UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Michigan Association of Public School Academies, *et al.*,

Plaintiffs,

v.

U.S. Department of Education, *et al.*,

Defendants.

Case No. 2:24-cv-112

Judge Michael H. Watson

Magistrate Judge Vascura

OPINION AND ORDER

The U.S. Department of Education (the "Department"), Secretary Miguel Cardona, and Ruth E. Ryder (collectively, "Defendants") move to dismiss the Complaint for lack of subject-matter jurisdiction. ECF No. 19. Michigan Association of Public School Academies, Thomas B. Fordham Institute ("Fordham"), Delaware Charter Schools Network, West Virginia Professional Charter School Board ("WVPCSB"), and North Carolina Coalition For Charter Schools oppose. ECF No. 22. For the following reasons, Defendants' motion is **GRANTED**.

I. BACKGROUND

In 2015, Congress expanded a charter school program (the "Program") for the purpose of, *inter alia*, providing "financial assistance for the planning, program design, and initial implementation of charter schools." 20 U.S.C.A. § 7221(2). As part of the expansion, Congress directed the Secretary of

Education to distribute different types of grants (the "Grants") every year. 20 U.S.C.A. §§ 7221a, 7221b.

In 2022, the Department proposed a rule that would guide the selection of Grant recipients. *See Proposed Priorities, Requirements, Definitions, and Selection Criteria—Expanding Opportunity Through Quality Charter Schools Program (CSP)—Grants to State Entities (SE Grants); Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools (CMO Grants); and Grants to Charter School Developers for the Opening of New Charter Schools and for the Replication and Expansion of High-Quality Charter Schools (Developer Grants)*, 87 FR 14197-01. After a notice-and-comment period, the Department issued a final rule (the "Rule"), which established priorities, application requirements, and selection criteria for some of the Grants. *Final Priorities, Requirements, Definitions, and Selection Criteria—Expanding Opportunity Through Quality Charter Schools Program (CSP)—Grants to State Entities (State Entity Grants); Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools (CMO Grants); and Grants to Charter School Developers for the Opening of New Charter Schools and for the Replication and Expansion of High-Quality Charter Schools (Developer Grants)*, 87 FR 40406-01. For example, the Rule may favor applicants that show collaboration with the local traditional school district or applicants where the traditional schools are over-enrolled. *Id.*

Fordham and WVPCSB (collectively, "Plaintiffs") are the only remaining plaintiffs. *See* ECF No. 29. Fordham is, among other things, a "charter school authorizer" that supports charter schools in Ohio. Am. Compl. ¶¶ 5–9, ECF No. 17. Similarly, WVPCSB is a charter school authorizer in West Virginia that works to expand access to public charter schools. *Id.* ¶¶ 14–21. Plaintiffs argue that the Rule will negatively impact the ability of the schools Plaintiffs work with to receive Grants. *See generally*, *id.* Based on these allegations, Plaintiffs assert several claims alleging violations of the Administrative Procedure Act ("APA") and the United States Constitution. *Id.*

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal for lack of subject-matter jurisdiction.[1] Without subject-matter jurisdiction, a federal court lacks authority to hear a case. *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 91 (2017) (citation omitted). "Motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). A facial attack under Rule 12(b)(1) "is a challenge to the sufficiency of the pleading itself," and the trial court therefore takes the allegations of the complaint as true. *Id.* (citation omitted). To survive a facial attack, the complaint must contain a "short and plain

[1] Although Defendants style their motion as a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), the Court construes the motion as proceeding under Rule 12(b)(1) because Defendants seek dismissal for lack of standing.

statement of the grounds" for jurisdiction. *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016) (internal quotation marks and citations omitted). A factual attack is a "challenge to the factual existence of subject matter jurisdiction." *Ritchie*, 15 F.3d at 598. No "presumptive truthfulness applies to the factual allegations[.]" *Id.* (citation omitted). When examining a factual attack under Rule 12(b)(1), "the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction." *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015) (internal quotation marks and citation omitted).

III. ANALYSIS

Defendants move to dismiss some of Plaintiffs' claims for lack of standing. Pursuant to Article III of the United States Constitution, federal jurisdiction is limited to "cases" and "controversies," and standing is "an essential and unchanging part of" this requirement. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). If a plaintiff lacks standing, then the federal court lacks jurisdiction. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Thus, standing is a "threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Article III standing has three elements. "First, the plaintiff must have suffered 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." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations

omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (cleaned up). Third, it must be likely that the injury will be "redressed by a favorable decision." *Id.* at 561 (quotation marks and citation omitted).

The burden is on the party invoking federal jurisdiction to demonstrate Article III standing. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 430–31 (2021) (citing *Lujan*, 504 U.S. at 561). Each element of standing must be supported with the "manner and degree of evidence required at the successive stages of litigation." *Lujan*, 504 U.S. at 561 (citing cases).

Plaintiffs lack standing because they do not allege an injury-in-fact. To establish injury-in-fact, a plaintiff must point to an injury that is "concrete—that is, real, and not abstract." *TransUnion LLC*, 594 U.S. at 424 (cleaned up). To reiterate: An "[a]bstract injury is not enough." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Rather, a plaintiff "must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct[.]" *Id.* at 101–02 (quotation marks and citations omitted). If a plaintiff asserts a risk of future harm, she must show that "threat of injury is both real and immediate, not conjectural or hypothetical." *Id.* at 102 (cleaned up).

Plaintiffs do not allege an injury-in-fact on their own behalf because they do not allege that they have any intention to ever apply for any of the Grants. *See generally*, Am. Compl., ECF No. 17. Because Plaintiffs have no intention to

apply for the Grants, they cannot be injured by how the Department might consider such applications. Thus, Plaintiffs have not alleged an injury-in-fact or, by extension, Article III standing on their own behalf.

To the extent Plaintiffs assert associational standing, they do not allege a basis for the same. An association has standing to sue on behalf of its members if:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). Plaintiffs have not alleged associational standing here.

To begin, the Court is skeptical that Plaintiffs are the type of "associations" that may have associational standing. From the Amended Complaint, the charter schools that work with Plaintiffs seem to be more like customers or clients than "members." *See generally*, Am Compl., ECF No. 17. Those kinds of business relationships often cannot support associational standing. *See, e.g.*, *Hillspring Health Care Ctr., LLC v. Dungey*, No. 1:17-CV-35, 2018 WL 287954, at *6, N. 12 (S.D. Ohio Jan. 4, 2018) (explaining that a business relationship is "insufficient for purposes of associational standing" (citing cases)).

In any event, even if Plaintiffs are "associations" and the schools they work with are "members," Plaintiffs have not alleged a basis for associational standing because Plaintiffs have not alleged that the schools they work with have

"standing to sue in their own right." *Hunt*, 432 U.S. at 343. Starting with Fordham, Plaintiffs do not identify a single specific school associated with Fordham that has or will suffer an injury. As explained in the prior Opinion and Order on standing, because Plaintiffs "do not allege which members suffered an injury or that all members [of Plaintiffs] suffered or will suffer an injury[,]" Plaintiffs "lack standing." O&O 9, ECF No. 29; *see also Tennessee Republican Party v. Sec. & Exch. Comm'n*, 863 F.3d 507, 520 (6th Cir. 2017) (explaining that, to have associational standing, the plaintiff-organization must "name the individuals who were harmed unless all the members of the organization are affected by the challenged activity" (quotation marks and citation omitted)). Accordingly, Plaintiffs have not alleged that any of Fordham's members have standing to sue, and, therefore, Fordham lacks associational standing.

Plaintiffs have also failed to allege that the schools associated with WVSCP would have standing to sue in their own right. True, Plaintiffs identify three schools associated with WVSCP that intend to apply for a Grant (the "Schools"). Am. Compl. ¶¶ 193–99, ECF No. 17. However, Plaintiffs do not identify any attribute of the Schools that would disadvantage them under the Rule's considerations. *Id.* Instead, Plaintiffs offer a generalized allegation that the Rule will disadvantage "some or all" of the schools WVSCP works with because traditional school districts in West Virginia are not over-enrolled and often do not coordinate with charter school programs. *Id.* ¶¶ 201–02. Further, as Defendants point out, although the Rule sets out new considerations for Grant

applications, it does not establish which of those considerations the Department will use for each grant cycle. *See* Final Rule, 87 FR 40406-01 at 40, 426 ("In any year in which we choose to use one or more of these priorities, requirements, definitions and selection criteria, we invite applications through a notice in the Federal Register."); *see also* 34 C.F.R. § 75.105 (discussing the process through which the Department will choose grant recipient selection considerations in a particular year). Plaintiffs offer no allegations that the considerations which could disadvantage the Schools (over-enrollment and coordination) would apply (or would be given significant weight) in the grant cycles during which the Schools intend to apply for Grants. *See generally*, Am. Compl., ECF No. 17. In sum, the injuries Plaintiffs allege might befall the Schools are merely "conjectural or hypothetical," which cannot support an injury-in-fact. *Lyons*, 461 U.S. at 102 (cleaned up).

Next, to the extent Plaintiffs argue that they have standing because they were denied procedural rights under the APA, that argument fails. A "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Thus, because Plaintiffs do not allege a concrete harm stemming from the alleged procedural violation, that procedural violation cannot support Article III standing.

Finally, Plaintiffs argue, in passing, that they (or their members) will also incur increased compliance costs. *E.g.*, Resp. 27, ECF No. 22. Even if these

costs could be a basis for Article III standing, the Amended Complaint contains no allegations about increased compliance costs. *See generally*, Am. Compl., ECF No. 17. Allegations in a response brief are not properly before the Court and, therefore, are not considered. *See, e.g.*, *Drinkard v. Tenn.Dep't of Child.'s Servs.*, No. 2:08-CV-005, 2008 WL 2609166, at *5 (E.D. Tenn. June 26, 2008) ("[T]he allegations in plaintiffs' response briefs have not been properly placed before the court and have not been considered."); *Knowles v. Chase Home Fin.*, LLC, No. 111CV01051JDBEGB, 2012 WL 13018539, at *9 (W.D. Tenn. Aug. 2, 2012) ("A party may not amend its complaint by submitting additional allegations in response to a Rule 12(b)(6) motion to dismiss." (collecting cases)). Further, although the Rule estimates that it will take a Grant applicant "60 hours" to complete an application, Final Rule, 87 Fed. Reg. at 40,427, Plaintiffs do not explain how long it took to complete applications under the prior scheme (and, thus, provide no basis to conclude that 60 hours is a meaningful increase in time). Thus, the "compliance costs" argument is unpersuasive.

At bottom, Plaintiffs do not allege that they have Article III standing.

IV. CONCLUSION

For these reasons, the motion to dismiss is **GRANTED**. The Fordham's and WVCSP's claims are **DISMISSED WITHOUT PREJUDICE** for lack of standing.

The Clerk shall enter judgment for Defendants and close the case.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT