**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF OREGON**
**PORTLAND DIVISION**

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

**FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM**

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the United States Department of Education, its Secretary, Betsy DeVos, the United States Department of Justice, and Attorney General Jefferson B. Sessions III move to dismiss the claims against them. For the reasons set forth below, plaintiffs lack standing to bring their claims against the federal defendants and have not stated any plausible claim against them. All claims against these defendants must therefore be dismissed.[1]

**INTRODUCTION**

In November 2015, Dallas School District No. 2 implemented a Student Safety Plan that changed the terms on which a transgender high school student was permitted to access sex-segregated facilities such as bathrooms and locker rooms. In the months that followed, both the high school principal and the school board expressed their continuing support for the policy, which plaintiffs challenge here. Whatever its merits, plaintiffs' complaint is properly directed

[1] The undersigned counsel certifies that, in conformity with Local Civil Rule 7-1(a), the plaintiffs and federal defendants conferred and made a good faith effort to resolve their dispute over the sufficiency of the complaint, but were unable to do so.

towards the school district that adopted the Student Safety Plan, which remains in effect to this day.

But plaintiffs[2] have also sued the United States Department of Education and other federal defendants, asserting that federal actions caused them injuries that this Court can redress. These allegations simply are not plausible: plaintiffs have not alleged any facts to support their theory that the federal government compelled the Dallas School District to adopt its Student Safety Plan, nor that any relief against the federal defendants would prompt the school district to abandon it. As the allegations in the complaint show, any injury that plaintiffs may have suffered stems solely from the Dallas School District's Student Safety Plan, and could only be redressed by relief against that school district. The plaintiffs therefore lack standing to pursue their claims against the federal defendants. For closely related reasons, plaintiffs have also failed to state any plausible claim against the federal defendants. For these reasons, plaintiffs' claims against the federal defendants must be dismissed.

## BACKGROUND

### A. Dallas School District and its Student Safety Plan

The Dallas School District adopted its Student Safety Plan in November 2015, allowing a transgender high school student "the right to enter and use . . . locker rooms, restrooms, and showers at District schools according to . . . perceived gender identity." Compl. ¶ 75. The Principal of Dallas High School publicly explained this policy and, the plaintiffs allege,

[2] The plaintiffs are Parents Rights in Education, a nonprofit organization; Parents for Privacy, an association; Lindsay Golly, a former student at Dallas High School; Kris and Jon Golly, her parents and the parents of A.G., a future student at Dallas High School; and Melissa Gregory, the mother of T.F., a current student at Dallas High School. Nicole Lillie is named as a plaintiff in the caption, but the complaint contains no allegations about her. Plaintiffs have agreed that all claims by Lindsay Golly must be dismissed. ECF No. 41 at 2.

threatened to punish students who protested it. *Id.* ¶¶ 87, 91–92. The District defended the policy at three separate school board meetings, from December 2015 through February 2016, inviting speakers that it said were "experts on gender identity issues, all of whom . . . exclusively supported the Student Safety Plan." *Id.* ¶ 93. The plaintiffs allege that the District "has, through various announcements to the students at Dallas High School and through board and community meetings on gender identity . . . conveyed . . . the message that any objection to the Student Safety Plan . . . will be viewed by District administration as intolerance and bigotry." *Id.* ¶ 109.

The plaintiffs allege that the Student Safety Plan violates students' right to privacy, *id.* ¶¶ 186–206, parents' right to direct the education and upbringing of their children, *id.* ¶¶ 207–20, and both parents' and students' right to the free exercise of religion, *id.* ¶¶ 256–64. They also allege that it violates Title IX of the Education Amendments of 1972, *id.* ¶¶ 228–47, and the Religious Freedom Restoration Act, *id.* ¶¶ 248–55.

**B. Federal Guidance Documents and Previous Litigation**

Plaintiffs challenge four U.S. Department of Education guidance documents discussing transgender students, two of which were withdrawn before this suit was filed. The earliest document, published in April 2014, was titled "Questions and Answers on Title IX and Sexual Violence." *See* Compl. ¶ 33 & Ex. H. It was withdrawn in September 2017, for reasons unrelated to this case.[3] The second document, "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," was published in December 2014. *See* Compl. ¶ 33 & Ex. I. The third document, the "Title IX Resource Guide," was published in April 2015. *See* Compl. ¶ 33 & Ex. J. None of these first three documents

[3] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter of September 22, 2017, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

discusses sex-segregated facilities such as restrooms or locker rooms, which are the focus of the Student Safety Plan adopted by the Dallas School District in November 2015, and the only source of plaintiffs' alleged harms.

The fourth guidance document challenged here is a Dear Colleague Letter jointly issued by the U.S. Departments of Education and Justice in May 2016, and jointly withdrawn by them by means of another Dear Colleague Letter in February 2017. The May 2016 letter said that, under Title IX, "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity." Ex. K at 3. The February 2017 letter noted that "[t]his interpretation has given rise to significant litigation regarding school restrooms and locker rooms," and that "the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy." The Departments also said that they would "not rely on the views expressed within" the May 2016 letter.[4] *See* Compl. ¶ 39.

The litigation to which the February 2017 letter referred included a number of suits making claims against the federal government essentially identical to the ones asserted here: that federal actors had announced an interpretation of Title IX that was causing harm to plaintiffs and could be challenged in federal court. *See Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945 (N.D. Ill. filed May 4, 2016); *Texas v. United States*, No. 7:16-cv-54 (S.D. Tex. filed May 25, 2016); *Bd. of Educ. of Highland Local School District v. U.S. Dep't of Educ.*, No. 2:16-cv-524 (S.D. Ohio filed June 10, 2016); *Women's Liberation Front v. U.S. Dep't of Justice*,

[4] U.S. Dep'ts of Educ. & Justice, Dear Colleague Letter of February 22, 2017 ("February 2017 letter") at 1, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

No. 16-cv-915 (D.N.M. filed Aug. 11, 2016); *Privacy Matters v. U.S. Dep't of Educ.*, No. 16-cv-3015 (D. Minn. filed Sept. 7, 2016).

Courts decided preliminary injunction motions in some of these cases, with differing results. *See Texas*, 7:16-cv-54, ECF No. 58 (S.D. Tex. Aug. 21, 2016) (granting nationwide preliminary injunction); *Highland*, No. 2:16-cv-524, ECF No. 95 (S.D. Ohio Sept. 26, 2016) (denying preliminary injunction); *see also Students & Parents for Privacy*, No. 16-cv-4945, ECF No. 134 (N.D. Ill. Oct. 18, 2016) (report and recommendation against preliminary injunction).

No claims against federal defendants were litigated to the merits, and all such claims were dismissed after the issuance of the February 2017 letter. *See Texas*, 7:16-cv-54, ECF No. 128 (S.D. Tex. Mar. 3, 2017) (voluntarily dismissing case and dissolving nationwide preliminary injunction); *Women's Liberation Front*, No. 16-cv-915, ECF No. 20 (D.N.M. Mar. 16, 2017) (voluntarily dismissing case); *Privacy Matters*, No. 16-cv-3015, ECF No. 83 (D. Minn. Apr. 13, 2017) (voluntarily dismissing case); *Highland*, No. 2:16-cv-524, ECF No. 131 (S.D. Ohio June 20, 2017) (voluntarily dismissing federal defendants); *Students & Parents for Privacy*, No. 16-cv-4945, ECF No. 178 (N.D. Ill. June 20, 2017) (voluntarily dismissing federal defendants).

This suit was filed in November 2017.

## STANDARD OF REVIEW

When a defendant brings a Rule 12(b)(1) motion, the plaintiff has the burden of establishing subject matter jurisdiction. *See Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007) ("Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence."). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "A 'facial' attack accepts the truth of the plaintiff's allegations but asserts that they 'are insufficient on their face to invoke

federal jurisdiction.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air*, 373 F.3d at 1039). "The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Id.* (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter that "state[s] a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when the factual allegations allow the court to infer the defendant's liability based on the alleged conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The factual allegations must present more than "the mere possibility of misconduct." *Id.* at 678. While considering a motion to dismiss, the court must accept all allegations of material fact as true and construe those facts in the light most favorable to the non-movant. *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). However, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

**ARGUMENT**

Article III of the Constitution limits federal courts to adjudicating "actual cases and controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Federal courts therefore have "neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them," and must resolve only "real and substantive

controvers[ies] admitting of specific relief through a decree of a conclusive character." *Preister v. Newkirk*, 422 U.S. 395, 401 (1975).

One aspect of this case-or-controversy limitation is the requirement of standing. To establish standing, plaintiffs (1) must have suffered an injury-in-fact, *i.e.*, a judicially cognizable injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (2) the injury must be "fairly … trace[able] to the challenged action of the defendant;" and (3) "it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation omitted, alterations in original).

Plaintiffs claim that they are injured by the Dallas School District's policy regarding access to sex-segregated facilities for a transgender student, and that these injuries are "a direct result of" the federal defendants' interpretation of Title IX in the challenged guidance documents "which," they say, "in turn forms the justification for the Student Safety Plan" adopted by the Dallas School District. Compl. ¶ 48. But their complaint does not plausibly allege that the school district's adoption of the Student Safety Plan was caused by the federal guidance documents challenged here, nor that any decision against the federal defendants would lead the school district to withdraw the Student Safety Plan. Because plaintiffs' alleged injuries are not fairly traceable to the challenged federal actions, nor likely to be redressed by any relief the Court could award against federal actors, plaintiffs lack standing to pursue their claims against the federal defendants. And those claims cannot survive review under Rule 12(b)(6). All claims against the federal defendants must therefore be dismissed.

**A. The injuries alleged by plaintiffs are not fairly traceable to federal actions.**

Any injuries that plaintiffs may be suffering could be caused only by the Dallas School District and its Student Safety Plan. Four of the five claims against the federal defendants discuss only the Student Safety Plan, and do not mention any federal actions. *See* Compl. ¶¶ 202–06 (Student Safety Plan violates students' right to privacy); *id.* ¶¶ 216–20 (Student Safety Plan violates parents' right to direct the education and upbringing of their children); *id.* ¶¶ 251–55 (Student Safety Plan violates the Religious Freedom Restoration Act); *id.* ¶¶ 258–64 (Student Safety Plan violates both parents' and students' right to the free exercise of religion). The remaining claim, for violations of the Administrative Procedure Act, nonsensically suggests that the interpretation of Title IX announced in the May 2016 letter was the root cause of the Student Safety Plan adopted in November 2015. *Id.* ¶¶ 141, 143.

Read as a whole, plaintiffs' complaint appears to assert that the federal government somehow compelled the Dallas School District to adopt its Student Safety Plan, either by investigating an Illinois school district that had not implemented a similar policy, *see id.* ¶¶ 64–67, or by issuing the guidance documents discussed above. *Id.* ¶ 40 (alleging that the school district "adopted and implemented the . . . Student Safety Plan" in "response to the foregoing Federal Guidelines and enforcement"); *id.* ¶ 75 ("In response to the threat of [federal] enforcement action [the school district] developed and implemented the Student Safety Plan . . . .").

But on the facts set out in their complaint, plaintiffs' alleged injuries are not "fairly traceable" to the challenged guidance documents. The immediate source of those asserted

injuries is the presence of a particular transgender student in certain sex-segregated facilities[5]—which can, in turn, be traced to the Student Safety Plan granting access to those facilities. That Plan was adopted six months before one of the challenged guidance documents—the May 2016 letter—was issued, and well after the others (which do not discuss sex-segregated facilities) were published. It is not plausible to allege, as plaintiffs do here, that the adoption of the Student Safety Plan can be fairly traced either to guidance documents that do not discuss restrooms or locker rooms, or to a document issued long after the Plan was adopted.

Nor do the investigations of other school districts support plaintiffs' theory of standing. Because those investigations are not being (and could not be) challenged here, they are not the "challenged action of the defendant" to which any injury must be traced. *Lujan*, 504 U.S. at 560. And in any event, it simply is not plausible that a letter of findings issued to an Illinois school district on November 2, 2015, Compl. ¶ 65, prompted the adoption of the Student Safety Plan in Dallas, Oregon less than two weeks later, *see id.* ¶ 75. The complaint notes that a transgender student at Dallas High School requested permission to use certain sex-segregated facilities in September 2015, *id.* ¶ 78, and the Student Safety Plan simply grants that student's request. The student's request two months before, and not a letter of finding issued to a far-away school district mere days before, was plainly the impetus for the Dallas School District's adoption of its Student Safety Plan.

"[W]hen a plaintiff alleges that government action caused injury by influencing the conduct of third parties," as plaintiffs allege that the federal defendants injured them by influencing the Dallas School District to adopt its Student Safety Plan, the Ninth Circuit has

[5] The injuries asserted by the students, parents, organization, and association that bring this case all stem from the presence of this transgender student in certain sex-segregated facilities in Dallas High School. The Secretary therefore analyzes their injuries together.

"held 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)).

But plaintiffs have offered nothing but speculation and guesswork about the motivations of the Dallas School District in adopting its Student Safety Plan. They say that the challenged guidance documents or investigations in other school districts impelled the Dallas School District to take the action that caused their asserted harms, but they have offered no factual allegations to show that this is so. Any harms that plaintiffs are suffering here are the direct result of the Student Safety Plan and, on the facts alleged, are not "fairly traceable" to any challenged federal action. *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 149 (2010). All claims against the federal defendants must therefore be dismissed.

**B. Plaintiffs' alleged injuries could not be redressed by any relief against federal actors.**

For similar reasons, plaintiffs' asserted injuries would not be "redressable by a favorable ruling" against the federal defendants. *Id.* Even if this Court were to vacate the challenged guidance documents, that remedy would not affect the Student Safety Plan, and so would not

redress plaintiffs' alleged injuries. As discussed above, the challenged policy was independently adopted by Dallas School District. An order declaring the federal guidance documents invalid would not force the District to alter its policy, as plaintiffs' allegations demonstrate. Two of the challenged guidance documents, including the May 2016 letter (which contains the only discussion of sex-segregated facilities), were withdrawn before the complaint was filed.[6] *See* Compl. ¶ 39. As the plaintiffs observe, "[d]espite" the withdrawal of those documents, Dallas School District "has not changed its policies." *Id.* ¶ 75. There is no reason to think that a ruling against the federal defendants would make it any likelier that the school district would change the challenged Plan.

To the contrary, it is apparent from the allegations in the complaint that Dallas School District adopted and maintains its Student Safety Plan not due to compulsion by the federal defendants but because the school district regards the Plan as the best policy for its high school. Plaintiffs allege that the Principal of Dallas High School threatened to punish students who protested the Student Safety Plan, *id.* ¶¶ 87, 91–92; that the school district defended the policy at three separate school board meetings, from December 2015 through February 2016, inviting speakers that it said were "experts on gender identity issues, all of whom . . . exclusively supported the Student Safety Plan," *id.* ¶ 93; and that the District "has, through various announcements to the students at Dallas High School and through board and community meetings on gender identity . . . conveyed . . . the message that any objection to the Student Safety Plan . . . will be viewed by District administration as intolerance and bigotry." *Id.* ¶ 109.

[6] If these two guidance documents had been in effect at the beginning of this litigation (which they were not) any challenge against them would have been rendered moot by their withdrawal. *See Nevada v. United States*, 699 F.2d 486, 487 (9th Cir. 1983) (discussing "the general rule that when actions complained of have been completed or terminated, declaratory judgment and injunctive actions are precluded by the doctrine of mootness").

Based on these allegations, it is not likely that the school district would abandon the Student Safety Plan merely because this Court declared federal guidance documents to be invalid. To the contrary, in moving to dismiss this case, the Dallas School District suggested that its Plan was an "inclusive polic[y]," and that plaintiffs' preferred policy "would discriminate against some of the District's students." ECF No. 31 at 1. Those are not the words of a school district being compelled to act against its better judgment.

**C. Plaintiffs have not stated a claim against the federal defendants.**

Each of plaintiffs' claims against the federal defendants derives from the proposition that these defendants have promulgated and still maintain a "Rule" prescribing the way in which transgender students must be allowed to access sex-segregated facilities in schools that accept federal funds. Plaintiffs allege that the federal defendants "created and promulgated this new legislative rule . . . through a series of Federal Guidelines that were sent to school districts between April 2014 and May 2016." Compl. ¶ 33. Plaintiffs identify four such guidance documents: "Questions and Answers on Title IX and Sexual Violence," published April 2014; "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," published December 2014; "Title IX Resource Guide," published April 2015; and a Dear Colleague Letter issued May 2016. *See* Compl. ¶ 33 & Exs. H–K.

The first three guidance documents do not contain any discussion of access to sex-segregated facilities by transgender students. The May 2016 letter, which does discuss this subject, was rescinded in February 2017, in a separate Dear Colleague Letter in which the U.S. Departments of Education and Justice said that they would "not rely on the views expressed within" the May 2016 letter. February 2017 Letter at 1; *see* Compl. ¶ 39. Plaintiffs allege that "[n]otwithstanding" the February 2017 letter, the views contained within the May 2016 letter are

being treated by federal defendants as a "Rule [that] has not been formally repealed" but rather "has continuing legal force and effect binding" Dallas School District. Compl. ¶ 39.

The complaint, however, is devoid of any factual allegation to support this legal conclusion. Indeed, the complaint contains no allegations of any actions by the federal defendants after the February 2017 letter was issued, much less any actions that would cast doubt on their clear statement "that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in" the May 2016 letter. February 2017 Letter at 1. The allegations in plaintiffs' complaint therefore do not render it "plausible," *Twombly*, 550 U.S. at 570, that the "Rule" to which they object was operative at the time they filed their complaint. 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. Those claims must therefore be dismissed for failure to state a claim for which relief can be granted.

## CONCLUSION

Plaintiffs are not suffering any harms that were caused by federal actions, nor any that could be redressed by relief against federal actors. They therefore lack standing to pursue their claims against the federal defendants. And they have not plausibly alleged those claims. All claims against the federal defendants must be dismissed.

Respectfully submitted,

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Dated: March 15, 2018

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**[PROPOSED] ORDER**

The federal defendants' motion to dismiss is **GRANTED** and all claims against the United States Department of Education, its Secretary, Betsy DeVos, the United States Department of Justice, and Attorney General Jefferson B. Sessions III are hereby **DISMISSED**.

**SO ORDERED** this _____ day of _____, 2018.

_____
Marco A. Hernandez
United States District Judge