UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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

Plaintiffs,

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 **Independent School District Number 706, State of Minnesota**,

Defendants,

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

Proposed Intervenor-Defendant.

Case No. 0:16-cv-03015-WMW-LIB

Judge Wilhelmina M. Wright
Magistrate Judge Leo I. Brisbois

FEDERAL DEFENDANTS' RESPONSE TO THE MOTION TO INTERVENE

The United States Department of Education ("ED"), Secretary of Education John B. King, Jr., the United States Department of Justice ("DOJ"), and Attorney General Loretta E. Lynch hereby respond to the motion to intervene filed by Jane Doe. ECF No. 22 (motion); ECF No. 24 (memorandum). While the federal defendants take no position on the Proposed Intervenor's 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 the motion to the extent it seeks intervention as of right.

DISCUSSION

A proposed intervenor may not intervene as of right if "existing parties adequately represent" the proposed intervenor's interest in the matter.[1] Fed. R. Civ. P. 24(a)(2). "[W]hen one of the parties is an arm or agency of the government, and the case concerns a matter of 'sovereign interest,' . . . the government is presumed to represent the interests of all its citizens." *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (some quotation marks omitted). If the government party is "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).

The Proposed Intervenor does not dispute the fact that the federal defendants are "governmental bod[ies] charged by law with protecting [her] interests." *Id.* Both the Department of Education and the Department of Justice are charged with "effectuating the provisions" of Title IX, a statute that protects students against sex discrimination in any

[1] The federal defendants concede that the movant has satisfied the other three requirements for intervention as of right—*i.e.*, that the motion is timely, that the Proposed Intervenor possesses standing and an interest related to the subject matter of this action, and that the disposition of this action threatens to impair that interest.

educational program or activity receiving federal funding. 20 U.S.C. §§ 1681, 1682; *see also* Exec. Order No. 12,250 (1981).

The Proposed Intervenor argues that the presumption of adequate representation nonetheless does not apply, because a ruling in Plaintiffs' favor "would directly affect Jane in a personal and immediate way." Int. Mem. 13, ECF No. 24. But the Eighth Circuit recently rejected a similar claim from proposed intervenors who argued that they "face[d] a narrower and more personal harm than the United States." *North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015). The Eighth Circuit explained that even though the proposed intervenors might "have different reasons than the government for seeking to defeat the [plaintiffs'] claims," ultimately, "the Government, as *parens patriae*, [was] charged with protecting" the same interest asserted by the proposed intervenors. *Id.* at 922. Therefore, because "the interest of the [proposed intervenors] and the United States [were] aligned," the presumption of adequate representation applied.[2] *Id.* at 921. The same is true in this case: The Departments of Justice and Education are statutorily charged with protecting all students—including Jane Doe—from sex

[2] Proposed Intervenor cites two earlier cases to argue otherwise, but neither is apposite. *See* Int. Mem. 12-13. In *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), the court determined that the State of Minnesota would not protect one of the intervenors' interests (property values on private lands) *at all*, because the State was only charged with protecting fish and game on public lands. *See id.* at 1001 ("[T]he landowners seek to protect local and individual interests *not shared* by the general citizenry of Minnesota.") (emphasis added). And in *Chiglo*, the court simply described *Mille Lacs*, and then decided it was inapposite. 104 F.3d at 188. Here, by contrast, Jane Doe's interest in preventing sex discrimination, including against transgender students, is fully shared by Federal Defendants. The presumption therefore applies.

discrimination. In doing so, they are presumed to defend their own legal interpretations adequately.

The presumption can only be overcome by "a strong showing of inadequate representation." *Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 389 F.3d 774, 780 (8th Cir. 2004). This requires a proposed intervenor to show that "the *parens patriae* has committed misfeasance or nonfeasance in protecting the public." *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997). Jane Doe cannot make that showing in this case. She has not argued that Defendants have "failed to enforce" Title IX's requirements or otherwise "breached a statutory obligation" to protect students like her from sex discrimination. *Stenehjem*, 787 F.3d at 922 (quotation marks omitted). Nor has she alleged any other "clear dereliction of duty." *Chiglo*, 104 F.3d at 188.

Instead, the Proposed Intervenor argues that she "seeks to raise defenses that the existing Defendants will not." Int. Mem. 13. But the presumption of adequate representation is not so easily overcome. The Eighth Circuit held in *Stenehjem* that "the proposed intervenor cannot rebut the presumption of representation by merely disagreeing with the litigation strategy." 787 F.3d at 922 (quotation marks omitted). The selection of arguments surely falls within a party's "litigation strategy." *See also Chiglo*, 104 F.3d at 188-89 (concluding that even a failure to appeal an adverse decision ordinarily "was not sufficient to show inadequate representation"). Moreover, if Proposed Intervenor was correct, proposed intervenors could automatically defeat the presumption of adequate

representation simply by proposing to advance an additional argument. That would write the presumption out of existence.[3]

The Proposed Intervenor next argues that a change in administration might lead the Federal Defendants to abandon their defense of her interests. *See* Int. Mem. 13-14. This argument proves too much, for a change in policy is *always* possible, and yet the Eighth Circuit has repeatedly confirmed that government representation is adequate absent a "clear dereliction of duty." *Stenehjem*, 787 F.3d at 922 (quoting *Chiglo*, 104 F.3d at 188). The abstract and ever-present possibility of some future policy change thus cannot be enough to show inadequate representation.

Finally, the Proposed Intervenor argues that the district court's injunction in *Texas v. United States*, No. 7:16-cv-54, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), precludes

[3] The Seventh Circuit did not hold otherwise in *City of Chicago v. FEMA*, 660 F.3d 980 (7th Cir. 2011); Int. Mem. 13. There, the court only ruled as to permissive intervention under Rule 24(b). *See id.* at 986 ("[W]e need not consider whether the airlines were entitled to intervene as a matter of right."). In dicta, the court discussed intervention as of right, which it suggested might have been available because the government party "has a conflict of interest with the airlines when it comes to settlement possibilities." *Id.* The court also mentioned cases in which outright failures to defend a proposed intervenor's interest supported intervention as of right. *See id.* at 985-86 (describing a suit by a "statute's intended beneficiaries" who "sought intervention to defend the statute on appeal after the state attorney general abandoned its defense"); *id.* (describing "intervention so that the intervenor could oppose a default judgment").

In the one case where a court "permitted intervention as a matter of right so that employees could urge a position that their employer had failed to argue," *id.* at 986, *quoted*, Int. Mem. 13, the movant sought to intervene alongside a *private* party, not the government body charged with protecting its interests, and so no presumption of adequate representation applied. *See Reich v. ABC*, 64 F.3d 316, 321-22 (7th Cir. 1995). The court in that case found that the representative "ha[d] done as little as possible to defend its own stakes in th[e] action, must less defend the [proposed intervenor's] position," and had "even conceded to default." *Id.* at 322. Nothing of the sort is true here.

Federal Defendants from providing adequate representation. *See* Int. Mem. 14. She argues that the injunction prohibits Federal Defendants from even "citing" the challenged guidance documents. *Id.* The Federal Defendants do not, however, read the *Texas* injunction as broadly as she does. The injunction only prohibits them from "using the [guidance documents] or asserting that the [guidance documents]," themselves "carry weight." *Texas*, 2016 WL 4426495, at *17; *see* Gov't PI Opp. 1 n.1, ECF No. 37. As Defendants' response to the preliminary injunction motion illustrates, the *Texas* injunction does not stop them from "citing" the documents in arguing that the documents do not constitute final agency action and did not require notice-and-comment rulemaking. Gov't PI Opp. 10-13 (finality); *id.* at 13-16 (notice and comment). Nor does the injunction prevent Defendants from arguing that their *interpretation* of Title IX's regulations—independent of any guidance documents—warrants deference. *See id.* at 16-30. Indeed, that interpretation received *Auer* deference *before* the enjoined 2016 Dear Colleagues Letter was even issued. *See G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720-22 (4th Cir. 2016) (deferring to ED's interpretation advanced in an amicus brief only), *mandate recalled and stayed, Gloucester Cnty. Sch. Bd. v. G.G.*, No. 16A52 (Aug. 3, 2016). The *Texas* injunction thus does not defeat the presumed adequacy of representation in this case. "There is no evidence in the record that the United States will mount anything other than a vigorous defense." *North Dakota v. United States*, 2014 WL 11381443, at *5 (D.N.D. Feb. 4, 2014), *aff'd*, 787 F.3d 918 (8th Cir. 2015).

CONCLUSION

While taking no position on the Proposed Intervenor's motion for permissive intervention under Rule 24(b), the Federal Defendants respectfully request that the Court deny the Proposed Intervenor's motion for intervention as of right under Rule 24(a).

Dated: October 19, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

/s/ *Spencer E. Amdur*
SPENCER E. AMDUR (PA Bar No. 322007)
BENJAMIN L. BERWICK (MA Bar No. 679207)
JAMES BICKFORD (NY Bar No. 4930376)
Trial Attorneys, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
Spencer.Amdur@usdoj.gov
tel.: (202) 616-7420
fax: (202) 616-8460

Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2016, a copy of the foregoing Federal Defendants' Response to the Motion to Intervene was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ *Spencer E. Amdur*
Spencer E. Amdur