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UNITED STATES DISTRICT COURT

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,	Case No. 3:17-cv-01813-HZ Proposed Defendant-Intervenor Basic Rights Oregon's **REPLY IN SUPPORT OF MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

v.

DALLAS SCHOOL DISTRICT NO. 2; **OREGON DEPARTMENT OF EDUCATION**; **GOVERNOR KATE BROWN**, in her official capacity as the Superintendent of Public Instruction; and **UNITED STATES DEPARTMENT OF EDUCATION**; **BETSY DEVOS**, in her official capacity as United States Secretary of Education as successor to **JOHN B. KING, JR.**; **UNITED STATES DEPARTMENT OF JUSTICE**; **JEFF SESSIONS**, in his official capacity as United States Attorney General, as successor to **LORETTA F. LYNCH**,

Defendants.

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I. INTRODUCTION

Plaintiffs' claims should be dismissed. They have failed to plead facts to support the claims they have brought or to identify any case law to support their characterization of the relevant law. Rather than confront the fatal flaws of their Complaint and the arguments contained in Basic Rights Oregon's ("BRO") Motion to Dismiss, Plaintiffs resort to characterizing the law as they wish it were rather than what courts across the country have said it is.

II. ANALYSIS

A. Plaintiffs Cannot Identify Facts or Law to Support a Privacy Claim.

Plaintiffs assert that "BRO implicitly acknowledges that privacy is a fundamental right, and in the next breath relies on cases out of context from workplace and prison settings to discount the same right of bodily privacy in this case." (Pls.' Resp. to Basic Rights Oregon's ("BRO") Mot. to Dismiss at 5, ECF No. 43.) Plaintiffs mischaracterize BRO's position.

BRO does not acknowledge that a right to exclude people from common spaces is included in any recognized constitutional right to privacy, for students or any group of people.[1] Plaintiffs have not identified any court that has recognized such a right. Indeed, as explained in BRO's Motion, courts that have been presented with similar bodily privacy claims by student plaintiffs seeking to exclude transgender students from bathroom and locker room facilities have rejected them. *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) ("Students R&R") ("There is no reason why a student who does not want to do so would have to take off clothing or reveal an intimate part of his or her body outside of the private stalls. Inside the stalls, there is no meaningful risk that any part of a student's unclothed body would be seen by another person. Therefore, these protections almost entirely mitigate any potential risk of unwanted exposure either by or to any Student Plaintiff.") (internal

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[1] Plaintiffs' assertion that BRO "is actually advocating that a prisoner's diminished expectation of privacy is the appropriate legal standard that should govern the expectation of privacy for our teenagers and children" has no basis. (Pls.' Response at 6.) In fact, in the primary prison case BRO cited, the court did not rely on a diminished expectation of privacy. *See Grummett v. Rushen,* 779 F.2d 491, 496 n.4 (9th Cir. 1985). No one, whether prisoner or parolee, worker or student, has a constitutional right to exclude others from common spaces.

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citation omitted); *see also Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2017 WL 6629520, at *6 (N.D. Ill. Dec. 29, 2017) ("[T]he restrooms at issue here have privacy stalls that can be used by students seeking an additional layer of privacy, and single-use facilities are also available upon request. Given these protections, there is no meaningful risk that a student's unclothed body need be seen by any other person."); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 290-91 (W.D. Pa. 2017) (rejecting the school district's argument that the policy implicated any actual privacy concerns at all "given the actual physical layout of the student restrooms at the High School," which meant that "anyone using the toilets or urinals at the High School is afforded actual physical privacy from others"); *Bd. of Educ. of Highland Local Sch. Dist. v. U. S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (finding no evidence that allowing transgender girl to use girls' facilities "would infringe upon the privacy rights of any other students"). Plaintiffs make no effort to distinguish those cases, nor could they.

Of the five cases Plaintiffs rely on to support the existence of such a right to exclude, three involve claims arising from situations where plaintiffs' naked bodies were involuntarily viewed by government officials. The fourth is a Ninth Circuit opinion *reversing* a district court preliminary injunction that denied women equal access to fishing vessels based on allegations of "privacy" violations made by male crew members concerned that they may have to expose themselves to the women if they were required to share facilities with them on a boat. The fifth is a case where the Sixth Circuit *rejected* a claimed due process right to be exempt from a dress code banning blue jeans. None support the existence of a right to exclude transgender students from common spaces, particularly in the absence of any allegations that students must undress in any common areas.

For instance, *York v. Story* involved allegations by an assault victim that a male police officer, over her protest, required her to have photographs taken of her naked body after she came into a police station to report the assault. 324 F.2d 450, 452 (9th Cir. 1963). The photographs were not required for the underlying investigation and were subsequently distributed throughout

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the police department after the victim was told they were destroyed. *Id.* The court concluded that the "photographing of one's nude body, and the distribution of such photographs to strangers," in this context constituted an arbitrary invasion of the victim's privacy. *Id.* at 455. There are no allegations remotely similar in this case.

Similarly, *Brannum v. Overton County School Board* involved a claim that school officials installed video equipment that recorded, stored, and permitted access to images of middle school students changing their clothes in a locker room without their knowledge in violation of the students' Fourth Amendment rights. 516 F.3d 489, 491 (6th Cir. 2008). There are no Fourth Amendment claims in this case, nor does this case involve any allegation that any student was subject to involuntary exposure of their undressed bodies. *Brannum* is not only non-binding but also inapposite.

In *Supulveda v. Ramirez*, the Ninth Circuit concluded that a male parole officer entering the bathroom stall of a female parolee who was unclothed from the waist down and urinating violated plaintiff's privacy rights. 967 F.2d 1413, (9th Cir. 1992). The court relied on, among other things, the fact that the officer's view of the parolee was compelled. *Id.* at 1416. Again, there are no allegations that any student was required to undress or urinate in view of others, let alone under the conditions or power dynamics involved in that case.

Curiously, Plaintiffs cite to *Caribbean Marine Services Co., Inc. v. Baldwin* for the proposition that the right to privacy includes a "privacy interest in remaining free from involuntary viewing of private parts of the body by members of the opposite sex."[2] 844 F.2d 668, 677 (9th Cir. 1988); (Pls.' Resp. to BRO Mot. to Dismiss at 6.) This case involves no involuntary exposure of private parts of the body because no student is required to disrobe in common spaces. The Ninth Circuit in *Baldwin* rejected arguments that granting women equal access to a ship where crew

[2] The full quote of the court is as follows: "Some courts have held that the privacy interest in remaining free from involuntary viewing of private parts of the body by members of the opposite sex should not impair employment rights unless the threatened invasion of privacy is serious and there are no means by which both interests can be reasonably accommodated." *Id*. at 677.

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members "enjoy little or no privacy with respect to intimate bodily functions" and undressing violated any constitutional or statutory interest in privacy. *Id.* at 671, 676. Instead, the court concluded that claims to privacy violations were speculative. *Id.* at 675-75. Further, to the extent the alleged privacy harms could be "minimized by taking reasonable steps to prevent the threatened intrusion," the alleged privacy claims would be "reduced to no more than a claim of inconvenience." *Id.* at 676, 678. Inconvenience, the court explained, does not justify the denial of equal employment opportunities. *Id.* The same is true here with regard to Plaintiffs' attempt to deny transgender students equal access to school facilities.

Finally, Plaintiffs cite to *Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005), as an example of a case where courts have "expressly acknowledged the right to bodily privacy in the context of schools." (Pls.' Resp. to Dallas School District's ("DSD") Mot. to Dismiss at 5, ECF No. 41.) *Blau* involved free expression and substantive due process challenges to a school dress code. *Id.* at 385, 387. The Sixth Circuit rejected those claims. *Id.* at 388-96. Ironically, the very quote relied on by Plaintiffs from that case was a quotation the Sixth Circuit used to chide the *Blau* plaintiffs for taking language from cases out of context. *Id.* at 395 (describing "the perils of failing to anchor broad language to the context in which it was written"). The actual language about being "compel[led] to lay bare the body, or to submit to the touch of a stranger, without lawful authority" is originally from *Union Pacific Railway v. Botsford*, 141 U.S. 250, 252 (1891), where the Supreme Court ruled that the common law did not permit a defendant to require a plaintiff in a tort case to undergo a surgical examination. That decision is no longer good law. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665, 115 S. Ct. 2386, 2396, 132 L. Ed. 2d 564 (1995); *Boswell v. Schultz,* 2007 OK 94, ¶ 7, 175 P.3d 390, 393; *Privee v. Burns*, 46 Conn. Supp. 301, 305, 749 A.2d 689, 693 (Super. Ct. 1999). *Blau* in no way supports Plaintiffs' privacy claims in this case.

Put simply, the cases relied on by Plaintiffs do not support the right to exclude they assert in this case. Plaintiffs concede that they have failed to allege that they have been forced to expose

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their bodies to any government official, let alone student, of any gender. Nor have they alleged that they were involuntarily videotaped or photographed while unclothed. The absence of such allegations is fatal to their privacy claim, and it should be dismissed.

B. Plaintiffs Cannot Articulate How the School District's Practices and Student Safety Plan Violate Title IX.

BRO's Motion to Dismiss makes two Title IX arguments: (1) that plaintiffs have failed to state a claim under Title IX because they have not alleged "harassment" as defined by the statute; and (2) granting Plaintiffs the declaratory relief they seek would, in itself, violate Title IX. (BRO Mot. to Dismiss at 7-13, ECF No. 30.) Plaintiffs conflate the two and, in so doing, address neither.

1. Plaintiffs have not adequately alleged a violation of Title IX. As noted in BRO's Motion to Dismiss, to sustain a sexual harassment claim under Title IX, Plaintiffs must establish that they experienced harassment based on sex, and that the harassment was "so severe, pervasive, and objectively offensive" that it "deprive[s] the victim of access to the educational opportunities or benefits provided by the school." *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). Plaintiffs only response to that is that they "are experiencing harassment on the basis of sex because they are required to disrobe in front of someone of the opposite biological sex, and that being forced to disrobe in the presence of the opposite biological sex is harassment."[3] (Pls.' Resp. to BRO Mot. to Dismiss at 7.) Putting aside the fact that Plaintiffs' Complaint does not allege that they are "required" to disrobe in front of anyone in the locker room, let alone a transgender student, this argument is unsupported by any case law. Plaintiffs, not surprisingly, do not cite to any case law to support their contention that the mere presence of a transgender student in a bathroom or locker room constitutes harassment based on sex. As noted in BRO's Motion to Dismiss, the courts that have addressed arguments similar to Plaintiffs' have rejected them

[3] Plaintiffs also contend, via a quote of a law review article, that "Predators will use cover of gender-identity-based rules or conventions to engage in peeping, indecent exposure, and other offenses and behaviors." (Pls.' Resp. to BRO Mot. to Dismiss at 7 (quoting Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J.L. & PUB. POL'Y 309, 329 (2018)).) Importantly, their Complaint makes no allegations that any such activity has occurred in the school in question. It is therefore irrelevant to this Motion.

squarely. *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *32 (N.D. Ill. Oct. 18, 2016) (The "mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases."); *see also Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418, at *67 (E.D. Pa. Aug. 25, 2017); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (rejecting female employee's claim that a transgender female co-worker's use of the women's restrooms constituted sexual harassment).

Plaintiffs largely ignore the above cited cases. The only case they even attempt to distinguish is *Cruzan* by arguing that the plaintiff asserting the failed Title IX claim in that case had access to many restrooms that the transgender teacher at the school did not. (*See* Pls.' Response to DSD's Mot. to Dismiss at 10-11.) However, the availability of alternative restrooms for the plaintiff in *Cruzan* is analogous to the facts here—Student Plaintiffs have the alternative of using a single-occupancy facility on campus if they are uncomfortable at the prospect of sharing a restroom with a transgender student. The other facts the court relied on are also identical to the facts here: the policy was not directed at the plaintiff, and that the transgender person in question did not "engage[] in any inappropriate conduct other than merely being present in the * * * restroom." *Cruzan*, 294 F.3d at 984.

Plaintiffs also contend that *Cruzan* is inapplicable because it involved claims of workplace harassment rather than harassment in the school setting, citing *Davis v. Monroe Cty. Bd. Of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996). (*See* Pls.' Response to DSD's Mot. to Dismiss at 11.) *Davis*, however, does not change the fact that Plaintiffs have failed to allege behavior that rises to the level of harassment under Title IX in any setting. *Davis*, in keeping with the facts supporting harassment claims in other settings, involved fondling, attempted fondling, sexually suggestive rubbing, and offensive language. *Davis*, 74 F.3d at 1188-89. In fact, the harassing student was eventually charged with and pled guilty to sexual battery. *Id.* at 1189. The conduct at issue was thus extreme and readily distinguishable from the conduct at issue in this case.

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Finally, Plaintiffs contend that the relevant holding in *Cruzan* was rejected by the Tenth Circuit in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007). There, the employee-plaintiff, who was a bus operator for the Utah Transit Authority ("UTA"), informed her boss that she would begin transitioning and using the women's restroom instead of the men's restroom. *Id.* at 1219. UTA ultimately fired the plaintiff, citing as its reasons "the possibility of liability for UTA arising from Etsitty's restroom usage" and "UTA's inability to accommodate her restroom needs." *Id.* Plaintiff filed suit against UTA, alleging unlawful gender discrimination in violation of Title VII and the Equal Protection Clause. *Id.* The court stated that even assuming it adopted the rule from *Cruzan,* "it would say nothing about whether UTA was nevertheless genuinely concerned about the possibility of liability and public complaints [resulting from a transgender employee using public women's restrooms while on her bus routes]. The question of whether UTA was legally correct about the merits of such potential lawsuits is irrelevant." *Id.* at 1227. Thus, the issue in *Etsitty* was completely different than that here and in *Cruzan*—whether UTA fired Etsitty for a legitimate as opposed to discriminatory reason, versus whether a transgender person's use of the restroom corresponding to his or her gender identity creates a hostile work or school environment.

In the absence of case law to support their position, Plaintiffs fall back on this assertion: "Nor is there any explanation why granting Student A or other transgender students the right to use unisex facilities or the teacher's lounge constitutes discrimination 'based on sex,' but affording the same alternatives to other students is not similarly discrimination 'based on sex.'" (Pls.' Resp. to BRO Mot. to dismiss at 7-8.) BRO does not argue that granting any student, transgender or not, the option to access single-occupancy bathrooms constitutes discrimination based on sex. Discrimination by sex occurs when transgender boys are denied access to facilities that all other boys may use because they are transgender. Plaintiffs attempt to compare transgender students who are denied access to the multi-occupancy facilities available to other students to Student Plaintiffs, who have access to those facilities but *opt not to use them* because of their own privacy

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concerns. These are not comparable situations. No school policy bans Student Plaintiffs from accessing the multi-occupancy restrooms and locker rooms used by other students. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), and vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017) (Davis. J., concurring) ("For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students.").

2. Plaintiffs' fail to respond to the argument that the injunctive relief they seek would discriminate on the basis of sex. Faced with extensive precedent from the Ninth Circuit, as well as the Sixth, Seventh, and Eleventh Circuits, holding that discrimination against a transgender individual is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution, Plaintiffs simply assert, without explanation and without any effort to distinguish the cases cited by BRO, that "Title IX does not offer protection for discrimination against transgender students." (Pls.' Resp. to BRO Mot. to Dismiss at 9.) The sole support provided for that decision is a district court case from the Western District of Pennsylvania, *Johnson v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676-677 (W.D. Penn. 2015). *Johnson* is neither binding nor persuasive authority for this Court for all of the reasons provided in BRO's Motion. (*See* BRO Mot. to Dismiss at 10-14.)[4]

C. Plaintiffs' Response Mischaracterizes Oregon's Anti-Discrimination Law.

Under Oregon law, discrimination in education occurs when the act of a school (1) "unreasonably differentiates treatment" or (2) "is fair in form but discriminatory in operation" on the basis of age, disability, national origin, race, marital status, religion, sexual orientation, or sex. ORS 659.850(1). Plaintiffs argue that the discomfort they experience around sharing the

[4] In fact, in response to DSD's Motion to Dismiss, Plaintiffs concede that "district court decisions from Illinois and Pennsylvania" are not persuasive to this court. (Pls.' Resp. to DSD's Mot. to Dismiss at 5.)

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common spaces of restrooms and locker rooms with transgender students compels denial of equal access to transgender students. But that discomfort is not due to discrimination based on any protected characteristics. As such, it does not implicate ORS 659.850.

Plaintiffs further argue that the Student Safety Plan (the "Plan") results in discrimination in the form of differential treatment of Student Plaintiffs. (Pls.' Resp. to Def. DSD's Mot. to Dismiss at 15.) In particular, Plaintiffs argue that the accommodation offered them—an accommodation based on their discomfort as opposed to their protected class status—should instead apply to transgender students. (Pls.' Resp. to BRO Mot. to Dismiss at 8; Pls.' Resp. to DSD Mot. to Dismiss at 15.) But as discussed in Point B, supra, allowing Plaintiffs the *choice* to use separate single-user facilities does not constitute discrimination of any kind, while *mandating* that transgender students use separate single-user facilities (and excluding them from the multi-occupancy facilities other students are permitted to use) does constitute unlawful discrimination based on sex and gender identity. Student Plaintiffs are electing an accommodation rather than following the School District's neutral policy that treats all students the same way. *See Powell v. Bunn*, 341 Or. 306, 316 (2006) (finding no discrimination occurred where "all children were treated in precisely the same way"). What Plaintiffs propose is a policy that would permit some students to use the bathroom corresponding with their gender identity, but would prohibit transgender students from doing so. Plaintiffs' proposed policy would thus violate ORS 659.850 by unreasonably differentiating treatment of transgender students, which amounts to discrimination on the basis of sex and gender identity.

Plaintiffs assert that their desired exclusion of transgender students would not amount to unlawful discrimination because Title IX fails to offer protection from discrimination for transgender students. Plaintiffs both misrepresent protection of transgender students under Title IX (*see supra* Sections B.1 and B.2; *see also* BRO Mot. to Dismiss at 7-13) and fail to explain the interaction of Title IX and ORS 659.850. Moreover, Plaintiffs ignore Oregon's protection against discrimination based on gender identity. ORS 174.100(7). Finally, Plaintiffs fail to allege any

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action by the School District against Student Plaintiffs that is based on their sex, religion, or another protected status as required by ORS 659.850. Accordingly, Plaintiffs fail to state a claim under Oregon anti-discrimination law.

D. Plaintiffs' Public Accommodation Claim Is Unsupported by Their Allegations or the Law.

To allege discrimination in a place of public accommodation, Plaintiffs must allege that the School District denied Plaintiffs "full and equal accommodations, advantages, facilities, and privileges * * * without any distinction, discrimination, or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status, or age." ORS 659A.403(1). Such discrimination is "on account of" a protected status if it is "by reason of" or "because of" that protected status. *Klein v. Or. Bureau of Labor and Industries*, 410 P.3d 1051, 1061 (Or. App. 2017) ("[B]y its plain terms, [ORS 659A.403] requires only that the denial of full and equal accommodations be causally connected to the protected characteristic or status * * * ."). Therefore, Plaintiffs must allege that the School District's Plan denies them full and equal accommodation *because of* their sex, sexual orientation, religion, or other protected characteristic.

Plaintiffs argue that the School District's policy denies them full and equal access, taking issue with Student A's alleged rejection of the accommodation offered to Student Plaintiffs. (Pls.' Resp. to BRO Mot. to Dismiss at 9-10.) Plaintiffs, however, fail to allege that the School District's policy denies them equal access *on account of* their religion, sex, sexual orientation, or other protected characteristic. Rather, the accommodation provided to Student Plaintiffs is due to their *discomfort* with sharing a bathroom with transgender students. Student Plaintiffs are not being forced to use single-occupancy facilities because of any protected characteristic of theirs. Indeed, they are not being forced to use single-occupancy facilities at all; they are *choosing* to do so. (*See* Compl. ¶¶ 79, 91.) Student Plaintiffs are thus allowed to use the group restroom corresponding with their gender identity like all other students, or to instead choose to use a single-occupancy facility. On the other hand, Student Plaintiffs seek to *require* Student A to use a bathroom

inconsistent with his gender identity—unlike all other students—or a single-occupancy facility. Such a requirement would amount to discrimination on the basis of Student A's sex and gender identity in contravention of Oregon law. ORS 174.100(7); ORS 659A.403(1); *Blachana, LLC v. Or. Bureau of Labor & Industries*, 273 Or. App. 806, 819 (Or. App. 2015). Because Plaintiffs fail to allege any facts tending to show the School District enacted the Plan in order to deny Plaintiffs equal access on account of their religion, sex, sexual orientation, or other protected status, this claim should be dismissed.

E. The Right to Parent Does Not Include the Right to Dictate the Operation of Public Schools.

Parents generally have a right to be free of government interference with how they raise and care for their children.. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). That right does not include a right to dictate the operation of public schools. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005).

In *Fields v. Palmdale School District*, a case involving sexual education, the Ninth Circuit held that "parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students." *Id.* at 1200. The court so held after determining that "no such specific right can be found in the deep roots of the nation's history and tradition or implied in the concept of ordered liberty." *Id.* at 1203-04. Though parents can control their children's education by selecting their preferred educational forum free from state interference, once a parent decides where to send his or her children for schooling, the parent's "fundamental right to control the education of their children is, at the least, substantially diminished." *Id.* at 1206.

Plaintiffs argue that *Fields* is inapposite to this case as it involves "matters of curriculum." (Pls.' Resp. to DSD Mot. to Dismiss at 8.) The Ninth Circuit did not so limit its ruling:

> While 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. Whether it is the school curriculum, the hours of the school day,

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> school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.

Id. at 1206 (emphasis in original) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005)) (internal quotation marks omitted). The court recognized that "[s]chools cannot be expected to accommodate the personal, moral or religious concerns of every parent" because such a requirement would "not only contravene the educational mission of the public schools, but also would be impossible to satisfy." *Id.* Accordingly, the court found that the Due Process Clause "does not vest parents with the authority to interfere with a public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise." *Id.* at 1206. Such authority is exactly what Plaintiffs seek the Court to provide them in this case.

Plaintiffs rely heavily on *Troxel v. Granville*, a case that addressed the right of parents to control the custody of their children. (Pls.' Resp. to BRO Mot. to Dismiss at 8); 530 U.S. 57 (2000). Unlike *Fields*, however, *Troxel* did not address the boundary between home and school, but rather was limited to the issue of state interference with a parent's custody decision regarding third-party petitions by non-parents for visitation with the children. *Id.* Accordingly, *Troxel* does not control the case at hand.[5]

F. Plaintiffs Cannot Articulate a Free Exercise Claim.

Although the First Amendment protects the free exercise of religion, "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

[5] Moreover, in *Troxel*, the Supreme Court criticized the Washington statute at issue for subjecting a parent's decision regarding third-party visitation to review by the court and failing to give any deference or weight to the parent's decision. *Id.* at 67, 69. Here, the School District has deferred to Plaintiffs' requests that their children not share facilities with transgender students by making available to Student Plaintiffs single-occupancy facilities. What the School District has refused to defer to are Plaintiffs' requests that the District discriminate against transgender students in violation of Oregon and federal law in order to accommodate Plaintiffs' personal, moral, or religious concerns.

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prescribes (or proscribes)." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). A law is generally applicable if the government action is not "specifically directed at" a religious practice. *Id.* at 878. A law may target religious practice, and thus fail to satisfy the generally applicable standard, if the government enforces the law "in a selective manner" against conduct motivated by religious belief or the law's purpose is to suppress free exercise of religion. *Church of Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993); *Emp't Div.*, 494 U.S. at 878. A neutral law of general applicability is subject to rational basis review. *Lukumi*, 508 U.S. at 531.

Plaintiffs assert that the Plan is not a neutral law of general applicability because it was adopted to support a single student, Student A. (Compl. ¶ 261; Pls.' Resp. to BRO Mot. to Dismiss at 11; Pls.' Resp. to DSD Mot. to Dismiss at 13.) As noted in BRO's Motion to Dismiss, Plaintiffs misunderstand the meaning of "generally applicable." (BRO Mot. to Dismiss at 23-24.) Plaintiffs do not address BRO's argument on the meaning of "generally applicable," and cite no law to support an alternative interpretation of the term.

Further, Plaintiffs in no way connect the Plan's support of Student A with any infringement of their free exercise of religion, other than bald assertions that the Plan forces Plaintiffs to "choose between the benefit of a free public education and violating their religious beliefs." (Compl. ¶ 253.) In fact, Plaintiffs fail to allege that the Plan was motivated by a desire to suppress free exercise of religion, or that the Plan targets a specific religion or religious practice, or that school officials selectively enforce the Plan against religiously motivated conduct. Accordingly, Plaintiffs fail to offer any basis for their contention that the Plan is not neutral or generally applicable and, thus, subject to strict scrutiny.

Plaintiffs also argue that a hybrid rights analysis requires strict scrutiny in this case. (Pls.' Resp. to DSD Mot. to Dismiss at 15.) However, in *Employment Division v. Smith*, the Court found no hybrid situation when considering "a free exercise claim unconnected with any communicative activity or parental right." *Emp't Div.*, 494 U.S. at 882. Here, Plaintiffs do not allege infringement

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of a communicative activity affecting both free exercise of religion and free speech and/or association rights. Plaintiffs do allege infringement of a parental right, but, as discussed above, fail to allege any facts to support such a claim, and it accordingly fails as a matter of law. *See San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004) (finding no hybrid rights claim where free speech claim did not have a fair probability of success). As a result, strict scrutiny does not apply.

But even if strict scrutiny did apply, it would be satisfied here because it serves a compelling government interest and is narrowly tailored to serve the same for the reasons articulated in BRO's Motion. (BRO Mot. to Dismiss at 25-27.)

Plaintiffs offer only two responses to these arguments, neither of which accurately recites the allegations in their Complaint or addresses the substance of BRO's arguments. (Pls.' Resp. to BRO Mot. to Dismiss at 11.) First, they allege that the Plan is somehow not narrowly tailored because it ensures that the PE teacher can see Student A's locker, but an "ethical or responsible educator" would not allow a "male PE teacher and Student A" to be "alone and out of sight with other students." Of course, there is no allegation that any teacher is to be alone and out of sight with other students.

Second, Plaintiffs state that the School District could more narrowly tailor the safety and dignity needs of all students by "mak[ing] the same accommodations to any student who requests to use single-use facilities or the teacher's lounge." (Pls. Resp. to BRO Mot. to Dismiss at 11.) Ironically, according to the facts as alleged in the Complaint, that is precisely what the School District has done. It has permitted boys, including a transgender boy, to use multi-occupancy boys' restrooms and locker rooms; it has permitted girls to use multi-occupancy girls' restrooms and locker rooms; and it has permitted any student "who requests to use single-use facilities or the teacher's lounge" to do so. (*See* Compl. ¶ 79, 81, 91.) If this outcome would truly be satisfactory to the Plaintiffs, it has already been accomplished.

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III. CONCLUSION

For the foregoing reasons, BRO respectfully requests that its Motion to Dismiss be granted.

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