PETER R. MERSEREAU, OSB No. 732028
pmersereau@mershanlaw.com
BETH F. PLASS, OSB No. 122031
bplass@mershanlaw.com
MERSEREAU SHANNON LLP
111 SW Columbia Street, Suite 1100
Portland, Oregon 97201-5865
Telephone: 503.226.6400
Facsimile: 503.226.0383

Of Attorneys for Defendant
Dallas School District No. 2

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

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

Plaintiffs,

v.

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

Defendants.

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

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

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

TABLE OF AUTHORITIES

FEDERAL CASES

///

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

STATE CASES

///

///

///

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

STATUTES AND LAWS

RULES

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

I. LR 7-1 CERTIFICATE

Pursuant to LR 7-1(a)(1)(A), the undersigned counsel for defendant Dallas School District No. 2 certifies that the parties have made a good faith effort through conferral to resolve the dispute and have been unable to do so.

II. MOTIONS

Defendant Dallas School District No. 2 (the "District") brings the following motions to dismiss plaintiffs Lindsay Golly and Nicole Lillie, and to dismiss all of the claims set forth in plaintiffs' complaint on the basis that plaintiffs have failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

III. INTRODUCTION

The Dallas School District is a public school district located in Dallas, Oregon. The District's mission is to provide opportunities for the full intellectual development of each child. Accordingly, the District prohibits discrimination and harassment on the basis of, among other things, sex, sexual orientation, and gender identity. Plaintiffs have sued the District over its inclusive policies. Plaintiffs seek to force the District to implement a policy that would discriminate against some of the District's students. The District moves to dismiss several parties and all of the claims in this lawsuit, as set forth below.

///

///

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

IV. THE COMPLAINT

The plaintiffs' complaint alleges the following facts:

A. The Dallas School District

The Dallas School District is a public school that provides K-12 education to both male and female students. Dkt. 1, Complaint ("Complaint") ¶ 20. The District does not have a written school board policy that specifically applies to the use of facilities by transgender students; however, the District has a broad nondiscrimination policy that prohibits discrimination on the basis of gender identity. Complaint Exhibit B. The District receives federal funding for its educational programs. Complaint ¶ 21.

Student A is currently a 12th grade student at Dallas High School. Complaint ¶ 76. Student A is a transgender male. Complaint Exhibit A. In September 2015, Student A began to publicly identify as male and requested permission to use the boys' facilities at the high school. Complaint ¶ 78. The District provided Student A the choice of private facilities to change clothes for physical education from the fall of 2015 through the end of the school year in June, 2016. Complaint ¶ 79. During the 2015-2016 school year, the District also developed a Student Safety Plan. Complaint Exhibit A. The Student Safety Plan permitted Student A to access the boys' locker rooms and restrooms at Dallas High School. *Id.*

The main boys' locker room at Dallas High School is a square room with four banks of lockers and wooden benches, and communal showers along one wall. Complaint ¶ 99. The boys' locker room also contains segregated lockers, showers and restroom facilities. *Id*. The girls' locker room is constructed similarly to the boys' locker room. Complaint ¶ 103.

Dallas High School students who desire the use of facilities that afford them additional

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

privacy are permitted to use the unisex staff lounge and are offered other accommodations. *See* Complaint ¶¶ 91, 265.

B. The Plaintiffs

Plaintiff Lindsay Golly no longer attends Dallas High School. *See* Complaint ¶ 16. Plaintiff A.G. is an 8th grade student at La Creole Middle School within the District. *Id.* He is not subject to the Student Safety Plan. *See* Complaint Exhibit A (stating that Student Safety Plan applies to the access to boys' locker room at Dallas High School). Plaintiffs Kris Golly and Jon Golly are the parents of Lindsay Golly and A.G. Complaint ¶ 16. Plaintiff T.F. is an 11th grade student at Dallas High School. Complaint ¶ 17. Plaintiff Melissa Gregory is T.F.'s parent. *Id.* Plaintiff Parents Rights in Education is a nonprofit organization whose mission is to protect and advocate for parents' rights to guide the education of their children. Complaint ¶ 10. Plaintiff Parents for Privacy is an association of current and former students and their parents who are concerned about United States Department of Education regulations and the Student Safety Plan. Complaint ¶ 11.

V. CONCEDED MOTIONS

A. Motion 1: Lindsay Golly should be dismissed.

The District moves to dismiss Lindsay Golly because she does not have standing. The District and plaintiffs conferred, and plaintiffs consent to this motion.

B. Motion 2: Nicole Lillie should be dismissed.

The District moves to dismiss Nicole Lillie. Lillie is identified as a plaintiff in the caption, but the complaint does not make any allegations regarding her involvement in this

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

matter. The District and plaintiffs conferred, and plaintiffs consent to this motion. Plaintiffs intend to amend the complaint to make specific factual allegations regarding Lillie.

C. Motion 3: A.G. and T.F.'s requests for compensatory damages should be dismissed.

The District moves to dismiss the request for compensatory damages brought by plaintiffs A.G. and T.F. The District and plaintiffs conferred, and plaintiffs consent to this motion. Plaintiffs intend to amend the complaint to plead the right to compensatory damages as well as the amounts sought.

VI. THE COMPLAINT FAILS TO STATE A CLAIM

A. Rule 12(b)(6) Legal Standard

In reviewing a motion to dismiss for failure to state a claim, the court's review is limited to the contents of the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). A court may also consider documents attached to the complaint, documents incorporated by reference into the complaint, or matters of judicial notice. *Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002). A motion to dismiss for failure to state a claim is proper when no cognizable legal theory supports the claim, or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief under a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). In evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). However, the court "need

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

not accept as true allegations contradicting documents that are referenced in the complaint." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

"While a complaint…does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level…." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Moreover, "where the…facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown"—that the plaintiff is "entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

B. Motion 4: Plaintiffs fail to state a claim for a violation of a constitutional right to privacy.

In the third claim for relief, plaintiffs allege that the District has violated a substantive due process right to privacy. Plaintiffs' allegations fail to state a claim for at least two reasons: (1) the alleged right to privacy does not exist; and (2) the District's policies do not infringe on the alleged rights.

(1) Plaintiffs allege a broad right to privacy that does not exist under the United States Constitution.

Plaintiffs do not have a constitutional right not to share restrooms and locker rooms with transgender students. "The Due Process Clause guarantees more than fair process, and the

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). "[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* at 720. There is no generalized "right to privacy." *See Katz v. United States*, 389 U.S. 347 (1967). Substantive due process only protects certain personal privacy rights that are "fundamental" or "implicit in the concept of ordered liberty." *Roe v. Wade*, 410 U.S. 113, 152 (1973).

Properly framed, *see Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085-86 (9th Cir. 2015), plaintiffs assert a broad, previously unrecognized right to privacy. They contend that the United States Constitution gives them the right not to encounter their transgender peers in restrooms and locker rooms. There is no legal support for the proposition that plaintiffs have a fundamental privacy right to avoid coming in contact with transgender students in common spaces. As two federal courts have recently found, high school students do not have such a right. *Students & Parents for Privacy v. U.S. Dep't. of Educ.*, 2016 WL 6134121, **23-27 (N.D. Ill. Oct. 18, 2016) ("*Students & Parents*"); *Doe v. Boyertown Area Sch. Dist.*, 2017 WL 3675418, **49-55 (E.D. Penn. Aug. 25, 2017).

This conclusion is bolstered by the fact that in assessing the existence and potential scope of plaintiffs' alleged privacy rights, the court must "consider the need to preserve the discretion of schools to craft individualized approaches to difficult issues that are appropriate for their respective communities." *Students & Parents*, 2016 WL 6134121, at *24. The public school system "relies necessarily upon the discretion and judgment of school administrations and school

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

board members[.]" *Wood v. Stickland,* 420 U.S. 308, 386 (1975). "[Section] 1983 was not intended to be a vehicle for federal court-correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees." *Id.* The Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 207 (1969). Thus, the District's decision to allow students to use restrooms and locker rooms that align with gender identity should be given great deference.

(2) The District has not infringed on plaintiffs' alleged privacy rights.

Plaintiffs assert the right to privacy in their unclothed bodies and the right to be free from government-compelled risk of intimate exposure to the opposite biological sex. *See* Complaint ¶¶198-199. Assuming for the sake of argument that such a broad right exists and is actually at issue in this case, plaintiffs have not alleged that District policies infringed upon those rights.

In order for a government entity to be responsible for the violation of an individual's constitutional rights, government action must violate that right. *See, e.g., Whalen v. Roe,* 429 U.S. 589 (1977). The government's interference must be direct or substantial. *Zablocki v. Redhail*, 434 U.S. 374, 387 n. 12 (1978). Mere incidental effects are not cognizable. *Christensen v. County of Boone,* 483 F.3d 454, 463 (7th Cir. 2007).

Here, the District has authorized Student A to use the main sex-segregated locker rooms and restrooms. Plaintiffs allege that within those locker rooms are "segregated lockers, showers and restroom facilities[.]" Complaint ¶ 99. Plaintiffs further allege that students who wish to use private facilities have been given the option to do so. Complaint ¶ 91. Thus, plaintiffs have

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

not alleged facts to show that the government has compelled them to risk exposing themselves to the "opposite biological sex."

Moreover, the complaint does not allege that either remaining student plaintiff – A.G. or T.F. – has ever seen a transgender student's unclothed body. As such, and as was the case in *Students & Parents,* "this case does not involve any forced or involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth" and "Plaintiffs are not suffering a 'direct' and 'substantial' infringement on any substantive due process right." *Students & Parents,* 2016 WL 6134121, at *95.

C. Motion 5: The District's policy does not violate parents' rights to control the upbringing of their children.

Plaintiffs allege that the District is violating their constitutional right to control and direct the upbringing of their children by (a) allowing District students to access facilities that align with gender identity, and (b) staff conducting a Needs Assessment at La Creole Middle School. Plaintiffs fail to state a claim because the parental right to direct the upbringing of children – the so-called *Meyer-Pierce* right – "does not extend beyond the threshold of the school door." *Fields v. Palmdale Sch. Dist.,* 427 F.3d 1197, 1207 (9th Cir. 2005).

The Due Process Clause of the Fourteenth Amendment gives parents and guardians the right to control the upbringing of their children. *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535 (1925). However, this right is limited, and it does not give parents the right to dictate the policies of public educational institutions. *Leebaert v. Harrington,* 332 F.3d 134, 141 (2d Cir. 2003) ("*Meyer, Pierce,* and their progeny do not begin to

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

suggest the existence of a fundamental right of every parent to tell a public school what his or her child will or will not be taught.") The right allows parents to remove their children from a public educational institution and select a private institution, or school their children at home, in order to inculcate the children with their preferred values. *See Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995). It does not "afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense." *Fields*, 427 F.3d at 1206.

To illustrate, the Constitution protects a parent's right to teach their children that racial segregation is preferable. *Runyon v. McCrary*, 427 U.S. 160, 177 (1976). However, the Constitution clearly does not require, or entitle, a school to racially segregate its students in order to support such a viewpoint. *Id.* The Supreme Court has clearly stated that, simply because some parents wish to teach their children that racial discrimination is not only permissible but positive, schools remain prohibited from doing so, and this prohibition does not violate this parental right. *Id.*

The District is permitted to institute policies, such as the Student Safety Plan, in order to educate and accommodate District students. The parent plaintiffs' disagreement with the District's decision-making in this regard does not violate parents' right to control their child's education.

Plaintiffs also allege that the District violated their constitutional right to direct the upbringing of their children because staff at La Creole Middle School administered a "Needs Assessment" to students. This precise assertion was rejected by the Ninth Circuit in *Fields*. There, parents complained that a survey administered to their first, third and fifth grade students,

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

which included explicit questions on the subject of sex, violated their substantive due process rights to parental control. *Fields*, 427 F.3d at 1200-1203. The court rejected the parents' claim:

> The parents' asserted right 'to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs,' by which they mean the right to limit what public schools or other state actors may tell their children regarding sexual matters, is not encompassed within the right to control their children's upbringing and education.

Id. at 1207.

Notwithstanding, plaintiffs have not alleged facts sufficient to hold the school district liable based on the Needs Assessment. There is no vicarious liability under section 1983. *Monell v. Dep't of Social Svs. of City of New York*, 436 U.S. 658, 691-94 (1978). Instead, a municipal entity – here, the District – rather than the individual employees must have caused the alleged constitutional deprivation. *Id.* at 692. Therefore, a plaintiff suing under section 1983 must identify a policy or custom of the government body that caused the constitutional deprivation, and a link between the policy or custom and the alleged deprivation. Mere assertions that a defendant deprived a plaintiff of their constitutional rights are insufficient to maintain a section 1983 claim. Likewise, a plaintiff's failure to identify a policy or custom which led to the deprivations, or to allege facts which would meet the municipal policy requirement, are grounds on which to dismiss section 1983 claims. That is, so-called *Monell* liability is an element of any section 1983 claim, meaning that "notice" pleading standards require plaintiffs suing municipal entities under section 1983 to allege that *Monell* is satisfied, and to provide plausibly supporting facts. *AE ex rel. Hernandez v. Co. of Tulare*, 666 F.3d 631, 636-38 (9th Cir. 2012) (so holding).

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

There are three general ways that a plaintiff making a section 1983 claim can establish that the municipal entity itself caused an alleged constitutional deprivation. First, a plaintiff can prove that the employee who deprived him of a constitutional right did so because he was acting pursuant to a formal municipal policy, or a custom of the municipal entity so entrenched that it amounts to a formal policy. Second, the plaintiff can prove that the person who allegedly deprived him of a constitutional right was an official with "final policymaking" authority such that the official's act necessarily constitutes a formal municipal policy. Third, a plaintiff can prove that an official with final policymaking authority "ratified" a municipal employee's alleged unconstitutional act. *See Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992).

Here, the complaint fails to identify any policy or custom of the District which caused the administration of the Needs Assessment of which they complain. Nor does the complaint allege any facts that would otherwise meet the municipal policy requirement. Therefore, plaintiffs failed to state a claim predicated on the Needs Assessment.

D. Motion 6: Plaintiffs do not allege facts to establish a Title IX hostile environment claim.

Plaintiffs' fourth claim is for a Title IX violation based on an allegedly sexually harassing hostile environment. They allege that allowing students to use restrooms, locker rooms, and showers that correspond to gender identity creates a sexually hostile environment.

Title IX provides in part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a).

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

To prevail on a Title IX hostile environment claim, plaintiffs must allege and prove the District had 1) "actual knowledge" of, and 2) was "deliberately indifferent" to, 3) harassment "on the basis of sex" by 4) someone the school district controlled, that was 5) so "severe, pervasive, and objectively offensive" that it deprived plaintiffs of access to the educational benefits or opportunities provided by the school district. *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 644-45, 650 (1999).

(1) Plaintiffs have not alleged a hostile environment based on sex.

Plaintiffs have not alleged that they were harassed or treated differently on the basis of their sex. In order to state a claim for harassment in violation of Title IX, the harassment must be "on the basis of sex." 20 U.S.C. § 1681.

Plaintiffs complain about the Student Safety Plan, but they are not being targeted or singled out on the basis of sex, nor are they being treated any differently than any female students who attend school within the District. The District's Nondiscrimination Policy applies to all students. Complaint Exhibit B. It applies equally to male and female students. *Id.* The mere fact that Student A is utilizing the policy to access District facilities, and that it is memorialized in the Student Safety Plan does not demonstrate that the Student Safety Policy targets male students because of their sex. *See Students & Parents*, 2016 WL 6134121, at *31. Because there is no discrimination on the basis of sex, plaintiffs fail to state a claim under Title IX.

(2) A student's use of school facilities that corresponds to gender identity is not severe, pervasive, and objectively offensive.

The allegations in the complaint do not come close to the "severe, pervasive, and

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

objectively offensive" standard required by Title IX. *Davis,* 526 U.S. at 633 (holding that an action "will lie only for harassment" that meets all three requirements). Conduct that rises to this level typically involves multiple instances of physical sexual contact or threatened physical sexual contact. For example, *Davis* involved several instances of sexual touching and suggestive rubbing. 526 U.S. at 653 (describing repeated acts of harassment and noting that the perpetrator ultimately pleaded guilty to criminal sexual misconduct); *see also, Vance v. Spencer County Public School District,* 231 F.3d 253, 259 (6th Cir. 2000); *Roe ex rel. Callahan v. Gustine Unified School District,* 678 F.Supp.2d 1008, 1026 (E.D. Cal. 2009).

Neither remaining student plaintiff has alleged a single specific instance of harassment or improper use of District facilities. Instead, they suggest 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. It is not.

Cases that involve sex-based harassment or hostile environment claims predicated on transgender people sharing facilities alongside their cisgender peers have rejected plaintiffs' theory. In *Cruzan v. Special School District No. 1,* 294 F.3d 981 (8th Cir. 2002) (per curium) a female teacher alleged that the school's decision to allow a transgender female teacher to use the women's faculty restroom created a hostile work environment on the basis of sex. The Eighth Circuit rejected plaintiffs' argument, finding that a transgender female's presence in a restroom alongside her cisgender female co-worker did not create a hostile working environment:

> [The plaintiff] does not assert [her transgender female colleague] engaged in any inappropriate conduct other than merely being present in the women's faculty restroom. Given the totality of the circumstances, we conclude a reasonable person would not have found the work environment hostile or abusive.

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

Id. at 984; *see also Students & Parents,* 2016 WL 6134121, at *32 ("mere presence" of transgender student in restroom or locker room is not objectively offensive); *Boyertown,* 2017 WL 3675418, at *66 (same).

Here, similarly, there is no allegation that Student A or any other District student has done anything other than use the restrooms and locker rooms for the facilities' designated purpose. This does not meet the high standard necessary to allege severe, pervasive, and objectively offensive harassment under Title IX.

(3) Plaintiffs do not have a Title IX claim predicated on the District's offer to accommodate them.

The District has offered accommodations to students request to use restrooms and locker room facilities that afford additional privacy. *See* Complaint ¶¶ 243-244. Plaintiffs contend that these accommodations violate Title IX. *Id.* at ¶ 245.

There is no legal support for this proposition. The plaintiffs' complaint alleges that the District provides comparable locker room facilities for males and females. *See* Complaint ¶ 104. As the court explained in *Students & Parents,* "Student plaintiffs who choose to use the alternate single-use facilities cannot complain that the alternate facilities are not 'comparable' to the main facilities offered to boys and girls, which they have chosen not to use." 2016 WL 6134121, at *36.

E. Motion 7: Plaintiffs have not stated a Free Exercise claim.

The Student Safety Plan does not violate the plaintiffs' Free Exercise rights. The plaintiffs allege that the District's actions "burden the free exercise rights of some Plaintiffs[.]"

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

This claim is without merit.

(1) Kris Golly, Jon Golly, and A.G. do not have standing to assert a Free Exercise claim based on the Student Safety Plan.

The Gollys and A.G. do not have standing to assert a Free Exercise Claim. Article III of the Constitution limits the jurisdiction of federal district courts to "cases" or "controversies," a restriction which requires a plaintiff to show that he or she has actually been injured by defendant's challenged conduct. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). To satisfy the case-or-controversy requirement of Article III which is the "irreducible constitutional minimum" of standing, a plaintiff must show three things. First, that they have suffered an "injury in fact," which is an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must show, second, that there is a causal connection between the injury and the conduct complained of." *Id.* And third, it "must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561. In shorthand, a plaintiff must show injury in fact, causation, and redressability.

The only specific allegations concerning the Free Exercise claim involve Kris and Jon Golly and their son A.G.[1] *See* Complaint ¶ 120, 216. They do not allege that the Student Safety Plan has compelled them to do anything that violates the teachings of their religion, nor could they make such an allegation. The Student Safety Plan plainly applies to Dallas High School. Complaint Exhibit A. Kris Golly, Jon Golly, and A.G. do not attend Dallas High School. Therefore, they do not have standing to bring a Free Exercise claim to challenge the Student

[1] As stated above, plaintiffs have agreed to dismiss Lindsay Golly.

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

Safety Plan.

(2) The Student Safety Plan does not violate the Free Exercise clause.

The First Amendment's Free Exercise Clause provides that "Congress shall make no law…prohibiting the free exercise [of religion]." U.S. Const. amend. I. The right to exercise one's religion freely, however, "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)." *Emp't Div. v. Smith,* 494 U.S. 872, 879 (1990) (internal quotation marks omitted).

The Student Safety Plan is generally applicable and neutral with respect to religion. And plaintiffs do not allege that the District was motivated to enact the Student Safety Plan to target a particular religion or religion generally. Thus, it need only be rationally related to a legitimate interest in order to be deemed permissible under the Free Exercise clause. *Smith,* 494 U.S. at 897; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993) (It is only when religious practices or groups are particularly targeted by a policy or law that heightened scrutiny applies.).

The Student Safety Plan easily satisfies rational basis review. As plaintiffs' complaint notes, the Student Safety Plan was adopted in order to support a District student and to comply with the law. *See* Complaint ¶ 75; *see also Schwenk v. Hartford,* 204 F.3d 1187, 1201-03 (9th Cir. 2000). Because the District's policies were instituted for completely secular reasons, are neutral with respect to religion, and apply to all students, plaintiffs' Free Exercise claim fails.

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

F. Motion 8: Plaintiffs' allegations fail to state claims under ORS 659.850 and ORS 659A.403.

Plaintiffs' allegations do not state claims under ORS 659A.850 or ORS 659A.403 because plaintiffs allege that everyone is treated in the same manner. ORS 659.850 prohibits discrimination "based on…religion…sex, [and] sexual orientation" in schools which receive state funds. Oregon courts have interpreted ORS 659.850's prohibition against "discrimination" to mean that a school district cannot commit an act or permit someone to commit an action, that subjects a student to "treatment different from that afforded other children" because of a protected characteristic. *See Powell v. Bunn,* 341 Or 306, 313-316, 142 P.3d 1054 (2006). Likewise, ORS 659A.403 prohibits discrimination in public accommodations "on account of...religion, sex, [and] sexual orientation." ORS 659A.403(1); *Klein v. Oregon Bureau of Labor and Industries*, 289 Or. App. 507, __ P.3d __ (Dec. 28, 2017).

Plaintiffs fail to state a claim under these statutes for the same reasons described above with respect to the Title IX claim. Plaintiffs do not allege facts to show that they have been treated differently than others on the basis of their religion, sex, or sexual orientation. Rather, they allege everyone is treated in the same manner. Accordingly, plaintiffs fail to state a claim under ORS 659.850 and 659A.403.

///

///

///

MERSEREAU SHANNON LLP
111 SW COLUMBIA STREET, SUITE 1100
PORTLAND, OREGON 97201-5865
(503) 226-6400

VII. CONCLUSION

For the reasons given above, the District requests that the Court dismiss plaintiffs' complaint.

DATED: February 20, 2018.

MERSEREAU SHANNON LLP

s/ Peter R. Mersereau

PETER R. MERSEREAU, OSB No. 732028
pmersereau@mershanlaw.com
BETH F. PLASS, OSB No. 122031
bplass@mershanlaw.com
503.226.6400
Of Attorneys for Defendant
Dallas School District No. 2