UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD W. REYNOLDS, et al., Plaintiffs, v. GREG TALBERG, et al., Defendants, STAND WITH TRANS, a Michigan Corporation, and WILLIAMSTON HIGH SCHOOL GAY-STRAIGHT ALLIANCE, an unincorporated association, Proposed Defendant-Intervenors.	Case No. 1:18-cv-00069-PLM-PJG Hon. Paul L. Maloney **ORAL ARGUMENT REQUESTED**

PROPOSED DEFENDANT-INTERVENORS' MOTION TO DISMISS

Proposed Defendant-Intervenors move to dismiss Plaintiffs' Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The bases for this Motion are set forth in the accompanying brief.

Pursuant to Western District of Michigan Local Rule 7.1(d), counsel for Movants sought the parties' concurrence in the relief requested in this Motion. The Defendants concur in the relief requested. Movants did not obtain Plaintiffs' concurrence, thus necessitating the filing of this Motion.

Date: March 12, 2018

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BRIEF IN SUPPORT OF
PROPOSED DEFENDANT-INTERVENORS' MOTION TO DISMISS

TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

FACTS 2

ARGUMENT 3

I. The School District Acted Within the Scope of Its Authority Under Michigan Law. 4

II. Plaintiffs Have Failed to State a Claim Under the Matt Epling Safe School Law. 5

III. The School District's Policies and Practices Do Not Violate the Fundamental Right to Parent. 6

IV. The School District's Policies and Practices Do Not Violate the Fundamental Right to Privacy. 8

V. The School District's Policies and Practices Do Not Violate Freedom of Speech. 11

VI. The School District's Policies and Practices Do Not Violate Free Exercise of Religion. 12

A. Plaintiffs failed to allege facts demonstrating an infringement on their ability to practice their religion. 12

B. The District's Policies Are Neutral and Generally Applicable Because They Do Not Target Religion, and They Survive Rational Basis Review. 13

VII. The School District's Policies and Practices Do Not Violate the Michigan Constitution. 15

VIII. The School District's Policies and Practices Do Not Violate Title IX. 17

IX. The School District's Policies Are Not Void for Vagueness. 19

X. The School District's Policies and Practices Do Not Violate the Elliott-Larsen Civil Rights Act. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Adams ex rel. Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996) 13

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 3

Beattie v. Line Mountain Sch. Dist., 992 F. Supp. 2d 384 (M.D. Pa. 2014) 13

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 3

Bhan v. Battle Creek Health Sys., No. 1:10-CV-202, 2013 U.S. Dist. LEXIS 58407, 2013 WL 1768461 (W.D. Mich. Apr. 24, 2013) 20

Blau v. Fort Thomas Public School Dist., 401 F.3d 381 (6th Cir. 2005) 7

Board of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016) 10, 18

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 12, 14, 16

Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995) 7

by Martinez v. Cui, 608 F.3d 54 (1st Cir. 2010) 8

by Students & Parents for Privacy v. U.S. Dep't of Educ., No. 16-CV-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017) 9

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 14, 15

Country Mill Farms, LLC v. City of E. Lansing, 280 F. Supp. 3d 1029, 2017 WL 5514818 (W.D. Mich. 2017) 16

Crosby v. Reynolds, 763 F. Supp. 666 (D. Me. 1991) 10

Ctr. for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365 (6th Cir. 2011) 3

Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324 (E.D. Pa. 2017) 9

EEOC v. Harris Funeral Homes, __ F.3d __, No. 16-2424, 2018 WL 1177669 (6th Cir. Mar. 7, 2018) 16

Employment Division v. Smith, 494 U.S. 872 (1990) 13, 14

Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. 2017) 10

Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005) 7

Glowacki v. Howell Public Sch. Dist., No. 2:11-CV-15481, 2013 WL 3148272 (E.D. Mich. June 19, 2013) 11

Haynes v. Neshewat, 729 N.W.2d 488 (Mich. 2007) 20

Hyman v. City of Louisville, 132 F. Supp. 2d 528 (W.D. Ky. 2001), *vacated and remanded on other grounds*, 53 Fed. App'x 740 (6th Cir. 2002) 19

J.F. Cavanaugh & Co. v. Detroit, 337 N.W.2d 605 (Mich. 1983) 4

Johnson v. United States, 135 S. Ct. 2551 (2015) 19

Kissinger v. Bd. of Trustees of Ohio State Univ., 5 F.3d 177 (6th Cir. 1993) 14

LaPine v. Savoie, No. 16-1893, 2017 WL 6764085, at *5 (6th Cir. Aug. 11, 2017) 8

Meyer v. Nebraska, 262 U.S. 390 (1923) 7

Morrison ex rel. Morrison v. Bd. of Educ. of Boyd Cty., Kentucky, 419 F. Supp. 2d 937 (E.D. Ky. 2006), *aff'd*, 521 F.3d 602 (6th Cir. 2008) 12

Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) 13

Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008) 13

People v. Tennyson, 790 N.W.2d 354 (Mich. 2010) 5

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 7

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 16

Runyon v. McCrary, 427 U.S. 160 (1976) 7

Sherbert v. Verner, 374 U.S. 398 (1963) 12

Sheridan Rd. Baptist Church v. Dep't of Educ., 396 N.W.2d 373 (Mich. 1986) 16

Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016) 19

State Fire Marshall v. Lee, 300 N.W.2d 748 (Mich. Ct. App. 1980) 16

Students & Parents for Privacy v. U.S. Dep't of Educ., No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) 9

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 11

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 19

Ward v. Polite, 667 F.3d 727 (6th Cir. 2012) 11

Washington v. Glucksberg, 521 U.S. 702 (1997) 9

Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).....18

STATUTES

20 U.S.C. § 1681(a) 17

Elliott-Larsen Civil Rights Act 4, 5, 20

Matt Epling Safe School Law 5

Mich. Comp. Laws § 380.11a(3) 4

OTHER AUTHORITIES

U.S. Constitution.....1, 6, 7, 8, 11, 15

Michigan Constitution 15

CONCISE STATEMENT OF REASONS SUPPORTING MOVANTS' POSITION

This Court should grant the Movants' Motion to Dismiss because the Plaintiffs' complaint fails to allege facts raising a plausible inference that their constitutional or statutory rights have been violated. Plaintiffs challenge certain policies, and actions taken pursuant to those policies, that the Williamston Community School District adopted to better protect LGBT students from harassment and discrimination and to ensure that such students have the use of common facilities and education programs. Plaintiffs' primary contention is that the District's non-discrimination policies actually discriminate against them due to their religious beliefs. However, none of the policies, or actions taken pursuant thereto, interfere with Plaintiffs' religious beliefs or practices; they simply prohibit Plaintiffs from bullying, harassing or discriminating against LGBT individuals. Furthermore, the District has a compelling interest in protecting and educating its students, including its LGBT students.

INTRODUCTION

Plaintiffs have sued the Williamston Community School District ("the District") and various school board members because in October and November, 2017, the District passed and updated policies to better protect LGBT students in Williamston Community Schools from harassment and discrimination. The relief Plaintiffs seek would strip LGBT students of these protections, putting them at risk of serious harm, and prohibit transgender students from using school facilities and programs consistent with their gender identity in violation of the Constitution, Title IX, and Michigan state law.

Proposed Defendant-Intervenor Stand with Trans is a non-profit organization in Michigan whose mission is to support and empower transgender youth. *See* Mot. to Intervene. Stand with Trans works with students and families throughout Michigan to ensure transgender students have safe, non-discriminatory environments in which to go to school. Nicole Ellefson, the Facilitator of the Lansing Stand with Trans support group, advocated for the specific policies in Williamston challenged by Plaintiffs in this case. *Id.*

Proposed Defendant-Intervenor Williamston High School Gay-Straight Alliance ("GSA") is a student-run group for LGBT students and allies at Williamston High School. *See* Mot. to Intervene. They have an interest in maintaining policies to assist their LGBT members and peers can attend school free from harassment and discrimination. Several GSA members spoke at the Williamston school board meeting in favor of the policies at issue in this case. *Id.*

The District's policies and practices do not violate any law. To the contrary, many forms of anti-LGBT discrimination and harassment that the District's policies are intended to prevent may violate Title IX and the federal Constitution. Similarly, as several courts have recognized, it is the policy and practice of excluding transgender students from common facilities and education programs sought by Plaintiffs that would violate Title IX and the federal Constitution.

Proposed Defendant-Intervenors submit this brief in support of their proposed motion to dismiss Plaintiffs' complaint. Defendant-Intervenors address only the Complaint's failure to state a claim. They do not address issues of justiciability.[1]

FACTS

Based on the allegations in the Complaint, Plaintiff A.B. is a student in the Williamston Community School District, and Plaintiffs Monica Shafer and Christopher Johnecheck are parents of students in the District. Compl. ¶¶ 10-12. Plaintiffs Edward and Erin Reynolds are parents of children who are no longer enrolled in the District. Compl. ¶ 9. They object to various policies passed by the school board in October and November 2017 that protect LGBT students.

In October and November, 2017, the Williamston Community School District added several categories of protection to its existing non-discrimination policies to which Plaintiffs object. These include: "sexual orientation" to Policy 4900, Fair Employment Clause (Pls. Exhibit A); "sexual orientation, gender identity, gender expression" to Policy 7500, Guidance Program (Pls. Exhibit B), Policy 8010, Equal Education Opportunity (Pls. Exhibit C), Policy 8040, School Admissions (Pls. Exhibit E), Policy 8260-R, Bullying (Pls. Exhibit F), and Policy 8720, Student Organizations (Pls. Exhibit G).

On November 6, 2017, the District adopted Policy 8011 on Gender Identity, which provides that "Williamston Community Schools fosters an educational environment for all students that is safe, welcoming, and free from stigma and discrimination, regardless of sex, sexual orientation, gender identity, or gender expression." (Pls. Exhibit D). The District shall "accept the gender identity" of a student "reflecting the student's legitimately held belief" once

[1]Intervenor-Defendants' choice not to address the justiciability of Plaintiffs' claims should not be interpreted as a concession that Plaintiffs' have demonstrated standing or ripeness.

the student or their guardian notifies the school. *Id.* The District will "customize support" to allow equal access to educational programs and opportunities. *Id.*

There are no allegations that any Plaintiffs have been harmed as a result of the challenged anti-discrimination policies, nor are there allegations that any Student Plaintiffs have been disciplined, or even threatened with discipline, for harassment or bullying. Student Plaintiffs have not alleged ever encountering a transgender student in a common restroom or locker room, or in any education program or activity. Even if such an event were to occur, there are no allegations that students must change their clothes in the presence of other students, shower together, or at all. There are no allegations that a transgender student, or *any* student, has ever done anything harmful to Plaintiffs or anyone else, inside restrooms and locker rooms or outside them.

ARGUMENT

Plaintiffs have not stated a plausible claim upon which relief can be granted. A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 678)). Because Plaintiffs have not alleged sufficient facts that would plausibly entitle them to relief under the law, their claims should be dismissed with prejudice. *See Twombly*, 550 U.S. at 547.

I. THE SCHOOL DISTRICT ACTED WITHIN THE SCOPE OF ITS AUTHORITY UNDER MICHIGAN LAW.

Plaintiffs assert that the Elliott-Larsen Civil Rights Act ("ELCRA") is "a pervasive regulatory scheme that regulates and controls discrimination issues in Michigan," and that any civil rights or anti-discrimination policies promulgated outside of the ELCRA are ultra vires and invalid. Compl. ¶¶ 55, 60. Plaintiffs are wrong as a matter of law, and have failed to state a claim for relief.

The Michigan Court of Appeals addressed this issue in *J.F. Cavanaugh & Co. v. Detroit*, 337 N.W.2d 605 (Mich. 1983). In that case, the City of Detroit had passed an ordinance requiring contractors to take affirmative action with respect to women and racial minorities, exceeding the scope of ELCRA. The question faced by the court was whether ELCRA occupied the field, thereby preempting municipalities from enacting their own laws in the field of civil rights. In a thorough and thoughtful analysis, the Court of Appeals found "[t]he Elliott-Larsen act does ***not*** create a pervasive scheme of regulation of civil rights," and that there was no preemption, express or implied. *Id.* at 610 (emphasis added). Thus, the court concluded, municipalities were free to enact their own civil rights ordinances. Only where those ordinances conflict with Elliott-Larsen will they be found invalid.

Since Elliott-Larsen does not "occupy the field" and the District's polices addressing discrimination do not conflict in any way with Elliott-Larsen, there is no legal impediment to the District's promulgation of its own policies. Moreover, the policies fall squarely within or are incident to the District's powers under the Revised School Code, including Mich. Comp. Laws § 380.11a(3)(b) (providing for the safety and welfare of pupils) and 380.11a(3)(d) (hiring, contracting for, scheduling, supervising, or terminating employees, independent contractors, and

others). Accordingly, Plaintiffs' claim that the District exceeded its authority by adopting the policies at issue fails.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE MATT EPLING SAFE SCHOOL LAW.

In their claim that the District's policies violate the Matt Epling Safe School Law, Plaintiffs improperly attempt to twist the words of the statute, arguing that the District has violated the statute by acknowledging some of the causes of bullying. Compl. ¶ 67. This makes little sense: the plain language of the statute requires school districts to adopt policies that prohibit bullying for any reason. The District has done so; Plaintiffs do not contend (nor could they) that the District's policy *permits* bullying for some reasons. The Matt Epling Safe School Law does *not* prohibit school districts from acknowledging some of those reasons that students may be bullied. Interpreting the law in this way would lead to an absurd result, which should be avoided. *People v. Tennyson*, 790 N.W.2d 354, 361 (Mich. 2010). Taken to its logical conclusion, Plaintiffs' reading of the Matt Epling Safe School Law would only permit schools to prohibit *reasonless* bullying – leaving the door open to bullying if it is based on any specific reason. There is no such limitation found in the plain language of the statute and there is no logical basis to interpret it in this way.

In addition, Plaintiffs are doubtless aware of the tragic history behind the statute: in 2002, shortly after a bullying and hazing incident, Michigan eighth-grader Matt Epling took his own life. His family fought for years to have an anti-bullying law passed by the legislature, and in 2011 it was finally signed into law – making Michigan nearly the last state in the country to adopt such a law. *See* http://mattepling.webs.com/antibullying.htm; http://www.michigan.gov/snyder/0,4668,7-277-57577-266963--,00.html.

But there was significant public backlash against the version of the draft bill that passed the state Senate, because a loophole had been inserted before the vote: the bill expressly exempted bullying that was "'a statement of a sincerely held belief or moral conviction' of a student or school worker." *See* Valerie Strauss, *Anti-bullying legislation attacked for allowing bullying*, Washington Post (Nov. 5, 2011). Matt Epling's father expressed his concern that the law "would basically say it is okay to bully or to ignore instances of bullying based on your own religious beliefs and/or moral convictions, which is contrary to the rest of the bill and it is definitely contrary to what I've been telling students, to step in and step up when they see this taking place in their school." *Id.*

Ultimately, the exemption that would have allowed bullying if it were the result of a "sincerely held belief or moral conviction" was removed from the law and replaced with the current language, which prohibits bullying, regardless of subject matter or motivating animus. Plaintiffs, in their attempt to write the deleted religious/moral exemption back into the law, ask this Court to adopt a skewed reading of the statute that ignores its plain meaning and legislative history.

III. THE SCHOOL DISTRICT'S POLICIES AND PRACTICES DO NOT VIOLATE THE FUNDAMENTAL RIGHT TO PARENT.

Parent Plaintiffs have failed to state a claim that their Fourteenth Amendment right to direct the education and upbringing of their children has been infringed upon by the District's policies. No case law suggests that the fundamental right to parent encompasses a right to strip other students of non-discrimination protections. Nor does it permit parents who send their children to public schools to insist upon the absence of transgender students in school sports, activities, or common areas of restrooms and locker rooms. Moreover, such a rule would violate the Equal Protection Clause, as explained in section IV.

Plaintiffs allege the District's policies violate their parental liberty rights by infringing on their religious and moral ideas about what they call "alternative sexual lifestyles." Compl. ¶ 75. According to the Complaint, these beliefs require Parent Plaintiffs to send their children to school to participate in sports and use public school facilities such as restrooms and locker rooms without the presence of transgender students, and to receive no information about LGBT people. Compl. ¶¶ 72-75. It is clear that the Fourteenth Amendment encompasses none of the "rights" that Parent Plaintiffs assert.

The Supreme Court has held the Due Process Clause of the Fourteenth Amendment encompasses a parental liberty right to direct the upbringing of their children without interference by the state. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a Nebraska law prohibiting teaching of foreign language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down Oregon's compulsory attendance law). However, the right to parent children "is not an unqualified right." *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 395 (6th Cir. 2005) (holding parents did not have a fundamental right to exempt student from school dress code) (citing *Runyon v. McCrary,* 427 U.S. 160, 177 (1976)). As the Sixth Circuit made clear, *Meyer* and *Pierce* stand for the "critical point" that "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Blau*, 401 F.3d at 395. *See also Fields v. Palmdale School District*, 427 F.3d 1197, 1206 (9th Cir. 2005) (parents have no constitutional right to force the state to run its public schools in accordance with "any of the countless moral, religious, or philosophical objections that parents might have" to actions of the school district); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (parents do not have a right to "to dictate the curriculum at the public school to which they have

chosen to send their children"), *abrogation on other grounds recognized by Martinez v. Cui*, 608 F.3d 54, 63 (1st Cir. 2010).

Parents may, as Edward and Erin Reynolds have done, choose to remove their children from public school. Compl. ¶ 121. What they cannot do is force the District to adopt only policies and practices that conform to their particular moral or religious views. Plaintiffs have no fundamental right to prohibit the District from enacting non-discrimination policies for LGBT students or allowing transgender students to use facilities and play on sports teams consistent with their gender identity because of their own personal moral or religious opposition. Therefore, Parent Plaintiffs have failed to state a claim for a relief under the Fourteenth Amendment against the District's policies.

IV. THE SCHOOL DISTRICT'S POLICIES AND PRACTICES DO NOT VIOLATE THE FUNDAMENTAL RIGHT TO PRIVACY.

Plaintiffs have failed to state a claim that the District's policies or actions violate their fundamental right to privacy, or any other right "central to individual dignity and autonomy." Compl. ¶ 83. Plaintiffs are asserting a new privacy right under the Due Process Clause that has never been recognized by any court in this country, and should not be recognized now: the right to exclude other people from common spaces.

Plaintiffs object to Policy 8011, which prohibits discrimination on the basis of gender identity and gender expression. Student Plaintiffs have alleged no facts to suggest they have ever been forced to expose their body to any student of any gender, or that they are even required to use communal restrooms and locker rooms. In *LaPine v. Savoie*, the Sixth Circuit found an inmate's privacy claim failed because alternative options for privacy were available, including the fact that "inmates are permitted to use towels in the shower and bathroom facilities to cover themselves and some inmates choose to shower with their underwear on." No. 16-1893, 2017

WL 6764085, at *5 (6th Cir. Aug. 11, 2017) (internal quotation marks omitted). Here, Plaintiffs have not alleged they are forced to shower or completely undress at school. Nor have they alleged they have exposed themselves, or been exposed to, *any* other student, let alone a transgender student. Even if Student Plaintiffs were to encounter transgender students in a communal facility, they have alleged no facts to suggest existing privacy protections in the school facilities are insufficient.

Rather, Plaintiffs allege that their right to privacy is violated by the mere risk of being in the presence of boys who are transgender in the boys' facilities or girls who are transgender in the girls' facilities. Compl. ¶ 85. While Plaintiffs have not alleged any facts suggesting they have shared a facility with a transgender student, such an occurrence would certainly not violate any fundamental right "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

No court in this country has recognized a fundamental right to exclude others from common spaces. In fact, many courts have recognized that the presence of transgender students in common restrooms or locker rooms does *not* infringe anyone's constitutional right to privacy. *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 387 (E.D. Pa. 2017) ("[H]igh school students … have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs"); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *29 (N.D. Ill. Oct. 18, 2016) (finding no privacy violation because no students were forced to reveal intimate body parts, and existing privacy protections such as stalls "entirely mitigate any potential risk of unwanted exposure either by or to any Student Plaintiff"), *adopted and approved by Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017);

Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 290 (W.D. Pa. 2017) (finding that the presence of a girl who was transgender in a girl's school bathroom did not show "any threatened or actually occurring violations of personal privacy"); *Board of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 876 (S.D. Ohio 2016) (finding that school district's policy preventing a girl who was transgender from using a girl's bathroom was not substantially related to the district's interest in student privacy); *see also Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting non-transgender female prisoner's claim that housing a transgender female prisoner with her violated her right to privacy).

The remedy Plaintiffs seek—excluding transgender students from common facilities consistent with their gender identity—would violate the Equal Protection Clause. The Southern District of Ohio, in considering the same privacy argument raised by a school district that refused to allow transgender students to use facilities that matched their gender identity, found no evidence that allowing a transgender girl to use girls' facilities "would infringe upon the privacy rights of any other students" and that the transgender girl was likely to succeed on the merits of her claim that denying her the use of restrooms consistent with her gender identity. *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874-77 (S.D. Ohio 2016). *See also Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 290-91, 302 (W.D. Pa. 2017) (holding school district's policy violated transgender students' rights under the Equal Protection Clause and rejecting the district's privacy argument). Plaintiffs have no fundamental right to exclude students from common facilities that match their gender identity simply because they are transgender.

To the extent Plaintiffs allege other aspects of the District's policies violate their constitutional privacy rights, they have also failed to state a claim. They have failed to include

any factual allegations to explain how Parent Plaintiffs' right to "personal identity and personal autonomy" is violated by the policies or from where such a right is derived. They likewise have alleged no facts or law to explain how the District's implementation of anti-bullying protections for LGBT students violates theirs or anyone's privacy rights.

V. THE SCHOOL DISTRICT'S POLICIES AND PRACTICES DO NOT VIOLATE FREEDOM OF SPEECH.

Plaintiffs have failed to state a claim that compliance with anti-discrimination policies unconstitutionally interferes with their freedom of speech. The Supreme Court has recognized that schools may limit speech when, among other reasons, it "colli[des] with the rights of other students to be secure and to be let alone." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). In fact, schools have a duty to protect their students from harassment and bullying. The Sixth Circuit has recognized that anti-discrimination policies on their face do not violate anyone's First Amendment rights. *See Ward v. Polite*, 667 F.3d 727, 741 (6th Cir. 2012). Similarly, it is a high bar to find anti-bullying policies facially unconstitutional. *See Glowacki v. Howell Public Sch. Dist.*, No. 2:11-CV-15481, 2013 WL 3148272 at *14 (E.D. Mich. June 19, 2013).

Plaintiffs have not alleged any set of facts that suggest the District has threatened them with punishment under the policies related to any incident. They have not alleged any Plaintiffs have been chilled from speaking due to the challenged policies. The District's policies do not infringe upon Plaintiffs' or anyone's right to express their beliefs about issues related to sexual orientation or gender identity. Rather, Plaintiffs ask the Court to strike down the District's entire anti-discrimination and anti-harassment policies because of their general opposition to LGBT people, or what they call "alternative sexual lifestyles." The First Amendment does not entitle students or parents to veto school anti-discrimination or anti-harassment policies simply because

they disagree with them. *See, e.g., Morrison ex rel. Morrison v. Bd. of Educ. of Boyd Cty., Kentucky*, 419 F. Supp. 2d 937, 943 (E.D. Ky. 2006) (rejecting First Amendment challenge to school LGBT anti-bullying policy and training), *aff'd*, 521 F.3d 602 (6th Cir. 2008).

VI. THE SCHOOL DISTRICT'S POLICIES AND PRACTICES DO NOT VIOLATE FREE EXERCISE OF RELIGION.

Plaintiffs have failed to allege any facts showing a plausible infringement on their exercise of their religious beliefs. Even if they had made such allegations, the District's policies and practices would be subject only to rational basis review, because they are neutral and generally-applicable, and easily meet this standard.[2]

A. Plaintiffs failed to allege facts demonstrating an infringement on their ability to practice their religion.

The Plaintiffs have not alleged facts to support the claim that the District's policies and practices interfere with their freedom to practice their religion. The policies do not force Plaintiffs to "affirm[] a repugnant belief," penalize them for their religious beliefs, or "impede the observance" of an aspect of their religion. *Sherbert v. Verner*, 374 U.S. 398, 402, 404 (1963). None have alleged that they have ever been compelled to do anything against their religious beliefs, or prevented from doing something required by their religious beliefs.

To the extent Plaintiffs suggest that sharing the common areas of public restrooms or locker rooms with transgender students would interfere with Student Plaintiffs' or their parents' religious practices, there are no allegations that such an event has ever occurred or is likely to occur in the future. There are no allegations that Student Plaintiffs are required to use common

[2]Even if the District's policies were subject to strict scrutiny, they would still survive because they are narrowly tailored to serve the compelling government interests of student safety and non-discrimination. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

restrooms or locker rooms, or have ever encountered a transgender student, inside a restroom or locker room or outside one.

To the extent the Plaintiffs object to the transmission of ideas about LGBT people through the adoption of the District policies, they have failed to state a claim. "[T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently."*Parker v. Hurley*, 514 F.3d 87, 105 (1st Cir. 2008); *see also Beattie v. Line Mountain Sch. Dist*., 992 F. Supp. 2d 384, 394 (M.D. Pa. 2014) (holding that female student could not be excluded from wrestling team to protect students against "the perceived psychological and moral degradation accompanying coeducational wrestling"); *Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (holding that female student could not be excluded from wrestling team based on "student and parent objections based on moral beliefs"). The free exercise of religion does not give students or parents the right to dictate school curricula or policies. *See Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1065 (6th Cir. 1987) (finding "[t]he requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion").

B. The District's Policies Are Neutral and Generally Applicable Because They Do Not Target Religion, and They Survive Rational Basis Review.

Plaintiffs have not alleged any facts to suggest they will be "punished" for their religious beliefs, other than simply having to comply with the generally-applicable anti-discrimination and anti-bullying policies. As the Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), "the right of free exercise does not relieve an individual of the obligation

to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (internal quotation marks omitted). A law that is neutral and generally applicable is constitutionally permissible if it is rationally related to a legitimate government interest. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Plaintiffs claim that the District policies are not generally applicable because they conflicts with their Christian beliefs. Compl. ¶ 106. This assertion reflects a misunderstanding of the term. "Generally applicable" means that the government action is not "specifically directed at" a religious practice. *Employment Division*, 494 U.S. at 878. To make that determination, the Supreme Court has looked at whether the government enforces a law "in a selective manner" to "impose burdens only on conduct motivated by religious belief" and not on similar conduct motivated by other reasons. See *Lukumi*, 508 U.S. at 543. The Sixth Circuit has similarly found a school program neutral and generally applicable when it "was not intended to prohibit any particular religious practice or belief" and was not used to "attack or exclude any individual on the basis of his or her religious belief." *Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177, 179 (6th Cir. 1993) (finding veterinary school's practice of requiring operations on live animals as part of the curriculum did not violate student's free exercise rights).

Plaintiffs have alleged no facts that could plausibly support a claim that the District's policies target any particular religious group or religious practice, that it has been enforced selectively against people engaging in religiously-motivated conduct, or that it has as its object the suppression of anyone's free exercise of religion. *Employment Division*, 494 U.S. at 878. No facts alleged suggest that the school district implemented the policy to infringe on religious practices or beliefs. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (finding

that IRS policy barring racial discrimination does not "prefer[] religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden").

The non-discrimination policies were adopted to "support all students." Pls. Exhibit D. Unlike in *Lukumi*, where "almost the only conduct subject to [the challenged ordinances was] the religious exercise of Santeria church members," 508 U.S. at 535, the District's policies have no exceptions or carve-outs that indicate its provisions are actually intended to apply solely to members of one or more religious group.

The District's policies are generally applicable, and any burden on religious practice incidental. As such, strict scrutiny does not apply. Therefore, rational basis applies, and the state's interest in preventing discrimination, harassment, and bullying of students in school easily meets that threshold.

VII. THE SCHOOL DISTRICT'S POLICIES AND PRACTICES DO NOT VIOLATE THE MICHIGAN CONSTITUTION.

Plaintiffs allege that the District's policies violate their rights under Article I, §§ 2, 4-5 and Article VIII, § 2 of the Michigan constitution. Compl. ¶ 119. Specifically, they claim that, due to the District's policies, they are suffering discrimination in the exercise of their civil and political rights because of their religion; they are being denied the right and liberty to worship as they please; they are being denied the right of free speech; and they are being deprived of the right to participate in Michigan's system of free public education.

Plaintiffs' claims of violations of their right to free speech under the state constitution fail for the same reasons that they fail under the federal Constitution, as described in detail above.

Plaintiffs' right-to-worship claims fail even under a strict scrutiny review. Under Michigan law, religious freedom claims brought under Article 1, § 4 of the state constitution are analyzed using the compelling state interest test, in which the court considers five factors:

> (1) whether a defendants' belief, or conduct motivated by belief, is sincerely held; (2) whether a defendant's belief, or conduct motivated by belief, is religious in nature; (3) whether a state regulation imposes a burden on the exercise of such belief or conduct; (4) whether a compelling state interest justified the burden imposed upon a defendant's belief or conduct; and (5) whether there is a less obtrusive form of regulation available to the state.

Country Mill Farms, LLC v. City of E. Lansing, 280 F. Supp. 3d 1029, 2017 WL 5514818, at *16 (W.D. Mich. 2017).

Here, as described in detail above, Plaintiffs have not alleged facts showing that the District's policies place a burden on the exercise of their religious beliefs or conduct. Plaintiffs are not being required to take any action or affirm any beliefs that are contrary to their religious convictions. Plaintiffs are merely barred from harassing, bullying, or discriminating against LGBT students, which, Plaintiffs would surely agree, is not an exercise of their religious beliefs. Absent allegations of any actual burden, Plaintiffs have failed to state a claim.

Furthermore, even if Plaintiffs could demonstrate that their exercise of their religious beliefs is burdened by policies that prohibit discrimination against LGBT students, their claim would still fail. The District has a compelling interest in educating its students (including its LGBT students) and in ensuring their safety by preventing bullying and discrimination. *See Sheridan Rd. Baptist Church v. Dep't of Educ.*, 396 N.W.2d 373, 380 (Mich. 1986) ("There is no doubt that a state has a compelling interest in the education of its citizens."); *State Fire Marshall v. Lee*, 300 N.W.2d 748, 751 (Mich. Ct. App. 1980) ("There is a compelling state interest to ensure the safety and welfare of all school children."); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 628 (1984) (the government has a compelling interest "of the highest order" in "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services"); *Bob Jones Univ.,* 461 U.S. at 604; *EEOC v. Harris Funeral Homes*, __ F.3d __, No. 16-2424, 2018 WL 1177669, at *19-24 (6th Cir. Mar. 7, 2018) (the government has a

compelling interest in protecting transgender employees from sex discrimination). Any minimal burden on Plaintiffs' exercise of religion is far outweighed by the District's compelling interest in protecting and educating its students.

With respect to Plaintiffs' allegation that they are being deprived of their right to participate in Michigan's public school system, Plaintiffs have failed to adduce any facts supporting such a claim. Plaintiffs claim that the District's policies have "forced Plaintiffs Edward and Erin Reynolds to remove their children from the School District and enroll them in a private school at their own expense," thereby depriving them of their right to a free public education. Compl. ¶ 121. However, Plaintiffs have alleged no facts showing how the District allegedly required or forced them to remove their children from the school district. Plaintiffs have merely alleged facts showing that they disagree with the District's anti-discrimination and anti-bullying policies and have chosen, as a result, to enroll their children in private school.

VIII. THE SCHOOL DISTRICT'S POLICIES AND PRACTICES DO NOT VIOLATE TITLE IX.

Plaintiffs have not pled sufficient facts to support a claim of discrimination on the basis of sex under Title IX. On the contrary, they seek injunctive relief that would violate Title IX by discriminating against transgender students. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program of activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Plaintiffs do not allege any facts to suggest they have been excluded from or denied the benefits of any education program or activity. Rather, they suggest the mere presence of transgender students "in athletics and other programs" is a violation of their rights under Title IX.

No court has ever held that permitting transgender students to participate in school programs consistent with their gender identity is a violation of another student's rights under Title IX. In fact, denying transgender students equal access to educational programs consistent with their gender identity would violate transgender students' rights under Title IX. *See, e.g.*, *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-51 (7th Cir. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 871 (S.D. Ohio 2016), *stay pending appeal denied*, 845 F.3d 217 (6th Cir. 2016).

The policies to which Plaintiffs object do not permit girls to be treated differently or worse than boys, or vice versa, or other otherwise permit discrimination on the basis of sex. In fact, the opposite is true. The District policies take a strong stance against sex-based discrimination. *See* Pls. Exhibit D (the District "fosters an educational environment for all students that is safe, welcoming, and free from stigma and discrimination, regardless of sex"). The alleged conduct to which Plaintiffs object—allowing transgender students to participate in sports or other school programs that accord with their gender—does not target Student Plaintiffs on the basis of sex. Plaintiffs have not alleged that Student Plaintiffs are being treated differently from others, or that they are being singled out based on their sex, the fact that they are not transgender, or that they do or do not match sex stereotypes. According to the facts as stated in the Complaint, like other students, Student Plaintiffs are permitted to participate in sports consistent with their gender identity. The substance of Plaintiffs' claims appears to be not an objection to Student Plaintiffs receiving different or worse treatment than other students, but to transgender students receiving equal treatment. That is not a violation of Plaintiffs' rights under Title IX. To hold otherwise would be to exclude transgender students from and deny them the benefits of participation in an education program because of sex.

IX. THE SCHOOL DISTRICT'S POLICIES ARE NOT VOID FOR VAGUENESS.

Plaintiffs do not allege sufficient facts or law to suggest the District's policies are unconstitutionally vague or overbroad. The Supreme Court has held that a law is void for vagueness where it "fails to give ordinary people fair notice of the conduct it punishes" or is "so standardless that it invites arbitrary enforcement." *Shuti v. Lynch*, 828 F.3d 440, 443 (6th Cir. 2016) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015)). Plaintiffs have not alleged any specific enforcement of the policies against them, and instead ask this Court to declare the policies unconstitutional on their face. This extreme remedy requires a "demonstra[tion] that the law is impermissibly vague in all of its applications," *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 497 (1982).

Plaintiffs have failed to state such a claim. The Bullying policy puts students on sufficient notice of what conduct is prohibited, including definitions for guidance on types of harassment and bullying. Pls. Exhibit F. To the extent Plaintiffs suggest the non-discrimination policies are unconstitutionally vague for failing to define the protected characteristics, this claim also fails. Sexual orientation, gender identity, and gender expression have been included in non-discrimination laws and policies around the country, and have a "common meaning" such that "a person of ordinary intelligence would understand to whom the terms apply." *See Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 545-46 (W.D. Ky. 2001), *vacated and remanded on other grounds*, 53 F. App'x 740 (6th Cir. 2002). Thus, Plaintiffs have failed to state a claim that the District's policies are facially void for vagueness.

X. THE SCHOOL DISTRICT'S POLICIES AND PRACTICES DO NOT VIOLATE THE ELLIOTT-LARSEN CIVIL RIGHTS ACT.

Plaintiffs allege that the District's policies are "of a sexual nature" and create an intimidating, hostile and offensive environment. Compl. ¶ 143. As an initial matter, to the extent

that Plaintiffs are alleging that the District's policies govern or promote sexual activity by students or staff, that is readily disproven by simply reading the policies themselves. The policies address discriminatory behavior, not sexual activity.

More importantly, Plaintiffs misapprehend the scope and effect of the ELLRA. In order to state a claim under that statute, Plaintiffs "must establish four elements: (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation." *Haynes v. Neshewat*, 729 N.W.2d 488, 492 (Mich. 2007). Specifically, in order to state a claim, a plaintiff must show that he himself is "a member of a class deserving of protection under the statute, and that for the same or similar conduct, he was treated differently than similarly situated persons outside the protected class." *Bhan v. Battle Creek Health Sys.*, No. 1:10-CV-202, 2013 U.S. Dist. LEXIS 58407, at *9, 2013 WL 1768461, at *3 (W.D. Mich. Apr. 24, 2013).

Here, Plaintiffs are not the targets of discrimination. They do not allege that they are being treated differently than other similarly situated persons outside of their protected class (if, indeed, they are in a "protected class" at all). They have not been denied the use of restrooms, locker rooms or other facilities based on their sex – or, as far as the allegations in the Complaint go, for any other reason. In the absence of allegations of such discrimination *against Plaintiffs*, their claim under the ELCRA must fail.

CONCLUSION

For the foregoing reasons, Stand with Trans and Williamston High School GSA's motion to dismiss should be granted.

Date: March 12, 2018

Respectfully submitted,

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