IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KNOW YOUR IX, , *

v. * **Civil Action No. RDB-20-01224**

ELISABETH D. DEVOS, *

, *

Defendants.

* * * * * * * * * * * * *

MEMORANDUM OPINION

In May of 2020, the U.S. Department of Education promulgated a rule seeking to define sexual harassment under any education program receiving federal financial assistance. Plaintiffs Know Your Title IX, Council of Parent Attorneys and Advocates, Inc., Girls for Gender Equity, and Stop Sexual Assault in Schools filed a lawsuit on May 14, 2020, asserting that certain provisions of this new rule violated federal law. Specifically, they contend that those provisions of the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance regulation, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) ('Rule"), contravene the Administrative

Dismiss Plaintiffs' Complaint on the grounds that each of the Plaintiffs lack standing.[1]

19, 2020). The Plaintiffs allege that the Rule includes several provisions that are contrary to both the language and spirit of Title IX, and not only depart significantly from consistent past practice, but create a "double standard" in which educational institutions have dramatically different obligations to respond to different forms of discrimination. (Compl. For. Decl. & Inj. Relief ¶ 11, ECF No. 1.) The unlawful provisions, the Plaintiffs allege, include:

a.

Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013). Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a defendant to challenge the court's subject matter jurisdiction over the plaintiff's suit. Under Rule 12(b)(1), the plaintiff bears the burden of proving, by preponderance of evidence, the existence of subject matter jurisdiction. *See Demetres v. E. W. Const., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015).

"A defendant may challenge subject-matter jurisdiction in one of two ways: facially or factually." *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017). A facial challenge involves the allegation "that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). Accordingly, the plaintiff is "afforded the same procedural protection as she would receive under a Rule 12(b)(6) consideration," wherein "the facts alleged in the complaint are taken as true," and the defendant's challenge "must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Id.* By contract, in a factual challenge, the defendant argues "that the jurisdictional allegations of the complaint [are] not true," providing the trial court the discretion to "go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations." *Id.* (first alteration in original) (quoting *Adams*, 697 F.2d at 1219). Thus, with a factual challenge, "the presumption of truthfulness normally accorded a complaint's allegations does not apply." *Id.* The Court should only grant a Rule 12(b)(1) motion based on a factual challenge to subject matter jurisdiction if the facts are not in dispute and the moving party is entitled to prevail as a matter of law. *See Na'tl Fed'n of the Blind v. U.S. Dep't of Educ.*, 407 F. Supp. 3d 524, 530 (D.

dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990)).

The Court's standing decisions make clear that "standing is not dispensed in gross." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). To the contrary, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* However, this does not mean that in the case of multiple plaintiffs, each plaintiff must prove his own standing. "[T]he Supreme Court has made it clear that 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (quoting *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)); *see also Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650-51 (2017); *Horne v. Flores*, 557 U.S. 433, 445 (2009) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 491-94) ("Here, as in all standing inquires, the critical question is whether at least one petitioner has 'alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'"). Therefore, in this case, this Court must find at least one plaintiff with standing in order for the Plaintiffs' case to survive the Defendants' Motion to Dismiss. If it does so, this Court need not analyze Defendants' arguments regarding the remaining Plaintiffs. *See Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, 2020 WL 3960625, at *8 (D. Md. July 13, 2020) (analyzing only whether one plaintiff has standing).

There are two specific types of standing relevant to this case: *organizational* standing and *associational* standing. *Organizational* standing provides that an organization may claim standing in its own right by adequately alleging the standing requirements as they apply to

individuals, namely that the organization itself has erea(n)1.7 (i)-1.4(n)1.7jir int that ifa irlys

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assistance to professionals and laypersons, COPAA works to secure high-quality educational services for students with disabilities and to promote excellence in special education advocacy. (*Id.*) Some of COPAA's attorneys and advocate members rep

resources to support discriminatory practices and (2) provide individual citizens effective protection against those practices. (Compl. For Decl. & Inj. Relief ¶ 17.) Congress was not concerned with the revenue flow of private attorneys. An attorney does not gain standing any time a change in the law causes her legal practice to shift or become less lucrative. Ms. Abdnour does not have a recognizable injury in fact under Article III that would allow her to bring suit in her own right, and therefore, neither does COPAA.

II. Girls for Gender Equity ("Gender Equity")

Gender Equity is a 501(c)(3) nonprofit corporation founded to create opportunities for, and to remove systematic barriers from, the development of girls (cisgender and transgender) and non-binary youth of color. (Compl. For Decl. & Inj. Relief ¶ 24, ECF No. 1.) It carries 4e.4(ee.4(ee.4.7(r)-1.4(e)-sc(4e-5.3o)3.n(3())-53.5(ow)4)etTc 0.112 Tw [(c001 Tc 0.8(eref)-1.

action," challenged a federal firearm statue. The group alleged that it had suffered an Article III injury because it needed to divert resources in order to help its members navigate the new law, and thus could not spend those funds on other goals. *Id.* The Fourth Circuit held that voluntary "budgetary choices" are not cognizable injuries under Article III. *Id.* at 675. "To determine that an organization that decides to spend its money on educating members, responding to members' inquiries, or undertaking litigation in response to legislation suffers a cognizable injury would be to imply standing for organizations with merely 'abstract concern[s] with a subject that could be affected by an adjudication.'" *Id.* (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26 40 (1976)).

In *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 238-41 (4th Cir. 2020) the Fourth Circuit examined *Lane* and held that a voluntary reallocation of resources is insufficient to establish organizational standing. The Fourth Circuit, "to put a finer point on it," explained that "it is not relevant for Article III purposes whether [the plaintiff] felt moved to act in a particular manner." *Id.* at 238. As the Court found, "[m]any statutes and regulations may spur private organizations to react to them in some fashion." *Id.* at 239 (citing *Lujan*, 504 U.S. at 561-62). "[y sth

In support of their claim for injury, the Plaintiffs cite this Court's decision in *Knowledge Ecology Int'l v. Nat'l Insts. of Health*, 2019 WL 1585285 (D. Md. Apr. 11, 2019). In that case, Judge Messitte of this Court did in dicta note that a "diversion of resources away from the organization's primary mission in order to address an allegedly improper action may suffice to establish standing." *Id.* at *4. However, as in this case, the plaintiffs, like Gender Equity, could not show such injury. The plaintiffs argued that they had expended resources on their suit against the defendant, National Institute of Health, to advocate against a private license granted by the organization. *Id.* at *6. This Court held that such injury was "the very type of manufactured injury that is not recognized for standing purposes." *Id.* Judge Messitte continued, explaining that the plaintiff's "core purpose" as an organization was "pursuing precisely the type of advocacy it undertook" and that resources spent on litigating the case in front of the court were "very much in line with [the plaintiff's] core mission rather than a diversion of resources away from it." *Id.*

The same is true in the case at hand. Gender Equity claims that its core mission is carried out through policy advocacy. If this Court were to allow a party whose organizational mission is to engage in policy advocacy to claim injury on the basis of a need to engage in that exact activity, *any* advocacy group could find standing to challenge laws when there are changes in policy. To hold in such way would be contradictory to *Knowledge Ecology International*, as well as the longstanding principle that the doctrine of standing limits the jurisdiction of the courts by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List*, 573 U.S. at 157. Gender Equity's alleged injury is "no more than a mere disagreement with the policy decisions" of

the ED, *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 362 (4th Cir. 2020), and therefore, is insufficient to provide Gender Equity with standing to bring this suit.

III. Stop Sexual Assault in Schools ("SSAIS")

SSAIS is a nonprofit education and advocacy organization. (Compl. For Decl. & Inj. Relief ¶ 25, ECF No. 1.) Its mission is to prevent sexual harassment and assault in K-12 schools by educating students, families, and schools about K-12 students' right to an education free from sex discrimination. (*Id.*) SSAIS's claims are similar to that of Gender Equity. The Complaint alleges that "[f]ollowing issuance of the Rule, SSAIS must now dedicate a substantial amount of time to analyzing the Rule . . . , assessing existing or needed state or local parallel protections to fill in gaps created by the challenged provisions of the Rule, recreating educational materials, and providing technical assistance to students, families, educators, and journalists." (*Id.* at ¶ 138.) SSAIS claims that such "diversion of resources" will cause SSAIS to "lack the capacity and time to pursue projects it had planned to accomplish in 2020." (*Id.*) It also claims that because of the "confusing and contradictory policy landscape" created by the Rule, it will have to update its informational and training materials and "engage in the resource-draining task of recreating itself as an expert in state and local policies." (ECF No. 38 at 33.)

Again, this Court finds the Plaintiffs' arguments to be in conflict with *CASA de Maryland*. As the Fourth Circuit held, "it is not relevant for Article III purposes whether [the plaintiff] felt moved to act in a particular manner." *CASA*, 971 F.3d at 238. SSAIS's resource reallocations, although they may be motivated by sincere policy preferences, "are

not cognizable organizational injuries because no action by the defendant has directly impaired the organization's ability to operate and to function." *Id.* at 239.

Additionally, even if SSAIS could allege some recognizable injury, it cannot show how such injury was caused by the ED's alleged violation of the APA, or how it "will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. SSAIS's argument is that it has suffered injury by having to read the Rule and tell people what it says. Even if the ED had issued a Rule that SSAIS preferred, it presumably would still need to "dedicate a substantial amount of time to analyzing the Rule . . . , assessing existing or needed state or local parallel protections . . . , recreating educational materials, and providing technical assistance to students, families, educators, and journalists." (*Id.* at ¶ 138.) Further, if the ED's policies were to change as a result of this litigation, SSAIS would then presumably have to once again edit its materials in order to accommodate the changes. Any alleged violations of the APA are not the legal cause of SSAIS's alleged injury. *See Comcast Corp. v. Nat'l Ass'n of Af. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (describing but-for causation as the idea that "a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred"). There is no remedy this Court can provide to redress SSAIS's harm. SSAIS lacks Article III standing to bring this suit.

IV. Know Your Title IX

Plaintiff Know Your Title IX is a survivor-and-youth project of Advocates for Youth. (*See* Compl. For Decl. & Inj. Relief ¶ 22, ECF No. 1.) The organization's goal is "to

survivor activists; and advocating for campus, state, and federal policy change." (*Id.*) Like Gender Equity and SSAIS, Know Your Title IX argues that it has organizational standing, claiming that the injury it has suffered is one to Know Your Title IX itself. (*See* ECF No. 38 at 18.) Know Your Title IX claims that "[t]he Rule's provisions directly frustrate Know Your Title IX's mission." (*Id.*) The organization claims that the Rule depresses the number of survivors who can access Title IX remedies. (*Id.* at 18-19.) For example, Know Your

year." (*Id.* at 20.) It is true that an organization like Know Your Title IX "may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission." *CASA*, 971 F.3d at 237 (citing *Lane*, 703 F.3d at 674). However, again, this Court finds that the Plaintiffs' arguments are rejected under *Lane* and *CASA de Maryland*. The Fourth Circuit has squarely held that "[r]esource reallocations motivated by the dictates of preference, however sincere, are not cognizable organizational injuries because no action by the defendant has directly impaired the organization's ability to operate and to function." *Id.* at 239.

Know Your Title IX does attempt to distinguish its own case from that of the plaintiffs in *Lane* and *CASA de Maryland*. In the Complaint, Know Your Title IX alleges that in anticipation of the Rule, it received a "spike in training requests" for Spring 2020, and further, that it "expects the number of calls and training requests to increase further now that the Rule has been released." (Compl. For Decl. & Inj. Relief ¶ 126, ECF No. 1.) This claim differs slightly from their other arguments related to Know Your Title IX's frustrati(ur)-8oso7 3( )]T.

organizations that advocated for survivors of sexual harassment, a "chilling effect" on the filing of sexual harassment and sexual violence complaints made it increasingly difficult for them to fulfill their organizational missions. *Id.* While the defendants in *SurvJustice* argued that this chilling effect was merely "subjective" and "speculative," the court noted that the allegations were instead "observed"—the Plaintiffs produced details of decreases in the filing of student complaints *Id.* The plaintiffs further alleged that, when asked, their clients directly attributed their hesitancy in filing to the ED action at issue. *Id.*

In this case, Know Your Title IX has not alleged the same observable change in response to the Rule. The Plaintiffs have not provided any details about the number or nature of the pre-Rule requests (Compl. For Decl. & Inj. Relief ¶ 125, ECF No. 1), nor whether the alleged increase occurred as expected (*Id.* at ¶ 126). At this point, Know Your Title IX's concerns about an increase in the number of calls and training requests that it will receive in reaction to the Rule are merely speculative. While the Supreme Court has held that "threatened injuries" may be sufficient to meet the requirements for injury in fact under Article III, *Clapper*, 568 U.S. at 408, the Supreme Court has also been clear that such threats must be "certainly impending" in order to "ensure that the alleged injury is not too speculative for Article III purposes," *Lujan*, 504 U.S. at 564 n.2. Know Your Title IX has not yet sufficiently alleged any uptick in calls in response to the Rule. Furthermore, under the Fourth Circuit's decisions in *Lane* and *CASA de Maryland*, it would still need to show causation, namely, how such uptick would cause an involuntary reallocation of resources and that the ED's actions "ha[ve] directly impaired the organization's ability to operate and to function." *CASA*, 971 F.3d at 239.

Know Your Title IX's standing theory grounded in the frustration of its mission and diversion of resources cannot create standing for all the Plaintiffs because it is insufficient at this time to meet the injury in fact requirement for Article III standing. Know Your Title IX has not demonstrated that the Rule forced the organization to take action as a matter of law. Its "unilateral and uncompelled response to the shifting needs of its members cannot manufacture an Article III injury." *See id.* at 238.

CONCLUSION

For the reasons stated above, the Motion to Intervene by Intervenor Defendants Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc. (ECF No. 20) is DENIED AS MOOT. Defendants' Motion to Dismiss (ECF No. 34) is GRANTED and this case is DISMISSED WITHOUT PREJUDICE. A Separate Order follows.

Dated: October 20, 2020

/s/

Richard D. Bennett

United States District Judge