No. 24-6072

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDREW BRIDGE, *et al.*,

Plaintiffs-Appellants,

v.

OKLAHOMA STATE DEPARTMENT OF EDUCATION, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:22-CV-787-JD, The Honorable Judge Jodi Dishman

JOINT OPENING BRIEF OF THE SCHOOL DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Federal Law

Federal Cases

Oklahoma Constitution

Oklahoma Law

State Regulations

Other

RELATED APPEALS

The School Defendants are not aware of any appeals prior to or related to this case.

RELEVANT PROCEDURAL HISTORY

Andrew Bridge, Mark Miles, and Sarah Stiles (collectively "Plaintiffs") filed their Complaint on September 6, 2022. *See* Complaint, App'x at 10.[1] Independent School District No. 2 of Cleveland County, Oklahoma ("Moore School District"), Independent School District No. 40 of Cleveland County, Oklahoma ("Noble School District"), Independent School District No. 89 of Oklahoma County, Oklahoma ("Oklahoma City School District"), and Harding Independence Charter District, Inc. ("Harding Charter School District") (collectively the "School Defendants") each filed timely answers to the Complaint.

The Oklahoma State Department of Education ("SDOE"), the State Superintendent of Instruction, each board member of the Oklahoma State Board of Education ("SBOE"), and the Oklahoma Attorney General (collectively the "State Defendants") filed a motion to dismiss on October

[1] The following citation convention will be utilized for citations to the Appendix or Supplemental Appendix: Abbreviated Title of Document, [App'x or Supp. App'x], [Vol. # (if applicable)] at [pin cite].

26, 2022. *See* Motion to Dismiss by State Defendants, App'x at 118. The School Defendants did not file a motion to dismiss the Complaint but asserted Rule 12(b) defenses in their respective answers. *See* Answer of Oklahoma City School District, App'x at 55, ¶ 1; Answer of Harding Charter School District, App'x at 62, ¶ 1; Answer of Noble School District, App'x at 84, ¶¶ 150–52; Answer of Moore School District, App'x at 111–12, ¶¶ 150–52.

On September 29, 2022, Plaintiffs filed a motion for preliminary injunction as to the School and State Defendants. *See* Plaintiffs' Motion for Preliminary Injunction, Supp. App'x, Vol. 1 at 23. In their motion, Plaintiffs made substantive legal arguments regarding the merits of their claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("Equal Protection") and Title IX to the Education Amendments of 1972 ("Title IX") against the School Defendants. *See id.*, Supp. App'x, Vol. 1 at 30–54. The School Defendants filed a response to the preliminary injunction motion on November 16, 2022. *See* School Defendants' Response to Motion for Preliminary Injunction, Supp. App'x, Vol. 2 at 504. Contrary to Plaintiffs' assertion in their opening brief, the School Defendants *did take a position* as to the

merits of the Plaintiffs' requested relief. *See generally id.*, Supp. App'x, Vol. 2 at 509–24.

While Plaintiffs are correct that the School Defendants did not take a position on the legality of Oklahoma Senate Bill 615, now codified at OKLA. STAT. tit. 70, § 1-125[2] ("S.B. 615"), the School Defendants asserted Plaintiffs could not legally prevail on Equal Protection and Title IX claims merely as a consequence of the School Defendants complying with S.B. 615. *See generally id.*

After the district court granted the State Defendants' motion to dismiss, the School Defendants moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). School Defendants' Motion for Judgment on the Pleadings, App'x at 260. The district court granted the School Defendants' motion on March 22, 2024. Order Granting School Defendants' Motion for Judgment on the Pleadings, App'x at 268.

[2] Following its enactment on May 25, 2022, OKLA. STAT. tit. 70, § 1-125, was amended on July 1, 2023, to include new language allowing coaches to, under certain conditions, enter restrooms and changing areas designated for the opposite sex. These changes were not material to the issues raised in this lawsuit. However, to clarify, any references to S.B. 615 or OKLA. STAT. tit. 70, § 1-125, are to the statute as originally enacted and in force at the time this lawsuit was filed.

Throughout this litigation, the School Defendants have maintained that they cannot be held legally responsible for implementation of the requirements of S.B. 615. Accordingly, Plaintiffs failed to state a claim for relief against the School Defendants, and the district court's dismissal on the pleadings should be affirmed.

SUMMARY OF ARGUMENT

Plaintiffs brought suit against the School Defendants because they adopted a bathroom policy implementing the requirements of S.B. 615. By doing so, Plaintiffs allege the School Defendants violated their substantive due process rights under the Equal Protection Clause and discriminated against them on the basis of sex in violation of Title IX.

Both claims must fail because the School Defendants had no meaningful choice in adopting the policy. S.B. 615 mandates that:

> To ensure privacy and safety, each public school and public charter school that serves students in prekindergarten through twelfth grades in this state shall require every multiple occupancy restroom or changing area designated as follows:
>
> 1. For the exclusive use of the male sex; or

2. For the exclusive use of the female sex.[3]

OKLA. STAT. tit. 70, § 1-125(B). S.B. 615 further mandates that no school district board of education or public charter school governing board shall adopt a policy contrary to S.B. 615's provisions. *Id.* § 1-125(E)(2).

The mandate has teeth. A finding of noncompliance necessitates that the noncompliant school district "shall receive a five percent (5%) decrease in state funding . . . for the fiscal year following the year of noncompliance." *Id.* § 1-125(F). In addition to this severe financial penalty, S.B. 615 creates a cause of action for parents and legal guardians to sue a non-compliant school district or public charter school. *Id.* § 1-125(G). Additionally, the SBOE adopted rules[4] providing that schools will be evaluated during the accreditation process to ensure compliance with S.B. 615. OKLA. ADMIN. CODE 210:35-3-186(h)(5)(A). The rules provide that failure to comply with S.B. 615 may result in adverse accreditation

[3] The statute defines "sex" as the "physical condition of being male or female based on genetics and physiology, as identified on the individual's original birth certificate[.]" OKLA. STAT. tit. 70, § 1-125(A)(1).

[4] The SBOE initially adopted emergency rules on August 25, 2022. *See* 40 Okla. Reg. 141 (Nov. 15, 2022) (included in addendum). However, the emergency rules were not effective until Governor Stitt approved them on September 14, 2022. *Id.* Consequently, the emergency rules were not in effect at the time Plaintiffs filed their lawsuit on September 6, 2022.

action. *Id.* Adverse accreditation action includes non-accreditation, which means the school is no longer recognized by the SBOE.

The School Defendants cannot be held liable for adopting a policy that the Oklahoma Legislature compels them to adopt. To succeed on their Equal Protection claim, Plaintiffs must show that a "final policymaker" caused the constitutional harm. Ordinarily, a public school's final policymaker is its governing board, or another person to whom such authority has been delegated. Under S.B. 615, the Oklahoma Legislature supplanted this policymaking authority. The State made itself the final policymaker as to bathroom usage in public schools. In the Title IX analysis, a school district can only be liable for its own intentional acts. As is the case under the Equal Protection Clause, the School Defendants cannot be liable under Title IX for enacting mandatory state laws.

The School Defendants ask the Court to affirm the dismissal of Plaintiffs' claims against them. Moreover, the School Defendants ask this Court to hold that Oklahoma school districts cannot be liable for obeying mandatory laws and regulations.

BACKGROUND

Moore School District and Noble School District are public school districts located in Cleveland County, Oklahoma, and are recipients of both state and federal funding. Complaint, App'x at 17–18, ¶¶ 19–20. Harding Charter School District is a public charter school district and a recipient of both state and federal funding. *Id.* ¶ 22. Oklahoma City School District is the authorized public chartering agency that sponsors Harding Charter School District. *Id.* ¶ 21. Although Oklahoma City School District receives federal funding, it did not and does not receive any state or federal funding for any of the Plaintiffs, and it exercises no control over the day-to-day activities of Harding Charter School District. *See* OKLA. STAT. tit. 70, § 3-134(L); *see also* Complaint, App'x at 18, ¶ 21; Answer of Harding Charter School District, App'x at 54, ¶ 11.

The SDOE and the SBOE are charged with supervising and adopting regulations as to the public school system of Oklahoma. Complaint, App'x at 15–16, ¶ 16. The School Defendants are under the general direction and control of the SDOE and SBOE. *Id.*, App'x at 15, ¶ 15. The SDOE is responsible for the allocation of state aid to the School Defendants. OKLA. STAT. tit. 70, § 3-104(A)(3)(a). The SBOE is required

to reduce the School Defendants' state aid upon a finding of non-compliance with OKLA. STAT. tit. 70, § 1-125(B) or (C).[5] *See* Complaint, App'x at 13, ¶ 6; OKLA. STAT. tit. 70, § 1-125(F), (H).

The School Defendants had no role in enacting S.B. 615 or in the adoption of emergency SDOE rules. *See* Complaint, App'x at 12, ¶ 3; *see also generally* Answer of Oklahoma City School District, App'x at 52–56; Answer of Harding Charter School District, App'x at 57–63; Answer of Noble School District, App'x at 64–90; Answer of Moore School District, App'x at 91–117; School Defendants' Response to Motion for Preliminary Injunction, Supp. App'x, Vol. 2 at 509–13.

On May 25, 2022, Oklahoma Governor Stitt signed S.B. 615, which mandated Oklahoma public schools to enforce restrictions on usage of restrooms or changing areas based on a student's sex as assigned in their original birth certificate. Complaint, App'x at 12, ¶ 3. S.B. 615 also mandated Oklahoma public schools to adopt a policy to provide disciplinary action for individuals who refuse to comply with the law. *Id.*, App'x at 13, ¶ 5. Upon a finding of non-compliance, a public school shall

[5] The amendment of OKLA. STAT. tit. 70, § 1-125, on July 1, 2023, included violation of Subsection D as an additional basis for reduction of state aid.

be penalized with a five percent (5%) decrease in state funding. Complaint, App'x at 13, ¶ 6; OKLA. STAT. tit. 70, § 1-125(F). Additionally, the law allows a parent/guardian of an enrolled student to file a lawsuit against a public school for non-compliance. Complaint, App'x at 28–29, ¶ 57; OKLA. STAT. tit. 70, § 1-125(G).

Each year, the School Defendants receive state aid administered by the SDOE. OKLA. STAT. tit. 70, § 3-104(A)(3)(a). For the 2021–2022 fiscal year, Harding Charter School District received $4,486,015.23 in state education funds. *See* Affidavit of Steven Stefanik (attached as Ex. 1 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp. App'x, Vol. 2 at 529, ¶ 11. For the 2022–2023 fiscal year, Harding Charter School District anticipated receiving $4,425,421.56 in state educational funds. *Id.* ¶ 12. For the 2023–2024 fiscal year, a five percent (5%) reduction in state funding would equal $221,271.07. *Id.* ¶ 13.

Similarly, Noble School District received more than sixty percent (60%) of its funding from the State of Oklahoma. *See* Declaration of Frank Solomon (attached as Ex. 2 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp. App'x, Vol. 2 at 541, ¶ 4. The state aid calculation for Noble School District for the 2022–2023 fiscal year was

$12,674,405.13. *Id.* ¶ 5. A five percent (5%) reduction in state aid in the 2023–2024 fiscal year would result in a reduction of $633,720.55 in state funding. *Id.* ¶ 6.

Moore School District received approximately fifty-six percent (56%) of its funding from state aid. Declaration of Dr. Robert Romines (attached as Ex. 3 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp. App'x, Vol. 2 at 544, ¶ 4. The 2022–2023 school year state aid calculation for Moore School District was $81,111,718.46. *Id.* ¶ 5. A five percent (5%) reduction in state aid for the 2023–2024 fiscal year would result in a reduction of $4,100,000 in state funding. *Id.*, Supp. App'x, Vol. 2 at 545, ¶ 6.

A five percent (5%) reduction of state aid funds provided to School Defendants would result in corollary reduction of staffing, reduction of educational services, reduction of programs, elimination of course offerings, increased class sizes, and/or implementation of busing reductions. *See* Affidavit of Steven Stefanik (attached as Ex. 1 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp. App'x, Vol. 2 at 529, ¶ 14; Declaration of Frank Solomon (attached as Ex. 2 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp.

App'x, Vol. 2 at 542, ¶ 7; Declaration of Dr. Robert Romines (attached as Ex. 3 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp. App'x, Vol. 2 at 545–46, ¶¶ 9–10.

S.B. 615 compelled "already underfunded" School Defendants to adopt the bathroom policy at issue, or else face a "punitive 5% budget cut," which Plaintiffs admit was "unpalatable" for the School Defendants. *See* Complaint, App'x at 28, ¶ 56. Furthermore, "the threat of private lawsuits and accompanying expenses against Oklahoma public schools and public charter schools underscores the coercive nature of SB 615." *Id.*, App'x at 29, ¶ 57. As a result, the School Defendants had no meaningful choice but to comply with the requirements of S.B. 615.

STANDARD OF REVIEW

An appellate court reviews *de novo* the district court's granting of "a defense motion for judgment on the pleadings . . . using the same standard of review applicable to a Rule 12(b)(6) motion." *Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1259 (10th Cir. 2004). A motion for judgment on the pleadings is analyzed under the same standard that applies to a motion to dismiss. *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240–41 (10th Cir. 2005). In applying *de novo*

review, this Court will "accept the well-pled factual allegations in the complaint as true [and] 'resolve all reasonable inferences in the plaintiff's favor.'" *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195, 1200–01 (10th Cir. 2016) (brackets in original). In short, this Court will determine whether the Complaint states a valid claim against the School Defendants. *Id.*

ARGUMENT

PROPOSITION I

THE COURT MAY AFFIRM DISMISSAL OF THE SCHOOL DEFENDANTS ON ALTERNATIVE GROUNDS

This Court has routinely held that it can "affirm a district court's decision 'on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.'" *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1290 (10th Cir. 2001) (affirming motion to dismiss on alternate grounds) (noting that "[r]emanding [a] case for dismissal under Rule 12(b)(6) would indeed be a 'futile exercise.'"); *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000) (affirming motion to dismiss on alternate grounds).[6]

[6] *See also Bradford v. U.S. Dept. of Labor*, 101 F.4th 707, 718 (10th Cir. 2024) (affirming denial of preliminary injunction on alternate grounds);

In *Richison*, this Court elaborated that "appellants must always shoulder a heavy burden—they must come ready both to show the district court's error and, when necessary, to explain why no other grounds can support affirmance of the district court's decision." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (affirming grant of summary judgment on alternate grounds) (clarifying that the Court "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to [the Court] on appeal.").

While the School Defendants did not join in the State Defendants' motion to dismiss or file one of their own, the School Defendants nonetheless made substantive arguments in response to Plaintiffs' preliminary injunction motion, and Plaintiffs had the opportunity to

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Walton v. Powell, 821 F.3d 1204, 1212 (10th Cir. 2016) (affirming ruling on summary judgment motions on alternate grounds) (holding that "[t]o prevent cases from needlessly bouncing back and forth between district and appellate courts, this court is entitled to affirm a district court on alternative grounds that court didn't consider if those grounds are adequate, apparent in the record, and sufficiently illuminated by counsel on appeal."); *Brown v. Collins*, 517 F. App'x 71, 72 (3d Cir. 2013) (unpublished) (affirming grant of judgment on pleadings on alternate grounds).

reply to those arguments. Although not reached by the district court, the School Defendants' arguments set forth below were responded to by Plaintiffs, and are set forth fully on appeal. Thus, the School Defendants' arguments are properly before this Court.

In their opening brief, Plaintiffs point out that they are not appealing the district court's decision as to the motion for preliminary injunction. Appellants' Opening Br., at 27 n.4. Presumably this is why Plaintiffs declined to include pleadings related to their preliminary injunction motion in their Appendix. Nevertheless, the School Defendants' arguments in response to that motion are relevant to the School Defendants' position on this appeal. Plaintiffs broadly state that the sole issue on appeal is whether "the district court err[ed] in dismissing Plaintiffs' Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c)[.]" Appellant's Opening Br., at 4. The School Defendants' response to the motion for preliminary injunction may, and should, be considered by this Court.

Moreover, all School Defendants filed answers asserting affirmative defenses that Plaintiffs failed to state a claim upon which relief can be granted. Answer of Oklahoma City School District, App'x at

55, ¶ 1; Answer of Harding Charter School District, App'x at 62, ¶ 1; Answer of Noble School District, App'x at 84, ¶¶ 150–52; Answer of Moore School District, App'x at 111–12, ¶¶ 150–52.

Moore School District and Noble School District asserted affirmative defenses explicitly stating that they could not be held liable for adoption of policies required by S.B. 615, because Plaintiffs could not show that they acted as "final policymaker" for purposes of establishing municipal liability. *See* Answer of Noble School District, App'x at 88, ¶ 166; Answer of Moore School District, App'x at 115–16, ¶ 166. Similarly, each of the School Defendants asserted affirmative defenses contending that they could not be liable under Title IX because Plaintiffs could not demonstrate a voluntary, non-state-coerced act evidencing deliberate indifference or a hostile environment in violation of Title IX. *See* Answer of Oklahoma City School District, App'x at 56, ¶ 5; Answer of Harding Charter School District, App'x at 62, ¶ 4; Answer of Noble School District, App'x at 88, ¶ 168; Answer of Moore School District, App'x at 116, ¶ 168. The School Defendants pled and preserved these defenses sufficiently for this Court's consideration on appeal from a judgment on the pleadings.

Even if the School Defendants had ***never*** raised the arguments discussed herein at the district court level, on appeal this Court could still affirm the lower court's judgment on the pleadings by virtue of the plain meaning of the factual averments made in Plaintiffs' Complaint. *See* Complaint, App'x at 12, ¶ 3, and 19–20, ¶¶ 56–57. Plaintiffs' own Complaint necessitates the conclusion that the School Defendants cannot be held legally liable under the Equal Protection Clause or Title IX for the alleged harm suffered by Plaintiffs. *See infra* Proposition II, at 26–27. The School Defendants' arguments are properly before this Court.

PROPOSITION II

PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex., et al. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "An equal protection claim must allege that the challenged state action purposefully discriminates based on class membership." *Fowler v. Stitt*, 104 F.4th 770, 784 (10th Cir. 2024) (emphasis added).

In the context of a political subdivision such as a school district, the municipal entity "can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (emphasis in original). To answer whether the municipality itself caused a constitutional violation, it must be shown that a final policymaker chose to "follow a course of action" that led to a constitutional violation. *Id.* at 388.

Determining where final policymaking authority lies is a question of state law. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). Under Oklahoma law, school districts retain exclusive local control over certain enumerated and implied functions, while the Oklahoma Legislature, the SBOE, and the SDOE exercise general control and supervision over school districts. *See* OKLA. CONST. art. 13, §§ 1, 5; OKLA. STAT. tit. 70, § 3-104; OKLA. STAT. tit. 70, § 5-117.

Illustrative of this balance between State and local authority, OKLA. STAT. tit. 70, § 5-117(A)(2)–(3), empowers a school district's board of education to "[m]ake rules, *not inconsistent with the law or rules of the State Board of Education*, governing the board and the school system of the district" and to "[m]aintain and operate a complete public school

system of such character as the board of education shall deem best suited to the needs of the school district." (emphasis added).

In other areas, state statutes carve out authority exclusive to school districts for more specifically delineated purposes. *Compare* OKLA. STAT. tit. 70, § 11-103.6a(F) (stating that "[s]chool districts shall exclusively determine the instruction, curriculum, reading lists and instructional materials and textbooks, subject to any applicable provisions or requirements as set forth in the law[.]") *with id.* § 11-103.6a(E) (stating that "[t]he content of all subject matter standards and corresponding student assessments shall be solely approved and controlled by the state through the State Board of Education.").

Read together, these statutes demonstrate that a school district's board of education has express and implied authority to act as final policymaker for the school district, *unless* such authority is supplanted by the State's authority.

S.B. 615 is one example where the Oklahoma Legislature and/or the SDOE has sought to preempt the local control of school districts on

certain issues.[7] In this case, the Oklahoma Legislature has preempted school districts' local control as to the usage of school bathrooms. This preemption is fatal to Plaintiffs' claims against the School Defendants. Once a school district's local control is preempted by State law, it is stripped of its final policymaking authority as to that issue. *See Pembaur*, 475 U.S. at 483.

In *Whitesel v. Sengenberger*, this Court recognized that a political subdivision "cannot be liable for merely implementing a policy created by" state government. 222 F.3d 861, 872 (10th Cir. 2000). There, the plaintiff sued a board of county commissioners for implementing a policy created by the state judiciary. *Id.* In *Whitesel*, the Court held that § 1983 liability could not exist under such circumstances because a plaintiff must show that the final policymaker of the political subdivision was "the

[7] *See also, e.g.*, THE SAVE WOMEN'S SPORTS ACT, codified at OKLA. STAT. tit. 70, § 27-106 (requiring separation of school-sponsored athletic teams based on biological sex and creating a cause of action against school districts that fail to follow the statute); Ryan Walters, *SDOE Instructional Support Guidelines for Teachers*, accessible at: https://sde.ok.gov/ (last visited July 31, 2024) (accessible via link below "What's New?" titled "Walters Issues Guidance on Bible Usage in Historical, Literary Context") (mandating that a physical copy of the Bible and the Ten Commandments be placed in every classroom in grades five through twelve).

moving force" behind the constitutional deprivation, and the board of county commissioners could not be the "moving force" if it was simply implementing a policy created by the state judiciary. *Id.*

The same principle and rationale apply in this case. The School Defendants cannot be considered the "moving force" behind the alleged constitutional deprivations because they merely implemented policies mandated by Oklahoma law.

In another instructive case, the Second Circuit held that a county could not be liable under § 1983 for implementing a policy when it did so pursuant to a mandatory state law. *Juzumas v. Nassau Cty.*, 33 F.4th 681 (2d Cir. 2022). Nassau County required Juzumas to surrender his longarms after a conviction, as required by New York's Penal Law § 400.00(11)(a). *Id.* at 687. Juzumas sued Nassau County, claiming that the county's policy of taking his longarms violated the Second Amendment of the U.S. Constitution. *Id.* The Second Circuit concluded that the county "reasonably appl[ied] state law, [rather than] crafting its own independent firearm surrender policy untethered to the Penal Law." *Id.* at 688. The *Juzumas* court therefore held that Nassau County could not be liable for implementation of the policy. *Id.*

In reaching this decision, the Second Circuit described a two-part test for "assessing asserted constitutional violations arising from municipal enforcement of state law." *Id.* (citing *Vives v. City of New York*, 524 F.3d 346 (2d Cir. 2008)). First, it must be determined "whether the municipality had a 'meaningful choice' as to whether it would enforce state law." *Id.* If the answer is yes, then the court asks whether the "municipality adopted a 'discrete policy' to enforce the law that represented a 'conscious choice' by one of its policy makers." *Id.* The Second Circuit quickly answered both questions in favor of the county, finding that the state statute's mandatory "shall" language definitively established that the county was not the final policymaker and therefore not liable. *Id.* at 689.

S.B. 615 goes several steps further than the statute enforced by Nassau County. For instance, New York law did not punish Nassau County by imposing a financial penalty if it failed to enforce the statute. New York law did not create a cause of action for aggrieved citizens to sue the county if it failed to require individuals to surrender their weapons after a conviction. Moreover, the New York law did not expressly require Nassau County to adopt a policy enforcing the statute or

disciplining individuals that disobeyed the statute, and the law did not expressly prohibit Nassau County from adopting any policy contrary to its language.

The *Whitesel* and *Juzumas* decisions make it abundantly clear that the School Defendants cannot be liable for complying with mandatory state law. The School Defendants had no meaningful choice in implementing the provisions of S.B. 615. Consequently, Plaintiffs cannot identify any final policymaker of the School Defendants that was the "moving force" behind the bathroom restrictions Plaintiffs allege caused their injuries.

The Plaintiffs have repeatedly acknowledged this fact. Within the four corners of the Complaint, Plaintiffs admit "SB 615 **mandates** that each Oklahoma public school . . . designate . . . restrooms or changing areas exclusively for the use of either the 'male sex' or the 'female sex.'" Complaint, App'x at 12, ¶ 3 (emphasis added). Plaintiffs also aver that the "punitive 5% budget cut" would be detrimental to "already underfunded" schools and that the "threat of private lawsuits . . . underscores the coercive nature of SB 615." *Id.*, App'x at 28, ¶ 56. In their opening brief, Plaintiffs again acknowledge that S.B. 615, and the

SBOE's emergency rules[8] implementing S.B. 615, "**requir[e]** every public school . . . to designate all multiple occupancy restrooms or changing areas for the exclusive use of either the male sex or the female sex[.]"[9] Appellants' Opening Br., at 23 (emphasis added).

The Plaintiffs' own factual averments are admissions that the School Defendants had no meaningful choice in enforcing the bathroom restrictions mandated by S.B. 615. The district court's dismissal of Plaintiffs' Equal Protection claims against the School Defendants should be affirmed.

PROPOSITION III

PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF TITLE IX

Plaintiffs assert that the School Defendants violated their rights under Title IX when the School Defendants adopted multi-occupancy bathroom restrictions mandated by S.B. 615. Complaint, App'x at 46–48.

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[8] To reiterate, the emergency rules were not in effect until Governor Stitt signed them eight (8) days after the Complaint was filed.

[9] Two of the *Amici Curiae* supporting Plaintiffs also expressly recognize the mandatory obligation of public schools to follow S.B. 615. *See, e.g.*, Br. of *Amici Curiae* American Medical Association, et al., at 17; Br. for the United States as *Amicus Curiae*, at 2.

Plaintiffs' Complaint alleges that prior to the enactment of S.B. 615, the School Defendants were supportive of Plaintiffs and allowed Plaintiffs to use the multi-occupancy bathrooms that corresponded to their gender identity without incident. *Id.*, App'x at 30–31, ¶ 68, 33, ¶ 82, 36–37, ¶ 99. The School Defendants admit that they are recipients of federal funds and subject to the provisions of Title IX but assert that they had no meaningful choice as to the enforcement of S.B. 615's requirements.

Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . " 20 U.S.C.A. § 1681(a).

In *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 74 (1992), the U.S. Supreme Court concluded that monetary damages are available for a private right of action alleging an intentional violation of Title IX. The *Franklin* Court noted that remedies for violating Spending Clause statutes such as Title IX are limited when the alleged violation is unintentional. *Id.* The reason for not permitting monetary damages for an unintentional violation is that the entity receiving federal funds lacks notice that it will be liable for a monetary award. *Id.* (relying on

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 28–29 (1981)).

In 1998, the U.S. Supreme Court held a plaintiff alleging an intentional violation of Title IX, based on a school district's deliberate indifference to known acts of sexual harassment by a teacher, could recover monetary damages from the school district. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). One year later, the Supreme Court acknowledged that a school district could be liable for monetary damages arising from its deliberate indifference to known acts of student-on-student sexual harassment. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999). Since *Gebser* and *Davis*, the vast majority of Title IX cases involving public schools have involved allegations of teacher-on-student or student-on-student sexual harassment, and determining whether the school district was deliberately indifferent to known acts of sexual harassment.

To state a Title IX claim based on third party conduct, a plaintiff must allege that a school district "(1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive, and objectively offensive that it (4) deprived the plaintiff of

access to educational benefits or opportunities provided by the school." *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1246 (10th Cir. 1999).

In a Title IX action, a recipient of federal funds may only be liable for its own misconduct. *Id.* Title IX is based upon "notice . . . and an opportunity to rectify any violation[.]" *Gebser*, 524 U.S. at 290. Deliberate indifference, which is defined as an intentional violation of Title IX or a conscious decision to permit sex discrimination in a school's program, is a high standard. *Davis*, 526 U.S. at 643; *Murrell*, 186 F.3d at 1246.

In *Davis*, the Supreme Court held that Title IX liability attaches when an institution has "substantial control over both the harasser and the context in which the known harassment occurs." 526 U.S. at 645. A school district is not vicariously liable for all harassment on school grounds; rather, it is "only liable for its own misconduct." *Id.* at 640.

Moreover, the *Gebser* Court emphasized that a federal funding recipient cannot be directly liable for its indifference where it lacks the "authority to take corrective action to end the discrimination." 524 U.S. at 290. The Supreme Court has rejected vicarious liability and agency

principles as bases for holding a school district liable under Title IX for the actions of a third party such as a school employee or student. *Id.*

These cases necessitate the conclusion that a school district cannot be liable under Title IX for implementation of a policy when the policy is mandated by the State and where the school district lacks the authority to take any remedial action. In this case, the factual averments and the law are clear. The School Defendants had no meaningful choice or substantial control over whether to enforce the mandates of S.B. 615. The law unequivocally mandates that the School Defendants are prohibited from adopting any policy that does not comport with the bathroom restrictions set forth in S.B. 615. OKLA. STAT. tit. 70, § 1-125(E)(2).

Title IX is nearly identical to Title VI of the Civil Rights Act of 1964 ("Title VI") except that Title IX addresses discrimination on the basis of "sex" while Title VI addresses discrimination on the basis of "race, color, or national origin." *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cty.*, 334 F.3d 928, 936 (10th Cir. 2003) (Tacha, J., concurring). Thus, as is true with Title VI, Title IX liability may arise when a school district *intentionally* violates the clear terms of the statute. In analyzing Title VI claims, courts utilize the burden shifting analysis of *Tex. Dep't of Cmty.*

Affairs v. Burdine, 450 U.S. 248, 252–53 (1981). *Bryant*, 334 F.3d at 929–30; *Buhendwa v. Univ. of Colo. at Boulder*, 214 F. App'x 823, 827 (10th Cir. 2007) (unpublished). Likewise, in order to establish intentional discrimination under Title IX, a plaintiff must establish a *prima facie* case of discrimination. *Bryant*, 334 F.3d at 929–30. The defendant has the burden of articulating a legitimate, non-discriminatory reason for the action. *Id.* Then, the burden shifts back to the plaintiff to establish that the defendant's reason is a pretext for discrimination. *Id.*

Even if Plaintiffs had successfully pleaded a *prima facie* case of discrimination based on the School Defendants' adoption of S.B. 615's bathroom restrictions, which they have not, the fact remains that the Oklahoma Legislature **mandated** these restrictions on the School Defendants. In other words, if the Court finds that Plaintiffs adequately alleged a *prima facie* case, the School Defendants' forced compliance with S.B. 615's mandate is nonetheless a legitimate, nondiscriminatory reason for the School Defendants' actions.

Plaintiffs' own Complaint alleges that Plaintiffs were allowed to use multi-occupancy restrooms based on their gender identity prior to the enactment of S.B. 615. Complaint, App'x at 30–31, ¶ 68, 33, ¶ 82, 36–37,

¶ 99. This acknowledgement is clear evidence that the reasons for the adoption of School Defendants' policies are not a pretext for intentional discrimination.

As noted in *Bryant*, "[c]hoice implicates intent." 334 F.3d at 933. The SDOE provides general supervision of all Oklahoma public schools, controls and distributes both federal and state funds for all public schools, and oversees accreditation status for public schools. OKLA. STAT. tit. 70, § 3-104. Plaintiffs acknowledge the Oklahoma Legislature enacted S.B. 615 to mandate that the School Defendants designate multi-occupancy restroom usage according to a student's sex on the individual's original birth certificate. Complaint, App'x at 12, ¶ 3. Failure to comply with the mandate results in a five percent (5%) reduction in state funding, private causes of action, and/or loss of accreditation. *Id.*, App'x at 13, ¶ 6; OKLA. STAT. tit. 70, § 1-125(F), (G); OKLA. ADMIN. CODE 210:35-3-186(h)(5).

Plaintiffs readily admit that the SDOE and SBOE have control and authority over the School Defendants as to the enactment of the provisions of S.B. 615. Complaint, App'x at 15–16, ¶¶ 15–17. The School Defendants did not make a meaningful and conscious choice to treat

Plaintiffs differently, and a school district's penalty for non-compliance with S.B. 615 affects not only the quality of Plaintiffs' education, but that of all students. *See* Affidavit of Steven Stefanik (attached as Ex. 1 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp. App'x, Vol. 2 at 529, ¶ 14; Declaration of Frank Solomon (attached as Ex. 2 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp. App'x, Vol. 2 at 542, ¶ 7; Declaration of Dr. Robert Romines (attached as Ex. 3 to *School Defendants' Response to Motion for Preliminary Injunction*), Supp. App'x, Vol. 2 at 545–46, ¶¶ 9–10.

The School Defendants lacked the ability to remedy the alleged sex discrimination. Moreover, the School Defendants had no meaningful choice but to implement the requirements of S.B. 615. Therefore, the district court properly granted the School Defendants' motion for judgment on the pleadings because Plaintiffs' Complaint shows—on its face—that the School Defendants did not intentionally violate Title IX. The School Defendants cannot be liable for the State Defendants' actions.

PROPOSITION IV

OKLAHOMA CITY SCHOOL DISTRICT CANNOT BE LIABLE FOR HARDING CHARTER SCHOOL DISTRICT'S ACTIONS

As noted in Proposition I, this Court has the authority to consider any grounds that are supportive of the district court's decision affirming judgment on the pleadings. Therefore, this Court should consider that Oklahoma City School District is not liable for Harding Charter School District's actions. In Count II of Plaintiffs' Complaint, Plaintiffs assert that Oklahoma City School District was aiding and perpetuating discrimination against Plaintiff Stiles in violation of Title IX by sponsoring Harding Charter School District as a public charter school. Complaint, App'x at 48, ¶ 146. Yet, Plaintiffs do not assert that any one of the Plaintiffs was enrolled in Oklahoma City School District, that Oklahoma City School District adopted a bathroom policy which discriminated against any one of the Plaintiffs, or that Oklahoma City School District violated Title IX as to the rights of any one of the Plaintiffs. *See generally* Complaint, App'x at 11–51.

The Oklahoma Charter Schools Act ("OCSA") provides that a charter school's governing body "shall be responsible for the policies and operation decisions of the charter schools." OKLA. STAT. tit. 70, § 3-136(7).

Under the OCSA, the student membership and attendance of a charter school shall be considered separate from the student membership and attendance of the sponsor, and the calculation of state aid and federal funding is based on the charter school's student population. OKLA. STAT. tit. 70, § 3-142(A). The OCSA provides that "[s]ponsors acting in their official capacity shall be immune from civil and criminal liability with respect to all activities related to a charter school with which they contract." OKLA. STAT. tit. 70, § 3-134(L). Since Plaintiff Stiles was not a student enrolled in Oklahoma City School District, Harding Charter School District received state and federal funds independent of Oklahoma City School District, and Plaintiffs admit that Harding Charter School District adopted the bathroom policy to comply with S.B. 615. Complaint, App'x at 37, ¶ 101. Oklahoma City School District cannot be liable for Harding Charter School's alleged actions.

CONCLUSION

While it is unfortunate that Plaintiffs have endured so many challenges in their young lives, their own Complaint alleges that it is the State Defendants' actions that are the true cause of Plaintiffs' alleged injuries. The School Defendants had no meaningful choice but to adopt

bathroom restrictions in accordance with S.B. 615—or face daunting consequences. The School Defendants were not the moving force behind Plaintiffs' alleged injuries. The School Defendants ask the Court to affirm dismissal of the claims brought against them, as well as the denial of leave to amend the Complaint.

Respectfully submitted,

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STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

While the Plaintiffs and State Defendants dispute the legality of S.B. 615, the School Defendants take no position on this matter. Rather, the School Defendants ask the Court to hold as a matter of law that a school district cannot be liable for following the requirements of State law and regulations. Determination of this issue would have far-reaching implications for school districts and other political subdivisions that implement legislative policy determinations. The School Defendants believe oral argument would aid the Court in addressing this significant issue.

s/ Adam T. Heavin
Adam T. Heavin

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionally spaced in Century Schoolbook font, 14-point type, and contains 6,548 words, which is less than the maximum number allowed by the rules of this Court. I relied on my word processor (Microsoft Word) to obtain the count.

s/ Adam T. Heavin
Adam T. Heavin

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Appellee's Response Brief, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the commercial virus scanning software Cynet, version 4.14.1.12275, last updated on September 11, 2024, and according to the program is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ Adam T. Heavin
Adam T. Heavin

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2024, I electronically transmitted the attached document to the Clerk of the Tenth Circuit Court using the Electronic Case Filing System for filing. Based on the records currently on file in this case, the Clerk of the Tenth Circuit Court will transmit a Notice of Electronic Filing to those registered participants of the ECF System.

s/ Adam T. Heavin
Adam T. Heavin

RULE 28(f) ADDENDUM

I. Senate Bill No. 615, codified at OKLA. STAT. tit. 70, § 1-125 (as enacted on May 25, 2022).

II. State Department of Education Emergency Rules Regarding Senate Bill No. 615, *Oklahoma Register*, Vol. 40, No. 5, at 141–43 (as adopted on August 25, 2022, and approved by Governor Stitt on September 14, 2022).

2022 Okla. Sess. Law Serv. Ch. 323 (S.B. 615) (WEST)

OKLAHOMA 2022 SESSION LAW SERVICE

Fifty-Eighth Legislature, 2022 Second Regular Session

Additions are indicated by **[Text]**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~.

CHAPTER 323
S.B. No. 615
SCHOOLS

An Act relating to schools; defining terms; directing certain schools to require certain restrooms or changing areas to be used by individuals based on their sex; requiring certain schools to provide reasonable accommodation to certain individuals; providing exceptions under certain circumstances; requiring school district boards of education and public charter school governing boards to adopt certain disciplinary policy; directing state funding of a noncompliant school district or charter school to be decreased by certain percentage in certain fiscal year; creating a cause of action for certain noncompliance; providing for promulgation of rules; providing for codification; and declaring an emergency.

SUBJECT: Schools

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1–125 of Title 70, unless there is created a duplication in numbering, reads as follows:

<< OK ST T. 70 § 1–125 >>

A. As used in this section:

1. “Sex” means the physical condition of being male or female based on genetics and physiology, as identified on the individual's original birth certificate; and

2. “Multiple occupancy restroom or changing area” means an area in a public school or public charter school building designed or designated to be used by more than one individual at a time, where individuals may be in various stages of undress in the presence of other individuals. The term may include but is not limited to a school restroom, locker room, changing room, or shower room.

B. To ensure privacy and safety, each public school and public charter school that serves students in prekindergarten through twelfth grades in this state shall require every multiple occupancy restroom or changing area designated as follows:

1. For the exclusive use of the male sex; or

2. For the exclusive use of the female sex.

C. Each public school or public charter school in this state shall provide a reasonable accommodation to any individual who does not wish to comply with the provisions of subsection B of this section. A reasonable accommodation shall be access to a single-occupancy restroom or changing room.

D. The provisions of this section shall not apply to individuals entering a multiple occupancy restroom or changing area designated for use by the opposite sex when entering in any of the following circumstance:

1. For custodial, maintenance, or inspection purposes; or

2. To render emergency medical assistance.

E. 1. Each school district board of education and public charter school governing board shall adopt a policy to provide disciplinary action for individuals who refuse to comply with the provisions of this section.

2. No school district board of education or charter school governing board shall adopt a policy contrary to the provisions of this section.

F. Upon a finding of noncompliance with the provisions of subsections B and C of this section by the State Board of Education, the noncompliant school district or public charter school shall receive a five percent (5%) decrease in state funding for the school district or public charter school for the fiscal year following the year of noncompliance.

G. A parent or legal guardian of a student enrolled in and physically attending a public school district or public charter school shall have a cause of action against the public school district or public charter school for noncompliance with the provisions of subsections B and C of this section.

H. The State Board of Education shall promulgate rules to implement the provisions of this section.

SECTION 2. It being immediately necessary for the preservation of the public peace, health or safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Approved May 25, 2022.

End of Document

TITLE 210. STATE DEPARTMENT OF EDUCATION
CHAPTER 35. STANDARDS FOR ACCREDITATION OF ELEMENTARY, MIDDLE LEVEL, SECONDARY, AND CAREER AND TECHNOLOGY SCHOOLS

[OAR Docket #22-738]

RULEMAKING ACTION:
EMERGENCY adoption
RULES:
Subchapter 3. Standards for Elementary, Middle Level, Secondary, and Career and Technology Schools
Part 19. Standard X: School Facilities
210:35-3-186. Site and buildings: size and space; accessibility; maintenance; health and safety [AMENDED]
AUTHORITY:
State Board of Education; 70 O.S. §§ 1-125 and 3-104
ADOPTION:
August 25, 2022
EFFECTIVE:
Immediately upon Governor's approval
APPROVED BY GOVERNOR:
September 14, 2022
EXPIRATION:
Effective through September 14, 2023, unless superseded by another rule or disapproved by the Legislature
SUPERSEDED EMERGENCY ACTIONS:
n/a
INCORPORATIONS BY REFERENCE:
n/a
FINDING OF EMERGENCY:
Senate Bill 615 (2022) was signed into law on May 25, 2022, and contained an emergency clause, making it effective on May 25, 2022. In part, Senate Bill 615 sets forth a mandate to the State Board of Education to promulgate rules to implement the requirements and prohibitions of the law. As a new law and with a requirement that the State Board promulgate rules to implement the provisions of the law, the State Board adopted the proposed emergency rule.
GIST/ANALYSIS:
Senate Bill 615 (2022) was signed into law on May 25, 2022, with an emergency clause making it effective on May 25, 2022, and now codified at 70 O.S. § 1-125. The language of Senate Bill 615 requires each school district to designate multiple occupancy restrooms or changing areas for the exclusive use of the male or female sex and to provide a single-occupancy restroom or changing room as an accommodation for those that do not wish to comply with male and female designations. In addition, this law requires the State Board of Education to promulgate rules to implement the requirements and prohibitions identified in the law. The amended rule provides the process by which a determination of non-compliance with sections (B) and (C) of 70 O.S. § 1-125 may result in a reduction of state aid to a school district, as provided in the aforementioned law.
CONTACT PERSON:
Brad Clark, General Counsel, Office of Legal Services, 8:00 a.m. to 5:00 p.m., Monday through Friday at Oklahoma State Department of Education, 5th Floor, Hodge Education Building, 2500 North Lincoln Boulevard, Oklahoma City, Oklahoma. Telephone number: (405)522-3274 E-mail: Brad.Clark@sde.ok.gov

PURSUANT TO THE ACTIONS DESCRIBED HEREIN, THE FOLLOWING EMERGENCY RULES ARE CONSIDERED PROMULGATED AND EFFECTIVE UPON APPROVAL BY THE GOVERNOR AS SET FORTH IN 75 O.S., SECTION 253(F):

SUBCHAPTER 3. STANDARDS FOR ELEMENTARY, MIDDLE LEVEL, SECONDARY, AND CAREER AND TECHNOLOGY SCHOOLS

PART 19. STANDARD X: SCHOOL FACILITIES

210:35-3-186. Site and buildings: size and space; accessibility; maintenance; health and safety

(a) **General requirements for school facilities.** All school facilities shall meet the following requirements:

(1) The site and building(s) shall be properly sized and equipped for the number of occupants and grades served in accordance with the requirements of 70 O.S. § 5-131.

(2) Adequate space shall be provided for classrooms, specialized instructional areas, support facilities and other areas as needed, these areas being grouped and arranged in such manner to provide optimum instructional function and class control.

(b) **Accessibility requirements for school facilities.** The site and building(s) shall be readily accessible, and shall meet all requirements of state and federal law, including those relating to ~~in~~ providing access for students with disabilities.

(c) **Capital improvement plans.** Each school district shall develop and adopt a four-year capital improvement plan for all public schools in the district that meets the requirements of 70 O.S. 18-153 and 210:30-1. School facilities shall be able to accommodate changes in curriculum and/or equipment within a program.

(d) **Maintenance of school facilities and equipment.** Programs for preventive and corrective maintenance shall be developed and implemented to ensure that the site and building(s) will be clean, in good repair, and maintained with consideration for function and aesthetic values. Equipment, furnishings, and supplies in proper quantity and quality shall be maintained; and a system shall be developed and implemented for inventory, issue, usage, storage, repair, and replacement.

(e) **Health and safety.** The site and building(s) shall ensure that the health and safety of all school students, school personnel, and school visitors are properly safeguarded.

(1) **Building code compliance.** Where required, the facility shall have utility systems, plumbing systems, electrical systems, mechanical systems, emergency systems, building interiors and building envelope designed, built, and maintained to all federal, state, and local standards, codes and/or other legal requirements.

(2) **Loading and unloading zones.** The site shall be as free as possible from hazards, provide a safe area for (un)loading of vehicles, with adequate lighting, signage and drainage.

(3) **Hazardous materials.** Appropriate programs pertaining to hazardous materials, hazardous waste, asbestos, underground storage tanks, lead contamination, and other applicable life, health, and/or safety matters shall be developed and implemented in accordance with federal, state, and local statutes, regulations, and codes.

(4) **Emergency warning and prevention systems.** Proper precautions shall be taken to prevent injuries. All equipment and facility safety features shall be in place and properly maintained, including, but not limited to safety goggles in accordance with the requirements of 70 O.S.

§24-117 and respirators in accordance with the requirements of 70 O.S. §24-118.

(f) **School safety inspections.** The school's administration shall ensure that qualified personnel conduct a safety/emergency/disaster procedure review at least annually and safety inspections of site, building(s), and equipment regularly.

(g) **School safety drills.** Each public school district shall adopt policies and procedures for each type of safety drill required by this subsection. All safety drills shall conform to the written plans and procedures adopted by the district for protecting against natural and man-made disasters and emergencies as required by Title 63 O.S. § 681 and 70 O.S. §§ 5-148 and 5-149.

(1) **Compliance documentation.** Each public school district shall document compliance with the requirements of this subsection by each school site in writing as follows:

(A) The records for each fire drill shall be preserved for at least three (3) years and shall be made available to the State Fire Marshal or the designated agent of the State Fire Marshal upon request. In addition, one copy of the fire drill compliance report shall remain at each school site and one copy shall be filed with the school district's administrative office;

(B) In addition to the fire drill documentation required by (1)(A) of this subsection, each public school district shall document all other required safety drills in writing by school site. One copy of the safety drill compliance report shall remain at each school site and one copy shall be filed with the school district's administrative office. Each school district shall also submit documentation in writing for each school site to the Oklahoma Office of Homeland Security Oklahoma School Security Institute in accordance with the Institute's established forms, policies and/or procedures; and

(C) Each school district shall make all of its safety compliance reports required by this subsection available to the Regional Accreditation Officer during the accreditation process.

(2) **Safety drill types and requirements.** Each school district shall ensure that every public school within the district shall conduct no fewer than ten (10) safety drills per school year at each school site. All students and teachers at the public schools shall participate. Safety drills conducted in accordance with this subsection shall meet all of the following requirements:

(A) **Fire drills.** Each public school shall conduct a minimum of two (2) fire drills per school year. Each fire drill shall be conducted within the first fifteen (15) days of the beginning of each semester. The fire drills shall include the sounding of a distinctive audible signal designated as the fire alarm signal.

(B) **Tornado drills.** Each public school shall conduct a minimum of two (2) tornado drills per school year, in which all students and school employees participate. At least one (1) tornado drill shall be conducted in the month of September and at least one (1) tornado drill shall be conducted during the month of March.

(C) **Security drills.** Each public school shall conduct a minimum of four (4) security drills per school year, with two (2) security drills conducted per semester. One security drill shall be conducted within the first fifteen (15) days of each semester. No security drill shall be conducted at the same time of day as a previous security drill conducted in the same school year. Security drills shall be conducted for the purpose of securing school buildings to prevent or mitigate injuries or deaths that may result from a threat around or in the school.

(D) **Additional safety drills.** The principal of each public school shall, at the direction of the district superintendent, utilize the remaining two (2) required safety drills for one or more of the following purposes:

(i) To conduct additional drills of any of the types provided in this subsection;

(ii) To conduct one or more drill(s) developed by the district that is consistent with the risks assessed for the school facility; or

(iii) To conduct one or more drills in accordance with recommendations submitted by the Safe School Committee as authorized by the provisions of 70 O.S. § 24-100.5 or any assisting fire or law enforcement department.

(h) **Restrooms and Changing Areas.**

(1) **Definitions.** For purposes of this subsection (h):

(A) "Sex" means the physical condition of being male or female based on genetics and physiology, as identified on the individual's original birth certificate;

(B) "Multiple occupancy restroom or changing area" means an area in a public school or public charter school building designed or designated to be used by more than one individual at a time, where individuals may be in various stages of undress in the presence of other individuals. The term may include but is not limited to a school restroom, locker room, changing room, or shower room.

(C) "School" means any public school and public charter school that serves students in prekindergarten through twelfth grades in this state.

(D) "Individual" means any student, teacher, staff member, or other person on the premises of a School.

(2) **Designation of Multiple Occupancy Restroom or Changing Areas.** Each School shall require every multiple occupancy restroom or changing area to be designated as follows:

(A) For the exclusive use of the male Sex; or

(B) For the exclusive use of the female Sex.

(3) **Reasonable Accommodation.** Each School shall provide access to a single-occupancy restroom or changing room to an Individual who does not wish to utilize the multiple occupancy restroom or changing area designated for their Sex.

(4) **District Policies.** Each school district board of education and public charter school governing board shall adopt a policy to provide disciplinary action for Individuals who refuse to:

(A) Use the multiple occupancy restroom or changing area designated for their Sex;

(B) Designate multiple occupancy restrooms or changing areas for the exclusive use of one Sex; or

(C) Provide access to a single-occupancy restroom or changing room to an Individual who does not wish to utilize the multiple occupancy restroom or changing area designated for their Sex, provided that such Individual is authorized to be on the School premises.

(5) **Monitoring and Complaints.**

(A) Schools will be evaluated by the Regional Accreditation Officer during the accreditation process to ensure compliance with the provisions of 70 O.S. § 1-125 and this Rule. Failure to comply with 70 O.S. § 1-125 and this Rule may result in adverse accreditation action.

(B) Students, parents, teachers, school staff, and members of the public may file a complaint with the State Board of Education alleging a violation of 70 O.S. § 1-125 and/or this Rule. A copy of such complaint shall be submitted to the general counsel for the State Department of Education.

(6) **Response by School.**

(A) Within fifteen (15) days of observing or obtaining information suggesting that that a School may be in violation of 70 O.S. § 1-125 and/or this Rule or receiving a complaint pursuant to subsection (h)(4)(C), the State Department of Education shall notify, in writing, the board of education or governing board of the School involved. Simultaneously, the State Department of Education shall provide a copy of the written notification to the State Board of Education.

(B) Upon receipt of the notification, the board of education or governing board of the School shall have fifteen (15) days to request an opportunity to appear before the State Board of Education and/or submit a written response. If the board of education or governing board of the School fails to request an opportunity to appear, the State Board of Education shall proceed without further notice or delay, to conclude the matter.

(7) **Noncompliance.**

(A) Upon a finding of noncompliance with the provisions of subsections B and C of 70 O.S. § 1-125 by the State Board of Education, the noncompliant school district or public charter school shall receive a five percent (5%) decrease in state funding for the school district or public charter school for the fiscal year following the year of noncompliance. State funding shall mean State Aid funding as contemplated 70 O.S. § 18-101 et seq.

(B) If the State Board of Education makes a finding of non-compliance, the five percent reduction shall be withheld from the school district or public charter school's periodic distributions over the course of the fiscal year following the year of noncompliance.

(C) Prior to making a finding of noncompliance, the State Board of Education may, if mitigating factors are present, provide a probationary period for a school district or public charter school to come into compliance with subsections B and C of 70 O.S. § 1-125.

[OAR Docket #22-738; filed 10-10-22]

TITLE 610. STATE REGENTS FOR HIGHER EDUCATION
CHAPTER 25. STUDENT FINANCIAL AID AND SCHOLARSHIPS

[OAR Docket #22-740]

RULEMAKING ACTION:
EMERGENCY adoption
RULES:
Subchapter 39. Oklahoma National Guard Educational Assistance Program [NEW]
610:25-39-1. Purpose [NEW]
610:25-39-2. Eligibility and applications [NEW]
610:25-39-3. Assistance [NEW]
AUTHORITY:
Oklahoma State Regents for Higher Education; 70 O.S. §§ 3231 and 3206
ADOPTION:
September 8, 2022
EFFECTIVE:
Immediately upon Governor's approval
APPROVED BY GOVERNOR:
October 12, 2022
EXPIRATION:
Effective through September 14, 2023, unless superseded by another rule or disapproved by the Legislature
SUPERSEDED EMERGENCY ACTIONS:
N/A
INCORPORATIONS BY REFERENCE:
N/A
FINDING OF EMERGENCY:
The State Regents for Higher Education find that a compelling public interest requires the passage of these emergency rules. These emergency rules are necessary to comply with 70 O.S. § 3231. In the absence of emergency rules, the earliest the permanent rule process could be complete is September 14, 2023. The emergency rules will provide temporary guidance to OSRHE staff, institutions of higher education and prospective and enrolled students until such time as the permanent rule process - which will include public comment and potentially a public hearing - is complete.

Section 3231 states that "[the] Oklahoma State Regents for Higher Education shall promulgate rules to implement the provisions of this act…" Therefore, Section 3231 requires OSRHE to establish this program. Allowing a delay in establishing this program until September 14, 2023 could create a "violation of…state law" or create "serious prejudice to the public interest." 75 O.S. § 253(A)(1)(c) & (e). These are both outcomes that the emergency rule provisions of 75 O.S. § 253 allow OSRHE to prevent.
GIST/ANALYSIS:
During the 2022 session, the Oklahoma Legislature approved SB 1418 creating the Oklahoma National Guard Educational Assistance Program. Subject to available funding, the bill authorizes educational benefits equivalent to resident tuition, mandatory fees, and academic service fees, not to exceed 18 credit hours per semester at institutions in the Oklahoma State System of Higher Education. In addition to a maximum of 120 credit hours of undergraduate coursework, the bill authorizes benefits for up to 40 credit hours of graduate coursework toward a master's degree.

SB 1418 also creates the new Oklahoma National Guard Educational Assistance Revolving Fund, a continuing fund not subject to fiscal year