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

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; C.A., a minor, by and through her parent and guardian, N.A.; A.M, a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A.T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W.,	)	No. 1:16 CV 4945
Plaintiffs,	)	The Hon. Jorge L. Alonso, *District Judge*
v.	)	
UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his official capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as United States Attorney General; and SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS,	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS OF STUDENTS A, B, AND C, BY AND THROUGH THEIR PARENTS AND LEGAL GUARDIANS, AND OF THE ILLINOIS SAFE SCHOOLS ALLIANCE

Establishing that Plaintiffs' claims are without merit is of enormous importance to the daily lives of the student Movants as well as to the Alliance's ability to carry out one of its core missions of representing transgender students and their interests in the District and elsewhere. Neither Federal Defendants nor the District dispute that self-evident fact, or that as a result Movants satisfy the Rule 24(a) requirements that intervenors as of right must have an interest in

the subject matter of the action that could be threatened by the outcome of the case. *See* Fed. Br. 4 n.2. Plaintiffs' contrary contention that Movants lack sufficient interest in the suit to warrant intervention rests on Plaintiffs' *merits* assertion that transgender students do not have Title IX protection. *See* Pls. Br. 9–11 (student Movants "do not have a significant legal interest" in this case and lack "standing" because "Title IX's definition of sex does not include gender identity"). But Plaintiffs' argument proves our point: it shows that Movants *do* have a compelling interest in the outcome of this litigation, which will resolve that merits question and thus determine whether the intervenor students are able to use gender-identity-appropriate facilities at the District high schools they now or soon will attend.

Movants' interests in participating in this case therefore could hardly be stronger, more personal, or more direct. Plaintiffs' legally mistaken, medically unfounded, and deeply offensive insistence throughout their filings that transgender boys are girls and transgender girls are boys goes to the essence of the intervenor students' identities and to the legal issues in the case. No one is better positioned than the student Movants to refute Plaintiffs' factual and legal errors, as they will do with both personal and expert evidence establishing that their gender identity is their "sex" in fact and under Title IX and the Equal Protection Clause; and no one will be harmed more if Plaintiffs' erroneous views were to prevail. Certainly no one has a greater stake in this case than Student A, who is the subject of the challenged District policy and about whom false statements abound in Plaintiffs' Complaint and preliminary injunction and intervention briefs, including the demonstrably false and medically baseless statement that Student A is a "biological male." And as a representative of transgender students, including Student A, regarding implementation of the resolution agreement and training at the District, and the ally of

transgender students in general in seeking to obtain their rights in Illinois schools, the Alliance shares the student Movants' interests.

Interests of such magnitude and relevance to the dispute warrant this Court's exercise of its discretion to allow Movants to intervene permissively under Rule 24(b)—which neither Federal nor the District defendants oppose. Movants believe that the Court would benefit from their perspectives and experience, and from the expert evidence they intend to introduce, as it considers the important issues presented for decision. Far from being the irrelevant distraction that Plaintiffs pretend (Pls. Br. 13–14), whether the intervenor students are male or female in accord with their gender identity, and reasonably may be deemed so by the agencies that Congress charged with implementing Title IX's antidiscrimination mandate, is central to this case. There is no reason to believe that allowing Movants to address that highly relevant issue will delay or unnecessarily complicate the litigation or cause any prejudice to Plaintiffs.

The case for permissive intervention is so strong here that there is no need for the Court to go beyond the exercise of its Rule 24(b) discretion. Nevertheless, Movants also fit readily under Rule 24(a)'s provision for intervention as of right. Because they satisfy the timeliness and interest factors under Rule 24(a), as Federal Defendants concede, Movants' right to intervene turns on whether their interests are adequately represented by Federal Defendants.[1] There is ample justification here to find that Federal Defendants will not adequately represent Movants' interests, especially as they concern the two claims (the fourth and fifth causes of action) in which Federal Defendants are not named and which lie solely against the District, the scope of the District's obligations under the Resolution Agreement, and the Equal Protection defense to Plaintiffs' claims. Moreover, Movants are not required to show that a government party has

[1] No party has suggested that the District, which serves both the Plaintiff students and the intervenor students, adequately represents Movants' interests in this action.

engaged in "gross negligence or bad faith" to intervene as of right, as decisions from courts in this Circuit demonstrate.

A. Movants Have Satisfied All Conditions For Intervention As Of Right.

1. Movants have demonstrated that their significant legal interest as parties at the heart of this dispute will be impaired if the Court rules in favor of Plaintiffs.

As Federal Defendants and District concede, Movants have shown that this action threatens to impair their interest in the subject matter of this action. The three transgender students seeking to intervene wish to use the locker room facilities at their current or future District 211 high schools that correspond to their gender identity. Plaintiffs seek to squelch that interest: they ask this Court to declare not only that the challenged agreement between OCR and the District is not required by Title IX, but also that transgender students' use of gender-identity-appropriate facilities in high schools is contrary to federal and Illinois law. Plaintiffs' proposed relief likewise would damage the Alliance, which works to achieve equality of facilities usage for transgender students, including Student A, and which has conducted training and education on this issue in the District.

In arguing that Movants do not have the requisite interest in this dispute, Plaintiffs attempt to transform the threshold intervention issue into an up-or-down vote on the merits of their case: Movants lack an interest in this litigation because they are outside the protection of Title IX. *See* Pls. Br. 9–10. But that argument merely demonstrates Movants' compelling interest in how this case is resolved. Plaintiffs' suit seeks to bar transgender students from using gender-appropriate locker room facilities based on Plaintiffs' preferred definition of "sex"; and the student Movants' equal usage of those facilities turns on the Court's resolution of Plaintiffs' claims.

The student Movants' interests could not be more direct. Plaintiffs' Complaint seeks to prohibit Student A from using the locker room that corresponds to her gender identity—as she is entitled to do as a result of the very agreement that Plaintiffs challenge. Student C will attend a District high school a few months from now. Student B will join his brother at Fremd next year. Plaintiffs' claims threaten that Students B and C will never able to use the locker rooms on an equal basis with their peers, endangering their everyday happiness and well-being. *See* Movants' Br. Ex. 2 ¶¶ 17–21; *id.* Ex. 3 ¶¶ 10–12.[2] And Plaintiffs' success in this suit would harm the interests of the Alliance, which has a mission to enable transgender students to use gender-appropriate restrooms and locker rooms at school and which has been directly involved in achieving that goal for Student A. *See id.* Ex. 4, ¶¶ 17–19.[3] Contrary to Plaintiffs' suggestion, all those interests are unquestionably "unique to the proposed intervenor[s]" given the allegations and claims in the Complaint. Pls. Br. 9.

2. Defendants do not adequately represent Movants' interests.

No party contends that the District is an adequate representative of Movants' interests. Both Plaintiff and intervenor students do or will attend District schools, and the District's Board president has said that the District seeks to "please everyone," showing that the District's and

[2] It is incorrect to suggest that Students B and C lack standing because their interests are too speculative. *See* Pls. Br. 11. Parents of both students have represented that they will attend District high schools, one in a few months and one a year from now. Movants' Mem. Ex. 2, ¶ 2; *id.* Ex. 3, ¶ 2. Plaintiffs demand a permanent injunction requiring District 211 "to permit only biological females" and "biological boys" to use locker room or restroom facilities matching their gender identity, as well as an order holding unlawful federal action recognizing gender identity as part of "sex" under Title IX. Compl. pp. 74–75. That relief would eliminate any ability of Students B and C to use the proper facilities, representing a concrete, particularized, and imminent invasion of their interests. Both students have thus shown "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

[3] *Am. Nat. Bank & Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 147 (7th Cir. 1989) does not support Plaintiffs' challenge to the Alliance's interests. Unlike the union's interests in that case, the Alliance's interests are not limited to its expertise in general but include its specific interests as a representative of and expert regarding transgender students in the District. In addition, the *Am. Nat. Bank* court concluded that the union's interest in the health and safety of plumbers would be unaffected by a ruling in that case; by contrast, the Alliance's work for the equal treatment of transgender students in the District will be directly undermined by a ruling for the Plaintiffs here.

Movants' interests are not aligned. The District has a history of intransigence in its dealings with Student A—granting her use of the girls' locker room only under threat of loss of federal funding—which also makes it a poor advocate for Movants' interests. And in April 2016 the District declined to adopt a policy that would permit all transgender students to use gender-appropriate locker rooms, leaving Student B's and C's rights under District policy uncertain. *See* Movants' Br. 12.

Federal Defendants also have not been fully aligned with the interests of transgender students. After initially agreeing with the District that the challenged agreement between OCR and the District applies only to Student A, OCR publicly stated the agreement should apply districtwide. But after the District publicly accused OCR of "bad faith" and threatened to rescind the agreement, OCR publicly agreed (again) that the agreement applied only to Student A. *See* Movants' Br. 4, 12-13; *id.* Ex. 4, ¶¶ 11–12; Letter from Catherine E. Lhamon, Asst. Sec'y of Civil Rights, U.S. Dep't of Educ., to Jennifer A. Smith, Counsel for the District, dated Dec. 7, 2015 (the resolution "agreement provisions specific to locker room access apply only to Student A and the District's agreement to provide Student A access to locker rooms is based on the student's representation that she will change in private changing stations") (attached as Exh. A).

By acquiescing to the demands of the District—an entity no party contends adequately represents Movants' interests—and agreeing to a policy that guarantees only one transgender student in the District equal use of school locker rooms, Federal Defendants have shown that they are inadequate representatives of Students B and C, who are entitled to equal use of school facilities including locker rooms, as well as Student A, who has been singled out although all transgender students should be afforded similar use of gender appropriate facilities. It is no answer that OCR's agreement with the District provides that OCR may receive "information on

all gender-based discrimination and complaints." Pls. Br. 6. That provision relies upon the *District* to report those incidents to OCR; and in any event, the mere receipt of reports is a far cry from seeking equal usage on behalf of all transgender students in the District, as Movants contend is required by Title IX and the Equal Protection Clause. OCR's agreement with the District stands in contrast to those it has made with school districts elsewhere, in which OCR obtained districtwide relief on behalf of transgender students. *See, e.g.*, Resolution Agreement with Arcadia Unified School District (July 24, 2013), *available at* http://tiny.cc/bmc7by (requiring district, among other measures, to revise all policies to provide transgender students "equal access to and equal opportunity to participate" in "all programs and activities offered by the District"); Resolution Agreement with Downey Unified School District (Oct. 8, 2014), *available at* http://tiny.cc/dvc7by (requiring district, among other measures, to "make any necessary revisions or modifications to ensure that all students, including students who do not conform to sex stereotypes," participate "in all programs and activities" without discrimination "based on sex, gender identity or gender expression").

In addition, Movants argued in their opening brief—and Federal Defendants have not contradicted—that Federal Defendants are unlikely to pursue the constitutional defense to Plaintiffs' claims that Movants plan to raise. In ED's most recent filing in a dispute over a transgender student's right to use gender-appropriate restrooms, ED limited argument in its amicus brief to Title IX grounds, omitting any argument at all on equal protection. *Am. Cur.* Br. of the U.S., *GG v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015, ECF No. 25). And by no stretch of the imagination could ED's statement of interest in the case Plaintiffs cite (*Tooley v. Van Buren Public Schs.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015, ECF No. 64-1)) be regarded as a fully developed argument that the Equal Protection Clause independently

protects transgender students. In that statement, ED argued only that "Title IX and the Equal Protection Clause," and not equal protection as a separately enforceable right, provided viable vehicles for plaintiff's claims. *Id.* Movants are aware of no brief in which ED has made a fully developed argument that the Equal Protection Clause, independent of Title IX or ED regulations and guidance, requires that transgender students must be able to use restrooms and locker rooms corresponding to their gender identity; but Movants believe the Constitution so commands and precludes all of Plaintiffs' claims.

Moreover, no party has contradicted Movants' argument that Federal Defendants' responses to the Complaint are unlikely to match those of Movants. Many allegations in the Complaint relate directly to Student A or to events as to which the Alliance has direct knowledge. Students B and C are transgender students who will soon be in District schools. Movants' experiences and knowledge will inform their arguments in unique ways that government parties cannot replicate.

Federal Defendants plainly cannot be adequate representatives of the Movants as to Plaintiffs' fourth and fifth causes of actions, which are not asserted against Federal Defendants, only against the District. Compl. ¶¶ 418–85. Movants are uniquely situated to provide argument and background to the Court on those claims, including Plaintiffs' allegations that allowing transgender students equal use of locker rooms "creates a sexually harassing hostile environment," *id.* ¶ 425, and that such access contravenes "biological sex." *E.g.*, *id.* ¶¶ 442, 476. These assertions contradict Students A, B and C's core identity and personhood and offend science, Title IX, and the Constitution, as Movants intend to demonstrate.

Finally, permitting intervention accords with Movants' private right of action under Title IX, which allows individuals to bring their own claims under that statute. *See Cannon v. Univ. of*

Chicago, 441 U.S. 677, 702 (1979). Movants' ability to bring a separate suit if the District denies them their Title IX rights, as well as their rights to equal protection, means that judicial economy will be furthered by considering Movants' arguments in this suit.

3. Movants' intervention as of right is supported by case law in this Circuit.

In attempting to show that Federal Defendants adequately represent Movants' interests, Plaintiffs and Federal Defendants repeatedly cite *Ligas ex rel. Foster v. Maram*, 478 F.3d 771 (7th Cir. 2007), and the statement in that case that the proposed intervenors had not rebutted the presumption that government parties adequately represented them by showing gross negligence or bad faith. *Ligas*, however, does not compel denial of intervention as of right here.

Ligas is readily distinguishable on its facts. Proposed intervenors in *Ligas* sought to intervene as plaintiffs, not defendants, and could not show that the existing plaintiffs' proposed relief would damage the intervenors' own interests in any way (478 F.3d at 774), a problem Movants in this case do not have. Further, it appears that the intervenors in *Ligas* made no argument that the governmental entities in the case did not adequately represent their interests. *Id.* at 774–75. It also bears noting that intervention of right was *granted* upon remand in *Ligas*, despite arguments that state officials adequately represented the proposed intervenors' interests as existing parties. *Ligas v. Maram*, No. 05 C 4331, 2010 WL 1418583, at *3–4 (N.D. Ill. Apr. 7, 2010).

In addition, intervention as of right has often been granted in this Circuit without the movant showing that the government party has acted in bad faith or with gross negligence. As Plaintiffs fail to acknowledge, the Seventh Circuit made no reference to those concepts when it allowed students to intervene in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 1528 (2015). The court instead looked only to the

intervenors' concern that disposition of the case could "thwart their right to contraception." *Id.* at 558 (finding such concern sufficient to permit intervention).

The Seventh Circuit's analysis in *Notre Dame* is consistent with other cases in this Circuit in which courts have permitted parties to intervene despite the presence of government parties who were not shown to lack good faith or to have acted negligently. *See, e.g., Joe Sanfelippo Cabs Inc. v. City of Milwaukee*, No. 14-CV-1036, 2015 WL 1728123, at *2 (E.D. Wis. Apr. 15, 2015) (granting intervention as of right because "the City's goal is not identical to movants'" given that "the City, a governmental entity, must consider an array of political and budgetary pressures in formulating its legal strategy, which may lead it to place other interests above movants' interests"); *Freedom From Religion Found., Inc. v. Koskinen*, 298 F.R.D. 385, 387 (W.D. Wis. 2014) (granting intervention of right though "the IRS will adequately represent the movants' interests to some extent"; the IRS did "not fully represent the movants' interests" because it did not intend to make constitutional arguments that movants wished to make); *Builders Ass'n of Greater Chi. v. City of Chicago*, 170 F.R.D. 435, 441 (N.D. Ill. 1996) (granting intervention of right in part because the movants' interest in maintaining the city governmental defendant's program was "different in kind" from the city's interest, and the movants were "likely to supplement the City's evidence of past and present discrimination with anecdotal evidence of the experiences of their members"). As in those cases, intervention as of right should be granted here because Federal Defendants lack Movants' personalized interest in the litigation, lack Movants' direct knowledge of relevant facts, have not contradicted Movants' concern that ED will not make the constitutional arguments Movants intend to make, and also because Federal Defendants are not even named in two of Plaintiffs' claims.

II. The Court Should Permit Intervention Under Rule 24(b).

"All that is required for permissive intervention . . . is that the applicant have a claim or defense in common with a claim or defense in the suit." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996). Plaintiffs never dispute that Movants meet this central requirement. Movants have also shown much more: that they are key figures in the struggle over the rights of transgender students in the District. They urge the Court to grant them the ability to defend their interests, which are central to this case. Neither the District nor Federal Defendants disagree that permissive intervention is warranted.

Plaintiffs, however, assert that because they have argued intervention as of right is improper, permissive intervention is off the table. Plaintiffs' position would write permissive intervention out of Rule 24, and is not how Rule 24 works. To the contrary, the Seventh Circuit has warned that "courts must be careful not to collapse the two inquiries—the inquiry under Rule 24(a) and the inquiry under Rule 24(b)." *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 987 (7th Cir. 2011).[4] Instead, Rule 24(b) requires *separate* analysis—without reference to considerations under Rule 24(a) save for timeliness, which no one questions here—of whether the Court should exercise its discretion to permit Movants to intervene. The Rule 24(b) standard is met "if the motion is filed timely and the intervening party is advocating 'for the same outcome as one of the existing parties'—a much lower 'interest' standard than that required to intervene as a matter of right." *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562, 2011 WL 5834275, at *1 (E.D. Wis. Nov. 21, 2011) (quoting *Bond v. Utreras*, 585 F.3d

[4] Plaintiffs argue that the rationale for permissive intervention "disappears" if a proposed intervenor cannot show that a governmental party is an inadequate representative. Pls. Br. 12. That contention depends on Plaintiffs' argument that Federal Defendants adequately represent Movants, which Movants have demonstrated is not the case. Moreover, Plaintiffs' argument is based on a single district court case, *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996), that cites no authority for this assertion, has no grounding in the plain language of Rule 24, and is contradicted by cases in which intervention as of right has been denied but permissive intervention has been granted.

1061, 1070 (7th Cir. 2009)). The Seventh Circuit's separate analysis of Rule 24(a) and (b) in *Ligas* confirms that analysis of permissive intervention under Rule 24(b) is distinct from analysis of intervention as of right. *See* 478 F.3d at 775; accord *Solid Waste Agency*, 101 F.3d at 508–09 (denying intervention as of right because movant failed to show inadequate representation but remanding for a determination whether permissive intervention was appropriate).

Accordingly, courts in this Circuit often have granted permissive intervention despite denying intervention as of right, and they have done so even when existing parties adequately represented the interests of a proposed intervenor because their interests were "precisely aligned." *Ashford v. City of Milwaukee*, No. 13-C-0771, 2014 WL 1281525, at *1 (E.D. Wis. Mar. 26, 2014); *see also ABS Global, Inc. v. Inguran, LLC*, No. 14-CV-503, 2015 WL 1486647, at *4–5 (W.D. Wis. Mar. 31, 2015); *Baldus*, 2011 WL 5834275, at *2–3; *Askin v. Quaker Oats Co.*, No. 11-CV-111, 2011 WL 5008524, at *5–6 (N.D. Ill. Oct. 20, 2011); *Collins v. United States*, No. 03-C-2958, 2004 WL 407016, at *3 (N.D. Ill. Jan. 28, 2004); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, No. 02-C-0553-C, 2002 WL 32350046, at *2 (W.D. Wis. Nov. 20, 2002).

Plaintiffs complain that permitting Movants to intervene will "dramatically change the focus of this case" because Movants will introduce evidence and arguments against Plaintiffs' claims. Pls. Br. 13. Yet it is Plaintiffs who have brought claims that directly affect student Movants' identity, daily lives, and well-being, in a Complaint that repeatedly references Student A and makes false assertions about her sex. Plaintiffs' contention that Movants' evidence will not be "germane to this lawsuit," *id.*, is thus absurd. As another court in this district has held, the fact that an intervenor's "potentially meritorious arguments in favor of dismissal might jeopardize" a plaintiff's case "does not suggest that allowing them to intervene will *unduly*

prejudice [plaintiff] within the meaning of Rule 24(b).” *Askin*, 2011 WL 5008524, at *6. Plaintiffs cannot argue now that Movants should be excluded from this case because Movants will challenge Plaintiffs’ claims in ways the existing defendants will not. On the contrary, this argument strongly suggests that the current defendants’ representation of Movants’ interests is inadequate.

Plaintiffs pretend that introduction of Movants’ evidence will “protract this litigation,” in contrast to the “clean questions of law” that Plaintiffs present. Pls. Br. at 13–14. No such clean legal questions are presented, however—as the 226-paragraph factual presentation in Plaintiffs’ Complaint shows. *See* Compl. ¶¶ 47–273. Facts—especially the factual question of the “sex” of transgender students in general, and of Student A in particular—are at the heart of this case. The Complaint accordingly involves questions of gender identity that are at the heart of Movants’ everyday experience. Plaintiffs’ allegations of harassment and emotional distress also are fact dependent. Plaintiffs cannot credibly contend that they are the only parties who deserve to present evidence of their experiences, particularly when they seek to permanently extinguish Movants’ equal use of gendered facilities in the District. Movants will be directly affected by the outcome of this litigation—indeed are those *most* directly affected by it—and deserve a chance to be heard.

CONCLUSION

For the foregoing reasons, Movants respectfully ask this Court to GRANT their Motion to Intervene.

Dated: June 14, 2016

Respectfully submitted,

/s/ *Britt M. Miller*

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