UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

STATE OF TENNESSEE, *et al.,* Plaintiffs, and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL and A.C., by her next friend and mother, Abigail Cross, Intervenor-Plaintiffs, LINDA MCMAHON, in her official capacity as Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION, Defendants.	Case No. 2:24-cv-00072-DCR-CJS Chief District Judge Danny C. Reeves Magistrate Judge Candace J. Smith

DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION TO INTERVENE BY VICTIM RIGHTS LAW CENTER AND JANE DOE

Before the Court is a motion to intervene by Victim Rights Law Center (VRLC), a nonprofit advocacy organization that provides legal assistance to victims of sex-based harassment, and Jane Doe, a former student and alleged victim of sex-based harassment. VRLC and Doe seek to intervene for "the limited purpose" of appealing "the vacatur of the 2024 Rule's protections for victims of sex-based harassment and to ensure that any remedy is appropriately tailored," based on intervenors' impression that the government "will not appeal the Court's decision and therefore will not represent VRLC and Jane Doe's legal interests." ECF No. 164-1 at 5, 16. The Office of the Solicitor General has not yet made a final determination concerning appeal in this case. But if intervenors are correct that Defendants elect not to appeal, neither VRLC nor Doe may appeal in Defendants' stead because they lack Article III standing. Conversely, should Defendants appeal,

intervenors do not contend that Defendants would fail to adequately represent their interests in this litigation. Either way, the Court should deny the motion to intervene. Because VRLC and Doe lack standing for an independent appeal, the Court also should deny their motion for extension of time to file a notice of appeal.

BACKGROUND

As set forth more fully in Defendants' prior briefing, this case concerns a 2024 rule (the "2024 Rule") that makes numerous changes to the Department of Education's Title IX regulations. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024). The 2024 Rule contains numerous provisions, ranging from revising recordkeeping requirements to guaranteeing access to lactation spaces for breastfeeding students. *See generally id.* Plaintiffs and Plaintiffs-Intervenors challenged several portions of the 2024 Rule, including § 106.10, § 106.31(a)(2), and the definition of sex-based hostile environment harassment in § 106.2, focusing particularly on those provisions' application to gender identity discrimination. *E.g.*, ECF No. 21-3, ¶ 351; ECF No. 1, ¶ 263. Plaintiffs and Plaintiffs-Intervenors did not raise any claim that the Rule's changes to the grievance procedures schools must employ to address complaints of sex discrimination and sex-based harassment were unlawful. *See* 34 C.F.R. §§ 106.45, 106.46.

On January 9, 2025, the Court granted Plaintiffs' and Plaintiffs-Intervenors' motions for summary judgment, denied Defendants' motion for summary judgment, and vacated the 2024 Rule on a nationwide basis. ECF Nos. 143, 144. The Court declined to sever the challenged portions of the 2024 Rule from its other provisions, including the provision addressing the grievance procedures schools must employ to address complaints of sex discrimination and sex-based harassment. ECF No. 143 at 12. On January 10, 2025, the Court entered an Amended Judgment,

which slightly revised the declaratory relief portion of the original Judgment. ECF Nos. 145, 146. The Defendants subsequently issued guidance to regulated entities explaining that as a result of the vacatur of the 2024 Rule, the Department of Education "will enforce Title IX under the provisions" of the previously issued "2020 Title IX Rule," including "the definition of sexual harassment, the procedural protections owed to complainants and respondents, the provision of supportive measures to complainants, and school-level reporting processes as outlined in the 2020 Title IX Rule." *See* Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter on Title IX Enforcement* (Feb. 4, 2025), https://perma.cc/8XH7-FQSN; *see also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (the "2020 Rule").

On February 28, 2025, VRLC and Doe filed this motion, requesting to intervene for the "the limited purpose" of appealing "the vacatur of the 2024 Rule's protections for victims of sex-based harassment and to ensure that any remedy is appropriately tailored." ECF No. 164-1 at 16. VRLC and Doe claim that "[r]eversion to the 2020 Rule" will "remove[] protections against sex-based harassment and impose[] disproportionate burdens on survivors." ECF No. 164-1 at 2. They also seek an extension of time to file a notice of appeal. ECF No. 165.

LEGAL STANDARDS

Federal Rule of Civil Procedure 24(a)(2) establishes four requirements for intervention of right: "(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *United States v. Tennessee*, 260 F.3d 587, 591–92 (6th Cir. 2001); *see* Fed. R. Civ. P. 24(a)(2).

Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may

permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The Court may deny a request for permissive intervention, among other reasons, because an existing party already adequately represents the proposed intervenor's interests. *See, e.g.*, *Tennessee v. Cardona*, No. 2:24-cv-072-DCR, 2024 WL 3584362, at *1 (E.D. Ky. May 20, 2024) ("Since the existing plaintiffs adequately represent Griffin's interests, permissive intervention is not warranted.").

The Sixth Circuit has held that mere intervention in an existing suit in district court does not require the intervenor to demonstrate constitutional standing. *See Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428 (6th Cir. 2008) (explaining that "[a]n intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing" (alteration in original) (quoting *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994))). However, "an intervenor seeking to appeal, like any other party, must fulfill the requirements of Article III of the Constitution before it can continue to pursue an action in the absence of the party on whose side intervention was permitted." *Id.* (citing *Diamond v. Charles*, 476 U.S. 54, 68 (1986)); *see Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317-18 (6th Cir. 2005) ("The Supreme Court has held that for an intervenor to continue litigation by pursuing an appeal when the party on whose side it has intervened has not appealed, the intervenor must have standing in its own right" (citing *Diamond*, 476 U.S. at 65)). Accordingly, the Court should deny an intervention request where the sole purpose of intervention is to appeal and where the proposed intervenors lack standing to sustain such an appeal. *See, e.g.*, *Ctr. for Powell Crossing, LLC v. City of Powell*, No. 2:14-CV-2207, 2016 WL 3384298, at *3 (S.D. Ohio June 20, 2016) ("[T]he court concludes that Petitioners may not intervene for purposes of filing an appeal because they lack standing."), *aff'd sub nom. Ctr. for*

Powell Crossing, LLC v. Ebersole, 696 F. App'x 702 (6th Cir. 2017).

ARGUMENT

The motion to intervene should be denied because neither proposed intervenor has established Article III standing. "[A] party seeking to establish Article III standing must show: 1) an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical, 2) a causal connection between the injury and the conduct complained of, and 3) a likelihood of redressability by a favorable judgment." *Providence*, 425 F.3d at 318 (quotation marks omitted). "It is possible to have standing to intervene in a lawsuit, but not have Article III standing to bring an independent appeal." *Id.* "This is so because the 'injury in fact' requirement is stricter than the 'substantial interest' inquiry." *Id.* Neither VRLC nor Doe has established standing to support their intervention to appeal "the vacatur of the 2024 Rule's protections for victims of sex-based harassment" as set out in their intervention motion. ECF No. 164-1 at 16. Accordingly, neither may pursue an appeal in the absence of Defendants.[1]

1. VRLC has failed to establish standing to appeal any aspect of the district court's vacatur order. "[O]rganizations must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals." *FDA v. All. for Hippocratic Med.* ("*Alliance*"), 602 U.S. 367, 393-94 (2024). "Like an individual, an organization may not establish standing simply based on the intensity of the litigant's interest or because of strong opposition to the . . . conduct" at issue. *Id*. at 394 (quotation marks omitted). Likewise, an organizational plaintiff "cannot spend its way

[1] Should Defendants appeal the Court's judgment, the proposed intervenors do not contend that Defendants would fail to adequately represent their interests in this litigation, undermining a basis for intervention. *See* Fed. R. Civ. P. 24(a)(2) (listing inadequate representation by existing parties as a requirement for intervention as of right).

into standing simply by expending money to gather information and advocate against the defendant's action," *id*.; otherwise "all the organizations in America would have standing to challenge almost every federal policy that they dislike," *id*. at 395.

VRLC lacks standing to bring an independent appeal because it fails to "allege such a personal stake in the outcome of the controversy as to warrant [*its*] invocation of federal-court jurisdiction," *Providence*, 425 F.3d at 318 (quotation marks omitted). VRLC's asserted standing to pursue an appeal here rests on a theory that reversion to the 2020 Rule's regulatory scheme will harm its organizational interests. *See* ECF No. 164-1 at 4. VRLC claims that the reinstatement of the 2020 Rule will "impair[] VRLC's ability to provide legal assistance to student survivors," and will cause it to "expend significantly more time and resources to provide legal assistance to its clients," *id.* at 7, 10, which it otherwise would use to more broadly pursue its mission, *id.* at 11. VRLC argues that these anticipated impacts are sufficient to establish an Article III injury under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and its progeny. ECF No. 164-1 at 6-10.

VRLC errs in likening this case to *Havens*. In *Havens*, the plaintiff was a housing counseling service that sued the defendant under the Fair Housing Act on the ground that the defendant provided its employees false information about apartment availability. 455 U.S. at 368. As the Supreme Court has emphasized, the counseling service in *Havens* established Article III standing because "when [defendant] gave [its] employees false information about apartment availability," it "perceptibly impaired [the service's] ability to provide counseling and referral services for low- and moderate-income homeseekers." *Alliance*, 602 U.S. at 395 (quoting *Havens*, 455 U.S. at 379). The Court has explained that "*Havens* was an unusual case," *id.* at 396, likening it to "a retailer who sues a manufacturer for selling defective goods to the retailer," *id*. at 395.

The Supreme Court "has been careful not to extend the *Havens* holding beyond its

context," including most recently in *FDA v. Alliance for Hippocratic Medicine*. 602 U.S. at 396. There, the Court held that medical advocacy organizations lacked standing to challenge a decision of the FDA to relax regulatory requirements for the prescription of a certain drug. *Id.* The Court rejected the organizations' theory that the FDA's regulatory decision "impaired their ability to provide services and achieve their organizational missions," including by "mak[ing] it more difficult for them to inform the public about safety risks." *Id*. at 394, 395 (quotation marks omitted). The Court held that the "argument does not work to demonstrate standing" because "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's actions." *Id*. at 394. The Court also dismissed the organization's reliance on *Havens*, explaining that the FDA's "actions relaxing regulation of [the drug] have not imposed any similar impediment to the medical associations' advocacy businesses." *Id*. at 395.

The Supreme Court's reasoning in *Alliance* controls here. Like the organizational plaintiffs in *Alliance*, VRLC cannot establish standing on the ground that vacatur of the 2024 Rule "impair[s] [its] ability to provide legal assistance to student survivors" and "frustrate[s its] mission of representing student survivors in school Title IX proceedings." ECF No. 164-1 at 7, 9. As explained, the only "impairment" VRLC identifies is that vacatur has resulted in the reinstatement of the regulatory regime set out in the 2020 Rule, including the procedural protections owed to complainants and respondents. But nothing in the reinstated scheme prevents VRLC from continuing to provide legal assistance and representation to "student survivors" or any other complainants. VRLC does not claim that it is now receiving "false information" or the equivalent of "defective goods," as was the case in *Havens*. *Alliance*, 602 U.S. at 395.

Instead, VRLC predicts that the 2020 Rule's regulatory regime will make potential clients

"less willing to file or continue with a pending Title IX complaint." ECF No. 164-1 at 8. But VRLC's only support for that prediction consists of VRLC's experience when the 2020 Rule was first promulgated, and a made-for-this-litigation comparison between the requests it received for legal assistance in the six-week period after the 2024 Rule's promulgation and the six-week period after this Court's vacatur order. *See* ECF No. 164-1 at 7-8. Such speculative prediction is insufficient to establish that VRLC's alleged injury is "actual or imminent, not conjectural or hypothetical." *Providence*, 425 F.3d at 318 (citation omitted). More fundamentally, a potential diminishment in the demand for VRLC's services because of the independent actions of Title IX complainants is different in kind from the "perceptibl[e] impair[ment]" at issue in *Havens*. *Alliance*, 602 U.S. at 395 (quoting *Havens*, 455 U.S. at 379). Just as the plaintiffs in *Alliance* could not establish organizational standing based on the downstream effects of the FDA's relaxation of regulations for the prescription of a given drug, VRLC cannot establish standing based on the (potential) downstream effects that the reversion to the 2020 Rule's regulatory scheme will have on potential complainants' willingness to pursue Title IX complaints. Any such harm to VRLC is the result of the "voluntary and independent actions or omissions" of potential complainants, which "does not" "suffice for standing." *Crawford v. U.S. Department of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017) (emphasis omitted).

Equally unavailing is VRLC's claim that vacatur of the 2024 Rule will drain its resources because the reinstatement of the 2020 Rule's regulatory regime will require "significantly more time and resources to provide legal assistance." ECF No. 164-1 at 10. VRLC contends that the need to "divert[] its resources toward its legal assistance program to meet its clients' increased needs . . . will in turn reduce VRLC's ability to operate other programs." *Id.* at 11. But this, too, is speculative, and in any case again fails to demonstrate that vacatur of the 2024 Rule is "directly

affect[ing] and interfer[ing]" with VRLC's "core business activities." *Alliance*, 602 U.S. at 395. As the Supreme Court explained in *Alliance*, such direct interference is crucial for an organization to demonstrate standing based on a *Havens* diversion-of-resources theory. *See id.*

Apart from a passing parenthetical reference, *see* ECF No. 164-1 at 6, VRLC does not engage with the Supreme Court's reasoning in *Alliance*. Instead, VRLC relies on out-of-circuit district court cases that held VRLC had standing to challenge aspects of the 2020 Rule based on a broad reading of *Havens*. *See* ECF No. 164-1 at 7 (citing *Victim Rts. L. Ctr. v. Cardona*, 552 F. Supp. 3d 104, 126 (D. Mass. 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021); *SurvJustice Inc. v. DeVos*, No. 18-cv-00535-JSC, 2018 WL 4770741, at *6 (N.D. Cal. Oct. 1, 2018), *order amended*, 2019 WL 1434144 (N.D. Cal. Mar. 29, 2019)). Those cases, however, predate *Alliance*, which made clear that "*Havens* was an unusual case," and that courts should be "careful not to extend the *Havens* holding beyond its context." 602 U.S. at 396. For much the same reason, VRLC errs in invoking the Sixth Circuit's decision in *Fair Housing Center of Metropolitan Detroit v. Singh Senior Living, LLC*, 124 F.4th 990 (6th Cir. 2025). *See* ECF No. 164-1 at 6. In that case, the court of appeals vacated a district court decision finding an organization established standing in light of *Alliance*. *See Fair Hous. Ctr.*, 124 F.4th at 993. The Sixth Circuit recognized that *Alliance* clarified the scope of organizational standing and that "[i]t is not enough to broadly gesture toward a drain on an organization's resources and call it a day." *Id*. (quotation marks omitted). The same is true of VRLC here.

Because VRLC has not shown that it is suffering any concrete and particularized, actual or imminent injury due to the Court's vacatur of the 2024 Rule, it lacks standing to pursue an independent appeal. Accordingly, the Court should deny VRLC's motion to intervene. *See, e.g.*, *Ctr. for Powell Crossing*, 2016 WL 3384298, at *3.

2. Doe's claim that the reinstatement of the 2020 Rule causes her a cognizable Article III injury fares no better. Doe's theory of standing is narrow and fact specific. ECF No. 164-1 at 11-13. She claims that she was sexually assaulted while a student at a Massachusetts-based university and that she filed a Title IX complaint based on the incident in October 2024. ECF No. 164-3 ¶¶ 1-4. Doe's alleged injury focuses on the manner in which the university will conduct a hearing as part of the Title IX investigation. Specifically, Doe alleges that consistent with provisions of the 2024 Rule, the university was initially deciding between two options for conducting a hearing: (1) "shuttle questioning" in which the decisionmaker would pose questions and follow-up questions in one-on-one meetings with Doe and the respondent, or (2) a live hearing where the decisionmaker would pose questions and Doe and the respondent could participate virtually, from separate locations. *Id.* ¶¶ 14-15; *see* 34 C.F.R. §§ 106.46(f), 106.46(g) (2024) (governing live hearings). Doe claims, however, that after the vacatur of the 2024 Rule, the university informed her that she "will have to submit to cross-examination in a live hearing," with the cross-examination conducted by the respondent's advisor. ECF No. 164-3 ¶ 17.

Doe claims that she is "considering choosing not to participate in [her] upcoming Title IX hearing to avoid being cross-examined." ECF No. 164-3 ¶ 20. Doe worries, however, that failing to appear may make her "less credible to the Title IX decision-maker." *Id.* Doe therefore seeks to intervene and appeal the vacatur of the 2024 Rule so, as she frames it, she "do[es] not have to choose between being subjected to a distressing cross-examination or not being cross-examined and therefore reducing my chances of holding [the accused] accountable under the 2020 Rule." *Id.* ¶ 21. Doe claims that she anticipates the hearing to be scheduled for early April 2025. *Id.* ¶ 16. Accordingly, the only injury Doe identifies is the possibility of being subject to an adverse inference by the Title IX decisionmaker for failing to attend a live hearing, or attending and

potentially facing cross-examination by the respondent's advisor.[2]

Doe's theory of standing misunderstands the requirements of the 2020 Rule, and rests on supposition about inferences the decisionmaker might draw in adjudicating her case. The relevant provision of the 2020 Rule was codified at 34 C.F.R. § 106.45(b)(6)(i) (2020). It provides that "[f]or postsecondary institutions," a school's "grievance process must provide for a live hearing" and "must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." *Id.*; *see also id.* (providing that "[a]t the request of either party," the school "must provide for the live hearing to occur with the parties located in separate rooms"). Critically, while schools are required to provide a live hearing and the opportunity for cross-examination, the 2020 Rule makes clear that "[i]f a party . . . does not submit to cross-examination at the live hearing, . . . the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's . . . absence from the live hearing or refusal to answer cross-examination or other questions."[3] *Id.*

The harm Doe fears from application of the 2020 Rule's live hearing provision is entirely

[2] To the extent that Doe suggests that under the 2020 Rule, she will no longer be able to "participate virtually from [a] separate physical location[]" from the accused, ECF No. 164-3 at 3, that is incorrect. The 2020 Rule provides: "At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions." 34 C.F.R. § 106.45(b)(6)(i) (2020). In addition, the 2020 Rule specifically prevents a complainant from undergoing questioning by, or having to confront, the respondent. *Id.*

[3] A separate aspect of § 106.45(b)(6)(i) originally provided that a party's failure to submit to cross-examination at the live hearing precluded a decision maker from "rely[ing] on any statement of that party or witness in reaching a determination regarding responsibility." But as VRLC is surely aware, that specific provision was vacated by a district court and is not in force, such that it cannot be the grounds for standing here anyway. *See Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 132; Office for Civil Rights, U.S. Dep't of Educ., Ltr. to Students, Educators, and other Stakeholders *re Victim Rights Law Center et al. v. Cardona* (Aug. 24, 2021), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf. And Doe nowhere suggests that this aspect of the 2020 Rule somehow still applies or could injure her here.

speculative. Her fear that cross-examination at a live hearing would be "distressing," ECF No. 164-3 ¶ 21, is based on speculation about how she might be questioned by an advisor to the respondent, *id.* ¶ 18. And while Doe believes she will "look less credible" if she fails to appear at the hearing based on that fear, *id.* ¶ 20, nothing in the Rule requires the decisionmaker to draw a negative inference regarding Doe's credibility if she declines to participate in a live hearing. *See* 34 C.F.R. § 106.45(b)(6)(i) (2020). To the contrary, she may avoid the hearing or refuse to answer cross-examination questions knowing that the decisionmaker cannot "draw an inference about the determination regarding responsibility based solely" on her decision. *Id.* Doe's theory of injury thus assumes that university personnel will act in a manner in tension—if not direct conflict—with the express provisions of the 2020 Rule itself. Such speculation is insufficient to establish an injury in fact that is fairly traceable to vacatur of the 2024 Rule. *See Alliance*, 602 U.S. at 383 ("The causation requirement precludes speculative links—that is, where it is not sufficiently predictable how third parties would react to government action or cause downstream injury to plaintiffs."); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (declining "to abandon [the Court's] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors"). Accordingly, Doe has not shown that she has Article III standing and consequently fails to establish that she may intervene to appeal here.[4]

CONCLUSION

For the foregoing reasons, the Court should deny the motion to intervene and the motion for extension of time to file a notice of appeal.

[4] To the extent Doe might be found to have established Article III standing to support an appeal, it extends no further than a challenge to the Court's vacatur of the specific provisions of the 2024 Rule governing the conduct of live hearings—namely, § 106.46(f) and § 106.46(g).

Dated: March 7, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 7, 2025, the above document was filed with the CM/ECF filing system.

/s/ *Elizabeth Tulis*