirements for permissive intervention under Fed. R. Civ. P. 24(b) and federal case law. BRO's motion to intervene (1) does not impair the jurisdiction of this Court over this action, (2) presents no timeliness problem, and (3) offers a defense with questions of law and fact in common with the original action. Additionally, discretionary factors weigh in favor of intervention. *See Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977).

In an attempt to argue that BRO does not meet the threshold requirements for permissive intervention, Plaintiffs conflate those requirements with the *Spangler* factors a court may consider in choosing how to exercise its discretion. Plaintiffs assert that, on the one hand, BRO's arguments and interests coincide so completely with those of the School District that BRO's intervention would serve no purpose, and, on the other, BRO advances such radically different arguments and interests that its defenses share no common question of law or fact with the underlying action and would unduly complicate the issues. (Pls.' Obj. to Proposed Def. Basic Rights Oregon ("BRO") Mot. to Intervene at 5, 6, ECF No. 42.) Neither characterization is accurate. BRO has a unique and important set of interests in this litigation, and, as such, it seeks to advance distinct arguments that may benefit the Court's consideration of the issues already raised through the Plaintiffs' complaint. However, BRO would address the same underlying questions of fact and law, add no new claims, and cause no undue delay or prejudice. BRO meets the requirements of permissive intervention, and the factors the court may consider in exercising its discretion weigh in favor of intervention.

This case raises crucial issues about whether school districts may prohibit discrimination against transgender students, permit them to use facilities consistent with their gender identity, and take measures to protect them from harassment and bullying. The Plaintiffs claim that permitting a boy who is transgender to use restrooms and locker rooms with other boys, in and of itself, violates their rights. No original party to this action represents the interests of transgender youth.

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BRO does. The court should exercise its discretion to permit BRO to join this case as an intervenor-defendant to ensure the best and most complete development of crucial constitutional issues and to ensure the voices of transgender people and their families are not left out of a case that will have an overwhelming impact on them.

II. ARGUMENT

A court may permit intervention under Fed. R. Civ. P. 24(b) where the applicant for intervention shows (1) independent grounds for jurisdiction, (2) timely motion, and (3) a common question of law or fact between the original action and the proposed intervenor's claims or defenses. *See* Fed. R. Civ. P. 24(b); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011), citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). "If the trial court determines that the initial conditions for permissive intervention under rule 24(b)(1) or 24(b)(2) are met, it is then entitled to consider other factors in making its discretionary decision on the issue of permissive intervention." *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

A. Basic Rights Oregon Satisfies All Threshold Requirements for Permissive Intervention.

BRO has met the requirements for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).

1. BRO has met the requirements for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). Plaintiffs argue that BRO must show independent jurisdictional grounds. It need not. Where a district court exercises federal question jurisdiction and a proposed intervenor does not seek "to bring new state-law claims," the independent jurisdictional grounds requirement "does not apply." *See Geithner*, 644 F.3d at 844. BRO's intervention would simply add a defendant to an action based on federal question jurisdiction. (Compl. ¶ 3.) Because its intervention would not compromise or enlarge the court's jurisdiction, BRO need not prove an independent basis for it.

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Plaintiffs argue that BRO raises new claims, requiring it to prove an independent jurisdictional ground for those claims. Plaintiffs misunderstand the nature of BRO's proposed motion to dismiss. BRO has not pled, nor does it intend to plead, any cross claims or counterclaims pursuant to Fed. R. Civ. P. 13 or any other rule. (Pls.' Obj. to Proposed Def. BRO Mot. to Intervene at 3.) In this action, it has neither sued nor sought leave to sue any plaintiffs, defendants, or third parties. Rather, BRO seeks to opportunity to defend the original action.

What Plaintiffs characterize as new claims are in fact BRO's arguments that Plaintiffs' claims must be dismissed. Plaintiffs assert that the School District violated Title IX and state anti-discrimination law through permitting a transgender boy to use the same restrooms and locker rooms as other boys. The School District asserts that it has not violated Title IX or state anti-discrimination law through that action. BRO asserts that the School District has not violated Title IX or state anti-discrimination law, in part because the School District *would have violated* Title IX and state anti-discrimination law if it failed to permit a boy to use the same restrooms and locker rooms as other boys just because he is transgender. This argument is not likely to be raised by any of the original parties, because BRO has different interests from those parties. But it is also not a counterclaim alleging that Plaintiffs have violated Title IX or state anti-discrimination law by bringing this action. The parties simply advance different arguments about the way federal and state anti-discrimination law, as well as other federal law, applies to actions of a school district with regard to transgender students. Differing arguments do not require independent grounds of jurisdiction. "Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away." *Geithner*, 644 F.3d at 844 (citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1917 (3d ed. 2010)).

Plaintiffs seek to shoehorn a standing argument into consideration of independent jurisdictional basis. (Pls.' Obj. to Proposed Def. BRO Mot. to Intervene at 4.) But no court has stated that standing is a requirement for intervention under 24(b); at most, it is a factor that courts may consider separately. *See Spangler*, 552 F.2d at 1329. "Rule 24(b) 'plainly dispenses with

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any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.'" *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) (quoting *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S. Ct. 1044 (1940)) abrogated on other grounds by *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Standing may become a requirement if an intervenor-defendant seeks to appeal while the original defendants opt not to appeal. *See, e.g., id*; *Smuck v. Hobson*, 408 F.2d 175, 177 (D.C. Cir. 1969). If that situation arises later in this litigation, it would be appropriate to address standing at that time. At this stage, however, under well-settled law, a party seeking permissive intervention need not demonstrate standing. In fact, while *Spangler* lists standing as a discretionary factor, it cites only to *Smuck* on that point, implying this concern may only be relevant—or at least most relevant—on appeal. *See Spangler*, 552 F.2d at 1329.

2. Basic Rights Oregon's motion was timely. Plaintiffs concede that BRO "filed their motion within the timeframe that is typically allowed for a motion to intervene." (Pls.' Obj. to Proposed Def. BRO Mot. to Intervene at 4). Nonetheless, Plaintiffs argue that that BRO's intervention is untimely.

In determining timeliness for the purposes of permissive intervention, the Ninth Circuit considers "the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). "In the context of a timeliness analysis, prejudice is evaluated based on the difference between timely and untimely intervention—not based on the work Defendants would need to do regardless of when [the parties] sought to intervene." *Kamakahi v. Am. Soc'y for Reprod. Med.*, No. 11-CV-01781-JCS, 2015 WL 1926312, at *4 (N.D. Cal. Apr. 27, 2015); *see also Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007).

As Plaintiffs have conceded, there was no delay in filing the motion. Any additional work Plaintiffs may need to do related to BRO's presence in the lawsuit will be no greater now than if BRO had moved to intervene even earlier, before any of the original defendants had to respond.

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As such, BRO's motion causes no delay or prejudice for purposes of the timeliness analysis. To the extent Plaintiffs intended to raise delay separately under the *Spangler* factors, BRO addresses the argument below in Part B.

3. Basic Rights Oregon's defenses share a common question of law or fact with the main Action. BRO's defense shares common questions of law and fact with the original law suit. A common question of law and fact occurs when the resolution of a defense also requires resolution of some question of law or fact raised in the original action. *See Kootenai Tribe of Idaho*, 313 F.3d at 1109.

BRO's defense will involve multiple legal questions in common with the original action (e.g., the legality of the School District's actions under Constitutional, federal, and state law). If the case continues after the motions to dismiss, BRO's defense will also involve multiple factual questions in common with the original action (e.g., the availability of single-occupancy facilities in the school, the School District's practices related to sex-specific restroom and locker room use, and the necessity of the Student Safety Plan). BRO's additional legal argument with regard to Title IX and state anti-discrimination laws does not negate these common questions.

Accordingly, BRO meets all three threshold requirements for permissive intervention.

B. Discretionary Factors for Permissive Intervention Weigh in Favor of BRO.

Courts may consider additional factors in deciding whether to exercise discretion to grant or deny a motion to intervene under Rule 24(b). These discretionary factors include "the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] * * * whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler*, 552 F.2d at 1329. A requirement to meet each of these factors would collapse the distinction between permissive

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intervention and intervention as of right, and is not contemplated by the rules or supported in case law. *See* Fed. R. Civ. P. 24; *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009); *Kootenai Tribe of Idaho*, 313 F.3d at 1108. However, courts may consider the *Spangler* factors.

Plaintiffs argue that the discretionary factors weigh against permissive intervention. The opposite is true. Given the strong, unique, and highly relevant interests of BRO; the close relationship of BRO's legal position to the merits of the case; and BRO's capacity to contribute to full development of the critical factual and legal questions in the case, granting permissive intervention would facilitate a just adjudication. The School District does not adequately represent BRO's interests, and, in any event, Plaintiffs have not described any actual prejudice or delay that would result from BRO's intervention.

The School District's interests and BRO's interests in this lawsuit are, admittedly, aligned at this stage. But even if their interests do not (as they could) become adverse at a later stage, they are already distinct. The School District has an interest in the wellbeing of all students in the school, including Student Plaintiffs and Student A. It also, naturally, has an interest in containing its costs and limiting its exposure to liability, both in this case and in other cases in the future. BRO's interests are in the safety, dignity, and survival of transgender youth and adults, in Dallas County School District #2 and throughout Oregon. BRO has advocated for the very laws, policies, and practices that Plaintiffs' lawsuit, if successful, would eviscerate. BRO has members and supporters whose own safety, access to an education, and ability to participate in public life—or that of their children—would be endangered if Plaintiffs were to prevail. BRO has relationships to LGBTQ communities and in-depth knowledge of LGBTQ law and policy that the School District does not.

While the School District and BRO's arguments in their motions to dismiss are consistent, Plaintiffs overstate in describing them as merely duplicative. The arguments differ in ways one might predict based on the parties' differing interests. The School District includes an argument

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about Monell liability that BRO omits. BRO includes an argument about how the School District would violate the law if it did not treat boys who are transgender like it treats other boys—an argument the School District omits. BRO delves in more detail into how relevant federal and state laws address transgender issues. If the case continues beyond the motion to dismiss, BRO and the School District will develop distinct strategies, and will likely introduce different evidence and develop different arguments.

The Plaintiffs' only arguments that BRO's intervention would result in delay or prejudice are that "BRO complicates the issues, which will be prejudicial to the parties, and will delay discovery by adding parties and actions that should not be included with this case." (Pls.' Obj. to Def. to Proposed Def. BRO Mot. to Intervene at 4-5.) Plaintiffs do not explain how BRO would "complicate the issues." The core issues remain the same regardless of intervention—whether the original Defendants have violated the law as Plaintiffs allege. Raising the interests of transgender students does not complicate the issues—if anything, it clarifies them. With the exception of allegations about a survey, all of Plaintiffs' allegations against both the School District and the Federal Defendants revolve around the treatment of transgender students.

Plaintiffs argue that BRO would cause delay by adding actions and parties. But, as explained above, BRO adds no new claims or actions. BRO's intervention would, of course, involve the addition of one party: BRO. Any intervention involves adding a party; that alone is not enough to show delay. Plaintiffs' argument that "BRO hopes to make the entire Oregon LGBTQ community a party to this case" is exaggerated and implausible. (*See* Pls.' Obj. to Proposed Def. BRO Mot. to Intervene at 4.) While BRO has many members from the Oregon LGBTQ community and seeks to advance the interests of this community, its intervention would not make individuals parties. While the Plaintiffs may want no one to represent the interests of transgender people in a case in which they seek to eliminate policies and practices that prevent violence and discrimination against transgender people, their displeasure does not qualify as a factor weighing against intervention. In fact, it is for this very reason—BRO's unique role as a

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party whose mission included protecting the rights of transgender youth—that the Court should grant permissive intervention.

BRO is prepared to adhere to any discovery, briefing, or trial schedule this Court may order for the original parties, as well as to negotiate scheduling issues in good faith with the original parties. BRO has no intention to delay these proceedings, and it has taken no action to delay them. Purely speculative concerns about delay are not enough to weigh against permissive intervention. *Kamakahi*, 2015 WL 1926312, at *5 (granting permissive intervention where "[a]ny added delay * * * is speculative and unlikely to be significant"); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 12573549, at *3 (D. Idaho Jan. 21, 2014) (granting permission to intervene despite "Plaintiffs' as yet speculative concerns" about delay).

Ultimately, in this case, Plaintiffs request that this Court chart a path no other court has taken, declaring that school districts have a constitutional and statutory obligation to exclude students from sex-specific spaces because they are transgender. A success by the Plaintiffs would have major ramifications, not only in Dallas School District but beyond, not only through reinterpreting Title IX and the U.S. Constitution but also through encouraging endangerment and exclusion of transgender people from school, work, and other public places. In a case of this import, a party accountable to transgender students should be permitted to intervene, because it will help ensure the relevant constitutional and statutory issues are fully developed for the court's consideration. *See Latta*, 2014 WL 12573549, at *3 (permitting intervention in a case that "presents weighty and controversial issues of constitutional dimension, necessitating that the Court be advised * * * to the fullest extent possible.").

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III. CONCLUSION

For all of these reasons, BRO respectfully requests that this Court grant BRO leave to intervene and advance its defense.

DATED: March 20, 2018

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By */s/Darin M. Sands*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

PARENTS FOR PRIVACY, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Case No. 3:17-cv-1813 (HZ)
DALLAS SCHOOL DISTRICT NO. 2, *et al.*,	)	
	)	
Defendants.	)	
	)	

FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the United States Department of Education, its Secretary, Betsy DeVos, the United States Department of Justice, and Attorney General Jefferson B. Sessions III move to dismiss the claims against them. For the reasons set forth below, plaintiffs lack standing to bring their claims against the federal defendants and have not stated any plausible claim against them. All claims against these defendants must therefore be dismissed.[1]

INTRODUCTION

In November 2015, Dallas School District No. 2 implemented a Student Safety Plan that changed the terms on which a transgender high school student was permitted to access sex-segregated facilities such as bathrooms and locker rooms. In the months that followed, both the high school principal and the school board expressed their continuing support for the policy, which plaintiffs challenge here. Whatever its merits, plaintiffs' complaint is properly directed

[1] The undersigned counsel certifies that, in conformity with Local Civil Rule 7-1(a), the plaintiffs and federal defendants conferred and made a good faith effort to resolve their dispute over the sufficiency of the complaint, but were unable to do so.

towards the school district that adopted the Student Safety Plan, which remains in effect to this day.

But plaintiffs[2] have also sued the United States Department of Education and other federal defendants, asserting that federal actions caused them injuries that this Court can redress. These allegations simply are not plausible: plaintiffs have not alleged any facts to support their theory that the federal government compelled the Dallas School District to adopt its Student Safety Plan, nor that any relief against the federal defendants would prompt the school district to abandon it. As the allegations in the complaint show, any injury that plaintiffs may have suffered stems solely from the Dallas School District's Student Safety Plan, and could only be redressed by relief against that school district. The plaintiffs therefore lack standing to pursue their claims against the federal defendants. For closely related reasons, plaintiffs have also failed to state any plausible claim against the federal defendants. For these reasons, plaintiffs' claims against the federal defendants must be dismissed.

BACKGROUND

A. Dallas School District and its Student Safety Plan

The Dallas School District adopted its Student Safety Plan in November 2015, allowing a transgender high school student "the right to enter and use . . . locker rooms, restrooms, and showers at District schools according to . . . perceived gender identity." Compl. ¶ 75. The Principal of Dallas High School publicly explained this policy and, the plaintiffs allege,

[2] The plaintiffs are Parents Rights in Education, a nonprofit organization; Parents for Privacy, an association; Lindsay Golly, a former student at Dallas High School; Kris and Jon Golly, her parents and the parents of A.G., a future student at Dallas High School; and Melissa Gregory, the mother of T.F., a current student at Dallas High School. Nicole Lillie is named as a plaintiff in the caption, but the complaint contains no allegations about her. Plaintiffs have agreed that all claims by Lindsay Golly must be dismissed. ECF No. 41 at 2.

threatened to punish students who protested it. *Id.* ¶¶ 87, 91–92. The District defended the policy at three separate school board meetings, from December 2015 through February 2016, inviting speakers that it said were "experts on gender identity issues, all of whom . . . exclusively supported the Student Safety Plan." *Id.* ¶ 93. The plaintiffs allege that the District "has, through various announcements to the students at Dallas High School and through board and community meetings on gender identity . . . conveyed . . . the message that any objection to the Student Safety Plan . . . will be viewed by District administration as intolerance and bigotry." *Id.* ¶ 109.

The plaintiffs allege that the Student Safety Plan violates students' right to privacy, *id.* ¶¶ 186–206, parents' right to direct the education and upbringing of their children, *id.* ¶¶ 207–20, and both parents' and students' right to the free exercise of religion, *id.* ¶¶ 256–64. They also allege that it violates Title IX of the Education Amendments of 1972, *id.* ¶¶ 228–47, and the Religious Freedom Restoration Act, *id.* ¶¶ 248–55.

B. Federal Guidance Documents and Previous Litigation

Plaintiffs challenge four U.S. Department of Education guidance documents discussing transgender students, two of which were withdrawn before this suit was filed. The earliest document, published in April 2014, was titled "Questions and Answers on Title IX and Sexual Violence." *See* Compl. ¶ 33 & Ex. H. It was withdrawn in September 2017, for reasons unrelated to this case.[3] The second document, "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," was published in December 2014. *See* Compl. ¶ 33 & Ex. I. The third document, the "Title IX Resource Guide," was published in April 2015. *See* Compl. ¶ 33 & Ex. J. None of these first three documents

[3] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter of September 22, 2017, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

discusses sex-segregated facilities such as restrooms or locker rooms, which are the focus of the Student Safety Plan adopted by the Dallas School District in November 2015, and the only source of plaintiffs' alleged harms.

The fourth guidance document challenged here is a Dear Colleague Letter jointly issued by the U.S. Departments of Education and Justice in May 2016, and jointly withdrawn by them by means of another Dear Colleague Letter in February 2017. The May 2016 letter said that, under Title IX, "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity." Ex. K at 3. The February 2017 letter noted that "[t]his interpretation has given rise to significant litigation regarding school restrooms and locker rooms," and that "the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy." The Departments also said that they would "not rely on the views expressed within" the May 2016 letter.[4] *See* Compl. ¶ 39.

The litigation to which the February 2017 letter referred included a number of suits making claims against the federal government essentially identical to the ones asserted here: that federal actors had announced an interpretation of Title IX that was causing harm to plaintiffs and could be challenged in federal court. *See Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945 (N.D. Ill. filed May 4, 2016); *Texas v. United States*, No. 7:16-cv-54 (S.D. Tex. filed May 25, 2016); *Bd. of Educ. of Highland Local School District v. U.S. Dep't of Educ.*, No. 2:16-cv-524 (S.D. Ohio filed June 10, 2016); *Women's Liberation Front v. U.S. Dep't of Justice*,

[4] U.S. Dep'ts of Educ. & Justice, Dear Colleague Letter of February 22, 2017 ("February 2017 letter") at 1, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

No. 16-cv-915 (D.N.M. filed Aug. 11, 2016); *Privacy Matters v. U.S. Dep't of Educ.*, No. 16-cv-3015 (D. Minn. filed Sept. 7, 2016).

Courts decided preliminary injunction motions in some of these cases, with differing results. *See Texas*, 7:16-cv-54, ECF No. 58 (S.D. Tex. Aug. 21, 2016) (granting nationwide preliminary injunction); *Highland*, No. 2:16-cv-524, ECF No. 95 (S.D. Ohio Sept. 26, 2016) (denying preliminary injunction); *see also Students & Parents for Privacy*, No. 16-cv-4945, ECF No. 134 (N.D. Ill. Oct. 18, 2016) (report and recommendation against preliminary injunction).

No claims against federal defendants were litigated to the merits, and all such claims were dismissed after the issuance of the February 2017 letter. *See Texas*, 7:16-cv-54, ECF No. 128 (S.D. Tex. Mar. 3, 2017) (voluntarily dismissing case and dissolving nationwide preliminary injunction); *Women's Liberation Front*, No. 16-cv-915, ECF No. 20 (D.N.M. Mar. 16, 2017) (voluntarily dismissing case); *Privacy Matters*, No. 16-cv-3015, ECF No. 83 (D. Minn. Apr. 13, 2017) (voluntarily dismissing case); *Highland*, No. 2:16-cv-524, ECF No. 131 (S.D. Ohio June 20, 2017) (voluntarily dismissing federal defendants); *Students & Parents for Privacy*, No. 16-cv-4945, ECF No. 178 (N.D. Ill. June 20, 2017) (voluntarily dismissing federal defendants).

This suit was filed in November 2017.

STANDARD OF REVIEW

When a defendant brings a Rule 12(b)(1) motion, the plaintiff has the burden of establishing subject matter jurisdiction. *See Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007) ("Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence."). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "A 'facial' attack accepts the truth of the plaintiff's allegations but asserts that they 'are insufficient on their face to invoke

federal jurisdiction.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air*, 373 F.3d at 1039). "The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Id.* (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter that "state[s] a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when the factual allegations allow the court to infer the defendant's liability based on the alleged conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The factual allegations must present more than "the mere possibility of misconduct." *Id.* at 678. While considering a motion to dismiss, the court must accept all allegations of material fact as true and construe those facts in the light most favorable to the non-movant. *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). However, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

ARGUMENT

Article III of the Constitution limits federal courts to adjudicating "actual cases and controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Federal courts therefore have "neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them," and must resolve only "real and substantive

controvers[ies] admitting of specific relief through a decree of a conclusive character." *Preister v. Newkirk*, 422 U.S. 395, 401 (1975).

One aspect of this case-or-controversy limitation is the requirement of standing. To establish standing, plaintiffs (1) must have suffered an injury-in-fact, *i.e.*, a judicially cognizable injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (2) the injury must be "fairly … trace[able] to the challenged action of the defendant;" and (3) "it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation omitted, alterations in original).

Plaintiffs claim that they are injured by the Dallas School District's policy regarding access to sex-segregated facilities for a transgender student, and that these injuries are "a direct result of" the federal defendants' interpretation of Title IX in the challenged guidance documents "which," they say, "in turn forms the justification for the Student Safety Plan" adopted by the Dallas School District. Compl. ¶ 48. But their complaint does not plausibly allege that the school district's adoption of the Student Safety Plan was caused by the federal guidance documents challenged here, nor that any decision against the federal defendants would lead the school district to withdraw the Student Safety Plan. Because plaintiffs' alleged injuries are not fairly traceable to the challenged federal actions, nor likely to be redressed by any relief the Court could award against federal actors, plaintiffs lack standing to pursue their claims against the federal defendants. And those claims cannot survive review under Rule 12(b)(6). All claims against the federal defendants must therefore be dismissed.

A. The injuries alleged by plaintiffs are not fairly traceable to federal actions.

Any injuries that plaintiffs may be suffering could be caused only by the Dallas School District and its Student Safety Plan. Four of the five claims against the federal defendants discuss only the Student Safety Plan, and do not mention any federal actions. *See* Compl. ¶¶ 202–06 (Student Safety Plan violates students' right to privacy); *id.* ¶¶ 216–20 (Student Safety Plan violates parents' right to direct the education and upbringing of their children); *id.* ¶¶ 251–55 (Student Safety Plan violates the Religious Freedom Restoration Act); *id.* ¶¶ 258–64 (Student Safety Plan violates both parents' and students' right to the free exercise of religion). The remaining claim, for violations of the Administrative Procedure Act, nonsensically suggests that the interpretation of Title IX announced in the May 2016 letter was the root cause of the Student Safety Plan adopted in November 2015. *Id.* ¶¶ 141, 143.

Read as a whole, plaintiffs' complaint appears to assert that the federal government somehow compelled the Dallas School District to adopt its Student Safety Plan, either by investigating an Illinois school district that had not implemented a similar policy, *see id.* ¶¶ 64–67, or by issuing the guidance documents discussed above. *Id.* ¶ 40 (alleging that the school district "adopted and implemented the . . . Student Safety Plan" in "response to the foregoing Federal Guidelines and enforcement"); *id.* ¶ 75 ("In response to the threat of [federal] enforcement action [the school district] developed and implemented the Student Safety Plan . . . .").

But on the facts set out in their complaint, plaintiffs' alleged injuries are not "fairly traceable" to the challenged guidance documents. The immediate source of those asserted

injuries is the presence of a particular transgender student in certain sex-segregated facilities[5]—which can, in turn, be traced to the Student Safety Plan granting access to those facilities. That Plan was adopted six months before one of the challenged guidance documents—the May 2016 letter—was issued, and well after the others (which do not discuss sex-segregated facilities) were published. It is not plausible to allege, as plaintiffs do here, that the adoption of the Student Safety Plan can be fairly traced either to guidance documents that do not discuss restrooms or locker rooms, or to a document issued long after the Plan was adopted.

Nor do the investigations of other school districts support plaintiffs' theory of standing. Because those investigations are not being (and could not be) challenged here, they are not the "challenged action of the defendant" to which any injury must be traced. *Lujan*, 504 U.S. at 560. And in any event, it simply is not plausible that a letter of findings issued to an Illinois school district on November 2, 2015, Compl. ¶ 65, prompted the adoption of the Student Safety Plan in Dallas, Oregon less than two weeks later, *see id.* ¶ 75. The complaint notes that a transgender student at Dallas High School requested permission to use certain sex-segregated facilities in September 2015, *id.* ¶ 78, and the Student Safety Plan simply grants that student's request. The student's request two months before, and not a letter of finding issued to a far-away school district mere days before, was plainly the impetus for the Dallas School District's adoption of its Student Safety Plan.

"[W]hen a plaintiff alleges that government action caused injury by influencing the conduct of third parties," as plaintiffs allege that the federal defendants injured them by influencing the Dallas School District to adopt its Student Safety Plan, the Ninth Circuit has

[5] The injuries asserted by the students, parents, organization, and association that bring this case all stem from the presence of this transgender student in certain sex-segregated facilities in Dallas High School. The Secretary therefore analyzes their injuries together.

"held that 'more particular facts are needed to show standing.'" *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (quoting *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002)). This is "because the third parties may well have engaged in their injury-inflicting actions even in the absence of the government's challenged conduct." *Id.* "To plausibly allege that the injury was 'not the result of the *independent* action of some third party,'" *id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (emphasis in *Mendia*)), "the plaintiff must offer facts showing that the government's unlawful conduct 'is at least a substantial factor motivating the third parties' actions.'" *Id.* (quoting *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001)). Plaintiffs must "make that showing without relying on 'speculation' or 'guesswork' about the third parties' motivations," if they are to "adequately allege[] Article III causation." *Id.* (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 413–14 (2013)).

But plaintiffs have offered nothing but speculation and guesswork about the motivations of the Dallas School District in adopting its Student Safety Plan. They say that the challenged guidance documents or investigations in other school districts impelled the Dallas School District to take the action that caused their asserted harms, but they have offered no factual allegations to show that this is so. Any harms that plaintiffs are suffering here are the direct result of the Student Safety Plan and, on the facts alleged, are not "fairly traceable" to any challenged federal action. *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 149 (2010). All claims against the federal defendants must therefore be dismissed.

B. Plaintiffs' alleged injuries could not be redressed by any relief against federal actors.

For similar reasons, plaintiffs' asserted injuries would not be "redressable by a favorable ruling" against the federal defendants. *Id.* Even if this Court were to vacate the challenged guidance documents, that remedy would not affect the Student Safety Plan, and so would not

redress plaintiffs' alleged injuries. As discussed above, the challenged policy was independently adopted by Dallas School District. An order declaring the federal guidance documents invalid would not force the District to alter its policy, as plaintiffs' allegations demonstrate. Two of the challenged guidance documents, including the May 2016 letter (which contains the only discussion of sex-segregated facilities), were withdrawn before the complaint was filed.[6] *See* Compl. ¶ 39. As the plaintiffs observe, "[d]espite" the withdrawal of those documents, Dallas School District "has not changed its policies." *Id.* ¶ 75. There is no reason to think that a ruling against the federal defendants would make it any likelier that the school district would change the challenged Plan.

To the contrary, it is apparent from the allegations in the complaint that Dallas School District adopted and maintains its Student Safety Plan not due to compulsion by the federal defendants but because the school district regards the Plan as the best policy for its high school. Plaintiffs allege that the Principal of Dallas High School threatened to punish students who protested the Student Safety Plan, *id.* ¶¶ 87, 91–92; that the school district defended the policy at three separate school board meetings, from December 2015 through February 2016, inviting speakers that it said were "experts on gender identity issues, all of whom . . . exclusively supported the Student Safety Plan," *id.* ¶ 93; and that the District "has, through various announcements to the students at Dallas High School and through board and community meetings on gender identity . . . conveyed . . . the message that any objection to the Student Safety Plan . . . will be viewed by District administration as intolerance and bigotry." *Id.* ¶ 109.

[6] If these two guidance documents had been in effect at the beginning of this litigation (which they were not) any challenge against them would have been rendered moot by their withdrawal. *See Nevada v. United States*, 699 F.2d 486, 487 (9th Cir. 1983) (discussing "the general rule that when actions complained of have been completed or terminated, declaratory judgment and injunctive actions are precluded by the doctrine of mootness").

Based on these allegations, it is not likely that the school district would abandon the Student Safety Plan merely because this Court declared federal guidance documents to be invalid. To the contrary, in moving to dismiss this case, the Dallas School District suggested that its Plan was an "inclusive polic[y]," and that plaintiffs' preferred policy "would discriminate against some of the District's students." ECF No. 31 at 1. Those are not the words of a school district being compelled to act against its better judgment.

C. Plaintiffs have not stated a claim against the federal defendants.

Each of plaintiffs' claims against the federal defendants derives from the proposition that these defendants have promulgated and still maintain a "Rule" prescribing the way in which transgender students must be allowed to access sex-segregated facilities in schools that accept federal funds. Plaintiffs allege that the federal defendants "created and promulgated this new legislative rule . . . through a series of Federal Guidelines that were sent to school districts between April 2014 and May 2016." Compl. ¶ 33. Plaintiffs identify four such guidance documents: "Questions and Answers on Title IX and Sexual Violence," published April 2014; "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," published December 2014; "Title IX Resource Guide," published April 2015; and a Dear Colleague Letter issued May 2016. *See* Compl. ¶ 33 & Exs. H–K.

The first three guidance documents do not contain any discussion of access to sex-segregated facilities by transgender students. The May 2016 letter, which does discuss this subject, was rescinded in February 2017, in a separate Dear Colleague Letter in which the U.S. Departments of Education and Justice said that they would "not rely on the views expressed within" the May 2016 letter. February 2017 Letter at 1; *see* Compl. ¶ 39. Plaintiffs allege that "[n]otwithstanding" the February 2017 letter, the views contained within the May 2016 letter are

being treated by federal defendants as a "Rule [that] has not been formally repealed" but rather "has continuing legal force and effect binding" Dallas School District. Compl. ¶ 39.

The complaint, however, is devoid of any factual allegation to support this legal conclusion. Indeed, the complaint contains no allegations of any actions by the federal defendants after the February 2017 letter was issued, much less any actions that would cast doubt on their clear statement "that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in" the May 2016 letter. February 2017 Letter at 1. The allegations in plaintiffs' complaint therefore do not render it "plausible," *Twombly*, 550 U.S. at 570, that the "Rule" to which they object was operative at the time they filed their complaint. Because all of their claims against the federal defendants depend on the existence of this Rule (which is speculative at best) plaintiffs have not plausibly alleged any claim against the federal defendants. Those claims must therefore be dismissed for failure to state a claim for which relief can be granted.

CONCLUSION

Plaintiffs are not suffering any harms that were caused by federal actions, nor any that could be redressed by relief against federal actors. They therefore lack standing to pursue their claims against the federal defendants. And they have not plausibly alleged those claims. All claims against the federal defendants must be dismissed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

PARENTS FOR PRIVACY; KRIS GOLLY and JON GOLLY, individually and as guardians ad litem for A.G.; LINDSAY GOLLY; NICOLE LILLIE; MELISSA GREGORY, individually and as guardian ad litem for T.F.; and PARENTS RIGHTS IN EDUCATION, an Oregon nonprofit corporation,	Case No. 3:17-CV-01813-HZ PLAINTIFF'S RESPONSE TO U.S. DEFENDANTS' MOTIONS TO DISMISS Oral Argument Requested

Plaintiffs,

v.

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

Defendants.

INTRODUCTION

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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CONCLUSION

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

DATED this 29th day of March, 2018.

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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,

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

DECLARATION OF CAROLINE JANZEN IN SUPPORT OF PLAINTIFF'S RESPONSE TO FEDERAL DEFENDANTS' MOTIONS TO DISMISS

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.

I, Caroline Janzen, hereby declare, under penalty of perjury:

I am an attorney duly licensed in the state of Oregon, and I undertook the following activity at the request of Herbert G. Grey, one of plaintiffs' attorneys of record herein.

On or about March 12, 2018, I reviewed the homepage of the United States Department of Justice website (https://www.justice.gov), a true copy of which is attached as Exhibit 1. Once on the homepage, I typed the term "gender identity" into the search bar, and a true copy of the screenshot for that search is attached as Exhibit 2. A true copy of the results of my search is attached as Exhibit 3, with twenty links shown. (https://search.justice.gov/search?query=gender+identity&op=Search&affiliate=justice). Of those twenty links, Exhibit 4 is a true copy of search results directly relevant to the issue of transgender individuals in shared privacy facilities. *See* Ex. 4, p.3.

On or about March 12, 2018, I similarly reviewed the Department of Education website home page, and Exhibit 5 is a true copy of a screenshot of the homepage (https://www.ed.gov). I

typed the phrase "gender identity" in the search bar, and a true copy of the screenshot for that search is attached as Exhibit 6. The search results yielded 20 links, as shown on Exhibit 7. (https://findit.ed.gov/search?utf8=%E2%9C%93&affiliate=ed.gov&query=gender+identiy).

Of the 20 links shown, Exhibits 8 through 11 are true copies of search results directly relevant to the issue of transgender individuals in shared privacy facilities. *See, e.g.*, Ex. 8, p.13; Ex. 10, p. 4. Regarding Exhibit 9, the original title of the page listed on the search directory is "Resources for Transgender and Gender-Nonconforming Students", but the title of the document is "Resources for LGBTQ students", with fifteen additional links to documents related to transgender students and bathroom use. (https://www2.ed.gov/about/offices/list/ocr/lgbt.html).

Exhibit 10 is a true copy of the May 2016 Dear Colleague Letter, which is also attached to the Complaint as Exhibit K. Exhibit 11 is a true copy of "Questions and Answers on Title IX and Sexual Violence", attached to the Complaint as Exhibit H. Defendants' motion to dismiss (Motion, pp. 3-4, fn 3 and 4) recites that documents identified as Exhibits 10 and 11 have been withdrawn, which was not evident in my search results identified as Exhibit 7. Only by following links in Exhibit 9 was I able to find links to those withdrawal letters, along with 13 additional links related to transgender issues and/or private bathroom use.

I, Caroline Janzen, hereby declare that the foregoing declaration is based on my own personal knowledge and is presented for use as evidence under penalties for perjury.

DATED this 29th day of March, 2018.

Caroline Janzen

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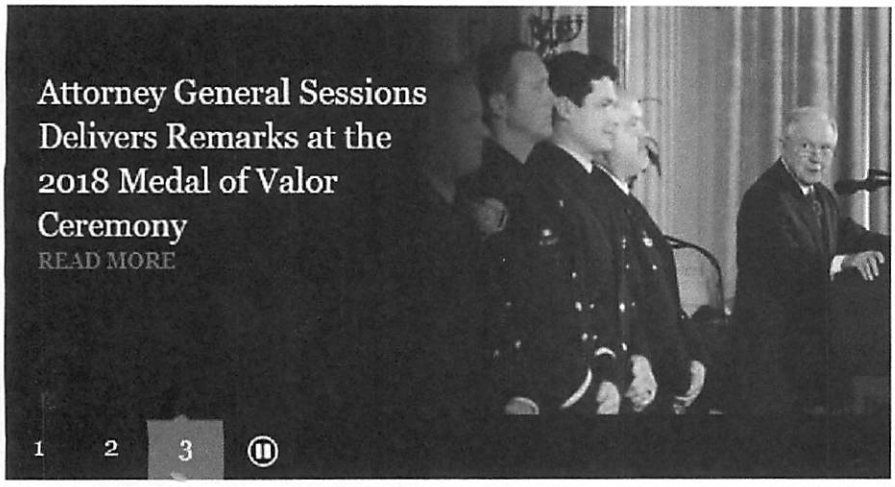

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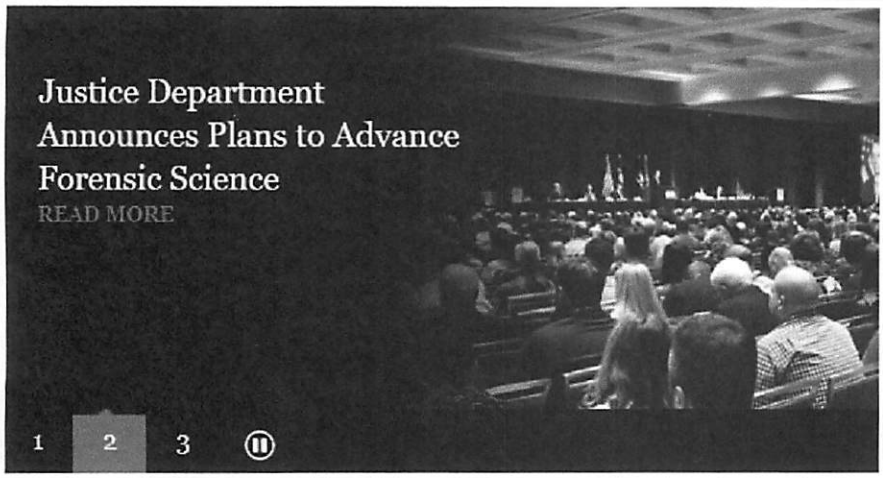

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gender identity

Gender Identity | CRS | Department of **Justice**
www.justice.gov/crs/what-we-do/gender-identity
Since 2009, CRS has helped communities prevent and respond to violent hate crimes based on gender identity issues and conflicts. The Agency works with ...

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The guidance makes clear that both federal agencies treat a student's gender identity as the ... with their gender identity. The guidance also ...

[PDF] **Country Information and Guidance Iran**: Sexual orientation ...
www.justice.gov/sites/default/files/pages/attachments/2016/09/30/uk_cig_iran_sexual_or...
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Attorney General Holder Directs Department to Include ...
www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-iden...
Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims

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[PDF] GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING ...
www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy...
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Understanding Bias: A Resource Guide - Justice
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Gender Identity | CRS | Department of Justice

www.justice.gov/crs/what-we-do/gender-identity
Since 2009, CRS has helped communities prevent and respond to violent hate crimes based on gender identity issues and conflicts. The Agency works with ...

U.S. Departments of Justice and Education Release Joint ...

www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights
The guidance makes clear that both federal agencies treat a student's gender identity as the ... with their gender identity. The guidance also ...

[PDF] Country Information and Guidance Iran: Sexual orientation ...

www.justice.gov/sites/default/files/pages/attachments/2016/09/30/uk_cig_iran_sexual_orientation_092016_0.pdf
Country Information and Guidance Iran: Sexual orientation and gender identity Version 2.0 September 2016

Attorney General Holder Directs Department to Include ...

www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination
Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims

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www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf
religion, sexual orientation, and gender identity by Federal law enforcement officers. 2. This Guidance applies to such officers at all times ...

Mississippi Man Pleads Guilty to Hate Crime for Murdering Transgender Victim Because of Her Gender Identity

www.justice.gov/opa/pr/mississippi-man-pleads-guilty-hate-crime-murdering-transgender-victim-because-her-gender
over 1 year ago - Joshua Brandon Vallum, 29, of Lucedale, Mississippi, pleaded guilty today to a federal hate crime for assaulting and murdering Mercedes Williamson ...

Understanding Bias: A Resource Guide - Justice

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Understanding **Bias:** A Resource Guide CRS is neither affiliated with, ... Gender identity refers to one's sense of self as male, female, or ...

[PDF] Country Information and Guidance Sri Lanka: Sexual ...

www.justice.gov/sites/default/files/pages/attachments/2015/12/07/sri_lanka_sexual_orientation_and_gender_identity_v1_0.pdf
Country Information and Guidance Sri **Lanka:** Sexual Orientation and Gender Identity Version 1.0 September 2015

[PDF] FREQUENTLY ASKED QUESTIONS APRIL 9, 2014

www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf

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gender identity, sexual orientation, or disability. Discrimination against an individual based on a perception of the individual's race, color ...

Hate Crime Laws | CRT | Department of Justice

www.justice.gov/crt/hate-crime-laws
The Act also extends federal hate crime prohibitions to crimes committed because ... by the victim's actual or perceived sexual orientation or gender ...

The Matthew Shepard And James Byrd, Jr., Hate Crimes ...

www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0
... gender, sexual orientation, gender identity, ... when motivated by the actual or perceived gender, disability, sexual orientation, or gender ...

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ...

www.justice.gov/opa/file/849946/download
bathrooms and changing facilities consistent with their gender identity. ... within the Middle District of North Carolina and because a substantial ...

3.20.16 Identifying and Preventing Gender Bias-2

www.justice.gov/opa/file/799366/download
This guidance document is intended to reflect and ... Gender bias, whether ... sexual assault, and stalking, regardless of sex, gender identity, or ...

Gender | CRS | Department of Justice

www.justice.gov/crs/what-we-do/gender
In May 2012, a 7-year-old Michigan boy, alleged to have been bullied based on his gender, committed suicide. The suicide created outrage and ...

Title IX | CRT | Department of Justice

www.justice.gov/crt/title-ix
Identity of Harasser. 1. Employees. ... including both boys and girls, sufficient to raise a claim under Title IX). c. Gender Harassment ...

Sexual Orientation | CRS | Department of Justice

www.justice.gov/crs/what-we-do/sexual-orientation
Gender; Gender Identity; Sexual Orientation; ... and civil rights organizations in the aftermath of violent hate crimes committed on the basis of ...

U.S. DEPARTMENT OF JUSTICE

www.justice.gov/crs/file/826336/download
and respond to alleged hate crimes committed on the basis of actual or perceived gender, gender identity, ... transferred to the Department of Justice ...

Protecting the Rights of Lesbian, Gay, Bisexual ...

www.justice.gov/crt/page/file/910161/download
Lesbian, **Gay, Bisexual, Transgender,** and Intersex **(LGBTI)** ... **Gay, Bisexual, Transgender,** and Intersex Transgender: when someone's gender identity ...

Guidance and Resources | CRT | Department of Justice

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JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Friday, May 13, 2016

U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students

The U.S. Departments of Justice and Education released joint guidance today to help provide educators the information they need to ensure that all students, including transgender students, can attend school in an environment free from discrimination based on sex.

Recently, questions have arisen from school districts, colleges and universities, and others about transgender students and how to best ensure these students, and non-transgender students, can all enjoy a safe and discrimination-free environment.

Under Title IX of the Education Amendments of 1972, schools receiving federal money may not discriminate based on a student's sex, including a student's transgender status. The guidance makes clear that both federal agencies treat a student's gender identity as the student's sex for purposes of enforcing Title IX.

"There is no room in our schools for discrimination of any kind, including discrimination against transgender students on the basis of their sex," said Attorney General Loretta E. Lynch. "This guidance gives administrators, teachers and parents the tools they need to protect transgender students from peer harassment and to identify and address unjust school policies. I look forward to continuing our work with the Department of Education – and with schools across the country – to create classroom environments that are safe, nurturing, and inclusive for all of our young people."

"No student should ever have to go through the experience of feeling unwelcome at school or on a college campus," said U.S. Secretary of Education John B. King Jr. "This guidance further clarifies what we've said repeatedly – that gender identity is protected under Title IX. Educators want to do the right thing for students, and many have reached out to us for guidance on how to follow the law. We must ensure that our young people know that whoever they are or wherever they come from, they have the opportunity to get a great education in an environment free from discrimination, harassment and violence."

"Every child deserves to attend school in a safe, supportive environment that allows them to thrive and grow. And we know that teachers and administrators care deeply about all of their students and want them to succeed in school and life," said Principal Deputy Assistant Attorney General Vanita Gupta, head of the Justice Department's Civil Rights Division. "Our guidance sends a clear message to transgender students across the country: here in America, you are safe, you are protected and you belong – just as you are. We look forward to working with school officials to make the promise of equal opportunity a reality for all of our children."

"Our federal civil rights law guarantees all students, including transgender students, the opportunity to participate equally in school programs and activities without sex discrimination as a core civil right," said Department of Education Assistant Secretary for Civil Rights Catherine E. Lhamon. "This guidance answers questions schools have been asking, with a goal to ensure that all students are treated equally consistent with their gender identity. We look forward to continuing to work with schools and school communities to satisfy Congress' promise of equality for all."

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The guidance explains that when students or their parents, as appropriate, notify a school that a student is transgender, the school must treat the student consistent with the student's gender identity. A school may not require transgender

students to have a medical diagnosis, undergo any medical treatment, or produce a birth certificate or other identification document before treating them consistent with their gender identity.

The guidance also explains schools' obligations to:

- Respond promptly and effectively to sex-based harassment of all students, including harassment based on a student's actual or perceived gender identity, transgender status or gender transition;
- Treat students consistent with their gender identity even if their school records or identification documents indicate a different sex;
- Allow students to participate in sex-segregated activities and access sex-segregated facilities consistent with their gender identity; and
- Protect students' privacy related to their transgender status under Title IX and the Family Educational Rights and Privacy Act.

At the same time, the guidance makes clear that schools can provide additional privacy options to any student for any reason. The guidance does not require any student to use shared bathrooms or changing spaces, when, for example, there are other appropriate options available; and schools can also take steps to increase privacy within shared facilities.

In addition to the departments' joint Title IX guidance, the Department of Education's Office of Elementary and Secondary Education also released *Examples of Policies and Emerging Practices for Supporting Transgender Students*, a compilation of policies and practices that schools across the country are already using to support transgender students. The document shares some common questions on topics such as school records, privacy and terminology, and then explains how some state and school district policies have answered these questions, which may be useful for other states and school districts that are considering these issues. In this document, the Department of Education does not endorse any particular policy, but offers examples from actual policies to help educators develop policies and practices for their own schools.

Many parents, schools and districts have raised questions about this area of civil rights law. Together, these documents will help navigate what may be a new terrain for some.

The Department of Justice's Civil Rights Division, created in 1957 by the enactment of the Civil Rights Act of 1957, works to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society. The division enforces federal statutes prohibiting discrimination on the basis of race, color, sex, disability, religion, familial status and national origin. Additional information about the Civil Rights Division of the Justice Department is available here.

The mission of the Department of Education's Office for Civil Rights (OCR) is to ensure equal access to education and promote educational excellence throughout the nation through the vigorous enforcement of civil rights. OCR is responsible for enforcing federal civil rights laws that prohibit discrimination by educational institutions on the basis of race, color, national origin, disability, sex and age, as well as the Boy Scouts of America Equal Access Act of 2001. Additional information about OCR is available here.

The mission of the Department of Education's Office of Elementary and Secondary Education (OESE) is to promote academic excellence, enhance educational opportunities and equity for all of America's children and families and to improve the quality of teaching and learning by providing leadership, technical assistance and financial support. Additional information about OESE is available here.

Dear Colleague Letter on Transgender Students

Examples of Policies and Emerging Practices for Supporting Transgender Students

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Topic(s):
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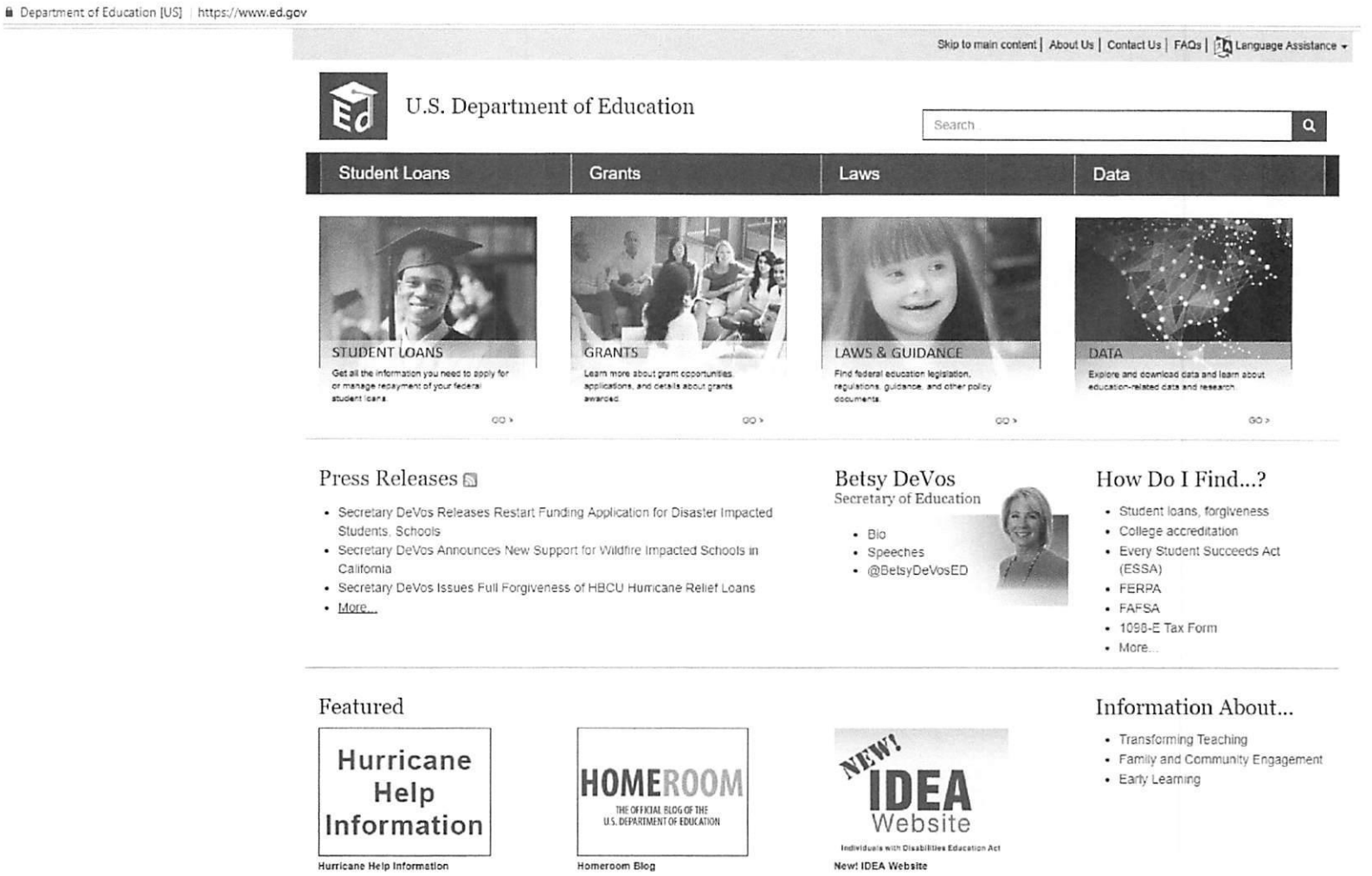
Component(s):
Civil Rights Division

Civil Rights - Educational Opportunities Section
Office of the Attorney General

Press Release Number:
16-568

Updated May 16, 2016



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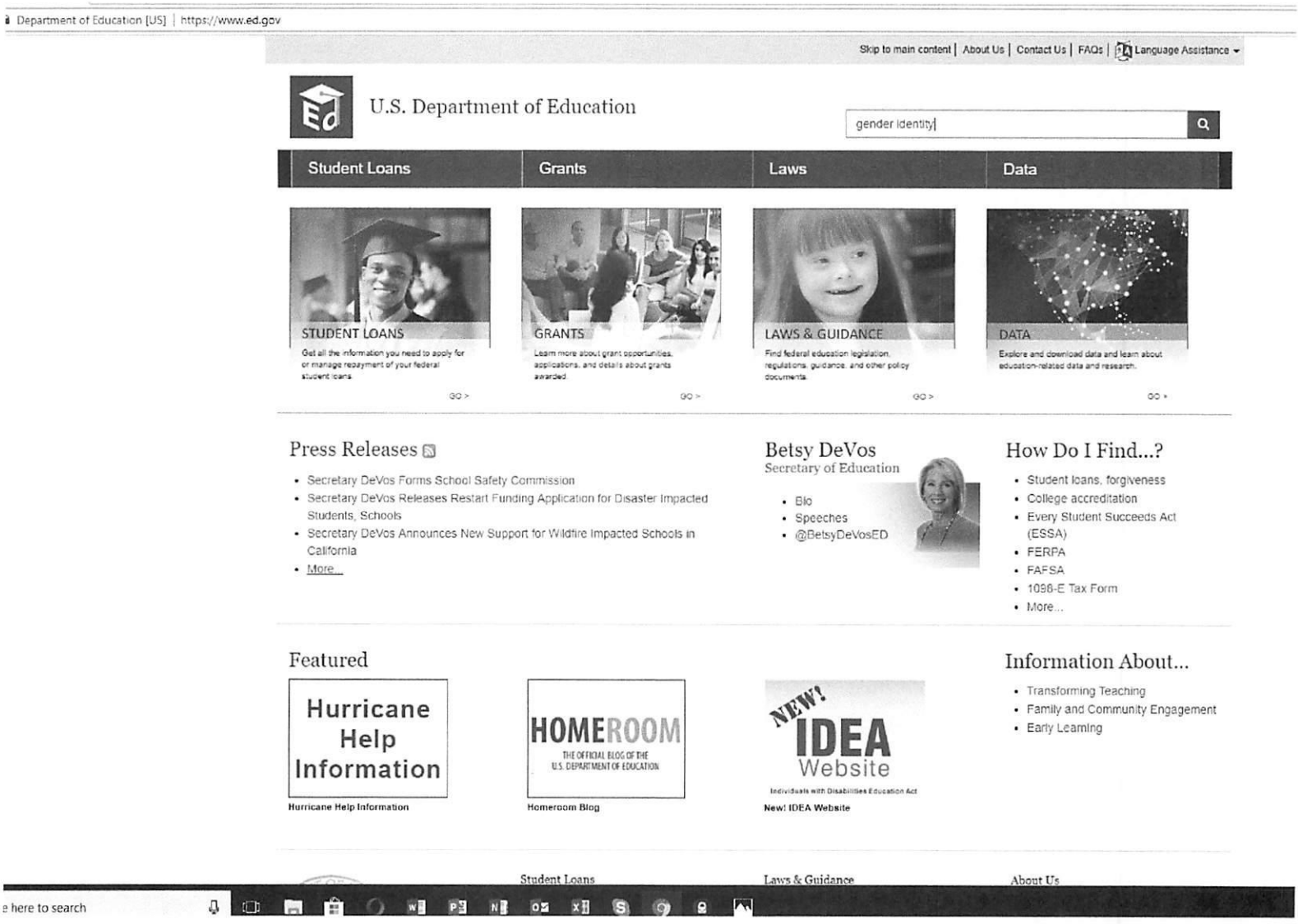

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gender identity

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www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
This prohibition encompasses discrimination based on a student's **gender identity**, including discrimination based on a student's transgender status

U.S. Departments of Education and Justice Release Joint ...
www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-s...
U.S. Departments of Education and Justice Release Joint Guidance to ... The guidance makes clear that both federal agencies treat a student's **gender**

[PDF] Examples of Policies and Emerging Practices for Supporting ...
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Examples of Policies and Emerging Practices for ... Examples of Policies and Emerging Practices for Supporting Transgender ... students whose **gender** ...

Resources for **Transgender and Gender-Nonconforming Students**
www2.ed.gov/about/offices/list/ocr/lgbt.html
Title IX protects all students, including transgender and **gender**-nonconforming students, from sex discrimination. Title IX encompasses discrimination ...

Title IX and Sex Discrimination - U.S. **Department of Education**
www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
The U.S. Department of Education's Office for Civil Rights (OCR) enforces, among other statutes, Title IX of the Education Amendments of 1972. Title ...

[PDF] **Selective Service CHAPTER 5**
ifap.ed.gov/fsahandbook/attachments/1415Vol1Ch5.pdf
If a student's **gender identity** is now male but he was assigned the sex of female at birth, the student is not required to register with the SSS ...

[PDF] June 2012 **Gender Equity in Education**
www2.ed.gov/about/offices/list/ocr/docs/gender-equity-in-education.pdf
June 2012 OFFICE FOR CIVIL RIGHTS U.S. DEPARTMENT OF EDUCATION . 1 **Gender** Equity in Education A Data Snapshot This data snapshot highlights several ...

Statutory Requirements for **Reporting IPEDS Data**
surveys.nces.ed.gov/IPEDS/ViewContent.aspx?contentId=18
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U.S. Departments of Education and Justice Release Joint ...

www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students

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[PDF] Examples of Policies and Emerging Practices for Supporting ...

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Examples of Policies and Emerging Practices for Supporting Transgender Students ... students whose **gender identity** is different from the sex they were ...

[PDF] Selective Service CHAPTER 5 - IFAP: Home

ifap.ed.gov/fsahandbook/attachments/1415Vol1Ch5.pdf
student's **gender identity** is now female but she was assigned the sex of male at birth, the student must register with ... Chapter 5—Selective Service

Title IX and Sex Discrimination - US Department of Education

www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive ...

[PDF] UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL ...

www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf
gender identity from an early age and was diagnosed with **Gender** Dysphoria prior to beginning kindergarten in the District. The Complainant first ...

U.S. Department of Education's Office for Civil Rights ...

www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-civil-rights-investigation-californias-downey-unified-school-district
Engage a consultant with expertise on child and adolescent **gender identity**, ...

Resources for Transgender and Gender-Nonconforming Students

www2.ed.gov/about/offices/list/ocr/lgbt.html
Title IX protects all students, including transgender and **gender**-nonconforming students, from sex discrimination. Title IX encompasses discrimination ...

Dear Colleague Letter from Assistant Secretary for Civil ...

www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg8.html
Dear Colleague letter from Assistant Secretary for Civil ... regardless of the actual or perceived sexual orientation or **gender identity** of the ...

Helping Schools Ensure the Civil Rights of Transgender ...

blog.ed.gov/2016/05/helping-schools-ensure-the-civil-rights-of-transgender-students/
As you define it, "**Gender identity** refers to an individual's internal sense of **gender**." **Gender identity** is not a human choice or a civil right.

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Transgender Students Share School Experiences with ED ...

blog.ed.gov/2015/07/transgender-students-share-school-experiences-with-ed-officials/
Transgender Students Share School Experiences ... The clear "sex-based" basis of Title IX is being ignored and being politically spun as "**gender** ...

Statutory Requirements for Reporting IPEDS Data

surveys.nces.ed.gov/IPEDS/ViewContent.aspx?contentId=18
Statutory Requirements for Reporting IPEDS Data: ... The collection and reporting of race/ethnicity and **gender** data on students and completers are ...

Archived: June 14, 2011, Letter to Colleagues Announcing ...

www2.ed.gov/policy/elsec/guid/secletter/110607.html
June 14, 2011, Letter to Colleagues Announcing Release of Legal Guidelines Regarding the Equal Access Act and the Recognition of Student-Led ...

[PDF] [Archived] Questions and Answers on Title IX and Sexual ...

www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf
Questions and Answers on Title IX and Sexual Violence . Notice of Language Assistance: If you have difficulty understanding English, you may, free of ...

[PDF] Franciscan University of Steubenville - ed

www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/franciscan-university-of-steubenville-request-08272014.pdf
from the student's assigned sex, or for whiCh there is documented legal or medical evidence that the **gender identity** is sincerely held as part of the

[PDF] June 2012 Gender Equity in Education

www2.ed.gov/about/offices/list/ocr/docs/gender-equity-in-education.pdf
June 2012 OFFICE FOR CIVIL RIGHTS U.S. DEPARTMENT OF EDUCATION . 1 **Gender** Equity in Education A Data Snapshot This data snapshot highlights several ...

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nces.ed.gov/surveys/ssocs/pdf/SSOCS_2016_Questionnaire.pdf
U.S. DEPARTMENT OF EDUCATION NATIONAL CENTER FOR EDUCATION STATISTICS ... **Gender identity** ... (SSOCS), National Center for Education Statistics, 550 ...

[PDF] Dorchester County School Distric Two - ed

www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11151348-b.pdf
whether existing arrangements related to the Student's **gender identity**, **gender** transition, or transgender status are meeting her educational needs and

Indicator 7: Discipline Problems Reported by Public Schools

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nces.ed.gov/programs/crimeindicators/ind_07.asp
The percentage of public schools reporting student harassment of other students based on sexual orientation or **gender identity** was lower in 2013–14 ...

FCSM | Federal Committee on Statistical Methodology

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Examples of Policies and Emerging Practices for Supporting Transgender Students

U.S. Department of Education

Office of Elementary and Secondary Education

Office of Safe and Healthy Students

May 2016

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U.S. Department of Education
Office of Elementary and Secondary Education
Office of Safe and Healthy Students

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Senior Advisor to the Secretary, Delegated the Duties of the Assistant Secretary, Office of Elementary and Secondary Education

David Esquith
Director, Office of Safe and Healthy Students

May 2016

U.S. Department of Education, Office of Elementary and Secondary Education, Office of Safe and Healthy Students, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 2016).

This guide is also available on the Office of Safe and Healthy Students website at www.ed.gov/oese/oshs/emergingpractices.pdf. Any updates to this guide will be available at this website.

If you need technical assistance, please contact the Office of Safe and Healthy Students at: OESE.Info.SupportingTransgenderStudents@ed.gov

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Examples of Policies and Emerging Practices for Supporting Transgender Students

The U.S. Department of Education ("ED") is committed to providing schools with the information they need to provide a safe, supportive, and nondiscriminatory learning environment for all students. It has come to ED's attention that many transgender students (*i.e.*, students whose gender identity is different from the sex they were assigned at birth) report feeling unsafe and experiencing verbal and physical harassment or assault in school, and that these students may perform worse academically when they are harassed. School administrators, educators, students, and parents are asking questions about how to support transgender students and have requested clarity from ED. In response, ED developed two documents:

- ED's Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division jointly issued a Dear Colleague Letter ("DCL") about transgender students' rights and schools' legal obligations under Title IX of the Education Amendments of 1972.[1] Any school that has questions related to transgender students or wants to be prepared to address such issues if they arise should review the DCL.

- ED's Office of Elementary and Secondary Education compiled the attached examples of policies[2] and emerging practices[3] that some schools are already using to support transgender students. We share some common questions on topics such as school records, privacy, and terminology, and then explain how some state and school district policies have answered these questions. We present this information to illustrate how states and school districts are supporting transgender students. We also provide information about and links to those policies at the end of the document, along with other resources that may be helpful as educators develop policies and practices for their own schools.

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[1] 20 U.S.C. §§ 1681-1688; Dear Colleague Letter: Transgender Students (May 13, 2016), www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[2] In this document, the term *policy* or *policies* refers generally to policies, guidance, guidelines, procedures, regulations, and resource guides issued by schools, school districts, and state educational agencies.

[3] ED considers *emerging practices* to be operational activities or initiatives that contribute to successful outcomes or enhance agency performance capabilities. Emerging practices are those that have been successfully implemented and demonstrate the potential for replication by other agencies. Emerging practices typically have not been rigorously evaluated, but still offer ideas that work in specific situations.

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Each person is unique, so the needs of individual transgender students vary. But a school policy setting forth general principles for supporting transgender students can help set clear expectations for students and staff and avoid unnecessary confusion, invasions of privacy, and other harms. The education community continues to develop and revise policies and practices to address the rights of transgender students and reflect our evolving understanding and the individualized nature of transgender students' needs.

This document contains information from some schools, school districts, and state and federal agencies. Inclusion of this information does not constitute an endorsement by ED of any policy or practice, educational product, service, curriculum or pedagogy. In addition, this document references websites that provide information created and maintained by other entities. These references are for the reader's convenience. ED does not control or guarantee the accuracy, relevance, timeliness, or completeness of this outside information. This document does not constitute legal advice, create legal obligations, or impose new requirements.

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Student Transitions

1. **How do schools find out that a student will transition?**

Typically, the student or the student's parent or guardian will tell the school and ask that the school start treating the student in a manner consistent with the student's gender identity. Some students transition over a school break, such as summer break. Other students may undergo a gender transition during the school year, and may ask (or their parents may ask on their behalf) teachers and other school employees to respect their identity as they begin expressing their gender identity, which may include changes to their dress and appearance. Some school district or state policies address how a student or parent might provide the relevant notice to the school.

- Alaska's Matanuska-Susitna Borough School District issued guidelines ("Mat-Su Borough Guidelines") advising that transgender students or their parents or guardians should contact the building administrator or the student's guidance counselor to schedule a meeting to develop a plan to address the student's particular circumstances and needs.

- The guidelines issued by Washington's Superintendent of Public Instruction ("Washington State Guidelines") offer an example of a student who first attended school as a boy and, about midway through a school year, she and her family decided that she would transition and begin presenting as a girl. She prefers to dress in stereotypically feminine attire such as dresses and skirts. Although she is growing her hair out and consistently presents as female at school, her hair is still in a rather short, typically boyish haircut. The student, her parents, and school administrators asked her friends and teachers to use female pronouns to address her.

2. **How do schools confirm a student's gender identity?**

Schools generally rely on students' (or in the case of younger students, their parents' or guardians') expression of their gender identity. Although schools sometimes request some form of confirmation, they generally accept the student's asserted gender identity. Some schools offer additional guidance on this issue.

- Los Angeles Unified School District issued a policy ("LAUSD Policy") noting that "[t]here is no medical or mental health diagnosis or treatment threshold that

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students must meet in order to have their gender identity recognized and respected" and that evidence may include an expressed desire to be consistently recognized by their gender identity.

- The New York State Education Department issued guidance ("NYSED Guidance") recommending that "schools accept a student's assertion of his/her/their own gender identity" and provides examples of ways to confirm the assertion, such as a statement from the student or a letter from an adult familiar with the student's situation. The same guidance also offers the following example: "In one middle school, a student explained to her guidance counselor that she was a transgender girl who had heretofore only been able to express her female gender identity while at home. The stress associated with having to hide her female gender identity by presenting as male at school was having a negative impact on her mental health, as well as on her academic performance. The student and her parents asked if it would be okay if she expressed her female gender identity at school. The guidance counselor responded favorably to the request. The fact that the student presented no documentation to support her gender identity was not a concern since the school had no reason to believe the request was based on anything other than a sincerely held belief that she had a female gender identity."

- Alaska's Anchorage School District developed administrative guidelines ("Anchorage Administrative Guidelines") noting that being transgender "involves more than a casual declaration of gender identity or expression but does not require proof of a formal evaluation and diagnosis. Since individual circumstances, needs, programs, facilities and resources may differ; administrators and school staff are expected to consider the needs of the individual on a case-by-case basis."

3. **How do schools communicate with the parents of younger students compared to older transgender students?**

Parents are often the first to initiate a conversation with the school when their child is transgender, particularly when younger children are involved. Parents may play less of a role in an older student's transition. Some school policies recommend, with regard to an older student, that school staff consult with the student before reaching out to the student's parents.

- The District of Columbia Public Schools issued guidance ("DCPS Guidance") noting that "students may choose to have their parents participate in the transition process, but parental participation is not required." The guidance further

recommends different developmentally appropriate protocols depending on grade level. The DCPS Guidance suggests that the school work with a young student's family to identify appropriate steps to support the student, but recommends working closely with older students prior to notification of family. The guidance also provides a model planning document with key issues to discuss with the student or the student's family.

- Similarly, the Massachusetts Department of Elementary and Secondary Education issued guidance ("Massachusetts Guidance") that notes: "Some transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance. School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian. For the same reasons, school personnel should discuss with the student how the school should refer to the student, *e.g.*, appropriate pronoun use, in written communication to the student's parent or guardian."

- Chicago Public Schools' guidelines ("Chicago Guidelines") provide: "When speaking with other staff members, parents, guardians, or third parties, school staff should not disclose a student's preferred name, pronoun, or other confidential information pertaining to the student's transgender or gender nonconforming status without the student's permission, unless authorized to do so by the Law Department."

- Oregon's Department of Education issued guidance stating, "In a case where a student is not yet able to self-advocate, the request to respect and affirm a student's identity will likely come from the student's parent. However, in other cases, transgender students may not want their parents to know about their transgender identity. These situations should be addressed on a case-by-case basis and school districts should balance the goal of supporting the student with the requirement that parents be kept informed about their children. The paramount consideration in such situations should be the health and safety of the student, while also making sure that the student's gender identity is affirmed in a manner that maintains privacy and confidentiality."

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Privacy, Confidentiality, and Student Records

4. **How do schools protect a transgender student's privacy regarding the student's transgender status?**

There are a number of ways schools protect transgender students' interests in keeping their transgender status private, including taking steps to prepare staff to consistently use the appropriate name and pronouns. Using transgender students' birth names or pronouns that do not match their gender identity risks disclosing a student's transgender status. Some state and school district policies also address how federal and state privacy laws apply to transgender students and how to keep information about a student's transgender status confidential.

- California's El Rancho Unified School District issued a regulation ("El Rancho Regulation") that provides that students have the right to openly discuss and express their gender identity, but also reminds school personnel to be "mindful of the confidentiality and privacy rights of [transgender] students when contacting parents/legal guardians so as not to reveal, imply, or refer to a student's actual or perceived sexual orientation, gender identity, or gender expression."

- The Chicago Guidelines provide that the school should convene an administrative support team to work with transgender students and/or their parents or guardians to address each student's individual needs and supports. To protect the student's privacy, this team is limited to "the school principal, the student, individuals the student identifies as trusted adults, and individuals the principal determines may have a legitimate interest in the safety and healthy development of the student."

- The Mat-Su Borough Guidelines state: "In some cases, a student may want school staff and students to know, and in other cases the student may not want this information to be widely known. School staff should take care to follow the student's plan and not to inadvertently disclose information that is intended to be kept private or that is protected from disclosure (such as confidential medical information)."

- The Massachusetts Guidance advises schools "to collect or maintain information about students' gender only when necessary" and offers an example: "One school reviewed the documentation requests it sent out to families and noticed that field trip permission forms included a line to fill in indicating the student's gender. Upon consideration, the school determined that the requested information was irrelevant to the field trip activities and deleted the line with the gender marker request."

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5. How do schools ensure that a transgender student is called by the appropriate name and pronouns?

One of the first issues that school officials may address when a student notifies them of a gender transition is determining which name and pronouns the student prefers. Some schools have adopted policies to prepare all school staff and students to use a student's newly adopted name, if any, and pronouns that are consistent with a student's gender identity.

- A regulation issued by Nevada's Washoe County School District ("Washoe County Regulation") provides that: "Students have the right to be addressed by the names and pronouns that correspond to their gender identity. Using the student's preferred name and pronoun promotes the safety and wellbeing of the student. When possible, the requested name shall be included in the District's electronic database in addition to the student's legal name, in order to inform faculty and staff of the name and pronoun to use when addressing the student."

- A procedure issued by Kansas City Public Schools in Missouri ("Kansas City Procedure") notes that: "The intentional or persistent refusal to respect the gender identity of an employee or student after notification of the preferred pronoun/name used by the employee or student is a violation of this procedure."

- The NYSED Guidance provides: "As with most other issues involved with creating a safe and supportive environment for transgender students, the best course is to engage the student, and possibly the parent, with respect to name and pronoun use, and agree on a plan to reflect the individual needs of each student to initiate that name and pronoun use within the school. The plan also could include when and how this is communicated to students and their parents."

- The DCPS Guidance includes a school planning guide for principals to review with transgender students as they plan how to ensure the school environment is safe and supportive. The school planning guide allows the student to identify the student's gender identity and preferred name, key contacts at home and at school, as well as develop plans for access to restrooms, locker rooms, and other school activities.

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6. How do schools handle requests to change the name or sex designation on a student's records?

Some transgender students may legally change their names. However, transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to financial limitations or legal restrictions imposed by state or local law). Some school district policies specify that they will use the name a student identifies as consistent with the student's gender identity regardless of whether the student has completed a legal name change.

- The NYSED Guidance provides that school records, including attendance records, transcripts, and Individualized Education Programs, be updated with the student's chosen name and offers an example: "One school administrator dealt with information in the student's file by starting a new file with the student's chosen name, entered previous academic records under the student's chosen name, and created a separate, confidential folder that contained the student's past information and birth name."

- The DCPS Guidance notes: "A court-ordered name or gender change is not required, and the student does not need to change their official records. If a student wishes to go by another name, the school's registrar can enter that name into the 'Preferred First' name field of [the school's] database."

- The Kansas City Procedure recognizes that there are certain situations where school staff or administrators may need to report a transgender student's legal name or gender. The procedure notes that in these situations, "school staff and administrators shall adopt practices to avoid the inadvertent disclosure of such confidential information."

- The Chicago Guidelines state: "Students are not required to obtain a court order and/or gender change or to change their official records as a prerequisite to being addressed by the name and pronoun that corresponds to their gender identity."

- The Massachusetts Guidance also addresses requests to amend records after graduation: "Transgender students who transition after having completed high school may ask their previous schools to amend school records or a diploma or transcript that include the student's birth name and gender. When requested, and when satisfied with the gender identity information provided, schools should amend the student's record."

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Sex-Segregated Activities and Facilities

7. **How do schools ensure transgender students have access to facilities consistent with their gender identity?**

Schools often segregate restrooms and locker rooms by sex, but some schools have policies that students must be permitted to access facilities consistent with their gender identity and not be required to use facilities inconsistent with their gender identity or alternative facilities.

- The Washington State Guidelines provide: "School districts should allow students to use the restroom that is consistent with their gender identity consistently asserted at school." In addition, no student "should be required to use an alternative restroom because they are transgender or gender nonconforming."

- The Washoe County Regulation provides: "Students shall have access to use facilities that correspond to their gender identity as expressed by the student and asserted at school, irrespective of the gender listed on the student's records, including but not limited to locker rooms."

- The Anchorage Administrative Guidelines emphasize the following provision: "However, staff should not require a transgender or gender nonconforming student/employee to use a separate, nonintegrated space unless requested by the individual student/employee."

8. **How do schools protect the privacy rights of all students in restrooms or locker rooms?**

Many students seek additional privacy in school restrooms and locker rooms. Some schools have provided students increased privacy by making adjustments to sex-segregated facilities or providing all students with access to alternative facilities.

- The Washington State Guidelines provide that any student who wants increased privacy should be provided access to an alternative restroom or changing area. The guidelines explain: "This allows students who may feel uncomfortable sharing the facility with the transgender student(s) the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student."

- The NYSED Guidance gives an example of accommodating all students' interest in privacy: "In one high school, a transgender female student was given access to the female changing facility, but the student was uncomfortable using the female changing facility with other female students because there were no private changing areas within the facility. The principal examined the changing facility and determined that curtains could easily be put up along one side of a row of benches near the group lockers, providing private changing areas for any students who wished to use them. After the school put up the curtains, the student was comfortable using the changing facility."

- Atherton High School, in Jefferson County, Kentucky, issued a policy that offers examples of accommodations to address any student's request for increased privacy: "use of a private area within the public area of the locker room facility (e.g. nearby restroom stall with a door or an area separated by a curtain); use of a nearby private area (e.g. nearby restroom); or a separate changing schedule."

- The DCPS Guidance recommends talking to students to come up with an acceptable solution: "Ultimately, if a student expresses discomfort to any member of the school staff, that staff member should review these options with the student and ask the student permission to engage the school LGBTQ liaison or another designated ally in the building."

9. How do schools ensure transgender students have the opportunity to participate in physical education and athletics consistent with their gender identity?

Some school policies explain the procedures for establishing transgender students' eligibility to participate in athletics consistent with their gender identity. Many of those policies refer to procedures established by state athletics leagues or associations.

- The NYSED Guidance explains that "physical education is a required part of the curriculum and an important part of many students' lives. Most physical education classes in New York's schools are coed, so the gender identity of students should not be an issue with respect to these classes. Where there are sex-segregated classes, students should be allowed to participate in a manner consistent with their gender identity."

- The LAUSD Policy provides that "participation in competitive athletics, intramural sports, athletic teams, competitions, and contact sports shall be facilitated in a

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manner consistent with the student's gender identity asserted at school and in accordance with the California Interscholastic Federation bylaws." The California Interscholastic Federation establishes a panel of professionals, including at least one person with training or expertise in gender identity health care or advocacy, to make eligibility decisions.

- The Rhode Island Interscholastic League's policy states that all students should have the opportunity to participate in athletics consistent with their gender identity, regardless of the gender listed on school records. The policy provides that the league will base its eligibility determination on the student's current transcript and school registration information, documentation of the student's consistent gender identification (*e.g.*, affirmed written statements from student, parent/guardian, or health care provider), and any other pertinent information.

10. How do schools treat transgender students when they participate in field trips and athletic trips that require overnight accommodations?

Schools often separate students by sex when providing overnight accommodations. Some school policies provide that students must be treated consistent with their gender identity in making such assignments.

- Colorado's Boulder Valley School District issued guidelines ("Boulder Valley Guidelines") providing that when a school plans overnight accommodations for a transgender student, it should consider "the goals of maximizing the student's social integration and equal opportunity to participate in overnight activity and athletic trips, ensuring the [transgender] student's safety and comfort, and minimizing stigmatization of the student."

- The Chicago Guidelines remind school staff: "In no case should a transgender student be denied the right to participate in an overnight field trip because of the student's transgender status."

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Additional Practices to Support Transgender Students

11. What can schools do to make transgender students comfortable in the classroom?

Classroom practices that do not distinguish or differentiate students based on their gender are the most inclusive for all students, including transgender students.

- The DCPS Guidance suggests that "[w]herever arbitrary gender dividers can be avoided, they should be eliminated."

- The Massachusetts Guidance states that "[a]s a general matter, schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose."

- Minneapolis Public Schools issued a policy providing that students generally should not be grouped on the basis of sex for the purpose of instruction or study, but rather on bases such as student proficiency in the area of study, student interests, or educational needs for acceleration or enrichment.

- The Maryland State Department of Education issued guidelines that include an example of eliminating gender-based sorting of students: "Old Practice: boys line up over here." New Practice: birthdays between January and June; everybody who is wearing something green, etc."

12. How do school dress codes apply to transgender students?

Dress codes that apply the same requirements regardless of gender are the most inclusive for all students and avoid unnecessarily reinforcing sex stereotypes. To the extent a school has a dress code that applies different standards to male and female students, some schools have policies that allow transgender students to dress consistent with their gender identity.

- Wisconsin's Shorewood School District issued guidelines ("Shorewood Guidelines") that allow students to dress in accordance with their gender identity and remind school personnel that they must not enforce a dress code more strictly against transgender and gender nonconforming students than other students.

- The Washington State Guidelines encourage school districts to adopt gender-neutral dress codes that do not restrict a student's clothing choices on the basis of gender: "Dress codes should be based on educationally relevant considerations, apply

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consistently to all students, include consistent discipline for violations, and make reasonable accommodations when the situation requires an exception."

13. How do schools address bullying and harassment of transgender students?

Unfortunately, bullying and harassment continue to be a problem facing many students, and transgender students are no exception. Some schools make clear in their nondiscrimination statements that prohibited sex discrimination includes discrimination based on gender identity and expression. Their policies also address this issue.

- The NYSED Guidance stresses the importance of protecting students from bullying and harassment because "[the] high rates experienced by transgender students correspond to adverse health and educational consequences," including higher rates of absenteeism, lower academic achievement, and stunted educational aspirations.

- The Shorewood Guidelines specify that harassment based on a student's actual or perceived transgender status or gender nonconformity is prohibited and notes that these complaints are to be handled in the same manner as other discrimination, harassment, and bullying complaints.

- The DCPS Guidance provides examples of prohibited harassment that transgender students sometimes experience, including misusing an individual's preferred name or pronouns on purpose, asking personal questions about a person's body or gender transition, and disclosing private information.

14. How do school psychologists, school counselors, school nurses, and school social workers support transgender students?

School counselors can help transgender students who may experience mental health disorders such as depression, anxiety, and posttraumatic stress. Mental health staff may also consult with school administrators to create inclusive policies, programs, and practices that prevent bullying and harassment and ensure classrooms and schools are safe, healthy, and supportive places where all students, including transgender students, are respected and can express themselves. Schools will be in a better position to support transgender students if they communicate to all students that resources are available, and that they are competent to provide support and services to any student who has questions related to gender identity.

- The NYSED Guidance suggests that counselors can serve as a point of contact for transgender students who seek to take initial steps to assert their gender identity in school.

- The Chicago Guidelines convene a student administrative support team to determine the appropriate supports for transgender students. The team consists of the school principal, the student, adults that the student trusts, and individuals the principal determines may have a legitimate interest in the safety and healthy development of the student.

15. How do schools foster respect for transgender students among members of the broader school community?

Developing a clear policy explaining how to support transgender students can help communicate the importance the school places on creating a safe, healthy, and nondiscriminatory school climate for all students. Schools can do this by providing educational programs aimed at staff, students, families, and other community members.

- The Massachusetts Guidance informs superintendents and principals that they "need to review existing policies, handbooks, and other written materials to ensure they are updated to reflect the inclusion of gender identity in the student antidiscrimination law, and may wish to inform all members of the school community, including school personnel, students, and families of the recent change to state law and its implications for school policy and practice. This could take the form of a letter that states the school's commitment to being a supportive, inclusive environment for all students."

- The NYSED Guidance states that "school districts are encouraged to provide this guidance document and other resources, such as trainings and information sessions, to the school community including, but not limited to, parents, students, staff and residents."

16. What topics do schools address when training staff on issues related to transgender students?

Schools can reinforce commitments to providing safe, healthy, and nondiscriminatory school climates by training all school personnel about appropriate and respectful treatment of all students, including transgender students.

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- The Massachusetts Guidance suggests including the following topics in faculty and staff training "key terms related to gender identity and expression; the development of gender identity; the experiences of transgender and other gender nonconforming students; risks and resilience data regarding transgender and gender nonconforming students; ways to support transgender students and to improve school climate for gender nonconforming students; [and] gender-neutral language and practices."

- The El Rancho Regulation states that the superintendent or designee "shall provide to employees, volunteers, and parents/guardians training and information regarding the district's nondiscrimination policy; what constitutes prohibited discrimination, harassment, intimidation, or bullying; how and to whom a report of an incident should be made; and how to guard against segregating or stereotyping students when providing instruction, guidance, supervision, or other services to them. Such training and information shall include guidelines for addressing issues related to transgender and gender-nonconforming students."

17. How do schools respond to complaints about the way transgender students are treated?

School policies often provide that complaints from transgender students be handled under the same policy used to resolve other complaints of discrimination or harassment.

- The Boulder Valley Guidelines provide that "complaints alleging discrimination or harassment based on a person's actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination or harassment complaints."

- The Anchorage Administrative Guidelines provide that "students may also use the Student Grievance Process to address any civil rights issue, including transgender issues at school."

Terminology

18. What terms are defined in current school policies on transgender students?

Understanding the needs of transgender students includes understanding relevant terminology. Most school policies define commonly used terms to assist schools in understanding key concepts relevant to transgender students. The list below is not exhaustive, and only includes examples of some of the most common terms that school policies define.

- *Gender identity* refers to a person's deeply felt internal sense of being male or female, regardless of their sex assigned at birth. (Washington State Guidelines)
- *Sex assigned at birth* refers to the sex designation, usually "male" or "female," assigned to a person when they are born. (NYSED Guidance)
- *Gender expression* refers to the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice or mannerisms. (Washoe County Regulation)
- *Transgender* or *trans* describes a person whose gender identity does not correspond to their assigned sex at birth. (Massachusetts Guidance)
- *Gender transition* refers to the process in which a person goes from living and identifying as one gender to living and identifying as another. (Washoe County Regulation)
- *Cisgender* describes a person whose gender identity corresponds to their assigned sex at birth. (NYSED Guidance)
- *Gender nonconforming* describes people whose gender expression differs from stereotypic expectations. The terms *gender variant* or *gender atypical* are also used. Gender nonconforming individuals may identify as male, female, some combination of both, or neither. (NYSED Guidance)
- *Intersex* describes individuals born with chromosomes, hormones, genitalia and/or other sex characteristics that are not exclusively male or female as defined by the medical establishment in our society. (DCPS Guidance)
- *LGBTQ* is an acronym that stands for "lesbian, gay, bisexual, transgender, and queer/questioning." (LAUSD Policy)

- *Sexual orientation* refers to a person's emotional and sexual attraction to another person based on the gender of the other person. Common terms used to describe sexual orientation include, but are not limited to, heterosexual, lesbian, gay, and bisexual. Sexual orientation and gender identity are different. (LAUSD Policy)

19. How do schools account for individual preferences and the diverse ways that students describe and express their gender?

Some students may use different terms to identify themselves or describe their situations. For example, a transgender male student may identify simply as male, consistent with his gender identity. The same principles apply even if students use different terms. Some school policies directly address this question and provide additional guidance.

- The Washington State Guidelines recognize how "terminology can differ based on religion, language, race, ethnicity, age, culture and many other factors."
- Washington's Federal Way School District issued a resource guide that states: "Keep in mind that the meaning of gender conformity can vary from culture to culture, so these may not translate exactly to Western ideas of what it means to be transgender. Some of these identities include Hijra (South Asia), Fa'afafine (Samoa), Kathoey (Thailand), Travesti (South America), and Two-Spirit (Native American/First Nations)."
- The Washoe County Regulation, responding to cultural diversity within the state, offers examples of "ways in which transgender and gender nonconforming youth describe their lives and gendered experiences: trans, transsexual, transgender, male-to-female (MTF), female-to-male (FTM), bi-gender, two-spirit, trans man, and trans woman."
- The DCPS Guidance provides this advice to staff: "If you are unsure about a student's preferred name or pronouns, it is appropriate to privately and tactfully ask the student what they prefer to be called. Additionally, when speaking about a student it is rarely necessary to label them as being transgender, as they should be treated the same as the rest of their peers."

Cited Policies on Transgender Students

- Anchorage School District (AK): *Administrative Guidelines: Working with Transgender and Gender Nonconforming Students and Employees* (2015) (on file with ED)
- Atherton High School, Jefferson County School District (KY), *Policy on School Space* (2014), www.jefferson.k12.ky.us/schools/high/atherton/SBDMDocuments/Policy%20500%20Draft-%20Los%20Angeles%20Unified%20School%20District%20Revised%20Model.pdf
- Boulder Valley School District (CO), Guidelines Regarding the Support of Students and Staff Who Are Transgender and/or Gender Nonconforming (2016), http://www.bvsd.org/policies/Policies/AC-E3.pdf
- California Interscholastic Federation, *Guidelines for Gender Identity Participation* (2015), http://static.psbin.com/m/5/0ndq7wwfgh2em9/Guidelines_for_Gender_Identity_Participation.pdf
- Chicago Public Schools (IL), *Guidelines Regarding the Support of Transgender and Gender Nonconforming Students* (2016), cps.edu/SiteCollectionDocuments/TL_TransGenderNonconformingStudents_Guidelines.pdf
- District of Columbia Public Schools, *Transgender and Gender-Nonconforming Policy Guidance* (2015), dcps.dc.gov/publication/dcps-transgender-and-gender-non-conforming-policy-guidance
- El Rancho Unified School District, *Transgender and Gender-Nonconforming Students* (AR 5145.3) (2014), www.erusd.org/pdf/board_policies/5145_3.pdf
- Federal Way Public Schools (WA), *Working with Transgender and Gender-Nonconforming Students and Staff* (2014-2015), www.fwps.net/districtresources/wp-content/uploads/sites/32/2013/12/FWPS_Transgender3.pdf?7a385a
- Kansas City 33 School District (MO), *Prohibition Against Discrimination, Harassment and Retaliation (Transgender and Gender Nonconforming Employee and Students)* (2013), eboard.eboardsolutions.com/ePolicy/policy.aspx?PC=AC-AP(1)&Sch=228&S=228&RevNo=1.01&C=A&Z=R
- Los Angeles Unified School District (CA), *Transgender Students – Ensuring Equity and Nondiscrimination* (2014), notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/FLDR_GENERAL_COUNSEL/BUL-6224.1%20TRANSGENDER%20POLICY,%2008-15-14%20-%20ADDED%20ED%20CODE%20221%205.PDF

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- Maryland State Department of Education, *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* (2015), marylandpublicschools.org/MSDE/divisions/studentschoolsvcs/student_services_alt/docs/ProvidingSafeSpacesTransgendergenderNonConformingYouth012016.pdf

- Massachusetts Department of Elementary and Secondary Education, *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment Nondiscrimination on the Basis of Gender Identity* (2014), www.doe.mass.edu/ssce/GenderIdentity.pdf

- Matanuska-Susitna Borough School District (AK), *Transgender Student Guidelines* (2015), www.matsuk12.us/site/handlers/filedownload.ashx?moduleinstanceid=10846&dataid=41646&FileName=Title IX--Transgender Students Guidelines.pdf

- Minneapolis Public Schools (MN), *Permissible Grouping Principles* (2014), policy.mpls.k12.mn.us/uploads/regulation_6135_a.pdf

- New York State Education Department, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students* (2015), www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf

- Oregon Department of Education, *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* (2016), www.ode.state.or.us/groups/supportstaff/hklb/schoolnurses/transgenderstudentguidance.pdf.

- Rhode Island Interscholastic League, *Rules & Regulations* (Article I, Section 22 – Gender Identity), www.riil.org/files/8214/3861/6354/ARTICLE_1_ORGANIZATION_2015.pdf

- Shorewood School District (WI), *Nondiscrimination Guidelines Related to Students Who Are Transgender and Students Nonconforming to Gender Role Stereotypes* (2014), www.shorewood.k12.wi.us/uploaded/Board_Documents/Policies/411_Guidelines_and_Exhibit.pdf?1393865642372

- Washington Office of State Superintendent of Public Instruction, *Prohibiting Discrimination in Washington Public Schools* (2012), www.k12.wa.us/Equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf

- Washoe County School District (NV), *Gender Identity and Gender Non-Conformity – Students* (2015), washoecountyschools.net/csi/pdf_files/5161%20Reg%20-%20Gender%20Identity%20v1.pdf

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Select Federal Resources on Transgender Students

- U.S. Department of Education
  - Office for Civil Rights and U.S. Department of Justice's Civil Rights Division, *Dear Colleague Letter: Transgender Students* (May 13, 2016), www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf
  - Office for Civil Rights, *Resources for Transgender and Gender-Nonconforming Students*, www.ed.gov/ocr/lgbt.html
  - Office for Civil Rights, *Publications on Title IX*, www.ed.gov/about/offices/list/ocr/publications.html#TitleIX
  - Office for Civil Rights, *How to File a Discrimination Complaint*, www.ed.gov/about/offices/list/ocr/docs/howto.html
  - National Center on Safe Supportive Learning Environments, safesupportivelearning.ed.gov
- U.S. Department of Health and Human Services
  - Administration for Children and Families, *Resources for Serving Lesbian, Gay, Bisexual and Transgender Youth*, http://ncfy.acf.hhs.gov/features/serving-lesbian-gay-bisexual-transgender-and-questioning-youth-open-arms/resources-serving
  - Centers for Disease Control and Prevention, *LGBT Youth Resources*, www.cdc.gov/lgbthealth/youth-resources.htm
  - Homelessness Resource Center, *Homeless Populations: LGBTQI2-S Youth,* http://homeless.samhsa.gov/Channel/LGBTQ-153.aspx
  - Stopbullying.gov, *Bullying and LGBT Youth*, http://www.stopbullying.gov/at-risk/groups/lgbt
- U.S. Department of Housing and Urban Development
  - *Community-Wide Prevention of LGBTQ Youth Homelessness* (June 2015), https://www.hudexchange.info/resources/documents/LGBTQ-Youth-Homelessness-Prevention-Initiative-Overview.pdf

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- U.S. Department of Labor
    - Office of Job Corps, *Directive: Job Corps Program Instruction Notice No. 14-31* (May 1, 2015), https://supportservices.jobcorps.gov/Program Instruction Notices/pi_14_31.pdf

Resources for LGBTQ Students

Every school and every school leader has a responsibility to protect all students and ensure every child is respected and can learn in an accepting environment. Title IX protects all students, including LGBTQ students, from sex discrimination. Title IX encompasses discrimination based on a student's failure to conform to stereotyped notions of masculinity and femininity. Schools should also be aware of their obligation under Title IX and the Family Educational Rights and Privacy Act (FERPA) to protect the privacy of their students when maintaining education records.

Policy Guidance

Learn about different types of guidance documents, including how to comment on significant guidance.

- Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students PDF (387.47K) (Feb. 22, 2017)
- Examples of Policies and Emerging Practices for Supporting Transgender Students PDF (636.35K) (May 13, 2016)
- Dear Colleague Letter: Title IX Coordinators (Apr. 24, 2015), accompanied by a letter to Title IX coordinators and a Title IX resource guide.
- Dear Colleague Letter from Secretary of Education Arne Duncan on gay-straight alliances (Jun. 14, 2011), including legal guidelines for complying with the Equal Access Act.
- Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010)

OCR Case Resolutions

- Anoka-Hennepin School District (MN) (05-11-5901): Consent Decree and Resolution Letter
- Tehachapi Unified School District (CA) (09-11-1031): Resolution Agreement and Resolution Letter

Court Filings—Statements of Interest and Amicus Curiae Briefs

- Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants and Urging Reversal, *Carmichael v. Galbraith*, No. 12-11074 (5th Cir. April 1, 2013).
- United States Memorandum as Amicus Curiae in Response to Defendants' Motion to Dismiss/Summary Judgment, Pratt v. Indian River Central School District, No. 7:09-cv-00411 (N.D.N.Y. Aug. 13, 2010)."
- Memorandum of Law in Support of the United States' Motion to Intervene, *J.L. v. Mohawk Central School District*, No. 6:09 Cv. 943 (N.D.N.Y. Jan. 14, 2010).

Federal Government Resources

- Stopbullying.gov
- Substance Abuse and Mental Health Services Administration LGBT resources
- Resources from the Department of Health and Human Services
- Equal Employment Opportunity Commission Enforcement Protections for LGBT Workers
- Resources for Community-Wide Prevention of LGBTQ Youth Homelessness from the Department of Housing and Urban Development
- Guidance from the Department of Labor's Job Corps Program on ensuring equal access for transgender applicants and students

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Resources for LGBTQ Students

Every school and every school leader has a responsibility to protect all students and ensure every child is respected and can learn in an accepting environment. Title IX protects all students, including LGBTQ students, from sex discrimination. Title IX encompasses discrimination based on a student's failure to conform to stereotyped notions of masculinity and femininity. Schools should also be aware of their obligation under Title IX and the Family Educational Rights and Privacy Act (FERPA) to protect the privacy of their students when maintaining education records.

Policy Guidance

Learn about different types of guidance documents (http://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html), including how to comment on significant guidance (http://www2.ed.gov/policy/gen/guid/significant-guidance.html).

- Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students PDF (/ocr/letters/colleague-201702-title-ix.pdf) (387.47K) (Feb. 22, 2017)

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- Examples of Policies and Emerging Practices for Supporting Transgender Students PDF (/about/offices/list/oese/oshs/emergingpractices.pdf) (636.35K) (May 13, 2016)
- Dear Colleague Letter (/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf): Title IX Coordinators (Apr. 24, 2015), accompanied by a letter (/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf) to Title IX coordinators and a Title IX resource guide (/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf).
- Dear Colleague Letter (/policy/elsec/guid/secletter/110607.html) from Secretary of Education Arne Duncan on gay-straight alliances (Jun. 14, 2011), including legal guidelines for complying with the Equal Access Act (/policy/elsec/guid/secletter/groupsguide.doc).
- Dear Colleague Letter: Harassment and Bullying (/about/offices/list/ocr/letters/colleague-201010.pdf) (Oct. 26, 2010)

OCR Case Resolutions

- Anoka-Hennepin School District (MN) (05-11-5901): Consent Decree (/about/offices/list/ocr/docs/investigations/05115901-d.pdf) and Resolution Letter (/about/offices/list/ocr/docs/investigations/05115901-a.pdf)
- Tehachapi Unified School District (CA) (09-11-1031): Resolution Agreement (https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiagreement.pdf) and Resolution Letter (http://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiletter.pdf)

Court Filings—Statements of Interest and Amicus Curiae Briefs

- Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants and Urging Reversal (http://www.justice.gov/sites/default/files/crt/legacy/2013/04/17/carmichaelbrf.pdf), *Carmichael v. Galbraith*, No. 12-11074 (5th Cir. April 1, 2013).
- United States Memorandum as Amicus Curiae in Response to Defendants' Motion to Dismiss/Summary Judgment (https://www.justice.gov/sites/default/files/crt/legacy/2011/03/30/prattamicus.pdf), Pratt v. Indian River Central School District, No. 7:09-cv-00411 (N.D.N.Y. Aug. 13, 2010)."
- Memorandum of Law in Support of the United States' Motion to Intervene (http://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/mohawkmotion.pdf), *J.L. v. Mohawk Central School District*, No. 6:09 Cv. 943 (N.D.N.Y. Jan. 14, 2010).

Federal Government Resources

- Stopbullying.gov (http://www.stopbullying.gov/)
- Substance Abuse and Mental Health Services Administration LGBT resources (http://www.samhsa.gov/behavioral-health-equity/lgbt)
- Resources (http://www.hhs.gov/programs/topic-sites/lgbt/index.html) from the Department of Health and Human Services
- Equal Employment Opportunity Commission Enforcement Protections (http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) for LGBT Workers
- Resources (https://www.hudexchange.info/resources/documents/LGBTQ-Youth-Homelessness-Prevention-Initiative-Overview.pdf) for Community-Wide Prevention of LGBTQ Youth Homelessness from the Department of Housing and Urban Development
- Guidance (https://supportservices.jobcorps.gov/Program Instruction Notices/pi_14_31.pdf) from the Department of Labor's Job Corps Program on ensuring equal access for transgender applicants and students

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(/print/about/offices/list/ocr/lgbt.html)

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How Do I Find...

- Student loans, forgiveness (/fund/grants-college.html?src=rn)
- College accreditation (http://www.ed.gov/accreditation?src=rn)
- Every Student Succeeds Act (ESSA) (http://www.ed.gov/essa?src=rn)
- FERPA (/policy/gen/guid/fpco/ferpa/index.html?src=rn)
- FAFSA (http://fafsa.ed.gov/?src=edgov-rn)
- 1098-E Tax Form (http://www.ed.gov/1098-e?src=rn)

More > (/about/top-tasks.html?src=rn)

Information About...

- Transforming Teaching (http://www.ed.gov/teaching?src=rn)
- Family and Community Engagement (http://www.ed.gov/family-and-community-engagement?src=rn)
- Early Learning (/about/inits/ed/earlylearning/index.html?src=rn)

Related Topics

How to File a Complaint (/about/offices/list/ocr/docs/howto.html?src=rt)

Topics A-Z (/about/offices/list/ocr/topics.html?src=rt)

Civil Rights Data Collection (CRDC) (/about/offices/list/ocr/data.html?src=rt)

Other Civil Rights Agencies (/about/offices/list/ocr/related.html?src=rt)

Recursos de la Oficina Para Derechos Civiles en Español (http://www.ed.gov/about/offices/list/ocr/docs/list-sp.html)

Resources Available in Other Languages (http://www.ed.gov/about/offices/list/ocr/docs/howto-index.html)

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Student Loans

(/fund/grants-college.html?src=ft)

Repaying Loans (https://studentaid.ed.gov/repay-loans?src=ft)

Defaulted Loans (https://studentaid.ed.gov/repay-loans/default?src=ft)

Loan Forgiveness (https://studentaid.ed.gov/repay-loans/forgiveness-cancellation?src=ft)

Loan Servicers (https://studentaid.ed.gov/repay-loans/understand/servicers?src=ft#who-is-my-loan-servicer)

Grants & Programs

(/fund/grants-apply.html?src=ft)

Apply for Pell Grants (https://www.fafsa.ed.gov/?src=ft)

Grants Forecast (/fund/grant/find/edlite-forecast.html?src=ft)

Apply for a Grant (/fund/grant/apply/grantapps/index.html?src=ft)

Eligibility for Grants (/programs/find/elig/index.html?src=ft)

Laws & Guidance

(/policy/?src=ft)

Every Student Succeeds Act (ESSA) (https://www.ed.gov/essa?src=ft)

FERPA (/policy/gen/guid/fpco/ferpa/index.html?src=ft)

Civil Rights (/about/offices/list/ocr/know.html?src=ft)

New IDEA Website (https://sites.ed.gov/idea/?src=ft)

Data & Research

(/rschstat/?src=ft)

Education Statistics (https://nces.ed.gov/?src=ft)

Postsecondary Education Data (https://nces.ed.gov/ipeds/?src=ft)

ED Data Express (https://eddataexpress.ed.gov/?src=ft)

Nation's Report Card (https://nces.ed.gov/nationsreportcard/?src=ft)

What Works Clearinghouse (https://ies.ed.gov/ncee/wwc/?src=ft)

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FAQs (https://answers.ed.gov/?src=ft)

Recursos en español (/espanol/bienvenidos/es/index.html?src=ft)

Budget, Performance (/about/overview/focus/performance.html?src=ft)

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U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter on Transgender Students
Notice of Language Assistance

If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語，或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov。

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

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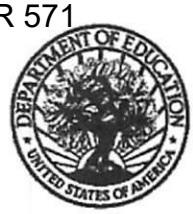
U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.[1] This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is *significant guidance*.[2] This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED's Office of Elementary and Secondary Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX's requirements.[3]

Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.
- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.
- *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A *transgender male* is someone who identifies as male but was assigned the sex of female at birth; a *transgender female* is someone who identifies as female but was assigned the sex of male at birth.

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- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[8]

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX

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requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity.[11]

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.[13]

- **Restrooms and Locker Rooms**. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

- **Single-Sex Classes**. Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.[19] When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools**. Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permitted under Title IX to set their own

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sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities.** Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations.** Title IX allows a school to provide separate housing on the basis of sex.[22] But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student's voluntary request for single-occupancy accommodations if it so chooses.[23]

- **Other Sex-Specific Activities and Rules.** Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (*e.g.*, in yearbook photographs, at school dances, or at graduation ceremonies).[24]

4. *Privacy and Education Records*

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records.** FERPA generally prevents the nonconsensual disclosure of PII from a student's education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information.[27] Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may

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violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity.

- **Disclosure of Directory Information**. Under FERPA's implementing regulations, a school may disclose appropriately designated directory information from a student's education record if disclosure would not generally be considered harmful or an invasion of privacy.[28] Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.[29] School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.[30] A school also must allow eligible students (*i.e.*, students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student's directory information.[31]

- **Amendment or Correction of Education Records.** A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

  - Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]
  - Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

* * *

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/
Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
Vanita Gupta
Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Justice

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[1] 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term *schools* refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).

[2] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[3] ED, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

[4] 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED's Title IX regulations. DOJ has also promulgated Title IX regulations. *See* 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. *See* 34 C.F.R. § 106.6(b).

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). *See also* U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf; USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (May 1, 2015), https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf; DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[6] *See Lusardi v. Dep't of the Army*, Appeal No. 0120133395 at 9 (U.S. Equal Emp't Opportunity Comm'n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.").

[7] *See G.G.*, 2016 WL 1567467, at *1 n.1 (noting that medical authorities "do not permit sex reassignment surgery for persons who are under the legal age of majority").

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

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[9] *See, e.g.*, Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN* (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, *In re Tehachapi Unified Sch. Dist., CA*, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). *See also Lusardi,* Appeal No. 0120133395, at *15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

[10] *See, e.g.*, OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), www.ed.gov/ocr/docs/shguide.pdf; OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf; OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), www.ed.gov/ocr/letters/colleague-201104.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[11] *See, e.g.*, Resolution Agreement, *In re Cent. Piedmont Cmty. Coll., NC*, OCR Case No. 11-14-2265 (Aug. 13, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (agreement to use a transgender student's preferred name and gender and change the student's official record to reflect a name change).

[12] 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.").

[16] 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

[17] 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school's obligations regarding transgender athletes apply with equal force to the association.

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

[19] 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. *Id.* § 106.34(a)(1).

[20] 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially

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equal single-sex school or coeducational school").

[21] 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

[22] 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

[23] *See, e.g.*, Resolution Agreement, *In re Arcadia Unified. Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

[24] *See* 34 C.F.R. §§ 106.31(a), 106.31(b)(4). *See also*, *In re Downey Unified Sch. Dist., CA*, *supra* n. 9; *In re Cent. Piedmont Cmty. Coll., NC, supra* n. 11.

[25] 34 C.F.R. § 106.31(b)(7).

[26] 20 U.S.C. § 1232g; 34 C.F.R. Part 99. FERPA is administered by ED's Family Policy Compliance Office (FPCO). Additional information about FERPA and FPCO is available at www.ed.gov/fpco.

[27] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

[28] 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

[29] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

[30] Letter from FPCO to Institutions of Postsecondary Education 3 (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

[31] 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3. 99.37(a)(3).

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence[1]

Title IX of the Education Amendments of 1972 ("Title IX")[2] is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.[3]

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").[4] The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.[5] Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

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[1] The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

[2] 20 U.S.C. § 1681 *et seq*.

[3] Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

[4] Available at http://www.ed.gov/ocr/letters/colleague-201104.html.

[5] Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

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- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.

- Discusses proactive efforts schools can take to prevent sexual violence.

- Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act ("FERPA"),[6] and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act")[7] as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.

- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, issued in 2001 (*2001 Guidance*).[8] The *2001 Guidance* discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the *2001 Guidance* remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

April 29, 2014

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[6] 20 U.S.C. §1232g; 34 C.F.R. Part 99.
[7] 20 U.S.C. §1092(f).
[8] Available at http://www.ed.gov/ocr/docs/shguide.html.

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Notice of Language Assistance
Questions and Answers on Title IX and Sexual Violence

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知： 如果您不懂英語，或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov.。

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A. A School's Obligation to Respond to Sexual Violence

A-1. What is sexual violence?

Answer: Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

A-2. How does Title IX apply to student-on-student sexual violence?

Answer: Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.[9]

A-3. How does OCR determine if a hostile environment has been created?

Answer: As discussed more fully in OCR's *2001 Guidance*, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

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[9] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

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A-4. When does OCR consider a school to have notice of student-on-student sexual violence?

Answer: OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

A-5. What are a school's basic responsibilities to address student-on-student sexual violence?

Answer: When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its

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effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.[10] The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

A-6. Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?

Answer: Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX's prohibition against

[10] Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual violence.

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sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's *2001 Guidance* for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and

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school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.[11]

B. Students Protected by Title IX

B-1. Does Title IX protect all students from sexual violence?

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?

Answer: A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it

[11] For additional informational on training please see the Department of Education's Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at http://rems.ed.gov/Docs/ASM_Marketing_Flyer.pdf.

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uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school's policies related to sexual violence include examples of particular types of conduct that violate the school's prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at http://www2.ed.gov/policy/elsec/guid/secletter/110607.html.

B-3. What issues may arise with respect to students with disabilities who experience sexual violence?

Answer: When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents.[12] Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

[12] OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. *See* 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 *et seq.* and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education's Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 *et seq.* and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.

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violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school's child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.[13]

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?

Answer: Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.[14] A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

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[13] *See* 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. *See* 34 C.F.R. § 300.300.
[14] OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.

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aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity.[15] The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.[16]

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student's behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school's DSO, are trained on the school's sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation. For more information on retaliation see question K-1.

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[15] For more information on the U nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status.

[16] For more information on the T nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.

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B-5. How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?

Answer: The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

C. Title IX Procedural Requirements

Overview

C-1. What procedures must a school have in place to prevent sexual violence and resolve complaints?

Answer: The Title IX regulations outline three key procedural requirements. Each school must:

(1) disseminate a notice of nondiscrimination (see question C-2);[17]

(2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);[18] and

[17] 34 C.F.R. § 106.9.
[18] *Id.* § 106.8(a).

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(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).[19]

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.[20] For additional information about the procedural requirements in the Clery Act, please see http://www2.ed.gov/admins/lead/safety/campus.html.

Notice of Nondiscrimination

C-2. What information must be included in a school's notice of nondiscrimination?

Answer: The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school's Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.[21]

Title IX Coordinator

C-3. What are a Title IX coordinator's responsibilities?

Answer: A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

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[19] *Id.* § 106.8(b).
[20] All postsecondary institutions participating in the Higher Education Act's Title IV student financial assistance programs must comply with the Clery Act.
[21] For more information on notices of nondiscrimination, please see OCR's Notice of Nondiscrimination (August 2010), available at http://www.ed.gov/ocr/docs/nondisc.pdf.

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reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school's notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

C-4. Are there any employees who should not serve as the Title IX coordinator?

Answer: Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating

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the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator's responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

Grievance Procedures

C-5. Under Title IX, what elements should be included in a school's procedures for responding to complaints of sexual violence?

Answer: Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school's grievance procedures satisfy this requirement, OCR will review all aspects of a school's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

(1) notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;

(2) application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;

(3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;

(4) designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);

(5) written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and

(6) assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.

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To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

(1) a statement of the school's jurisdiction over Title IX complaints;

(2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;

(3) reporting policies and protocols, including provisions for confidential reporting;

(4) identification of the employee or employees responsible for evaluating requests for confidentiality;

(5) notice that Title IX prohibits retaliation;

(6) notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;

(7) notice of available interim measures that may be taken to protect the student in the educational setting;

(8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not that sexual violence occurred) in resolving a complaint;

(9) notice of potential remedies for students;

(10) notice of potential sanctions against perpetrators; and

(11) sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

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A school's procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (*e.g.*, mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

C-6. Is a school required to use separate grievance procedures for sexual violence complaints?

Answer: No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

D. Responsible Employees and Reporting[22]

D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?

Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

[22] This document addresses only Title IX's reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school's code of conduct.

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complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

D-2. Who is a "responsible employee"?

Answer: According to OCR's *2001 Guidance*, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.[23]

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants' option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants' right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

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[23] The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998), and *Davis*, 524 U.S. at 642. The concept of a "responsible employee" under OCR's guidance for administrative enforcement of Title IX is broader.

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school has this obligation regardless of whether the student, student's parent, or a third party files a formal complaint. For additional information on a school's responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

D-3. What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?

Answer: Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

D-4. What should a responsible employee tell a student who discloses an incident of sexual violence?

Answer: Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request

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and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?

Answer: As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school's Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee.[24] When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs' obligations to report other student violations of school policy (*e.g.*, drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the RA's reporting obligation and the student's option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

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[24] Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered "campus security authorities" under the Clery Act. A school's responsibilities in regard to crimes reported to campus security authorities are discussed in the Department's regulations on the Clery Act at 34 C.F.R. § 668.46.

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should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School's Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

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for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.[25]

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

[25] The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") torequest to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. *See* 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

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and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

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E-2. What factors should a school consider in weighing a student's request for confidentiality?

Answer: When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student's request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator. If the school determines that it must disclose a student's identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for

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discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student's request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

E-3. What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?

Answer: OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.[26]

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[26] The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at http://www2.ed.gov/admins/lead/safety/handbook.pdf. Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious

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OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent.[27] These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or

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order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

[27] Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.

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health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as "Take Back the Night"?

Answer: No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as "Take Back the Night" or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

F. Investigations and Hearings

Overview

F-1. What elements should a school's Title IX investigation include?

Answer: The specific steps in a school's Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term "investigation" refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions

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the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.[28] Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

[28] This answer addresses only Title IX's requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

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to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.[29] Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.
- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

[29] As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.

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Intersection with Criminal Investigations

F-2. What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?

Answer: A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school's internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.

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F-3. How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?

Answer: A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

The DCL states that in one instance a prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency's process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.

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Off-Campus Conduct

F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?

Answer: Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (*e.g.*, a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an

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off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

Hearings[30]

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

[30] As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

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F-6. May every witness at the hearing, including the parties, be cross-examined?

Answer: OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

F-7. May the complainant's sexual history be introduced at hearings?

Answer: Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

Timeframes

F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?

Answer: As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR's experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.

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OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

G. Interim Measures

G-1. Is a school required to take any interim measures before the completion of its investigation?

Answer: Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the

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complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

G-2. How should a school determine what interim measures to take?

Answer: The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (*e.g.*, civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?

Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

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H. Remedies and Notice of Outcome[31]

H-1. What remedies should a school consider in a case of student-on-student sexual violence?

Answer: Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation. In any instance in which the complainant did not take advantage of a specific service (*e.g.*, counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school's student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

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[31] As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

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- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;

- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;

- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;

- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and

- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.[32]

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;

- Training or retraining school employees on the school's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;

- Developing materials on sexual violence, which should be distributed to all students;

- Conducting bystander intervention and sexual violence prevention programs with students;

- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

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[32] For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.

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- Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;

- Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and

- Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (*i.e.*, when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?

Answer: If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

H-3. What information must be provided to the complainant in the notice of the outcome?

Answer: Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

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Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.[33]

I. Appeals

I-1. What are the requirements for an appeals process?

Answer: While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

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[33] 20 U.S.C. § 1092(f) and 20 U.S.C. § 1232g(b)(6)(A).

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I-2. Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?

Answer: The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

J. Title IX Training, Education and Prevention[34]

J-1. What type of training on Title IX and sexual violence should a school provide to its employees?

Answer: A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact

[34] As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.

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information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?

Answer: Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (*i.e.*, conduct that is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school's code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school's students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual

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harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

J-3. What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?

Answer: All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.

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J-4. What type of training on sexual violence should a school provide to its students?

Answer: To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school's process for handling complaints of sexual violence. Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a

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hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school's sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school's responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

K. Retaliation

K-1. Does Title IX protect against retaliation?

Answer: Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school's investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school's investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way

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discriminating against the individual) because of the individual's complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

L. First Amendment

L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?

Answer: The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment,[35] and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying,[36] remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

[35] Available at http://www.ed.gov/ocr/firstamend.html.
[36] Available at http://www.ed.gov/ocr/letters/colleague-201010.html.

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and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.[37]

M. The Clery Act and the Violence Against Women Reauthorization Act of 2013

M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?

Answer: Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see http://www2.ed.gov/admins/lead/safety/campus.html.

M-2. Were a school's obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?

Answer: No. The Violence Against Women Reauthorization Act has no effect on a school's obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the *2001 Guidance*. For additional information about the Department's negotiated rulemaking related to the Violence Against Women Reauthorization Act please see http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html.

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[37] 34 C.F.R. § 106.42.

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N. Further Federal Guidance

N-1. Whom should I contact if I have additional questions about the DCL or OCR's other Title IX guidance?

Answer: Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR's webpage at https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at http://www.ed.gov/ocr/complaintintro.html or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at ocr@ed.gov.

N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?

Answer: Yes. OCR's policy guidance on Title IX is available on OCR's webpage at http://www.ed.gov/ocr/publications.html#TitleIX. In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school's obligation to respond to allegations of sexual harassment and sexual violence:

- Dear Colleague Letter: Harassment and Bullying (October 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf
- *Sexual Harassment: It's Not Academic* (Revised September 2008), http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf
- *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties* (January 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

PARENTS FOR PRIVACY, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Case No. 3:17-cv-1813 (HZ)
DALLAS SCHOOL DISTRICT NO. 2, *et al.*,	)	
	)	
Defendants.	)	
	)	

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM

As the federal defendants explained in their motion to dismiss, plaintiffs assert that they are injured by the presence of a particular transgender student in certain sex-segregated facilities in Dallas School District. Fed. Defs.' Mot. to Dismiss ("MTD") at 8–9 & n.5, ECF No. 49. Plaintiffs' standing to bring the claims alleged here rests entirely on that asserted injury, the immediate cause of which is the local Student Safety Plan granting access to those facilities. Plaintiffs attempt to argue that Dallas School District's "adoption of the Student Safety Plan was caused by federal action," Pls.' MTD Opp. at 6, ECF No. 59, but the complaint does not establish any causal connection that could be a predicate for their claims against the federal defendants. Indeed, the only federal actions to which they point are a series of guidance documents (which plaintiffs refer to collectively as a "rule"), some of which have been rescinded, and enforcement actions taken in other jurisdictions, which are not being (and could not be) challenged here.

Plaintiffs' complaint fails to establish their standing to maintain this case against the federal defendants. First, the injury they assert is not fairly traceable to the challenged federal

actions. *See* MTD at 8–10. Second, that injury is not likely to be redressed by relief against the federal defendants. *Id.* at 10–12. In addition, the complaint does not plausibly allege that the "rule" it purports to challenge is presently operative and, therefore, plaintiffs cannot make out a claim for which relief can be granted. *Id.* at 12–13. For these reasons, plaintiffs' claims against the federal defendants must be dismissed.

A. Plaintiffs' asserted injuries are not fairly traceable to the challenged federal actions.

At the motion to dismiss stage, "the complaint must allege sufficient facts plausibly establishing each element of the standing inquiry." *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012). Moreover, as the federal defendants explained in their motion to dismiss, "when a plaintiff alleges that government action caused injury by influencing the conduct of third parties," the Ninth Circuit has said "that 'more particular facts are needed to show standing.'" *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (quoting *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002)). This is "because the third parties may well have engaged in their injury-inflicting actions even in the absence of the government's challenged conduct." *Id.* "To plausibly allege that the injury was 'not the result of the *independent* action of some third party,'" *id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (emphasis in *Mendia*)), "the plaintiff must offer facts showing that the government's unlawful conduct 'is at least a substantial factor motivating the third parties' actions.'" *Id.* (quoting *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001)). Plaintiffs must "make that showing without relying on 'speculation' or 'guesswork' about the third parties' motivations," if they are to "adequately allege[] Article III causation." *Id.* (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 413–14 (2013)).

To proceed with their claims against the federal defendants, plaintiffs therefore must assert in their complaint "particular facts," *Nat'l Audubon Soc'y*, 307 F.3d at 849, sufficient to plausibly allege that the presence of a particular transgender student in certain sex-segregated facilities in Dallas High School is fairly traceable to the challenged federal actions, and "not the result of the *independent* action of" Dallas School District, *Mendia*, 768 F.3d at 1013. Plaintiffs also must plausibly allege that these federal actions were "at least a substantial factor motivating" the actions of Dallas School District, and do so "without relying on 'speculation' or 'guesswork' about [Dallas School District's] motivations." *Id.*

Plaintiffs have fallen far short of this mark. In their opposition brief, plaintiffs suggest that "enforcement action against other public school districts" must have had a "coercive effect to motivate consideration of the Student Safety Plan in Dallas School District." MTD Opp. at 7. But, conceding that their complaint does not allege any specific facts that would tend to show such a coercive effect, plaintiffs suggest that "the precise impact" of the challenged federal actions "is a matter for discovery." *Id.* Not so. It is, rather, plaintiffs' obligation to include in their complaint facts sufficient to plausibly establish that the impact is "substantial." *Mendia*, 768 F.3d at 1013. They have not come close to doing so, and their complaint must therefore be dismissed.[1]

Moreover, as the federal defendants noted in their motion, the Student Safety Plan was adopted six months before the May 2016 Dear Colleague letter discussing sex-segregated facilities, and well after the other challenged guidance documents (which do not discuss sex-

[1] Plaintiffs attempt to excuse the deficiencies in their complaint by noting that *Mendia* and *National Audubon Society* both found standing for the claims at issue in those cases. MTD Opp. at 7. That those plaintiffs complied with the relevant pleading standards does nothing to undermine the applicability of those standards here.

segregated facilities) were published. It simply is not plausible to suggest that the Student Safety Plan can be traced either to guidance documents that do not discuss restrooms or locker rooms, or to a document issued long after the Student Safety Plan was adopted.

Nor can it be traced, for purposes of standing, to investigations of other school districts. Those investigations are not the "challenged action of the defendant" at issue in this case. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). In any event, the factual allegations involving those investigations do not suggest any link to the adoption of the Student Safety Plan. *See* MTD at 9. The complaint cites only one investigation of a school district. Compl. ¶¶ 64–68. Plaintiffs allege that the investigation resulted in a resolution agreement, *id.* ¶ 67, but that agreement has been terminated[2] and the related litigation against the federal defendants named in that case has been voluntarily dismissed. *See* MTD at 5. Similarly, the complaint cites a lawsuit brought by the Department of Justice, which was filed long after the adoption of the Student Safety Plan. Compl. ¶ 70. That lawsuit also has been voluntarily dismissed.[3] Plaintiffs' bare allegations of earlier enforcement actions do not give rise to a plausible inference that the federal defendants coerced Dallas School District into adopting the Student Safety Plan, and certainly do not satisfy the pleading standard articulated by the Ninth Circuit in *Mendia* and *National Audubon Society*.

Because plaintiffs have not plausibly alleged that their injuries are fairly traceable to the challenged actions of the federal defendants, rather than the independent actions of Dallas School District, all claims against the federal defendants must be dismissed.

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[2] *See* Letter from the Department of Education's Office for Civil Rights to Township High School District 211 Terminating Resolution Agreement (June 7, 2017), attached as Exhibit A.

[3] Joint Stipulated Notice of Dismissal, *United States v. North Carolina*, No. 1:16-cv-00425 (M.D.N.C. Apr. 14, 2017), ECF No. 245.

B. Plaintiffs do not even attempt to show that their asserted injuries are likely redressable through relief against the federal defendants.

To survive a motion to dismiss, plaintiffs must also "allege sufficient facts plausibly establishing," *Native Village of Kivalina*, 696 F.3d at 867, that their asserted injuries are likely to be redressed by a favorable decision against the federal defendants, *Lujan*, 504 U.S. at 560–61. But the allegations in the complaint clearly suggest that Dallas School District adopted its Student Safety Plan of its own volition, and likely would not abandon it because of a ruling against the federal defendants here. The complaint notes that although the federal defendants in February 2017 withdrew the May 2016 Dear Colleague letter, which contains the only discussion of sex-segregated facilities in the challenged guidance documents, Compl. ¶ 39, Dallas School District "has not changed its policies," *id.* ¶ 75. The complaint also alleges a series of statements by Dallas School District officials in support of the Student Safety Plan. *Id.* ¶¶ 87, 91–93, 109.

In response to this argument, plaintiffs merely suggest that "it is immaterial whether" relief against the federal defendants "would motivate [Dallas School District] to withdraw the Student Safety Plan." MTD Opp. at 8. But so long as the Student Safety Plan is in effect, plaintiffs' asserted injuries will persist. And if those injuries are likely to persist whether or not this Court grants the plaintiffs relief against the federal defendants, then their asserted injuries cannot be redressed and they have no standing to sue the federal defendants.

Plaintiffs also suggest that the federal defendants' withdrawal of two guidance documents, including the May 2016 Dear Colleague letter discussing sex-segregated facilities, may not have been in good faith. They have filed a declaration with many exhibits, documenting a search of the U.S. Department of Education's website leading to an archival copy of each of the withdrawn guidance documents. *See* Decl. of Caroline Janzen, ECF No. 60. Both withdrawn guidance documents are prominently marked as "Archived Information," which is to say that

they are preserved for the record but not presently in effect. *See* ECF No. 60-1 at 51 (May 2016 Dear Colleague letter); ECF No. 60-2 at 1 (Questions and Answers on Title IX and Sexual Violence). There is no reason to think that the preservation of archival copies of withdrawn guidance documents casts doubt on the authenticity of the withdrawal.[4]

Because plaintiffs have not plausibly alleged that their injuries are likely to be redressed by relief against the federal defendants, all claims against those defendants must be dismissed.

C. Plaintiffs have not plausibly alleged the existence of the "Rule" that they would challenge here.

The federal defendants also moved to dismiss plaintiffs' claims under Rule 12(b)(6), because plaintiffs have not plausibly alleged that the "legislative rule" against which all of their claims are directed, Compl. ¶ 33, was operative at the time they filed their complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* MTD at 12–13. Because all of their claims against the federal defendants depend on the existence of this "rule" (which is speculative at best), plaintiffs have not plausibly alleged any claim against the federal defendants.

Plaintiffs do not even respond to the substance of this argument, but merely suggest that it is void because the federal defendants "made no specific mention of" each claim that depends on the existence of this rule. MTD Opp. at 1. But the federal defendants' motion was perfectly clear. Each of plaintiffs' claims against the federal defendants rests on their erroneous assertion that the federal defendants have established and maintained a "rule" that transgender students must be allowed to access particular sex-segregated facilities in schools that accept federal funds. Because plaintiffs' assertion is neither supported by the allegations in the complaint nor

[4] These withdrawn guidance documents are preserved in the online archives of the Department of Education's Office for Civil Rights, which can be accessed at www.ed.gov/ocr/archives.html. They do not appear among the current guidance documents, which can be found at www.ed.gov/ocr/frontpage/faq/rr/policyguidance/index.html.

buttressed in their opposition, plaintiffs have failed to plausibly allege the existence of such a rule. Accordingly, plaintiffs' claims must be dismissed under Rule 12(b)(6).

CONCLUSION

For the reasons set forth above and in the federal defendants' motion to dismiss, plaintiffs lack standing to bring their claims against the federal defendants, and have not stated any claim for which relief can be granted against those defendants. All claims against the federal defendants must therefore be dismissed.

Respectfully submitted,

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Attorneys for Governor Kate Brown and the Oregon Department of Education

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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

Plaintiffs,

v.

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

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

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

By Governor Kate Brown and the Oregon Department of Education

Defendants,

and

GOVERNOR KATE BROWN and OREGON DEPARTMENT OF EDUCATION,

Movants – Putative Amici.

I. INTRODUCTION

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

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

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

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

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

II. BACKGROUND

A. Transgender Students Face Serious Risks

The number of transgender youth (ages 13 to 17) in Oregon is estimated at 1,700.[1] Nationwide, transgender youth face extreme harassment and discrimination, particularly within the school environment.[2] Most often, schools are where gender-nonconforming youth first experience victimization and harassment, more so than any other context.[3] Unfortunately, that is true for many transgender students in our state. Transgender students in Oregon have

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[8] U.S. Dep'. of Health and Human Servs., *LGBTQ Youth*, https://www.stopbullying.gov/at-risk/groups/lgbt/index.html (last visited Mar. 12, 2018).

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

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

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

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

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

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B. Amici's Role in Protecting Transgender Students

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

DATED March 19, 2018.

Respectfully submitted,

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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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