Herbert G. Grey, OSB #810250
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
Telephone: 503-641-4908
Email: herb@greylaw.org

Ryan Adams, OSB # 150778
Email: ryan@ruralbusinessattorneys.com
Caleb S. Leonard, OSB # 153736
E-mail: Caleb@RuralBusinessAttorneys.com
181 N. Grant Street, Suite 212
Canby, OR 97013
Telephone: 503-266-5590

Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

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

Plaintiffs,

v.

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

PLAINTIFF'S RESPONSE TO DALLAS SCHOOL DISTRICT'S MOTIONS TO DISMISS

Oral Argument Requested

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.

Plaintiffs respond to FRCP 12(b) motions asserted by DALLAS SCHOOL DISTRICT ("DSD") as follows:

a) As recited in DSD's motions 1-3 (pp. 3-4), plaintiffs have agreed to replead to dismiss Lindsay Golly, to include allegations concerning Nicole Lillie's involvement in the case inadvertently omitted and to withdraw claims for damages brought by plaintiffs AG and TF. Plaintiffs have further agreed to replead to include specific damages allegations for each claim throughout the complaint sought by other plaintiffs;

b) Additionally, in the course of responding to DSD's motions, plaintiffs have concluded that DSD is correct that the existing allegations concerning the District's liability for the LaCreole Middle School special needs assessment are not sufficient to meet *Monell* standards. DSD Motion, p. 10. Plaintiffs will accordingly remove or replead those allegations from an Amended Complaint; and

c) Plaintiffs have met the *Twombly* and *Iqbal* standards for pleading their claims for relief and properly state claims for interference with parental rights, Title IX, free exercise of religion

on behalf of Jon and Kris Golly, and violations of ORS 659.850 and ORS 659A.403, whereby defendant DSD's motions should be denied.

SUMMARY OF ARGUMENT

The foundation of plaintiffs' claims in this case is that defendants have an obligation to protect the privacy, dignity and safety of all students, not selectively do so for one, or a few. The arguments DSD advances for the benefit of a single transgender student should be the arguments advanced in equal measure for the benefit of every student and anyone else coming on the Dallas High School campus.

DSD invites the court to limit the "right to privacy" in the face of controlling authority under the Fourteenth Amendment to the United States Constitution, Title IX and other authorities that students and others coming on the Dallas High School campus have well-established rights of bodily privacy.

DSD further invites the court to disregard clearly established parental rights in reliance on authorities limiting such rights in a curriculum context, which is not before the court in this case.

DSD would have the court believe that its actions under Title IX and other authorities is required to accommodate a single transgender student because "based on sex" includes gender identity (a disputed threshold legal issue), while denying as a matter of law plaintiffs' claims that DSD is violating plaintiffs' rights "based on sex" and other rights. In contrast, plaintiffs believe Title IX protections should be applied consistently rather than selectively. Tellingly, DSD's motion openly advocates that students who are uncomfortable with the accommodations stated in the Student Safety Plan can choose to go elsewhere for their education. DSD Motion, p. 9.

DSD purposely minimizes the impact on Jon and Kris Golly and others under the free exercise claim by pretending the only persons affected by the Student Safety Policy are students

attending Dallas High School. It then attempts to justify its action as "adopted to support *a* District student and to comply with the law", DSD Motion, p. 16 (emphasis added), when plaintiffs' complaint articulates the controlling interpretation of the law. Complaint ¶¶ 35-40.

Finally, DSD apparently acknowledges that Dallas High School is a place of public accommodation, but then denies the application of ORS 659.850 and ORS 659A.403 to plaintiffs' claims with self-serving arguments about whether differential treatment has occurred.

ARGUMENT

RESPONSE TO OVERALL FRCP 12(b)(6) MOTION: Plaintiffs' Complaint Properly States a Claim under *Twombly* and *Iqbal*.

Defendant DSD attempts to characterize plaintiffs' complaint as conclusory and unsupported by factual allegations, citing *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 5550556 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), but without making an actual motion supported by reference to the complaint. DSD Motion, p. 5. Even DSD's selective recitation of facts from plaintiff's complaint takes more than a page of its motion. DSD Motion, pp. 2-3. The duration of the factual allegations in plaintiffs' 65-page complaint amply demonstrate more than the "mere possibility of misconduct" and the infringement of well-established constitutional and statutory rights sufficient to satisfy *Twombly* and *Iqbal*. *See* Complaint, ¶¶ 24, 35-39, 42-49, 79-91, 97-125, 203-205, 210-219, 229-233, 244-246, 267-268.

RESPONSE TO MOTION 4: Plaintiffs' Alleged Right of Privacy Does Exist, and Plaintiffs' Have Properly Alleged Infringement of Their Privacy Rights.

DSD argues generally that alleged right of privacy does not exist, and that in any event there has been no infringement of plaintiffs' privacy rights here. DSD Motion, pp. 5-8. Defendant is wrong on both counts.

The right of privacy is well established in constitutional and statutory law, and it predates the right of privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973), cited by defendants. DSD Motion, p. 6. *Griswold v. Connecticut*, 381 U.S. 479 (1965) recognized the Fourteenth Amendment right of privacy as a right older than the Bill of Rights. *Id.* at 484 (reciting the famous "Bill of Rights have penumbras, formed by emanations from those guarantees…" language), 486 ("We deal with a right of privacy older than the Bill of Rights…"). It bears noting that *Katz v. U.S.*, 389 US 347 (1967), upon which DSD relies (DSD Motion, p. 6), is distinguishable as a Fourth Amendment search and seizure case arising from audio surveillance of a conversation in a public phone booth, and it predates *Roe* by six years.

Numerous other authorities have expressly acknowledged the right to bodily privacy in the context of schools, and even prisons. *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135 (9th Cir. 2011). In the context of a school dress code case, the Sixth Circuit observed:

> To compel [someone] to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals.

Blau v. Fort Thomas Public Sch. Dist., 401 F.3d 381 (6th Cir. 2005), quoting with approval *Union Pacific Railway v. Botsford*, 141 U.S. 250, 252 (1891). *See also Caribbean Marine Services, Inc. v. Baldwin*, 844 F.2d 668 (9th Cir. 1988); *York v. Story*, 324 F.2d 450 (9th Cir. 1963).

Comparing plaintiffs' claims in a public school context to pharmacist regulations in *Stormans v. Weisman*, 794 F.3d 1064 (9th Cir. 2015) is not an apt comparison. DSD Motion, p. 6. Relying on district court decisions from Illinois and Pennsylvania that have not been subjected to appellate review is no more persuasive to this court as a basis for dismissing plaintiffs' privacy claims as a matter of law. DSD Motion, pp. 6-7. Moreover, inviting the court generally to defer to

the judgments of school officials under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), in this specific context on the basis of limited trial court authority from other jurisdictions is nothing more than a plea to "Trust us." DSD Motion, p. 7. Such deference is not unlimited, especially where student privacy, dignity and safety are at issue, and where the record reflects the community has taken vigorous exception to DSD's Student Safety Plan. Complaint, ¶¶ 93, 186-205, 243.

Affirming the constitutional authorities referenced above, Title IX and its regulations unequivocally uphold the right to bodily privacy. 20 USC §1686 provides that "…nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." *See also* 34 CFR §106.32. Separate toilet, locker room and shower facilities are also specifically authorized:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

34 CFR §106.33. DSD's argument is also contrary to its own Policy JF/JFA, which expressly notes students' right of privacy. Complaint, ¶ 22(f). Ex. F to Plaintiff's Complaint.

Finally, DSD argues that there has been no infringement of privacy rights in any event and implicitly characterizes them as "mere incidental effects." DSD Motion, pp. 7-8. That discounts allegations of the unveiling of the Student Safety Plan to a PE class that included Student A on or about November 15, 2016 (Complaint, ¶¶ 22(a), 40, 75) or the reasonable and understandable apprehensions of students alleged. Complaint, ¶¶ 42-49, 83-91, 100-112, 122, 124-125, 229-233, 245-246. As noted below, DSD's own Policy JFCF (Ex. G to Plaintiffs' Complaint) includes in the definition of "harassment, intimidation or bullying to include "*reasonable fear* of physical

harm…including interfering with the *psychological well-being* of the student." Complaint, ¶ 22(g) (emphasis added). *Infra*, p. 9.

While it is true there are no allegations of direct interactions in intimate facilities, the complaint is rife with allegations of reasonable student apprehension at encountering opposite sex students in intimate settings. *Id.* Moreover, plaintiffs' complaint covers more than just students being subjected to intrusive exposure. Anyone, including parents and other visitors, coming on the campus and using facilities now should expect the possibility of such interactions – probably without warning because there would be no principled reason for DSD to take different action given its adoption of the Student Safety Plan. Complaint, ¶¶ 190-200. The district's indifference to the reasonable sensibilities of others does not justify dismissal as a matter of law.

RESPONSE TO MOTION 5: DSD Has Violated Parents' Fundamental Right to Direct the Care, Education and Upbringing of Their Children.

DSD acknowledges a long line of well-established constitutional and statutory authorities supporting parents' fundamental right to direct the care, education and upbringing of their children, then relies solely upon cases concerning limitation of those rights in curriculum matters. DSD Motion, pp. 8-9. The invitation to extend inapposite curriculum authorities to this case should be rejected, as should the district's attempt to dismiss plaintiffs' values as "idiosyncratic views" under *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005).

As noted in defendant's motion (DSD Motion, p. 8), there is a long line of authority dating back to 1923 upholding the fundamental right of parents to direct the education and upbringing of their children. *Meyer v. Nebraska*, 262 U.S. 390) (1923). *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). *Wisconsin v.*

Yoder, 406 U.S. 205 (1972). *Moore v. Cleveland*, 431 U.S. 494 (1977). *Troxel v. Granville*, 530 U.S. 57 (2000). Most notably, the court recited in *Pierce*:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of Sisters, 268 U.S. at 535, quoted with approval in *Wisconsin v. Yoder*, 406 U.S. at 233 and *Troxel v. Granville*, 530 U.S. at 65.

The United States Supreme Court more recently described parents' liberty interest in this manner:

> The liberty interest at issue in this case – the interest of parents in the care, custody and control of their children- is perhaps the oldest of the fundamental liberty interests recognized by this court. More than 75 years ago, in *Meyer v. Nebraska* [citation omitted], we held that the "liberty" interest protected by the Due Process Clause includes the rights of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters* [citation omitted], we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control…It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"[quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)]

Troxel v. Granville, 530 U.S. at 65-66. *See also Washington v. Glucksberg*, 521 U.S. 702, 720 (1977).

In the face of these authorities, it can scarcely be said that the "so called *Meyer-Pierce* right does not extend beyond the threshold of the school door.'" DSD Motion, p. 8, citing *Fields*. As noted above, the cases DSD relies upon to limit parental rights relate to matters of curriculum. *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir 2003) (referring to "what his or her child will or will not be *taught*"), quoted at DSD Motion, pp. 8-9.

Incredibly, DSD then doubles down to cite cases to the effect those unhappy with the way Dallas schools are run can choose to remove their children and send them to private schools. DSD Motion, p. 9. One can only guess at what the reaction would be if someone was to suggest that LGBTQ or other minority students unhappy with their educational environment can simply go elsewhere.

The second part of DSD's argument is that the Needs Assessment at LaCreole is not actionable under *Fields v. Palmdale School District*. DSD Motion, pp. 9-10. While plaintiffs concede the need to replead or remove the allegations in connection with the needs assessment, what DSD (and *Fields*) overlooks are federal and state laws requiring parental notice- and even consent- before such surveys are administered. Family Educational Rights and Privacy Act, 20 U.S.C. §1232h(b) (requiring written consent in certain matters, including sex behavior or attitudes, religious practices, affiliations or beliefs of the student or student's parent prior to participation) and Protection of Pupil Rights Act, 20 U.S.C. §1232(g)(b)(1) (requiring parents' written consent).

MOTION 6: Plaintiffs have Stated a Valid Title IX Hostile Environment Claim.

The gravamen of DSD's motion is that there has been no impact on plaintiffs that denies access to equal educational benefits or opportunities. DSD Motion, p. 11. Defendant's argument begs the threshold question in this case: whether "based on sex" under Title IX includes gender identity. In substance, DSD claims maintaining separate-sex facilities violates Title IX because "sex" includes gender identity, but it rejects plaintiffs using the same argument in reverse. Complaint, §§ 91, 226-246. DSD cannot have it both ways.

What defendants overlook is that once the Student Safety Plan was implemented, there was no legitimate basis for denying other persons besides Student A access to restrooms, locker rooms or showers. Put simply, others could claim the right to enter those spaces, whether they were

transgender or not, and members of the public (including plaintiffs) coming on school grounds might encounter the same situation as students during the instructional day. With the Student Safety Plan in place, DSD has no consistent legal justification for denying others the same rights afforded to Student A, all of which directly impacts students and others on the Dallas High School campus.

DSD further pretends there is no allegation of plaintiffs being "targeted or singled out on the basis of sex" (DSD Motion, p. 12), and they argue everyone is being treated the same. *Id.* However, the court must decide this motion based on the complaint, which recites a plethora of allegations about plaintiffs' reasonable apprehensions of encountering someone of another sex in an intimate space, noted above. *Supra*, pp. 4, 6. *See also* Complaint, §22(g), quoting DSD Policy JFCF (Ex. G to plaintiffs' Complaint). Sharing intimate facilities may not be an issue for Student A, who rejected continuing use of a single-stall facility as an accommodation (Complaint, § 79), but the record shows it is a crucial matter for others.

In addition, DSD's reliance on *Cruzan v. Special School District #1*, 294 F.3d 981 (8th Cir. 2002) (involving teachers sharing intimate facilities with a transgender teacher in the workplace) and other out-of-jurisdiction decisions should not be persuasive to the court here in evaluating the impact on students at Dallas High School. DSD Motion, pp. 13-14. *Cruzan* is easily distinguishable. In *Cruzan*, a teacher alleged that her school's policy of letting a transitioning male-to-female teacher use the female teachers' restroom was, among other things, a hostile work environment under Title VII. The district court disagreed, rejecting the hostile environment claim by noting that the male employee could only use <u>one</u> women's restroom (not everyone), and saying "Cruzan has the option of using the female faculty restroom used by Davis *or using other restrooms in the school not used by Davis*." *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp.

2d 964, 969 (D. Minn. 2001), *aff'd sub nom. Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981 (8th Cir. 2002) (emphasis added). Thus, the male was granted access to but one restroom while all other restrooms on campus were off limits to him.

In stark contrast, in our case Student A is officially authorized to enter *every* male student restroom (and locker room and shower) in the school while other students have no refuge. Complaint, §§ 79, 91, 115, 245-246. Also, the Eighth Circuit's *Cruzan* rule is not without detractors: the Tenth Circuit rejected *Cruzan's* rule which had said that the presence of a male in the women's restrooms, even in the form of a male-to-female transgender did not present a hostile work environment. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007).

Another distinction with *Cruzan* is that "harassment in the workplace is vastly different from sexual harassment in a school setting":

> The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its younger victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.

Davis v. Monroe County Board of Education, 74 F.3d 1186, 1193 (11th Cir.1996) (citation omitted), *rev'd*, 120 F.3d 1390 (1997), *rev'd on other grounds*, 526 U.S. 629 (1999). *See also Jane Doe v. Green*, 298 F.Supp. 2d 1025, 1037 (D-Nev., 2004) (limiting *Davis* to peer to peer harassment). Schools are charged with acting *in loco parentis,* while employers owe no such duty

to their employees." *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226–27 (7th Cir. 1997).

DSD also relies on cases saying that "*a* student's use…that corresponds to gender identity is not severe, pervasive and objectively offensive." DSD Motion, pp. 13 (emphasis added). How something so subjective can be determined as a matter of law is unclear, and the cases DSD relies upon are much more egregious instances of battery and sexual assault than may exist here and offer nothing in the way of a bright line. DSD Motion, pp. 13-14. It doesn't take into account the possibilities raised above arising from the Student Safety Policy, and reasonable apprehension apparently doesn't matter to DSD. In arguing that no student plaintiff "has alleged a single specific instance of harassment or *improper* use of District facilities (DSD Motion, p. 13, emphasis added), DSD begs the question whether sharing facilities is "improper" when specifically authorized by the District and argues that until there is an incident, their policy choice is appropriate, leaving plaintiffs no recourse. Severity may vary with the students affected. Its pervasiveness cannot be doubted when it applies to an entire campus and student body, and may later be applied to other schools as well. Objective offensiveness should also not be determined as a matter of law in a society where sex-segregated facilities in public and private venues are the norm.

DSD's last argument is that there is no Title IX claim available to plaintiffs at all because those who elect to use single-use facilities cannot be heard to complain those facilities are not comparable. DSD Motion, p. 14. Comparable facilities are not the issue in this case, but rather *who* uses *which* facilities. With no factual basis, the motion asserts plaintiffs were actually offered and rejected this accommodation. *Id. See* Complaint, §§ 243-244. The fallacy of DSD's logic becomes more apparent when one considers DSD made the same offer to Student A, who eventually rejected it, and the Student Safety Plan ensued. Complaint, § 79. DSD's argument also overlooks the reality

that some people, including plaintiffs, may also feel compelled to use those single-use facilities as an alternative to avoid encountering people of the opposite biological sex in the larger facilities customarily segregated by sex. Why it is permissible to compel plaintiffs and others to use alternate facilities, and it's not permissible to do so with Student A, is not evident from DSD's briefing.

If defendants do not acknowledge a right of action under Title IX for plaintiffs using this logic, they must concede transgender students like Student A have no right of action under Title IX, and there is no need for the Student Safety Plan in the first instance.

MOTION 7: The Golly Plaintiffs Properly State a Claim for Violation of Their Free Exercise of Religion Rights.

While the legal requirements DSD relies upon are correct, their application to the facts herein is not. Moreover, the Student Safety Plan is not a neutral law of general applicability because DSD itself acknowledges it was "adopted to support *a* District student and to comply with the law." DSD Motion, pp. 16 (emphasis added). What "law" is being complied with is not stated. DSD then opines there is no pleading of injury in fact, causation or redressability. DSD Motion, p. 15.

As noted above (*Supra*, p. 10), DSD sees the impact of Student Safety Plan much too narrowly. It summarily rejects the possibility that the Golly's religious teachings at home are impacted ("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.") DSD Motion, p. 15 (emphasis added). *Contra*: Complaint, ¶¶ 120, 208-219. Other members of Parents for Privacy are similarly concerned about the impacts for their students, whether religiously motivated or not. *Id.*

DSD then argues there is no free exercise violation here because the Student Safety Plan is a neutral law of general applicability that meets the standards of rational basis review. DSD Motion, p. 16. In actuality, it is neither neutral, nor generally applicable, and it ignores hybrid rights analysis, all of which require strict scrutiny as the proper standard of review.

As to neutrality, DSD's own argument betrays the lack of neutrality when it says "the Student Safety Plan was adopted in order to support *a* District student…" DSD Motion, p. 16 (emphasis added). True neutrality would be demonstrated by making an accommodation to any student to use single-use facilities rather than giving one student access to any facilities they choose at the expense of other students. Similarly, a policy implemented for a single student is not generally applicable unless the District is prepared to concede that the Student Safety Plan opens the door for others to claim the right to use any facilities, so it applies to more than one student- a position contrary to its own briefing. If that is true, the impact of the Student Safety Plan extends far beyond the students of Dallas High School. *Supra*, p. 7.

Nor can it be said that DSD had a legitimate interest in acting to "comply with the law" because the law (including regulations under Title IX) at the time of adoption of the Student Safety Plan clearly authorized separate sex facilities. *Supra*, p. 6. Whether the law required accommodation of transgender students, including Student A, or the nature of any accommodations was being hotly debated, including at school board meetings. Complaint, ¶ 93.

It bears noting that the Ninth Circuit noted in *Fields v. Palmdale School District*, 427 F.3d at 1202-1203 does not aid DSD on this point because no First Amendment issues were raised in that case, and in footnote 7 the court said, "We offer no comment as to any First Amendment issues that may arise with any of these matters." *Id.* at 1206.

For laws that are not neutral or generally applicable, strict scrutiny applies. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-532 (1993). *See also Stormans, Inc. v. Weisman*, 794 F.3d 1064, 1076 (9th Cir. 2015). Where, as here, plaintiffs allege multiple fundamental rights arising under the First and Fourteenth Amendments, hybrid rights analysis requires strict scrutiny as well. *Employment Division v. Smith*, 494 U.S. 872, 882 (1990). *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). *See also Leebaert v. Harrington*, 332 F.3d at 143 (distinguishing First Circuit treatment of "hybrid rights" from holdings in the First, Ninth, Tenth and DC Circuits).

MOTION 8: Plaintiffs Properly State a Claim under ORS 659.850 and 659A.403.

Defendants reject the alleged violation of these statutes, but implicitly concede that Dallas High School and other district facilities are places of public accommodation within the meaning of ORS 659A.400, which includes governmental buildings. DSD Motion, p. 17.

While it is true that both statutes prohibit "discrimination", the key determination is whether any action subjects a student "to treatment different from that afforded other children" based on a protected characteristic. SDS Motion, p. 17, quoting with approval *Powell v. Bunn*, 341 Or 306, 313-316 (2006). However, *Powell* does not help DSD for several reasons. First, there was no finding of discrimination or differential treatment in that case because all students were treated exactly the same. Second, this case is distinguishable from *Powell* because, as noted above, here there is clear differential treatment in that the action was taken for the benefit of one student at the apparent expense of other students. What would truly be equal treatment would be to allow any student to use single-use facilities on an equal basis, which Student A later rejected as an accommodation. Complaint, ¶ 79. Plaintiff's allegations are sufficient to withstand a motion to dismiss under ORS 659A.850.

Similarly, plaintiffs' ORS 659A.403 claim sufficiently alleges discrimination against plaintiffs based on their own protected status for religion, sex and sexual orientation. Complaint, ¶¶ 267-268. Plaintiffs do not "allege everyone is treated in the same manner", as DSD claims. DSD Motion, p. 17. True nondiscrimination would take the form of granting everyone the same accommodation, not compelling the community to accept an accommodation for one student.

It bears noting that DSD's reliance on *Klein v. BOLI*, 289 Or.App. 507 (December 27, 2017) in support of its position (DSD Motion, p. 17) may be premature in light of a pending petition for review to the Oregon Supreme Court filed March 2, 2018. Also, the United States Supreme Court may revisit its earlier decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (upholding First Amendment rights in the face of state nondiscrimination laws) in its consideration of *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission*, No. 16-111 (argued December 6, 2017).

CONCLUSION

Defendant DSD would have the court believe that the Student Safety Plan enacted on behalf of a single student has no actionable consequences or ramifications for the rest of the student body or others in the community. Nothing could be further from the truth, just as a stone tossed into a pond invariably generates ripples. DSD has chosen a course of favoring one student at the expense of everyone else when a true equal accommodation would be to allow anyone who requests the opportunity of single-use facilities to do so. DSD's pretense that no one else's rights

//

//

//

are affected by its action, and that discrimination is a one-way street in favor of a transgender student is legally and factually disingenuous.

DATED this 6TH day of March, 2018.

Herbert G. Grey, OSB #810250
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
Telephone: 503-641-4908
Email: herb@greylaw.org

Ryan Adams, OSB #150778
Email: ryan@ruralbusinessattorneys.com
Caleb S. Leonard, OSB # 153736
E-mail: Caleb@RuralBusinessAttorneys.com
181 N. Grant Street, Suite 212
Canby, OR 97013
Telephone: 503-266-5590

Of Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

Peter Mersereau
Beth Plass
111 SW Columbia Street, Suite 1100
Portland, OR 97201

Of Attorneys for Defendant Dallas School District No. 2

Darin M. Sands
601 SW Second Avenue, Sute 2100
Portland, OR 97201

Of Attorneys for Proposed Intervenor Basic Rights Oregon

Mathew W. dos Santos
Kelly Simon
ACLU FOUNDATION OF OREGON
P.O. Box 40585
Portland, OR 97240

Of Attorneys for Proposed Intervenor Basic Rights Oregon

Gabriel Arkles
Shayna Medley-Warsoff
AMERICAN CIVIL LIBERTIES FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Of Attorneys for Proposed Intervenor Basic Rights Oregon

_____ **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 DALLAS SCHOOL DISTRICT'S MOTIONS TO DISMISS on the following via the indicated method(s) of service:

James Bickford,
Civil Division, U.S. Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20530

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.

_____ **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.

Herbert G. Grey, OSB #810250
Ryan Adams, OSB # 150778
Caleb S. Leonard, OSB # 153736
Of Attorneys for Plaintiffs