UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor, by and through his Guardians JOHN DOE and JANE DOE, Plaintiff, v. BOYERTOWN AREA SCHOOL DISTRICT; DR. RICHARD FAIDLEY, in his official capacity as Superintendent of the Boyertown Area School District; DR. BRETT COOPER, in his official capacity as Principal; and DR. E. WAYNE FOLEY, in his official capacity as Assistant Principal, Defendants,	Civil Action No. 17-1249-EGS

MEMORANDUM OF LAW OF AIDAN DESTEFANO AND THE PENNSYLVANIA YOUTH CONGRESS FOUNDATION IN SUPPORT OF THEIR MOTION TO INTERVENE AS DEFENDANTS

Aidan DeStefano and the Pennsylvania Youth Congress Foundation ("PYC") move to intervene as defendants as of right pursuant to Fed. R. Civ. P. 24(a)(2) or, alternatively, for permissive intervention under Rule 24(b)(1). The basis for the Proposed Intervenor-Defendants' motion to intervene is set forth below as well as in the accompanying declarations.

I. INTRODUCTION

The Boyertown Area School District (the "School District") has been sued by a student because it has allowed transgender boys to use the restroom and locker facilities used by all other boys. According to the Complaint, when Plaintiff and his guardians informed school officials that he objected to sharing facilities with a transgender boy, he was offered the option of using private facilities. Plaintiff nevertheless asserts that the School District, by allowing transgender boys to use facilities that he is not required to use, violates his right to privacy and creates a sexually harassing environment.

In this lawsuit, Plaintiff asks this Court to order the School District to prohibit transgender boys from continuing to use the boys' facilities. Because they can't possibly use the girls' facilities any more than other boys could be expected to do so, if Plaintiff were to prevail, transgender students would be excluded from the facilities used by all other students and forced to use separate facilities that other students may *choose* to use, but no other student is *required* to use. This would send the powerfully stigmatizing message to transgender students -- and all other students -- that there is something so wrong with transgender students that their mere presence in the facilities used by their peers is unacceptable.

Aidan DeStefano is a student at Boyertown Area Senior High School. He is a transgender boy. Like other boys at his high school, he uses the boys' restrooms and locker rooms. The Pennsylvania Youth Congress advocates on behalf of LGBTQ youth in Pennsylvania, and its members include the Boyertown Area High School Gay-Straight Alliance, which has members who are transgender boys who use the boys' facilities at school. Because this case directly challenges Aidan and these other students' ability to enjoy full participation in school life and because an adverse ruling would subject them to being banished as outcasts from the facilities used by their peers, they have a profound interest in this litigation that cannot be adequately represented by the existing parties.

II. <u>FACTUAL BACKGROUND</u>

Boyertown Area Senior High School (the "High School") is a public school for grades 10 through 12, with a student body comprised of approximately 1,700 students. The High School has communal bathrooms and locker rooms that are designated for females and communal bathrooms and locker room that are designated for males. All of the communal bathrooms contain stalls with doors that lock. *DeStefano Decl.* ¶ 15. The communal locker rooms also have bathroom stalls with doors that lock, as well as privacy cubicles with curtains for changing and private showers.[1] *Id.* The High School also has single user facilities available for any students who are uncomfortable using the communal facilities or who otherwise seek greater privacy. *Id.* at ¶ 18.

The proposed intervenors are Aidan DeStefano ("Aidan") and the Pennsylvania Youth Congress Foundation ("PYC").

Aidan

Aidan is an eighteen-year old transgender student at Boyertown Area Senior High School. *DeStefano Decl.* ¶¶ 1, 2. He, like other boys at his high school, uses the restrooms and locker rooms designated for boys, and has been doing so since August 2016. *Id.* at ¶ 11.

As set forth in greater detail in his declaration, Aidan's public transition began when entered the High School in 10th grade. *Id.* at ¶ 4. The first time he used the girls' bathroom, he faced stares because it was clear to everyone that he didn't belong there. *Id.* He spoke to a school counselor and was given the option, at that time, of using the nurse's bathroom. *Id.* at ¶ 5.

Aidan continued with his transition: beginning hormone therapy; changing his legal name and the gender markers on his legal documents, including his birth certificate; and having chest surgery. *Id.* at ¶¶ 7-10. His counselor told him he could use the boys' facilities and he began doing so when he started his senior year last August. *Id.* at ¶¶ 9, 11. He has been using the boys' facilities throughout the year, without incident. *Id.* at ¶¶ 11, 13. Being able to fully be himself in

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[1] Students do not shower or completely undress before or after PE class. *DeStefano Decl.* ¶ 15.

all aspects of school life and to be treated the same as other boys at school has enabled him to thrive at school. *Id.* at ¶¶ 11-12. He is now on track to make honor roll for the third marking period in a row, something he had never achieved before. *Id.* at ¶ 12. He is competing on the boys' track team. *Id.* at ¶ 10. And he enjoys the support of his fellow students, even being elected to Homecoming Court. *Id.* at ¶ 11.

Aidan may have been the first transgender male to use the boys' facilities at the High School, but he is not the only one. He knows that he is not the student described in the Complaint in this case because he does not wear a bra and did not wear one in October of 2016. *Id.* at ¶ 14.

Aidan seeks to intervene in this litigation because it impacts him in a direct, personal, and profound way. *Id.* at ¶ 17. If the Plaintiff prevails, Aidan will be barred from using the boys' facilities. *Id.* at ¶ 18. This would be devastating for him. *Id.* at ¶ 19. He could not use the girls' facilities any more than any other boys could: it would be distressing for him to do so after working so hard to bring his life into alignment, and deeply uncomfortable for the girls in those facilities. *Id.* at ¶¶ 17-19. Even before he began hormones and had chest surgery, he was correctly perceived to be a boy in the girls' room. *Id.* at ¶ 4. Now, he has facial hair, a male chest, a deep voice, and everyone knows he's a guy. *Id.* at ¶ 17. If he is banished from the boys' facilities, he would have to use separate facilities. *Id.* at ¶ 18. There is nothing wrong with choosing to use a more private separate facility; but to be ***required*** to use separate facilities than those used by the other boys, including his teammates, would be humiliating and stigmatizing. *Id.* at ¶ 18. Aidan also cares about the well-being of other transgender students at school who would similarly be impacted if Plaintiff were to prevail in this litigation. *Id.* at ¶ 20.

<u>PYC</u>

PYC is a non-profit organization founded in 2011 by Pennsylvania students for the express purpose of advocating on behalf of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") youth in the Commonwealth of Pennsylvania. *Goodman Decl.* at ¶¶ 3-4. PYC works with students, as well as Gay-Straight Alliances and other LGBTQ youth organizations in schools and universities throughout the Commonwealth. *Id.* at ¶¶ 6-7, 10-12. PYC advocates for policies and practices that make schools safe for LGBTQ students, including transgender students' access to single-sex facilities that correspond with their gender identity. *Id.* at ¶¶ 7-8. Because Plaintiff is challenging the School District's practice of inclusion and non-discrimination with respect to single-sex facilities, PYC is forced to devote resources to supporting students at the High School and must direct its advocacy toward this matter, to the exclusion of other matters it might seek to pursue in keeping with its mission. *Id.* at ¶ 9. In addition, the High School's Gay-Straight Alliance is a member of PYC, and some members of that student organization are transgender students who use facilities that match their gender identity. *Id.* at ¶ 17-20.

III. <u>ARGUMENT</u>

Aidan and PYC have timely filed a motion to intervene because their legally cognizable interests may be impaired by this action's disposition in their absence. Their interests are not adequately represented by any existing party now, and there certainly is no guarantee that they will be adequately represented in the future, when school board membership may change. Movants satisfy the standards for intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b)(1).

A. MOVANTS SATISFY THE THIRD CIRCUIT'S TEST FOR INTERVENTION AS OF RIGHT

Intervention is intended to benefit intervening parties, but the Third Circuit has also recognized that timely intervention promotes judicial efficiency:

> [O]n balance, intervenors and the public interest in efficient handling of litigation are better served by prompt action on [an] intervention motion. *See Conservation Law Found.*, 966 F.2d at 44 ("An intervenor need only show that representation may be inadequate, not that it is inadequate."). The early presence of intervenors may serve to prevent errors from creeping into the proceedings, clarify some issues, and perhaps contribute to an amicable settlement. Postponing intervention in the name of efficiency until after the original parties have forged an agreement or have litigated some issues may, in fact, encourage collateral attack and foster inefficiency. In other words, the game may already be lost by the time the intervenors get to bat in the late innings.

Kleissler v. United States Forest Serv., 157 F.3d 964, 974 (3d Cir. 1998).

To intervene as of right, the prospective intervenor must establish: (1) that the application for intervention is timely; (2) that the applicant has a sufficient interest in the litigation; (3) that the asserted interest may be affected or impaired as a practical matter by the disposition of the action; and (4) that the interest is not adequately represented by an existing party in the litigation. Fed. R. Civ. P. 24(a)(2); *In re Community Bank of N. Va.,* 418 F.3d 277, 314 (3d Cir. 2005) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987))[2]; *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc*., 72 F.3d 361, 365-69 (3d Cir. 1995). *See also Kleissler*, 157 F.3d at 969. Aidan and PYC satisfy every element of the Third Circuit's test for intervention as of right.

[2] Prospective intervenors do not have to demonstrate independent Article III standing if the plaintiff who initiated the lawsuit has such standing. *King v. Governor of the State of N.J.*, 767 F.3d 216, 245 (3d Cir. 2014).

1. Movants' application for intervention is timely.

Movants' application for intervention is timely because this case has just commenced and the existing parties will not be prejudiced by their intervention at this very early stage. Timeliness is determined from all the circumstances, including (1) the stage of the proceeding, (2) the prejudice that delay may cause the parties, and (3) the reason for any delay. *Mountain Top*, 72 F.3d at 369. Plaintiff filed his complaint on March 21, 2017, and movants acted quickly to intervene, filing the instant motion within two weeks' time. The complaint has not yet been served on the defendants, the defendants have not yet answered the complaint, no scheduling order has been issued by the Court, and discovery has not yet begun. At this early stage, the intervenors' addition to the case will not delay this matter in any way, nor will it prejudice the existing parties or disrupt the Court's calendar. Aidan and PYC's motion to intervene is timely.

2. Movants have a sufficient interest that may be affected or impaired by the disposition of this action that could be impaired by the disposition of this action.

An intervenor's interest must be a "significantly protectable" legal interest, as distinguished from interests of a general and indefinite character. *Mountain Top*, 72 F.3d at 366. To this end, the proposed intervenor must demonstrate a tangible threat to a legally cognizable interest to have a right to intervene, and the interest must belong to the proposed intervenor. *Id.*

a. Aidan has a legally cognizable interest in continuing to use facilities consistent with his gender identity.

This case poses a tangible threat to Aidan's interest in using restrooms and locker rooms consistent with his gender identity. Plaintiff seeks to enjoin the School District from permitting him to do so pursuant to its current practice. As a practical matter, the disposition of this matter in Aidan's absence may affect or impair his interest in his continued use of facilities consistent with his gender identity. *Mountain Top,* 72 F.3d at 368. As discussed above, the ability to use the boys' facilities at school is critically important to him and has enabled him to thrive at school. If he were barred from those facilities as a result of this lawsuit, it would be distressing and humiliating and deny him full participation in school life.[3]

As a transgender boy who uses the boys' facilities at the High School, Aidan has a "direct and substantial interest" in a lawsuit aimed at halting his continued used of those facilities. *Kleissler*, 157 F.3d at 972 ("Timber companies have direct and substantial interests in a lawsuit aimed at halting logging . . . ."). In *Board of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 4269080, at *4 (S.D. Ohio Aug. 15, 2016), another federal district court permitted intervention by a student in analogous circumstances. The proposed intervenor, Jane, a transgender girl and student at Highland Elementary School, sought to intervene in a lawsuit filed by the School District against the Department of Education regarding its conclusion that the School District's treatment of Jane violated Title IX. *Id.* at *1. The district court granted Jane's motion to intervene under Rule 24(a) because Jane's right to be treated in a non-discriminatory manner by her school was a substantial legal interest. *Id.* at *3 ("Jane and her guardians have a substantial legal interest in this proceeding and easily satisfy this element of the intervention-as-of-right standard. Jane has a far more compelling interest in the disposition of this case than any number of potential intervenors in other cases whose injuries were 'clearly indirect.'") (internal citations omitted).

There can be no question that Aidan's legal interest may be affected or impaired by the disposition of this matter in his absence given that Plaintiff seeks to halt an existing practice that protects Aidan's well-being.

[3] In addition, Aidan also has a legally cognizable interest to enjoy non-discriminatory access to equal educational opportunities under Title IX, which prohibits sex discrimination by recipients of federal education funding.

b. PYC's own interests and its member's interests are sufficiently affected by this litigation to confer associational standing.

PYC, by its own right and through its associational standing on behalf of its member, the Gay-Straight Alliance at the High School, has a sufficient interest that may be affected or impaired by this litigation. An association may assert claims from injuries it sustains directly or solely as a representative of its members. *PA Prison Soc. v. Cortes*, 622 F.3d 215, 283 (3d Cir. 2010); *Children's Hosp. of Phila. v. Horizon N.J. Health*, No. CIV.A. 07-5061, 2008 WL 4330311, at *4 (E.D. Pa. Sept. 22, 2008).

i. PYC has an interest in this litigation because of its mission and the diversion of resources this action necessitates.

PYC advocates for young LGBTQ Pennsylvanians by advocating for responsible public policies to promote safer schools, including inclusive and non-discriminatory school policies and practices such as the School District's practice of allowing transgender students to use single-sex facilities that correspond to their gender identity. Because Plaintiff is challenging the School District's practice regarding single-sex facilities, PYC is forced to devote resources to supporting students at the High School and must direct its advocacy toward this matter, to the exclusion of other matters it might seek to pursue in keeping with its mission.

ii. PYC has an interest in this litigation as representative of its member, the Boyertown Gay-Straight Alliance.

An association has standing to sue on behalf of its members when (a) its members would otherwise have standing to sue in their own right, (b) the interests at stake are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the individual members' participation in the lawsuit. *PA Prison Soc.*, 622 F.3d at 228 (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The organization must make specific allegations that at least one identified member has suffered or will suffer harm. *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)).

PYC's members include Gay-Straight Alliances ("GSAs"), including the Boyertown GSA, which would have standing to sue in its own right. *See, e.g.*, *Gay-Straight All. of Okeechobee High Sch. v. School Bd. of Okeechobee Cty.*, 477 F. Supp. 2d 1246, 1251-52 (S.D. Fla. 2007) (holding that the GSA had associational standing to seek injunctive and declaratory relief under 42 U.S.C. § 1983 and the Equal Access Act); *Gay-Straight All. Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1105 (E.D. Cal. 2001) (holding that the GSA Network had direct standing, even without a club on campus, because its goals were implicated by defendants' conduct and it had devoted significant money and staffing to address the alleged issues on campus). The Boyertown GSA is a recognized extracurricular club at the High School. Its members include current students who are transgender and use the school's restroom and locker room facilities that correspond with their gender identity. Aidan is one such member, but he is not the only student. The Boyertown GSA would have standing to sue in its own right because it and its members, including students like Aidan, have a legally protectable interest in the School District's existing practice. The interest at stake in this litigation in maintaining the School District's existing practices is germane to the Boyertown GSA's purpose, which includes furthering inclusion on behalf of LGBTQ students. The Boyertown GSA's individual participation is not required in this action, as "the Supreme Court has repeatedly held that requests by an association for declaratory and injunctive relief do not require participation by individual association members." *Hospital Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 89-90 (3d Cir. 1991) (distinguishing such relief from requests for individualized damages by association members).

3. Movants' interests are not adequately represented by an existing party.

Prospective intervenors must show that the representation of their interests by existing parties is inadequate, but the burden of making that showing is minimal. *Mountain Top*, 72 F.3d at 368. Even if an applicant's interest may be similar to an existing party's, representation is considered inadequate when those interests "diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests." *Brody v. Spang*, 957 F.2d 1108, 1123, 1125 (3d Cir. 1992).

The presumption of government adequacy of representation does not apply in this case and has not applied to school districts in similar litigation. Where a proposed intervenor seeks to advance the same position as a government entity "charged by law" with advancing a particular policy, the government entity is generally "presumed adequate for the task . . . particularly when the concerns of the proposed intervenor, *e.g.*, a 'public interest' group, closely parallel those of the public agency. In that circumstance, the would-be intervenor [must make] a strong showing of inadequate representation." *Kleissler*, 157 F.3d at 972 (internal quotations and citations omitted). However, "when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [to show inadequacy of representation] is comparatively light." *Id.* (citing *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) and *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) ("when the proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it")).

No such presumption of government adequacy applies here, nor has it applied to school districts in similar cases. *See, e.g.*, *Students & Parents for Privacy v. United States Dep't of*

Educ., No. 16 C 4945, 2016 WL 3269001, at *1 (N.D. Ill. June 15, 2016). In *Students & Parents for Privacy*, plaintiffs sued the school district and four federal defendants regarding the school district's inclusive bathroom policies and the Department of Education's then-guidance to that effect. *Id.* at *1. In that case, the Court found that intervenors had not "overcome the presumption that the **federal defendants** adequately represented their interests," *id.* at *3, but observed that there "does not appear to be any dispute that the **District** inadequately represents the movant's interest." *Id.* at *2 (emphases added). Even with the federal defendants' participation, the Court ultimately granted permissive intervention to the transgender students and the organizational plaintiff. *Id.* at *3.

Here, there is no federal entity charged by law with advocating for Aidan and PYC's position: there is only the School District. In addition to the guidance from *Students & Parents for Privacy* that a school district, unlike certain federal government entities, does not adequately represent transgender students' or organizational plaintiffs' interests in similar litigation, there are three additional reasons that the School District does not adequately represent Aidan and PYC's interests in this specific case.

First, the School District's position is not that its practice is compelled by established law, but rather that "the law remains unsettled due to pending litigation in the Federal courts."[4] Unlike the federal defendants in *Students & Parents for Privacy*, the School District itself does not say it is "charged by law" to allow every transgender student to use single-sex facilities that correspond to that student's gender. Rather, the School Board takes the position that "[b]ecause

[4] *See* "Boyertown Area School District Frequently Asked Questions About Issues Regarding Doe vs. BASD," (March 27, 2017), available at https://www.boyertownasd.org/cms/lib/PA01916192/Centricity/Domain/1395/FAQs%20rev%202.10%203.27%20Final%20%20%20BOYERTOWN%20AREA%20SCHOOL%20DISTRICT.pdf

of the failure of the Federal executive branch, Congress and the Pennsylvania legislature to address issues such as transgender rights, the Boyertown Area School Board is ultimately left with the difficult choice in balancing the rights of a minority group of transgender students and the balance of the school community."[5]

Second, the School District's charge is clearly to represent the interests of all students -- including Plaintiff Joel Doe -- whereas Aidan and PYC are representing the interests and priorities particular to them. Aidan's interests and the School District's interests, to the extent they may align now because the School District is maintaining its policy, are not guaranteed to align in the future. The School District may alter, abandon, or reverse its current position. Notably, in response to this lawsuit, the School Board members were not unanimous in supporting the current practice, and the composition of the Board may change after this year's election.

Both Aidan and PYC represent interests that are "parochial" and "personal," and not merely broad policy positions. A ruling in Plaintiff's favor would directly affect Aidan in a personal and immediate way: he would be barred from using the boys' facilities, which for him would be devastating, humiliating, and stigmatizing.

Third, the School District does not even nominally represent PYC's interests. PYC represents LGBTQ students and GSAs across the state and seeks to empower LGBTQ students and GSAs to advocate for LGBTQ-inclusive policies. The fact that PYC supports the current School District practice does not mean that the District can speak for PYC. It cannot.

As the Third Circuit has recognized, "the government represents numerous complex and conflicting interests" and "it is not realistic to assume that the agency's programs will remain

[5] *See* footnote 4 *supra*.

static or unaffected by unanticipated policy shifts." *Kleissler*, 157 F.3d at 973-74. The presence of a government party does not alter the fact that the "central purpose of the 1966 amendment [to Rule 24] was to allow intervention by those who might be practically disadvantaged by the disposition of the action and to repudiate the view, [under the former rule], that intervention must be limited to those who would be legally bound as a matter of res judicata." *Kleissler*, 157 F.3d at 970 (citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 1908, at 301 (1986)). Aidan and PYC face real and personal consequences in this case. They will both be "practically disadvantaged" if Plaintiff obtains the relief he seeks, and that disadvantage is not the same as that faced by the School District. These are precisely the kinds of interests that are intended to be protected through Rule 24.

B. AIDAN AND PYC ALSO MEET THE REQUIREMENT FOR PERMISSIVE INTERVENTION

Aidan and PYC also satisfy the requirements for permissive intervention under Rule 24(b)(1). On a timely motion, the Court may permit anyone to intervene who has a claim or defense that shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1). In exercising its discretion, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. *King*, 767 F.3d at 245.

Aidan and PYC easily satisfy this test. As noted above, the motion is timely, being filed shortly after commencement of the litigation and before substantive proceedings. In addition, Aidan and PYC's defenses -- that the existing practice is consistent with the law and does not infringe the rights of any student -- relate directly to the claims raised by Plaintiff. Allowing Aidan and PYC to intervene will preserve judicial economy, as it will obviate the need for either party to file a separate action in the future to protect their interests. As such, if this Court declines to find intervention warranted under Rule 24(a)(2), it is respectfully requested that intervention be permitted under Rule 24(b)(1).

V. CONCLUSION

For all the foregoing reasons, Aidan and PYC respectfully request that this Court grant their motion to intervene pursuant to Fed. R. Civ. P. 24(a)(2), or in the alternative, Fed. R. Civ. P. 24(b)(1).

Respectfully submitted,

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