

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT

CAUSE NO.: 49D07-1107-PL-025402

TERESA MEREDITH, DR. EDWARD E.)
EILER, RICHARD E. HAMILTON,)
SHEILA KENNEDY, GLENDA RITZ,)
REV. MICHAEL JONES, DR. ROBERT M.)
STWALLEY III, KAREN J. COMBS,)
REV. KEVIN ARMSTRONG, DEBORAH J.)
PATTERSON, KEITH GAMBILL, and)
JUDITH LYNN FAILER,)

Plaintiffs,)

v.)

MITCH DANIELS, in his official capacity as)
Governor of Indiana; and DR. TONY BENNETT,)
in his official capacity as Indiana Superintendent)
of Public Instruction and Director of the Indiana)
Department of Education,)

Defendants.)

FILED

JUL 29 2011

223

Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

**MEMORANDUM IN OPPOSITION TO MOTION OF HEATHER COFFY
AND MONICA POINDEXTER TO INTERVENE AS DEFENDANTS**

Plaintiffs respectfully oppose the motion of Heather Coffy and Monica Poindexter (“Applicants”) to intervene as Defendants. This lawsuit raises the single issue of the constitutionality of the Choice Scholarship Program (“CSP”), a private-school voucher program recently enacted by the General Assembly. With respect to that issue, the interests of Applicants – parents of children who wish to attend private schools under the program – are identical to those of the State Defendants, who are represented by the Attorney General. Under these circumstances, the Attorney General is presumed to be an adequate representative of Applicants’

interests in defending the constitutionality of the CSP, and Applicants therefore are not entitled to intervene.

Although Applicants should not be allowed to intervene as parties in the litigation, Plaintiffs welcome their participation as *amici curiae*. Plaintiffs therefore suggest that Applicants' proposed brief in opposition to Plaintiffs' Motion for Preliminary Injunction be filed as a brief *amicus curiae*.

ARGUMENT

I. Applicants Have No Right to Intervene Under Trial Rule 24(A) Because Their Interests Are Adequately Represented by the Defendants

To intervene as of right under Trial Rule 24(A), Applicants must show that: 1) they have an "interest in the subject of the action," 2) the "disposition of the action may as [a] practical matter impede protection of that interest," and that 3) "representation of the interest by existing parties is inadequate." *Developmental Disabilities Residential Facilities Council v. Metropolitan Dev. Comm'n of Marion County* ("DDRFC"), 455 N.E.2d 960, 963-64 (Ind. Ct. App. 1983). As Applicants correctly explain, Applicants' Br. at 10, in applying Trial Rule 24 the Indiana courts frequently look to federal case law interpreting the similar federal Rule 24. *See, e.g., Board of Comm'rs of Benton County v. Whistler*, 455 N.E.2d 1149, 1154 (Ind. Ct. App. 1983) ("federal cases applying Fed. R. Civ. P. 24 [are] appropriate in [Trial Rule] 24 determinations") (citing *Bryant v. Lake County Trust. Co.*, 334 N.E.2d 730 (Ind. Ct. App. 1975)).

Here, Applicants' motion to intervene fails for one reason: Applicants have not shown, and cannot show, that the State Defendants represented by the Attorney General do not adequately represent their interest in defending the constitutionality of the CSP.

A. The Applicants' Interest in this Lawsuit Is Identical to that of the State Defendants

This lawsuit raises a single issue – the constitutionality, under several provisions of the Indiana Constitution, of the CSP. On this issue, the interests of the Applicants are identical to those of the State Defendants, as both seek the same outcome from this litigation, *i.e.*, upholding the constitutionality of the CSP.

Applicants' attempt to characterize their interest and the Defendants' interest as "different" or "distinct," *see* Applicants' Br. at 16-17, rests on a mischaracterization of what is at issue. Applicants point to the State Defendants' "broad interest in *administering* the [CSP] program as part of Indiana's overall approach to public education," as opposed to their own "narrower interest" as parents participating in the program. *Id.* at 15-16 (emphasis added). The issue presented here, however, is not the *administration* but the *constitutionality* of the CSP program. On that question – the only one presented by this lawsuit – the interests of the State Defendants and the Applicants are completely aligned.

Applicants have cited no cases – from Indiana or otherwise – in which private parties have been found to have an interest "different" or "distinct" from that of government defendants in defending against a challenge to the constitutionality of a statute.¹ That is unsurprising as the law is to the contrary. As the Fifth Circuit explained in *Ingebretsen v. Jackson Public School*

¹ Cases cited by the Applicants illustrate the type of truly distinct interests among parties that can support a motion to intervene. In *Heritage House of Salem, Inc. v. Bailey*, 652 N.E.2d 69 (Ind. Ct. App. 1995), the interests of the intervening defendants, private nursing homes that sought financial gain, were directly opposed to the named defendant, a state agency that sought to defray the cost of health care. *Id.* at 74. And in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), the Supreme Court found that, in a suit under federal labor law to set aside a union election and require that a new one be held with certain, specific safeguards in place, the Secretary of Labor's interest in assuring "free and democratic union elections" was "distinct" from an individual union member's interest in adding new claims to the lawsuit to vindicate his individual rights. *Id.* at 530, 538-39.

District, 88 F.3d 274 (5th Cir. 1996), in holding that the American Family Association Law Center could not intervene as of right to defend the constitutionality of a statute allowing student-led prayer in schools, where the “only issue before the court is the validity of [a state statute],” “the Attorney General, in defending that statute, can assert the rights of all [state residents] affected by the law, including the Free Exercise rights of the Proposed Intervenors.” *Id.* at 280; *see also United States v. City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2002) (intervention of right was properly denied where, *inter alia*, potential intervenors “share[d] the same objective” as the government plaintiff in the case).

B. The State Defendants, Represented by the Attorney General, Adequately Represent the Applicants’ Interests

The Defendants – Governor Daniels and Superintendent of Public Instruction Bennett – are represented in this litigation by the Attorney General, the state official charged by law with representing the interests of the State in court. *See* Ind. Code §§ 4-6-1-6, 4-6-2-1. As state officials defending the constitutionality of the CSP, the Defendants (and their counsel, the Attorney General) are *presumed* to be an adequate representative of the interests of the Applicants in defending the statute’s constitutionality. The Seventh Circuit and other federal courts have held that where a plaintiff has sued a governmental entity or official to challenge the validity of a state statute, regulation, or official government policy, the governmental defendant is presumed to be an adequate representative of all those who seek to uphold the law or policy. *See, e.g., Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774-75 (7th Cir. 2007) (denying intervention to disabled persons who sought to defend a challenged governmental practice on the ground that “when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests”); *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (denying

intervention to a pro-life group that sought to defend a challenged state law limiting access to abortions on the ground that “[a]dequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor”); *Daggett v. Comm’n on Gov’t Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999) (denying intervention to candidates for office who sought to defend the validity of a challenged state campaign finance law on the ground that “the government in defending the validity of the statute is presumed to be representing adequately the interests of all citizens who support the statute”); *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (denying intervention to students seeking to defend the validity of a state’s affirmative action program on the ground that, “[i]n a suit involving a matter of sovereign interest, the State is presumed to represent the interests of all of its citizens”).²

Consistent with these federal cases, the Indiana Court of Appeals has upheld a trial court’s denial of a motion to intervene based, in part, on its holding that the putative intervenor’s interest was adequately represented by a government party defendant. In *DDRFC*, an organization of relatives and friends of developmentally disabled citizens sought to intervene in a suit seeking judicial review of a plan for group housing made by a state agency. *See DDRFC*, 455 N.E.2d at 962. In finding that the motion to intervene as of right was properly denied, the Court of Appeals held, *inter alia*, that the trial court could have concluded that the state agency

² Respected commentators have also noted that, absent special circumstances, governmental parties are presumed to be adequate representatives of private parties’ interests. *See* 7C Charles A. Wright, et al. *Federal Practice & Procedure* § 1909 (3d ed. 2011) (noting that the “controlling principle . . . when a governmental body or officer is the named party” is that “representation will be presumed adequate unless special circumstances are shown”); 6 James Wm. Moore, *Moore’s Federal Practice* § 24.03[4][a][iv][A] (3d ed. 2010) (“Acting in a type of representative capacity is a basic governmental function, and the business of government could hardly be conducted if, in matters of litigation, individual citizens could usually or always intervene and assert individual points of view.”).

“would have adequately represented [the applicants’] interest” because “[i]t would be very logical for the trial court to presume that the agency would adequately defend its decision.” *Id.* at 964.

As a consequence, courts have held that an applicant for intervention can generally only defeat the presumption of adequate representation by showing that the governmental defendants have acted with “gross negligence” or “in bad faith” in carrying out their duty to defend the validity of the law or policy. *See Ligas*, 478 F.3d at 774. Far from asserting that the State Defendants here have acted with gross negligence or in bad faith, Applicants acknowledge that the Defendants are represented by “excellent legal counsel who will represent Defendants’ interests well.” Applicants’ Br. at 16 n.1. And, as a matter of not just logic but fact, the State Defendants and Attorney General are seeking to represent the interests of all parents in this case and are doing so with vigor and competence.³ Given the record of the proceedings to date, there can be no showing that the Attorney General, on behalf of the State Defendants, has acted with gross negligence or in bad faith, or otherwise is not adequately representing the interests of the Applicants in seeking to uphold the constitutionality of the statute.

³ In their filings in opposition to plaintiffs’ motion for a preliminary injunction, the State Defendants have explicitly invoked, “as *parens patriae*,” the interests of parents wishing to participate in the CSP. Defs’ Mem. in Opp. to the Mot. for Prelim. Inj. (“Defs’ Opp. Br.”) at 45. And the briefs filed by the State Defendants to date put forward many of the exact same points that Applicants seek to raise as Intervenors. *Compare* Defs’ Opp Br. at 13-15 (arguing that the “all suitable means” clause in Article 8, Section 1 of the Indiana Constitution renders the CSP statute constitutional) *with* Br. of Applicants for Interv. Heather Coffy and Monica Poindexter in Opp. to Pls’ Mot. for Prelim. Inj. (Applicants’ Opp. Br.) at 6-14 (same); *compare also* Defs’ Opp. Br. at 21-22 (arguing that a holding that the CSP statute was unconstitutional would affect other state programs) *with* Applicants’ Opp. Br. at 14-15 (same); *compare also* Defs’ Opp. Br. at 33-37 (arguing that the CSP is rendered “religion-neutral” by “parent choice”) *with* Applicants’ Opp. Br. at 18-20 (same).

C. Applicants' Specific Arguments Are Unavailing

Having failed to demonstrate that Applicants have an interest in this litigation that is distinct from that of the Defendants, Applicants make a series of specific arguments in support of intervention. All of these have been rejected in other cases and are equally unavailing here.

1. Applicants' Interests are More "Narrow" Than the Defendants. As noted above, Applicants' only attempt to differentiate their interest in this litigation from that of the State Defendants is to characterize their interest as "potentially more narrow and parochial"⁴ than the Defendants' "broad" interests in the Indiana education system. Applicants' Br. at 15-16. This attempt at differentiation is insufficient. As Judge Posner explained in *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 101 F.3d 503, 508 (7th Cir. 1996), it is not enough to merely assert that a government defendant has a diversity of interests to overcome the presumption that it is an adequate defendant because "then in no case brought or defended by the [government] could intervention be refused on the ground that the [government]'s representation of the would-be intervenor's interest was adequate." For this reason, as the First Circuit observed in *Daggett*, "[t]he general notion that the Attorney General represents 'broader' interests at some abstract level is not enough" to require intervention. *Daggett*, 172 F.3d at 112. See also *Hopwood*, 21 F.3d at 605 (affirming denial of motion to

⁴ Applicants cite *Californian for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), in which the court found, in a suit by public works contractors to challenge state agencies' enforcement of prevailing wage laws, that the "employment interests" of members of a union that sought to intervene were "more narrow and parochial" than the interests of the public at large. *Id.* at 1190 (emphasis added). No such interests are present here. Instead, this case more closely resembles *United States v. City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2002), in which the Ninth Circuit found that community groups and individuals could not intervene in a suit by the United States alleging a pattern and practice of Fourth Amendment violations by the Los Angeles Police Department because they are the "exact constituents [that] the United States is seeking to protect in this action" and therefore their interests were not "more narrow [and] parochial" than the government party's.

intervene in affirmative action lawsuit despite argument from proposed intervenors that the “State must balance competing goals while they are sharply focused on preserving the admissions policy” and is therefore “not in as good a position to bring in evidence of” discrimination).

2. Applicants May Disagree With Defendants Over “Litigation Approach.” *See* Applicant Br. at 16. The assertion that representation is not adequate because the applicants may make different arguments from those advanced by the parties has been rejected as basis for intervention.⁵ As the Indiana Court of Appeals held in *DDRFC*, in upholding the denial of a motion to intervene in that case, this argument “would require trial courts to predict the competency of counsel rather than analyze the similarity of the proposed intervenor’s interests and whether that interest is adequately represented by the named party.” 445 N.E.2d at 964-65; *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (“Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.”) (citing *City of Los Angeles*, 288 F.3d 391 at 402); 7C Charles A. Wright, et al. *Federal Practice & Procedure* § 1909 (“A mere difference of opinion concerning the tactics with which the litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party . . .”).

3. Applicants are in the “Best Position” to Defend This Lawsuit. Applicants argue that given their status as parents of children who intend to use CSP scholarships, they are in the “best position” to defend the constitutionality of the CSP program. This argument ignores the fact that

⁵ A related argument made by Applicants – that their counsel possess experience and expertise regarding the subject area of this lawsuit, *see* Applicants’ Br. at 19-20 – has also been found to be an insufficient basis for intervention. *See American Nat’l Bank & Trust Co. of Chi. v. City of Chi.*, 865 F.2d 144, 147 (7th Cir. 1989) (“This Court has held that a group’s particular expertise by itself is insufficient to meet the interest requirement.”).

to the extent that they have evidence that may be relevant to the issue presented in this lawsuit, that evidence can be made available to the Defendants in aid of their defense of this suit. *See Daggett*, 172 F.3d at 113 (“[T]here is no obvious reason why, if the evidence were useful and permitted by the district court, it would not be offered by the state, treating the applicants as friendly witnesses.”); *Hopwood*, 21 F.3d at 605 (“Although the [potential intervenors] may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the State.”). Nor is the asserted importance of this lawsuit to the Applicants a basis for intervention. *See also Keith*, 764 F.2d at 1270 (“A subjective comparison . . . of the conviction of defendants and intervenors is not the test for determining adequacy of representation.”).

Because Applicants have failed to show that they have an interest in this litigation that is not adequately represented by the Defendants, their motion to intervene as a matter of right under Trial Rule 24(A) must be denied.

II. Applicants’ Motion For Permissive Intervention Under Rule 24(B) Should Also Be Denied

Having no interests in this lawsuit that are not adequately represented by the Defendants, there is no reason to allow Applicants to intervene permissively under Rule 24(B): “When intervention of right is denied for the proposed intervenor’s failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears.” *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996).

Thus, in *DDRFC*, the Indiana Court of Appeals upheld the trial court’s denial of permissive intervention specifically because it found that the representation of the potential intervenor’s interests by the government defendant could be presumed to be adequate. 455 N.E.2d at 965. Indeed, courts routinely deny permissive intervention where they have found that a government party adequately represents the interests of the potential intervenors. *See, e.g.,*


Ingebretsen, 88 F.3d at 281; *Hopwood*, 21 F.3d at 606; *Keith*, 764 F.2d at 1272; *Daggett*, 172 F.3d at 113; *Ligas*, 478 F.3d at 776.

The presence of additional parties in such circumstances adds nothing of value to the judicial process – certainly nothing beyond the value of an *amicus curiae* brief, to which the Plaintiffs do not object – and only serves to create the potential for delay and the imposition of added costs on the original parties. And that is particularly true where, as here, it is important for all concerned that the litigation be pursued and resolved as expeditiously as possible. Adding the Applicants to this lawsuit as full-fledged parties would only needlessly complicate and burden a case that – as the court noted in upholding denial of permissive intervention in *Daggett* – “badly need[s] to be expedited.” 172 F.3d at 113.

CONCLUSION

For the foregoing reasons, Applicants’ motion to intervene should be denied. Plaintiffs do not object to Applicants’ proffered brief in opposition to the Motion for Preliminary Injunction being treated as a brief *amicus curiae*.

Respectfully submitted,



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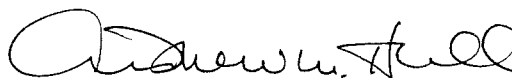
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon the following, this
29th day of July, 2011, via e-mail and U.S. Mail, first-class postage prepaid:

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