UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Privacy Matters, a voluntary unincorporated association; and Parent A, president of Privacy Matters,

Plaintiffs,

v.

United States Department of Education; United States Department of Justice; John B. King, Jr., in his official capacity as United States Secretary of Education; Loretta E. Lynch, in her official capacity as United States Attorney General; and Independent School District Number 706, State of Minnesota,

Defendants,

and

Jane Doe, by and through her mother, Sarah Doe,

Proposed Intervenor-Defendant.

Case No. 16-cv-3015 (WMW/LIB)

ORDER GRANTING MOTION TO INTERVENE, MOTION TO SEAL, AND REQUEST FOR LEAVE TO EXCEED WORD-COUNT LIMITATIONS

This matter is before the Court on Proposed Intervenor-Defendant Jane Doe's motion to intervene and motion for leave to file under seal the unredacted copies of declarations submitted in support thereof. (Dkts. 22, 32.) Plaintiffs Privacy Matters and Parent A, the president of Privacy Matters, also seek leave to exceed the word-count limitations imposed by the Local Rules for the purpose of their reply brief in support of their pending motion for a preliminary injunction. (Dkt. 47.) For the reasons addressed

below, the Court grants Doe's motions to intervene and to file documents under seal and grants Plaintiffs' request to exceed the word-count limitations.

BACKGROUND

In this this civil-rights action commenced on September 7, 2016, Plaintiffs seek declaratory and injunctive relief, as well as nominal and compensatory damages, against Independent School District Number 706, State of Minnesota ("ISD 706"), as well as four federal defendants—namely, the United States Department of Education; the United States Department of Justice; John B. King, Jr., in his official capacity as United States Secretary of Education; and Loretta E. Lynch, in her official capacity as United States Attorney General (collectively, "the Federal Defendants").

Plaintiffs challenge an ISD 706 policy ("District Policy")—which allegedly is based on guidelines promulgated by the Federal Defendants—that permits transgender students to use "private facilities such as locker rooms, restrooms, shower rooms, and hotel rooms on overnight school-sponsored trips by gender identity rather than by sex." Throughout their complaint, Plaintiffs reference "Student X," who Plaintiffs describe as "a male high school student who professes a female gender identity" and who, pursuant to the District Policy, is permitted "unrestricted access to enter and use girls' private facilities." Plaintiffs' complaint describes several occasions when other high school students have allegedly been adversely affected by "Student X's" use of those private facilities. Plaintiffs seek, among other things, a declaration that the District Policy is unlawful on statutory and constitutional grounds and injunctive relief striking down the District Policy and the related guidelines promulgated by the Federal Defendants.

Plaintiffs have filed a motion for a preliminary injunction, for which a hearing is scheduled on November 16, 2016. Briefing on that motion is not yet complete.

Doe filed a motion to intervene in this case on October 12, 2016. Doe is a 15-year-old sophomore student at Virginia High School in Virginia, Minnesota, which is part of ISD 706. Doe is the high school student referred to as "Student X" throughout Plaintiffs' complaint. Doe is transgender and, although designated male at birth, has publicly identified as female for nearly two years.[1] Doe seeks to intervene as a defendant in this case and requests that she be allowed to present oral argument during the hearing on Plaintiffs' pending motion for a preliminary injunction. Doe filed a proposed opposition to Plaintiffs' motion for a preliminary injunction contemporaneously with her motion to intervene. Because Doe redacted her non-pseudonymous name and signature, her mother's non-pseudonymous name and signature, and two recent photographs of herself from the documents she filed in support of her motion to intervene, Doe also seeks permission to file unredacted versions of these documents under seal. Plaintiffs do not oppose Doe's motions, but request permission to exceed the word-count limitations set forth in the Local Rules with respect to their reply brief in support of their motion for a preliminary injunction.

[1] Plaintiffs' court filings refer to Doe as male and use masculine pronouns in reference to Doe, asserting that "it is a matter of accuracy and appropriate legal advocacy to identify Doe as male." Plaintiffs have not requested that this Court adopt their choice of pronoun usage. However, Doe refers to herself as female and uses feminine pronouns in accordance with her gender identity, and she has requested that this Court do the same. The Court grants Doe's request and will refer to her as female and use feminine pronouns when referring to her.

ANALYSIS

I. Doe's Motion to Intervene

Federal Rule of Civil Procedure 24 provides two mechanisms for intervention. Rule 24(a) governs intervention of right, and Rule 24(b) governs permissive intervention. Doe seeks intervention of right or, in the alternative, permissive intervention. Because neither Plaintiffs nor Defendants oppose Doe's motion to the extent that she seeks permissive intervention, the Court begins with that analysis.[2]

As a threshold matter, the Eighth Circuit has held that "Article III standing is a prerequisite for intervention in a federal lawsuit." *Curry v. Regents of Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999) (internal quotation marks omitted); *see also Mausolf v. Babbitt*, 85 F.3d 1295, 1299-1300 (8th Cir. 1996). Although there is some uncertainty as to whether the standing prerequisite is limited to intervention of right under Rule 24(a), most courts in this District have considered standing as a prerequisite to permissive intervention under Rule 24(b) as well. *See Solliday v. Dir. of Bureau of Prisons*, No. 11-cv-2350, 2014 WL 6388568, at *3 (D. Minn. Nov. 14, 2014) (collecting cases). Article III of the United States Constitution limits federal jurisdiction to actual cases or controversies. U.S. Const., art. III, § 2, cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 790 (8th Cir. 2012). The standing inquiry requires the litigant to (1) have suffered an injury in fact, (2) establish a causal relationship between the contested conduct and the alleged injury,

[2] The Federal Defendants oppose Doe's motion only to the extent that she seeks intervention of right.

and (3) show that the injury would be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61; *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007).

An alleged injury must be "concrete, particularized, and either actual or imminent." *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833-34 (8th Cir. 2009) (internal quotation marks omitted). "The law recognizes economic, non-economic, and indirect economic injuries, for standing purposes." *Animal Prot. Inst. v. Merriam*, 242 F.R.D. 524, 527 (D. Minn. 2006). A prospective intervening defendant may establish an imminent injury sufficient for the purpose of standing by demonstrating that the remedies sought by the plaintiff, if granted, would threaten the prospective intervenor's interests. *See S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1024-25 (8th Cir. 2003) (concluding that "[s]uccess by [the plaintiff] in the whole litigation would impair the proposed intervenors' interests," and reversing the district court's denials of the motions to intervene).

Here, Plaintiffs seek preliminary and permanent injunctive relief that would require Doe's school to prohibit Doe from using the school restrooms and locker rooms that align with her gender identity. Doe alleges that, if Plaintiffs prevail on the merits, she will suffer an injury because her school will immediately stop providing her with equal treatment as required under Title IX, 20 U.S.C. §§ 1681, *et seq.*, and the Equal Protection Clause of the United States Constitution. In similar circumstances, the Eighth Circuit has recognized that a proposed intervenor established an imminent injury to a legally cognizable interest by alleging that, if the plaintiff were to prevail, the defendant school would immediately stop providing the prospective intervenor with constitutionally

required accommodations. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1092-93 (8th Cir. 2011). Therefore, this Court concludes that Doe has alleged an imminent injury in fact for the purpose of standing.

Doe also must establish a causal relationship by showing that the alleged injury is "fairly traceable" to the contested conduct. *Id.* at 1093. The Eighth Circuit has held that "when the defendant will be compelled to cause the alleged injury to the intervenor if the plaintiff prevails, the intervenor satisfies the traceability requirement even though the defendant and the intervenor seek the same outcome in the case." *Id.* Here, Doe has alleged an injury that is fairly traceable to the contested conduct by asserting that if Plaintiffs prevail, her statutory and constitutional rights will be directly affected.

Finally, Doe must demonstrate that her alleged injury would be redressed by a favorable decision. This element of standing may be established if the prospective intervenor's alleged injury would be redressed by a judicial determination that the challenged school policy is permitted by law. *See id.* Because Doe's alleged injury would be redressed by a decision in Defendants' favor, she has established the redressability element of standing. Accordingly, the Court concludes that Doe has standing to intervene.

Permissive intervention is governed by Federal Rule of Civil Procedure 24(b). In relevant part, Rule 24(b) provides:

> (1) *In General*. On timely motion, the court may permit anyone to intervene who:
>
> > (A) is given a conditional right to intervene by a federal statute; or
> > (B) has a claim or defense that shares with the main action a common question of law or fact.

> . . . .
>
> (3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

A district court's decision on a motion for permissive intervention "is wholly discretionary, and the principal consideration is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights." *N. Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 923 (8th Cir. 2015) (internal quotation marks omitted).

The first requirement for permissive intervention is that the motion must be timely. Fed. R. Civ. P. 24(b)(1). The timeliness of a motion to intervene is a decision within the district court's discretion based on all of the circumstances. *ACLU of Minn.*, 643 F.3d at 1094. The Eighth Circuit has articulated the following factors that a district court should specifically consider: (1) the extent to which the litigation has progressed at the time of the motion to intervene, (2) the prospective intervenor's knowledge of the litigation, (3) the reason for any delay in seeking intervention, and (4) whether the delay in seeking intervention may prejudice the existing parties. *Id.* Here, the parties do not dispute the timeliness of Doe's motion to intervene. Doe filed her motion early in the litigation—approximately one month after Plaintiffs commenced this case. Doe filed a proposed opposition to Plaintiffs' motion for a preliminary injunction contemporaneously with her motion to intervene, on the same date that Defendants filed their opposition memoranda. Moreover, Defendants have not yet answered Plaintiffs' complaint, no

scheduling order has been issued, and discovery has not begun.[3] Based on all the circumstances, Doe's motion to intervene is timely.

The second requirement for permissive intervention is that the proposed intervenor must have a claim or defense that shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1)(B). The parties do not dispute that Doe has satisfied this requirement. Indeed, a substantial portion of Plaintiffs' complaint alleges facts about Doe and her conduct. And, as addressed above, Doe has asserted constitutional and statutory interests that are implicated by the legal issues raised in this case and will be directly affected by any decision this Court renders. Therefore, Doe has established that her interests share common questions of fact and law with this case.

The third and "principal consideration" in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the original parties' rights. *Stenehjem*, 787 F.3d at 923 (internal quotation marks omitted); *accord* Fed. R. Civ. P. 24(b)(3). As addressed above, neither Plaintiffs nor Defendants object to Doe's permissive intervention in this case, and nothing in the Court's independent review of the record suggests that her intervention will cause undue delay or prejudice to the original parties.

Accordingly, because Doe has standing to intervene in this case and has established all of the requirements for permissive intervention under Rule 24(b), the

[3] The Court previously ordered, pursuant to a stipulation entered by the parties, that Defendants' answers will be due 30 days after the Court issues an order on Plaintiffs' pending motion for a preliminary injunction.

Court grants her motion for permissive intervention. In light of this ruling, the Court need not address Doe's alternative request for intervention of right.

II. Doe's Motion to Seal

Doe seeks leave to file under seal unredacted copies of documents she filed in support of her motion to intervene. Specifically, in her publicly filed documents, Doe redacted her non-pseudonymous name and signature, her mother's non-pseudonymous name and signature, and two recent photographs of herself.

"A person making a redacted filing may also file an unredacted copy under seal," and the district court "must retain the unredacted copy as part of the record." Fed. R. Civ. P. 5.2(f); *accord* Electronic Case Filing Procedures Guide § III.D.1.a (Feb. 2016). However, documents cannot be filed under seal unless the district court "has first issued a protective order or an order granting a motion to seal" the document. Electronic Case Filing Procedures Guide § IX.D.1. Because a district court has supervisory power over its records, the decision to seal is within the court's discretion. *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990).

The names of individuals known to be minors must be redacted from any document filed with the district court. *See* Fed. R. Civ. P. 5.2(a); Electronic Case Filing Procedures Guide § III.B.1. The purpose of this requirement is "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." Fed. R. Civ. P. 5.2 advisory committee's notes (internal quotation marks omitted); *accord Allstate Ins. Co. v. Linea Latina De Accidentes, Inc.*, No. 09-3681, 2010 WL 5014386, at *3 (D. Minn. Nov. 24, 2010). Here,

the unredacted declarations and exhibits that Doe seeks to file under seal contain the non-pseudonymous names and signatures of Doe and her mother and two recent photographs of Doe. Doe is undisputedly a minor. This case involves sensitive and personal issues regarding a minor's gender identity and topics that have stirred controversy both locally and nationally. Indeed, in her declaration, Doe's mother describes threats that Doe and her family have experienced in the short time since this case commenced. The Court concludes that the limited information that Doe has redacted from these documents would, if filed publicly, result in Doe being easily identified in public court filings and would adversely affect her privacy and security interests.

The Court is mindful that there is a common law right of access to judicial records, which includes the public's "right to access documents that are submitted to the Court and that form the basis for judicial decisions." *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 960 F. Supp. 2d 1011, 1013 (D. Minn. 2013) (citing *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013)). This common law right of access applies to judicial records in civil proceedings, as it "bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and 'to keep a watchful eye on the workings of public agencies.' " *IDT Corp.*, 709 F.3d at 1222 (internal citation omitted) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)). The public's right of access "also provides a measure of accountability to the public at large, which pays for the courts." *Id.*

The public's right of access "is not absolute, but requires a weighing of competing interests." *Webster Groves Sch. Dist.*, 898 F.2d at 1376. Specifically, the district court

"must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed." *IDT Corp.*, 709 F.3d at 1223. The weight that a district court gives to the presumption of access "must be governed by the role of the material at issue in the exercise of Article III judicial power and resultant value of such information to those monitoring the federal courts." *Id.* at 1224 (internal quotation marks omitted). Here, the information Doe seeks to file under seal is minimal, and her privacy and security interests outweigh any competing interests served by the public's right of access. Thus, the Court concludes that granting Doe's motion to seal is warranted here.

Accordingly, the Court grants Doe's motion for leave to file under seal unredacted copies of the declarations and exhibits filed in support of her motion to intervene.

III. Plaintiffs' Request to Exceed the Word-Count Limitations

Plaintiffs have filed a letter requesting permission to exceed the word-count limitations set forth in the Local Rules. Local Rule 7.1(f)(1)(B) provides that, except with the Court's prior permission, a moving party's supporting memorandum and reply memorandum must not exceed a combined total of 12,000 words. Plaintiffs seek leave to exceed this limitation by 8,000 words with respect to their reply brief in support of their motion for a preliminary injunction. Plaintiffs' request is unopposed. The Defendants in this case, including Doe, have collectively filed arguments comprising more than 30,000 words in opposition to Plaintiffs' motion for a preliminary injunction. In light of these

circumstances and the significant issues presented by Plaintiffs' motion for a preliminary injunction, the Court grants Plaintiffs' request.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED**:

1. Doe's motion to intervene, (Dkt. 22), is **GRANTED**. Doe is directed to re-file on ECF her Proposed Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, (Dkt. 25-1), as a stand-alone response memorandum no later than two business days after the date of this Order. Doe will be permitted to present oral argument during the November 16, 2016 hearing on Plaintiffs' motion for a preliminary injunction.

2. Doe's motion for leave to file under seal unredacted versions of the documents filed in support of her motion to intervene, (Dkt. 32), is **GRANTED**.

3. Plaintiffs' request for permission to exceed the word-count limitations set forth in the Local Rules, (Dkt. 47), is **GRANTED**. For the limited purpose of Plaintiffs' pending motion for a preliminary injunction, Plaintiffs are permitted a cumulative limit of 20,000 words, exclusive of the text exempted from the word-count limitations under Local Rule 7.1(f).

Dated: October 27, 2016

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge