IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

STUDENTS AND PARENTS FOR PRIVACY, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Defendants.

No. 1:16-CV-4945

Hon. Jorge L. Alonso, District Judge
Hon. Jeffrey T. Gilbert, Magistrate Judge

FEDERAL DEFENDANTS' RESPONSE TO THE MOTION TO INTERVENE

The United States Department of Education, Secretary of Education John B. King, Jr., the United States Department of Justice, and Attorney General Loretta E. Lynch hereby respond to the motion to intervene filed by the Illinois Safe Schools Alliance and three individual students in the above-captioned action (ECF No. 30). While the federal defendants take no position on the proposed intervenors' request for permissive intervention under Federal Rule of Civil Procedure 24(b), the federal defendants oppose the request for intervention as of right under Rule 24(a). Because the movants have not overcome the presumption that the federal defendants will adequately represent their interests, the federal defendants respectfully ask the Court to deny their motion to the extent it seeks intervention as of right.

DISCUSSION

To secure intervention as of right, a proposed intervenor must demonstrate that its "interest is not adequately represented by existing parties." *Am. Nat. Bank & Trust Co. of Chi. v. City of Chicago*, 865 F.2d 144, 146 (7th Cir. 1989). When those existing parties include "a

governmental body charged by law with protecting the interests of the proposed intervenors," courts will presume adequate representation "unless there is a showing of gross negligence or bad faith." *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007). That presumption applies here, and the movants are unable to overcome it.

The proposed intervenors do not dispute the fact that the federal defendants are "governmental bod[ies] charged by law with protecting [their] interests." *Id.* Nor could they. Both the Department of Education and the Department of Justice are charged with "effectuating the provisions" of Title IX, a statute that protects students — including the proposed intervenors — against sex discrimination in any educational program or activity receiving federal funding. 20 U.S.C. §§ 1681–1682; *see also* Exec. Order No. 12,250 (1981). Moreover, courts in this circuit routinely recognize that *Ligas*'s presumption of adequate representation applies where "a governmental body [is] attempting to uphold its own law." *Ind. Petrol. Mktrs. & Convenience Store Ass'n v. Huskey*, No. 1:13-CV-784, 2013 WL 6507002, at *5 (S.D. Ind. Dec. 11, 2013), *objections overruled*, 2014 WL 496825 (S.D. Ind. Feb. 6, 2014); *see also, e.g., Am. Nat. Bank & Trust Co.*, 865 F.2d at 148 (city could adequately defend its own city building code); *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 398–99 (W.D. Wis. 2015) (attorney general could adequately defend state's own voter identification law). That is precisely the case here: the plaintiffs' lawsuit challenges the Department of Education's own guidance documents and enforcement agreements and its interpretation of the statute it administers (Title IX). Accordingly, the federal defendants are "charged by law" with protecting the proposed intervenors' interests — and presumptively provide adequate representation.

Faced with this presumption, the proposed intervenors must demonstrate "gross negligence or bad faith" to secure intervention as of right. *Ligas*, 478 F.3d at 774. But like the

proposed intervenors in *Ligas*, they "have made no effort" to do so. *Id.* at 775. Like the *Ligas* court, then, this Court should deny intervention as of right. *See id.*

None of the proposed intervenors' authorities support a contrary result. The movants cite *Indiana Petroleum* for its statement that a "conflict between [proposed intervenors] and the State" may "render[] the State's representation inadequate." 2013 WL 6507002, at *6. But the only conflict they identify is their potential desire to pursue different litigation strategies or lines of argument. And *Indiana Petroleum* rightly recognized that where the government shares the same "ultimate goal" as a proposed intervenor, the fact that they may have slightly different subsidiary goals or motivations is not enough to justify intervention as of right. *Id.*; *see also, e.g.*, *United States v. S. Bend Cmty. Sch. Dist.*, 710 F.2d 394, 396 (7th Cir. 1983) (recognizing that "the Department of Justice was presumed to be an adequate representative of the NAACP's interest" because both parties "wanted the same thing," namely, "desegregation of the South Bend public schools"); *Jenkins ex rel. Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) ("A difference of opinion concerning litigation strategy or individual aspects of a remedy does not overcome the presumption of adequate representation."). Here, the federal defendants share the proposed intervenors' "ultimate goal" — defending the challenged guidance documents and enforcement agreements — and so they adequately represent the proposed intervenors' interests.

The movants' reliance on the vacated decision in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), *vacated*, 135 S. Ct. 1528 (2015), is similarly misplaced. There, the Seventh Circuit allowed several students to intervene on appeal in a dispute between a university and the federal government. But the court never held that the government's representation was inadequate — much less considered *Ligas*'s presumption of adequate representation in cases involving the government. At best, then, *Notre Dame* appears to have

authorized permissive intervention under Rule 24(b), not the intervention as of right under Rule 24(a) that the movants seek here.[1]

For all the foregoing reasons, the proposed intervenors have failed to demonstrate that their interests will be inadequately represented by the federal defendants.[2]

CONCLUSION

While taking no position on the proposed intervenors' motion for permissive intervention under Rule 24(b), the federal defendants respectfully request that the Court deny the proposed intervenors' motion for intervention as of right under Rule 24(a).

[1] The proposed intervenors cite several other decisions in passing. Each is similarly inapposite. In *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), the Supreme Court based its decision in part on its understanding of the specific statute before it (the Labor-Management Reporting and Disclosure Act of 1959). *See id.* at 538–39. In *City of Chicago v. FEMA*, 660 F.3d 980 (7th Cir. 2011), the court declined to rule on whether the proposed intervenors were entitled to intervene as a matter of right, instead granting them permissive intervention. *See id.* at 986. And in *Builders Ass'n of Greater Chicago v. City of Chicago*, 170 F.R.D. 435 (N.D. Ill. 1996), the court did not consider the presumption discussed above in determining the adequacy of the city's representation. *See id.* at 440–41.

[2] The federal defendants concede that the movants have satisfied the other three requirements for intervention as of right, *i.e.*, that the motion is timely, that the proposed intervenors possess an interest related to the subject matter of this action, and that the disposition of this action threatens to impair that interest.

June 7, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2016, I electronically filed the Federal Defendants' Response to the Motion to Intervene in the above-captioned action through the Court's CM/ECF system, which sent notice of such filing to all counsel of record.

June 7, 2016.

Respectfully submitted,

/s/ *Megan A. Crowley*
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