

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

JOEL DOE, a minor; by and through his  
Guardians JOHN DOE and JANE DOE;  
MARY SMITH; JACK JONES, a minor;  
by and through his Parents JOHN  
JONES and JANE JONES; and MACY  
ROE,

Plaintiffs,

vs.

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,

and

PENNSYLVANIA YOUTH CONGRESS  
FOUNDATION

Defendant Intervenor.

**Case No. 17-1249-EGS**

**The Honorable Edward G. Smith**

**PLAINTIFFS' BRIEF IN  
OPPOSITION TO DeSTEFANO  
MOTION TO INTERVENE**

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**BRIEF IN OPPOSITION TO  
DeSTEFANO MOTION TO INTERVENE**

**INTRODUCTION**

Aiden DeStefano ("Movant") is an adult and soon-to-be graduate from Boyertown Area High School who seeks leave to intervene in this lawsuit. The graduation ceremony occurs on Tuesday, June 6, 2017. Movant seeks to support

intervention into this matter by alleging a desire to return to the school as a member of the public and to use privacy facilities like locker rooms and bathrooms with members of the opposite sex since Movant identifies with the opposite sex.

The Movant's Motion to Intervene as of right should be denied because Movant has no legally protected interest in the litigation that will be affected or impaired by the outcome, much less a sufficient one, and because any interest would be entirely represented by another party to this lawsuit, the Pennsylvania Youth Congress. In addition, Movant alleges no involvement in the facts alleged in the Complaint, and stated as such in the declaration supporting the Motion to Intervene: "I know that I am not the student described in the Complaint..." DeStefano Dec. ¶ 14.

**I. Movant May Not Intervene As of Right Because the Standard Under Rule 24(a) Cannot Be Met.**

A person seeking leave to intervene must demonstrate that: (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter, by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation. *See, e.g., Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005) (citing *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998)); *See also Brody By and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992); *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987). The applicant bears the burden of demonstrating that he has met all four prongs of this conjunctive test. *See United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 n. 9 (3d Cir. 1994). If an

an applicant fails on any one prong of this test, the applicant is not entitled to intervene as of right. *See Sch. Dist. of Phila. v. Pa. Milk Mktg. Bd.*, 160 F.R.D. 66, 68 (E.D. Pa. 1995).

Because Movant cannot meet the second through fourth prongs, Plaintiffs focus on these criteria.

**A. Current parties adequately represent Movant's interests.**

Representation will be considered inadequate on any of the following three grounds: (1) that although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit. *Brody*, 957 F.2d at 1123.

Pennsylvania Youth Congress Foundation (PYC) adequately represents any possible interest that Movant has in this case. According to PYC, it advocates for people like Movant, who identify with the opposite sex, to have access to privacy facilities with members of the opposite sex. *See* PYC Brief in Supp. of Interv., Docket 7-2, p. 5. In addition, Defendant school district's Gay-Straight Alliance club is a member of PYC and has student members in the District who use privacy facilities with the opposite sex. *Id.* PYC represents any possible interest of Movant and does not diverge in any manner such that PYC would be unable to devote proper attention to Movant's interest.

Not only is the adequacy of representation by an existing party clear in substance, but it is also clear in that those who will advocate for the substance will be perfectly adequate because Movant is represented by the exact same counsel as PYC, a party to this lawsuit. As such, Movant may not intervene in this matter as of right.<sup>1</sup>

**B. Movant does not have a sufficient legal interest.**

The Third Circuit has issued guidance that in order to meet this prong of the test, a prospective intervenor must fundamentally demonstrate that its interest relates to the subject of the underlying proceeding, *i.e.*, that it is "significantly protectable." *Kleissler*, 157 F.3d at 969 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)) (internal quotation marks omitted). The asserted interest must be "a cognizable legal interest, and not simply an interest of a general and indefinite character." *Brody*, 957 F.2d at 1116 ((internal quotation marks omitted) (quoting *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987) ); *see also Treesdale, Inc.*, 419 F.3d at 220-21; *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995). Furthermore, the interest must be direct. The Court in *Kleissler* stated:

the polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote. Due regard for efficient conduct of the litigation requires that intervenors should have an interest that is specific to them, is

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<sup>1</sup> Movant cites *King v. Governor of the State of N.J.*, 767 F.3d 216 (3d Cir. 2014), for the proposition that an intervenor need not have Article III standing. Questions over Article III standing are irrelevant as Movant has not even satisfied the standards for permissive or as-of-right intervention. In addition, in *King*, the proposed intervenor was an organizational party similarly situated to PYC, and PYC is already a party to this case. PYC already represents Movant's alleged interests so Movant's motion to intervene should be denied.

capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought. The interest may not be remote or attenuated.

*Kleissler*, 157 F.3d at 972.

Movant's interest in returning to the school someday as a member of the public and using restrooms with people of the opposite sex is extremely general, indefinite, and remote. Movant is no longer under the authority of the state and is not compelled to be on campus; the school no longer acts *in loco parentis* to Movant. Movant is no different than every other member of the public who might wish to attend a publicly open event at the school and who seeks to use privacy facilities. Not only alumni, family members, or people living within the borders of the Boyertown Area School District, but any person who is permitted to set foot on the campus can allege the exact same generic interest in the outcome of this dispute. Because Movant does not have a sufficient legal interest, intervention should be denied.

## **II. Movant Should Not Be Granted Permissive Intervention Under Fed. R. Civ. P. 24(b).**

A decision to allow or deny permissive intervention is within the discretion of the District Court and “has virtually never been reversed.” *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 227 (3d Cir. 2005) (citing *Catanzano ex rel. Catanzano v. Wing*, 103 F.3d 223, 234 (2d Cir. 1996)).

As explained above, Movant has not established a sufficient interest in the outcome of this litigation for intervention. Rule 24(b)(1)(B) requires a “claim or defense” related to that of the main case. However, as set forth at length above,

Movant's interest after June 6, 2017 is no different than that of the public at large. If Movant can intervene, so can nearly any member of the public, whether seeking to intervene on behalf of Plaintiff students or on behalf of Defendant school district. If it is enough to allege that an individual wants to be at the school for an event--such as a school board meeting--and may need to use the privacy facilities, that would cover all members of the public.

If instead, Movant is claiming a particular interest because of a claimed emotional impact, such a claim is unrelated to the legal issues that drive this case, and therefore would be improper under Rule 24(b)(1)(B). Intervenor simply does not have sufficient interest to justify intervention. Interest in a "favorable opinion" rather than need of a "favorable judgment" is insufficient for intervention. *See Alexander v. Rendell*, 246 F.R.D. 220, 237 (W.D. Pa. 2007) (rejecting intervention where movants sought a "favorable opinion" not necessarily a "favorable judgment" sufficiently related to movants' interest). Indeed, Movant's declaration states the desire is to let students who identify with the opposite sex, who are still in school, use restrooms and locker rooms with people of the opposite sex.<sup>2</sup> DeStefano Dec. ¶ 20. Yet that interest is surely advanced by the PYC student members, who are in fact on campus now and using the privacy facilities at issue. Such an interest is not sufficient for Movant to intervene, particularly when already so clearly represented by current parties.

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<sup>2</sup> While Movant raises the specter of denial of access to privacy facilities should this Court grant the relief requested by Plaintiffs, *see* DeStefano Dec. ¶ 18, that is not the case. Plaintiffs merely request that all students, including students who identify with the opposite sex, utilize the facilities matching their sex. *Plaintiffs do not object to students of the same sex using privacy facilities with them, no matter how they may identify.* V. Compl. ¶¶ 49, 85, 103, 124.

It will serve the court and the parties to keep the issues narrowed to those that are legally relevant. To the extent that Movant has an interest, it is already adequately represented by the existing parties: Defendants who are defending the policy and the Intervenor, PYC. PYC, has student members at Defendant school district who have not graduated. In representing these students, any interest Movant alleged will be represented as well. Besides, the Intervenor is represented by the same team of attorneys who represent the Movant. As such, permissive intervention should be denied.

## **CONCLUSION**

For the foregoing reasons, Aiden DeStefano's Motion for Intervention should be denied.

Respectfully submitted this 2nd day of June, 2017.

By: /s/ Randall L. Wenger

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on June 2, 2017, the foregoing was filed electronically and served on the other parties via the court's ECF system.

/s/ Randall L. Wenger

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