

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DIGITAL MEDIA SOLUTIONS, LLC)	CASE NO. 1:19-cv-145
)	
Plaintiff,)	JUDGE DAN AARON POLSTER
)	
v.)	MAGISTRATE JUDGE
)	THOMAS M. PARKER
SOUTH UNIVERSITY OF OHIO, LLC,)	
<i>et al.</i>)	
)	
Defendants.)	

**MOTION OF KIMBERLY MILBRANDT, ASHLEY YORK, SARAH WATTS
AND BRANDY CHANDLER TO INTERVENE
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24**

On June 4, 2019, responding to an Order from this Court, the Receiver advised that in the course of transferring student files from the Argosy University's Georgia School of Professional Psychology, somebody working on behalf of the Receiver caused files to be shredded. Dkt. 356 at 2. The Students need their files to transfer to other degree-granting institutions, to secure internships, and to get licensed. Intervenors, Kimberly Milbrandt, Ashley York, Sarah Watts and Brandy Chandler are former students of that school ("Students"), who were delegated by their classmates to seek actions from the Receiver to address the harm caused by this development. The Intervenors have already proposed to the Receiver a suite of actions that the Receiver can undertake to ameliorate the damage: promptly identifying and returning to students all files that were preserved; designating a point-of-contact to work with students on recreating as much of their destroyed files as possible; and developing a comprehensive document describing the destruction that students can refer third parties to, including long after the Receivership is terminated. Having

not received a commitment from the Receiver to take these actions for the benefit of all students whose files were lost or destroyed, and with no procedures in place in the Receivership for representation of those similarly situated, Intervenor move pursuant to Fed. R. Civ. P. 24(a) to participate in this proceeding to seek that relief for themselves and their classmates.

While the Receiver has advised that he does not object to the Students intervening on their own behalf, he objects to the Students advocating on behalf of their classmates. But the interests of the Students and their former classmates they were chosen to represent are substantially similar, if not identical. There is no rationale and no need for imposing on 60 or 70 individual students the burden of separately intervening in this proceeding to require the Receiver to take actions and develop procedures that would help all of them remedy the harm caused by the Receiver's destruction of their records, and which the Receiver should have already carried out on his own initiative.

I. BACKGROUND

A. The Students' Unsuccessful Efforts to Obtain Their Files Individually

Argosy's Atlanta campus closed in March 2019. Milbrandt Decl. ¶ 2 (Ex. A).¹ Because the campus was closed before the Clinical Psychology program established an articulation agreement with other degree-granting institutions, the Students' academic and clinical training files ("Files") were kept on premises. Watts Decl. ¶ 5 (Ex. A); March 27 Watts Email to Dottore (Ex. B). Knowing that they would need their Files to transfer and get licensed, students began reaching out to the Receiver in late March to obtain them. *See, e.g.*, March 27 Watts Email to Dottore (Ex. B). For weeks, the Receiver assured the Students that their Files would be sent to Cleveland for storage, their names would be added to a list of students whose Files needed to be

¹ The intervenors' declarations are attached to this motion as Exhibit A.

pulled, and they would be contacted when their Files were located. *See, e.g.*, April 10 Emails from Milbrandt, Bayer, Krentzel and Salter to Tate (Ex. B).

According to time records of the Receiver and his counsel, the Receiver knew no later than May 6, 2019, that Files were missing. Dkt. 333 at 6; Dkt. 334 at 49. Yet, for weeks, the Receiver gave students hope, in fact, false hope that they would receive their Files soon. Follow up emails by students were met with a mixture of silence, evasive responses, and instructions to contact other employees who supposedly had more information (but didn't). *See, e.g.*, April 12 Email from Tate to Milbrandt, April 12 Email from Tate to Bayer, May 16 Email from Kotalik to Foreman (Ex. B).² On May 9th, after the time records establish that the Receiver knew that Files were lost, the Receiver told one student “[w]e have the training files. And they will be available shortly[.] I will follow up with you today.” May 9 Email from Dottore to Dean (Ex. B). He never followed up. May 20 Email from Dean to Dottore (Ex. B). Similarly, after this Court forwarded the Receiver an email from a student asking for help, a representative for the Receiver emailed the student stating: “I want to be sure you have a dedicated contact moving forward. I will be the person to help you with your records and I’m looking into the matter now. Is there a time tomorrow that we could speak?” May 8 Email from Anne Dean to Watts (Ex. B). The Receiver never called the student. Watts Decl. ¶ 16 (Ex. A).

The Receiver communicated conflicting messages to students about where the Files were and who could help them. For example, on May 16th, one student was told: “I have forwarded your request to Anne Dean who is handling the training file requests. Good for you for continuing on with school after this tragedy! I’m sure it hasn’t been easy. Best of luck to you!! [sic]” May 16 Kotalik Email to Foreman (Ex. B). Another student was told: “Unfortunately, the training files

² Correspondences between students and the Receiver are attached to this motion in chronological order as Exhibit B.

were never even sent to our office. We have never had them in our possession. To my knowledge, they never even left the Atlanta campus.” May 31 Kotalik Email to Chandra (Ex. B).

Ultimately, on May 29th, some students were informed that some of the Files had been destroyed. May 29 Tate Email to Milbrandt (Ex. B). After one of the Students informed this Court about this, it issued an order requiring the Receiver to file a report explaining the destruction of the Files. May 29 Milbrandt Email to Court (Ex. E); Dkt. 353. The Court ordered the Receiver to include statements about (1) whether the students were in any way responsible for the unavailability of their Files and (2) whether there is any recourse available to the Receiver or the students against the entity that destroyed the Files. Dkt. 353.

B. The Receiver’s Report on the Destruction of the Files

The Receiver’s report was submitted on June 4th. Dkt. 356. According to the report the Files were placed in boxes on two floors of the Argosy Atlanta facility, the third floor (the “Third Floor Records”) and the first floor (the “First Floor Records”). *Id.* at 2. The report confirmed that the First Floor Records had been destroyed. *Id.* The Receiver believes the First Floor Records contained the Files for thirty-three clinical psychology students, although he did not explain how that number was calculated. *Id.* The Third Floor Records remain intact but have not been reviewed. *Id.* The report also states that “the training files were principally comprised of (i) hard copy records of time spent at clinical training (ii) evaluations of performance; and (iii) recommendations.” *Id.* The report also suggests that students can replicate much of their Files via electronically stored records, despite the Receiver being told by students that was not true. *Id.*; May 31 Chandra Email to Kotalik, May 31 Milbrandt Email to Kotalik (Ex. B).

The Receiver’s report did not contain the statements required by the Court about whether the students were responsible for the unavailability of their Files or whether there is any recourse available to the Receiver or the students against the entity that destroyed the Files. Dkt. 356.

C. **The Files**

i. **Training Files**

The Students need their training files to transfer to other degree-granting institutions, to apply for internships, and to get licensed. March 27 Watts Email to Dottore (Ex. B). The Receiver's assertion notwithstanding, the training files contain more than hard copies of clinical training hours, evaluations, and recommendations. Dkt. 356 at 2; May 31 Chandra Email to Kotalik (Ex. B). Rather, the training files include:

- Final Project Evaluations
- Site Supervisor Evaluations
- Mid-Year Site Evaluations
- Student Rotation Evaluations
- Internship Readiness Forms
- Individual Field Training Agreements
- Clinical Training Advisement Forms
- Therapy Practicum Readiness Checklists
- CVs/Resumes
- Practicum Interview Outcome Forms
- Diagnostic Practicum Readiness Checklists
- Grading Checklists
- Activity Summaries for Practicums
- Practicum Grade Sheets
- Change of Grade Forms

Watts Decl., Ex. 1 (Ex. A). While students may have copies of some of these documents or be able to access electronic versions, many of the documents exist in hard copy only in students' training files. Milbrandt Decl. ¶ 16 (Ex. A); May 31 Milbrandt Email to Kotalik (Ex. B). This is particularly true for fifth-year students, as the online system was not available for the first few years they were enrolled in the program. Watts Decl. ¶ 22 (Ex. A). Also, the electronic records do not include records of clinical work on campus, which is a major component of students' work product. *Id.* at ¶ 23. Therefore, those students whose training files were destroyed will be left without many important documents they need to transfer and to get their licenses.

ii. Academic Files

Similarly, although the Receiver's report makes little mention of students' academic files, they also contain documents crucial for students doing post-doctoral internships and for licensure.

Milbrandt Decl. ¶ 7 (Ex. A). Specifically, students' academic files contain:

- Clinical Competency Exam Results
- Professor Evaluations About Students' Progress
- Clinical Research Project (Dissertation) Defense Paperwork

Id. The absence of their academic files has made it difficult for students to register for courses and receive proper clinical training placements at their transferee schools. *Id.* at ¶ 8. Additionally, transferee schools that have accepted Argosy students have expressed concern about not having their academic files, as not having them puts the schools out of compliance with the American Psychology Association's (APA) accreditation requirements. *Id.* at ¶ 9. Therefore, students whose academic files were destroyed may face difficulty transferring or getting their licenses.

D. The Students' Efforts to Reach A Collaborative Resolution with the Receiver Have Failed

The Students were chosen by their classmates to represent their interests. Milbrandt Decl. ¶ 4; Watts Decl. ¶ 4; York Decl. ¶ 4; Chandler Decl. ¶ 4 (Ex. A). The Students' goals are to obtain the Files that are still intact and to establish a process for those students whose Files were destroyed to create as complete a record as possible of the work they did in their psychology program. Milbrandt Decl. ¶ 3 (Ex. A). Before filing this motion, counsel for the Students reached out to the Receiver's counsel to propose collaborative solutions for the problems created by the Receiver's destruction of the Files. June 10 Rothschild Email to Berkson (Ex. C).³ Specifically, the Students proposed that: (1) the Receiver should review the Third Floor Records by no later

³ Emails between the Students' counsel and the Receiver's counsel are attached to this motion in chronological order as Exhibit C.

than June 25 to find out which students' Files survived and get them to students; (2) the Students and the Receiver should work together to prepare a legacy document explaining what transpired; and (3) the Receiver should designate staff to work with students to help locate or recreate the documents contained in their Files. *Id.*

The Receiver's counsel agreed to look for the represented Students' Files but refused to commit to making any effort to assist other affected students who are not represented, even though those students have delegated the represented Students to advocate for them. June 12 Berkson Email to Rothschild (Ex. C). Instead, the Receiver's counsel said he would only look for other students' Files if the students reached out individually to make that request. *Id.* Additionally, while the Receiver's counsel offered to help the represented Students get the records they need to transfer, no help was offered to ensure they would have what they needed for other aspects of their professional careers, such as internships and licensure. June 12 Rothschild Email to Berkson (Ex. C). Some of the unrepresented students have reached out to Mr. Berkson to request help locating their files or, if they were destroyed, creating a record of their contents for transferee schools, future internships and licensing bodies. June 13 Paull Email to Berkson (Ex. D). Mr. Berkson responded that students would have to track down evaluations (which are not all the missing documents) on their own, without offering any help from the Receiver. June 19 Berkson Email to Paull (Exh. D).

II. DISCUSSION

The Students move to intervene pursuant to Fed. R. Civ. P. 24(a), which provides for intervention of right by anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The Court has granted motions to intervene of numerous parties, including

students. Dkt. 49; Dkt. 244. For purposes of brevity, the Students incorporate the authorities cited in the motion of Flagler Master Fund SPC Ltd., and U.S. Bank, National Association, which filed the first motion to intervene. Dkt. 19.

Before applying the intervention standards, we address the only issue that is truly in dispute between the parties: whether the Students can intervene as advocates for their student body or solely on their own behalf.

First, the Students are intervening on behalf of their student body to advocate for actions and procedures by the Receiver *that the Receiver should already have been taking on his own initiative*. Indeed, the Receiver boasts that “[p]reserving student records” is exactly what he should be paid for. Dkt. 370 at 2. The Receiver is responsible to the students not only as the presiding officer of the students’ now-shuttered schools but directly for the harm they are suffering. Upon discovering that he had destroyed some or all of the students’ records, he should have immediately undertaken the ameliorative steps that the Students are now advocating, for all affected students. That not having occurred, and the Students’ efforts having been rebuffed, they turn to the Court for help. Dkt. 365 at 2 (stating the Court’s “primary concern in maintaining this receivership is with . . . the preservation and/or proper disposition of student records”).

Second, the Receiver’s position that he will only address the loss or destruction of a student’s files on an ad hoc basis, if the student directly contacts him, is inefficient and unduly burdensome on students. Indeed, this ad hoc approach has already failed. Many, many students—as exemplified by the communications attached as Exhibit B—reached out to the Receiver throughout the months of April and May about their Files and were misled and ignored. It was because these individual efforts were unavailing, that students organized amongst themselves to seek recourse and develop solutions for the harm inflicted upon them by the Receiver. It was in

her capacity as the student body's delegate to pursue legal remedies for the loss of their files that Intervenor Milbrandt sought out the undersigned counsel. Milbrandt Decl. ¶ 4 (Ex. A). The students seeking intervention have been delegated by their academic year cohorts to fill that role.

Nevertheless, the Receiver insists that the students revert back to the ad hoc interactions with him that caused them to organize their efforts in the first place. Some students have reached out on their own behalf, and have received a form message from Receiver's counsel that if the Receiver can't locate their files that they will have to fend for themselves to replace what was lost. (Ex. D). Students seek to intervene to ask the Court to require the Receiver to do more for the student body than the Receiver is offering.

The Receiver would have every student unsatisfied with responses like the email attached as Exhibit D intervene separately in this proceeding. That is inefficient for all concerned, and unnecessary. There is no bar in this equitable receivership proceeding to the development of procedures to protect the common interests of groups of students or employees, regardless of whether each individual one of them has intervened in the proceeding, or even if none has. *See, e.g.*, Dkt. 300 (Order Regarding Student Diplomas); Dkt. 222 (Order requiring Receiver to respond to all student and employee inquiries within 48 hours of receipt). Indeed, were it not for a stay on litigation claims, there cannot be any serious dispute that the Students would have standing to bring a Rule 23(b)(2) class action claim for injunctive relief of the type they are seeking.

The Students satisfy the standards for intervention under Rule 24. *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006). First, the requested intervention is timely. The Students first learned about the destruction of the Files on May 29th. May 29 Email from Tate to Milbrandt (Ex. B). Since learning about the destruction, the Students have acted

promptly to assert their interests by obtaining counsel; contacting the Receiver's counsel to try to reach a cooperative resolution; and filing this motion. Milbrandt Decl. ¶¶ 4, 17 (Ex. A).

Second, the rights of the Students and their similarly situated classmates to corrective action for the Receiver's destructions of their Files have not been presented in these proceedings. Thus far the Receiver has admitted that the First Floor Records were destroyed, and the Third Floor Records remain intact. Dkt. 356 at 2. However, the Receiver only begun taking inventory of the Third Floor Records, which could contain the Files of many students, after the Students demanded they do so. What little information has been disclosed was not done voluntarily, but only in response to court orders. Dkt. 353; 356. Nor has the Receiver fully complied with court orders to provide information about the destruction of the Files. Specifically, the Receiver's report lacked both statements this Court ordered him to include in his report about the destruction of the Files. Dkt. 356.

Third, impairment of the Students' interests, and the interests of their similarly situated classmates, is a real and actual possibility if intervention is not granted. The Students need their Files to transfer to other degree-granting institution, apply for internships, and get licensed. March 27 Watts Email to Dotorre (Ex. B). Their education has already been significantly derailed by Argosy's closing. Milbrandt Decl. ¶ 18 (Ex. A). Failure to obtain their Files in a prompt manner will further interfere with the Students' education, professional requirements, and career plans. *Id.* Since finding out about the destruction of the Files, the Students have attempted to work with the Receiver to reach a resolution that would lighten the burden of both parties. June 10 Rothschild Email to Berkson (Ex. C).

The Receiver should have taken all three of the actions requested by the Students voluntarily and immediately after recognizing some of the Files had been destroyed. Instead, the

Receiver kept the destruction of the records a secret for many weeks and has done little to remedy the problem since the Students found out about it on May 29th. Milbrandt Decl. ¶ 10 (Ex. A). The Students still hope these actions are taken. But given the Receiver's unwillingness to cooperate with the Students to reach a resolution, it is likely their interests, and the interests of their classmates they were chosen to represent, will be significantly impaired if they are prohibited from intervening.

Fourth, the existing parties will not adequately represent the interests of the Students. At this point, no students who are missing their Files are parties to this proceeding. While other students have intervened in the proceeding, their harms are distinct from those of the proposed intervenors. The Students, and their classmates they were chosen to represent, have experienced distinct harms that justify their intervention in this proceeding.

As all four of the Sixth Circuit's elements for mandatory intervention under rule 24(a) are present here, the Students' motion to intervene as of right should be granted. In the alternative, the Court should exercise its discretion to grant permissive intervention under Rule 24(b) as the motion is timely and alleges at least one common question of law or fact.

CONCLUSION

The Students, and their classmates they were chosen to represent, have spent months trying to obtain their Files from the Receiver. The Students need their Files to transfer, apply for internships, and get licensed. The Receiver has admitted that some Files were destroyed but has made little effort to determine which students' Files, if any, survived. Efforts by the Students to reach a collaborative resolution with the Receiver have failed. The Students should be allowed to intervene to ensure they have a forum in which to present their claims. Moreover, despite the Receiver's objection, the Students should also be allowed to intervene on the behalf of the students they were chosen to represent, as their interests in the proceeding are substantially similar, if not identical. Accordingly, the Students respectfully request the Court enter an Order in the form attached, granting their request to intervene as of right in this proceeding.

/s/ Richard S. Gurbst

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion to Intervene was served upon all parties of record by the Court's electronic filing system this 21st day of June, 2019.

/s/ Richard S. Gurbst

Richard S. Gurbst

One of the Attorneys for Intervenors