UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM

As the federal defendants explained in their motion to dismiss, plaintiffs assert that they are injured by the presence of a particular transgender student in certain sex-segregated facilities in Dallas School District. Fed. Defs.' Mot. to Dismiss ("MTD") at 8–9 & n.5, ECF No. 49. Plaintiffs' standing to bring the claims alleged here rests entirely on that asserted injury, the immediate cause of which is the local Student Safety Plan granting access to those facilities. Plaintiffs attempt to argue that Dallas School District's "adoption of the Student Safety Plan was caused by federal action," Pls.' MTD Opp. at 6, ECF No. 59, but the complaint does not establish any causal connection that could be a predicate for their claims against the federal defendants. Indeed, the only federal actions to which they point are a series of guidance documents (which plaintiffs refer to collectively as a "rule"), some of which have been rescinded, and enforcement actions taken in other jurisdictions, which are not being (and could not be) challenged here.

Plaintiffs' complaint fails to establish their standing to maintain this case against the federal defendants. First, the injury they assert is not fairly traceable to the challenged federal

actions. *See* MTD at 8–10. Second, that injury is not likely to be redressed by relief against the federal defendants. *Id.* at 10–12. In addition, the complaint does not plausibly allege that the "rule" it purports to challenge is presently operative and, therefore, plaintiffs cannot make out a claim for which relief can be granted. *Id.* at 12–13. For these reasons, plaintiffs' claims against the federal defendants must be dismissed.

A. Plaintiffs' asserted injuries are not fairly traceable to the challenged federal actions.

At the motion to dismiss stage, "the complaint must allege sufficient facts plausibly establishing each element of the standing inquiry." *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012). Moreover, as the federal defendants explained in their motion to dismiss, "when a plaintiff alleges that government action caused injury by influencing the conduct of third parties," the Ninth Circuit has said "that 'more particular facts are needed to show standing.'" *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (quoting *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002)). This is "because the third parties may well have engaged in their injury-inflicting actions even in the absence of the government's challenged conduct." *Id.* "To plausibly allege that the injury was 'not the result of the *independent* action of some third party,'" *id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (emphasis in *Mendia*)), "the plaintiff must offer facts showing that the government's unlawful conduct 'is at least a substantial factor motivating the third parties' actions.'" *Id.* (quoting *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001)). Plaintiffs must "make that showing without relying on 'speculation' or 'guesswork' about the third parties' motivations," if they are to "adequately allege[] Article III causation." *Id.* (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 413–14 (2013)).

To proceed with their claims against the federal defendants, plaintiffs therefore must assert in their complaint "particular facts," *Nat'l Audubon Soc'y*, 307 F.3d at 849, sufficient to plausibly allege that the presence of a particular transgender student in certain sex-segregated facilities in Dallas High School is fairly traceable to the challenged federal actions, and "not the result of the *independent* action of" Dallas School District, *Mendia*, 768 F.3d at 1013. Plaintiffs also must plausibly allege that these federal actions were "at least a substantial factor motivating" the actions of Dallas School District, and do so "without relying on 'speculation' or 'guesswork' about [Dallas School District's] motivations." *Id.*

Plaintiffs have fallen far short of this mark. In their opposition brief, plaintiffs suggest that "enforcement action against other public school districts" must have had a "coercive effect to motivate consideration of the Student Safety Plan in Dallas School District." MTD Opp. at 7. But, conceding that their complaint does not allege any specific facts that would tend to show such a coercive effect, plaintiffs suggest that "the precise impact" of the challenged federal actions "is a matter for discovery." *Id.* Not so. It is, rather, plaintiffs' obligation to include in their complaint facts sufficient to plausibly establish that the impact is "substantial." *Mendia*, 768 F.3d at 1013. They have not come close to doing so, and their complaint must therefore be dismissed.[1]

Moreover, as the federal defendants noted in their motion, the Student Safety Plan was adopted six months before the May 2016 Dear Colleague letter discussing sex-segregated facilities, and well after the other challenged guidance documents (which do not discuss sex-

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[1] Plaintiffs attempt to excuse the deficiencies in their complaint by noting that *Mendia* and *National Audubon Society* both found standing for the claims at issue in those cases. MTD Opp. at 7. That those plaintiffs complied with the relevant pleading standards does nothing to undermine the applicability of those standards here.

segregated facilities) were published. It simply is not plausible to suggest that the Student Safety Plan can be traced either to guidance documents that do not discuss restrooms or locker rooms, or to a document issued long after the Student Safety Plan was adopted.

Nor can it be traced, for purposes of standing, to investigations of other school districts. Those investigations are not the "challenged action of the defendant" at issue in this case. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). In any event, the factual allegations involving those investigations do not suggest any link to the adoption of the Student Safety Plan. *See* MTD at 9. The complaint cites only one investigation of a school district. Compl. ¶¶ 64–68. Plaintiffs allege that the investigation resulted in a resolution agreement, *id.* ¶ 67, but that agreement has been terminated[2] and the related litigation against the federal defendants named in that case has been voluntarily dismissed. *See* MTD at 5. Similarly, the complaint cites a lawsuit brought by the Department of Justice, which was filed long after the adoption of the Student Safety Plan. Compl. ¶ 70. That lawsuit also has been voluntarily dismissed.[3] Plaintiffs' bare allegations of earlier enforcement actions do not give rise to a plausible inference that the federal defendants coerced Dallas School District into adopting the Student Safety Plan, and certainly do not satisfy the pleading standard articulated by the Ninth Circuit in *Mendia* and *National Audubon Society*.

Because plaintiffs have not plausibly alleged that their injuries are fairly traceable to the challenged actions of the federal defendants, rather than the independent actions of Dallas School District, all claims against the federal defendants must be dismissed.

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[2] *See* Letter from the Department of Education's Office for Civil Rights to Township High School District 211 Terminating Resolution Agreement (June 7, 2017), attached as Exhibit A.

[3] Joint Stipulated Notice of Dismissal, *United States v. North Carolina*, No. 1:16-cv-00425 (M.D.N.C. Apr. 14, 2017), ECF No. 245.

B. Plaintiffs do not even attempt to show that their asserted injuries are likely redressable through relief against the federal defendants.

To survive a motion to dismiss, plaintiffs must also "allege sufficient facts plausibly establishing," *Native Village of Kivalina*, 696 F.3d at 867, that their asserted injuries are likely to be redressed by a favorable decision against the federal defendants, *Lujan*, 504 U.S. at 560–61. But the allegations in the complaint clearly suggest that Dallas School District adopted its Student Safety Plan of its own volition, and likely would not abandon it because of a ruling against the federal defendants here. The complaint notes that although the federal defendants in February 2017 withdrew the May 2016 Dear Colleague letter, which contains the only discussion of sex-segregated facilities in the challenged guidance documents, Compl. ¶ 39, Dallas School District "has not changed its policies," *id.* ¶ 75. The complaint also alleges a series of statements by Dallas School District officials in support of the Student Safety Plan. *Id.* ¶¶ 87, 91–93, 109.

In response to this argument, plaintiffs merely suggest that "it is immaterial whether" relief against the federal defendants "would motivate [Dallas School District] to withdraw the Student Safety Plan." MTD Opp. at 8. But so long as the Student Safety Plan is in effect, plaintiffs' asserted injuries will persist. And if those injuries are likely to persist whether or not this Court grants the plaintiffs relief against the federal defendants, then their asserted injuries cannot be redressed and they have no standing to sue the federal defendants.

Plaintiffs also suggest that the federal defendants' withdrawal of two guidance documents, including the May 2016 Dear Colleague letter discussing sex-segregated facilities, may not have been in good faith. They have filed a declaration with many exhibits, documenting a search of the U.S. Department of Education's website leading to an archival copy of each of the withdrawn guidance documents. *See* Decl. of Caroline Janzen, ECF No. 60. Both withdrawn guidance documents are prominently marked as "Archived Information," which is to say that

they are preserved for the record but not presently in effect. *See* ECF No. 60-1 at 51 (May 2016 Dear Colleague letter); ECF No. 60-2 at 1 (Questions and Answers on Title IX and Sexual Violence). There is no reason to think that the preservation of archival copies of withdrawn guidance documents casts doubt on the authenticity of the withdrawal.[4]

Because plaintiffs have not plausibly alleged that their injuries are likely to be redressed by relief against the federal defendants, all claims against those defendants must be dismissed.

C. Plaintiffs have not plausibly alleged the existence of the "Rule" that they would challenge here.

The federal defendants also moved to dismiss plaintiffs' claims under Rule 12(b)(6), because plaintiffs have not plausibly alleged that the "legislative rule" against which all of their claims are directed, Compl. ¶ 33, was operative at the time they filed their complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* MTD at 12–13. Because all of their claims against the federal defendants depend on the existence of this "rule" (which is speculative at best), plaintiffs have not plausibly alleged any claim against the federal defendants.

Plaintiffs do not even respond to the substance of this argument, but merely suggest that it is void because the federal defendants "made no specific mention of" each claim that depends on the existence of this rule. MTD Opp. at 1. But the federal defendants' motion was perfectly clear. Each of plaintiffs' claims against the federal defendants rests on their erroneous assertion that the federal defendants have established and maintained a "rule" that transgender students must be allowed to access particular sex-segregated facilities in schools that accept federal funds. Because plaintiffs' assertion is neither supported by the allegations in the complaint nor

[4] These withdrawn guidance documents are preserved in the online archives of the Department of Education's Office for Civil Rights, which can be accessed at www.ed.gov/ocr/archives.html. They do not appear among the current guidance documents, which can be found at www.ed.gov/ocr/frontpage/faq/rr/policyguidance/index.html.

buttressed in their opposition, plaintiffs have failed to plausibly allege the existence of such a rule. Accordingly, plaintiffs' claims must be dismissed under Rule 12(b)(6).

CONCLUSION

For the reasons set forth above and in the federal defendants' motion to dismiss, plaintiffs lack standing to bring their claims against the federal defendants, and have not stated any claim for which relief can be granted against those defendants. All claims against the federal defendants must therefore be dismissed.

Respectfully submitted,

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