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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

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

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2018 I served the foregoing PLAINTIFF'S RESPONSE TO BASIC RIGHTS OREGON'S MOTIONS TO DISMISS on the following via the indicated method(s) of service:

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

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

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

I further certify that on March ___, 2018 I served the foregoing PLAINTIFF'S RESPONSE TO BASIC RIGHTS OREGON'S MOTIONS TO DISMISS on the following via the indicated method(s) of service:

James Bickford,
Civil Division, U.S. Department of Justice
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Of Attorneys for U.S. Defendants

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

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