

IN THE UNITED STATES DISTRICT COURT
FOR THE 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,

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

ORDER

AND NOW, this 6th day of July, 2017, after considering the motion to intervene filed by Aidan DeStefano (“DeStefano”) (Doc. No. 7), the supplemental memorandum of law and declaration filed by DeStefano (Doc. No. 31), and the plaintiffs’ brief in opposition to DeStefano’s motion to intervene (Doc. No. 32), it is hereby **ORDERED** that the motion is **DENIED**.¹

BY THE COURT:

/s/ Edward G. Smith
EDWARD G. SMITH, J.

¹ DeStefano and the Pennsylvania Youth Congress Foundation (“PYC”) filed the motion to intervene along with a supporting memorandum of law on April 3, 2017. Doc. No. 7. Although the plaintiffs did not file a timely response to the motion in accordance with the court’s Local Civil Rules, they indicated during a telephone conference held on

May 19, 2017, that they did not oppose PYC's request to intervene, but did oppose DeStefano's request to intervene. After the telephone conference, the court entered an order which, *inter alia*, (1) granted part of the motion to intervene insofar as PYC sought to intervene in the case, (2) provided DeStefano with a period of time to file a supplemental submission in support of his motion to intervene, and (3) provided the plaintiffs with a period of time thereafter to file a response to DeStefano's supplemental submission. Order at 1-2, Doc. No. 29. DeStefano timely filed a supplemental declaration and memorandum of law on May 26, 2017, and the plaintiffs timely filed opposition to the motion on June 2, 2017. Doc. Nos. 31, 32.

In the motion to intervene, DeStefano seeks to intervene as a matter of right or, in the alternative, permissive intervention, under Rule 24 of the Federal Rules of Civil Procedure. *See* Memorandum of Law of Aidan DeStefano and the Pa. Youth Congress Found. in Supp. of Their Mot. to Intervene as Defs. ("Intervenors' Mem.") at 5-15, Doc. No. 7-2. With regard to DeStefano's argument that the court should permit him to intervene as a matter of right, the Federal Rules of Civil Procedure provides for two avenues for him to possibly seeking intervention: First, he can intervene if a federal statute gives him "an unconditional right to intervene." Fed. R. Civ. P. 24(a)(1). Second, he can intervene if he "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." Fed. R. Civ. P. 24(a)(2).

Here, the court will not address possible intervention under Rule 24(a)(1) because DeStefano has only argued that he has a right to intervene under Rule 24(a)(2). Intervenors' Mem. at 1, 6. To intervene under Rule 24(a)(2), DeStefano "must establish 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.'" *In re Community Bank of N. Va.*, 418 F.3d 277, 314 (3d Cir. 2005) (quoting *Harris v. Pemsley*, 820 F.2d 592, 596 (3d Cir. 1987)).

Here, the parties do not contest the first requirement of Rule 24(a)(2) intervention insofar as DeStefano timely applied to intervene in this action. The plaintiffs do, however, contest DeStefano's ability to satisfy the remaining requirements for Rule 24(a)(2) intervention. *See* Brief in Opp. to DeStefano Mot. to Intervene ("Opp. Br.") at 3 ("Because Movant cannot meet the second through fourth prongs, Plaintiffs focus on these criteria."). The court notes that despite purportedly contesting the second through fourth prongs, the plaintiffs only specifically discuss the second and fourth prongs for Rule 24(a)(2) intervention.

Regarding the second requirement, it appears that DeStefano graduated from the Boyertown Area Senior High School in early June. DeStefano has submitted a supplemental declaration in which he states that, despite his graduation, he (1) is attending college in the area and intends to return to the high school next year for several events, including his sister's high school graduation and some of his friends' basketball games, (2) he will be "devastated" if the plaintiffs prevail so as to preclude him from using the facilities that match his gender. *See* Supplemental Decl. of Aidan DeStefano in Supp. of Mot. for Leave to Intervene at ¶¶ 3-4. He also argues that if the plaintiffs obtain their sought-after injunction, he would be precluded from using the boys' restrooms and could not socialize with his friends on the basketball team while they are in the locker room. *See* Supplemental Mem. of Law of Aidan DeStefano in Supp. of his Mot. to Intervene as Def. ("Supplemental Mem.") at 2. He asserts that he has a legally cognizable interest in continuing to use the facilities that are consistent with his gender identity. *See* Intervenors' Mem. at 7-8.

The plaintiffs contend that DeStefano lacks a sufficient interest in the litigation because he graduated from the senior high school earlier this month and, as such, he is no longer under the authority of the state. Opp. Br. at 5. In addition, the plaintiffs argue that DeStefano's interest in being able to use the facilities consistent with his gender identity when he returns to the school for certain events is "extremely general, indefinite, and remote." *Id.* Moreover, they assert that DeStefano's status and interest is a "generic interest" that is no different than any person who desires to attend a publicly open event at the school and seeks to use the privacy facilities. *Id.*

The court recognizes that when addressing whether a proposed intervenor has a sufficient interest in the litigation,

"[t]he claimed interest in the litigation must be one that 'is specific [to those seeking to intervene], is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought.'" [*Benjamin ex rel. Yock v. Dep't of Pub. Welfare*, 432 F. App'x 94, 98 (3d Cir. 2011) (quoting *Kleissler v. United States Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998))]. The "polestar" for intervention is "whether the proposed intervenor's interest is direct or remote." *Id.* (quoting *Kleissler*, 157 F.3d at 972). A proposed intervenor's interest need not be a legal interest, provided that he or she "will be practically disadvantaged by the disposition of the

action.” *Id.* . . . (quoting *Kleissler*, 157 F.3d at 970). “However, rather than merely showing some impact, ‘the applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene.’” *Id.* (quoting *Harris[v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987))].

Benjamin ex rel. Yock v. Department of Pub. Welfare of Pa., 701 F.3d 938, 951 (3d Cir. 2012) (alteration to original).

Here, the issue about whether DeStefano has a sufficient interest in the litigation is complicated by his recent graduation from the high school. Since he is no longer a student at the school, his interest in the litigation is as a member of the general public. It is unclear from the record before the court as to what the school district’s policy is with respect to members of the public and their use of locker room and restroom facilities during events on the high school campus. While an adverse ruling on the plaintiffs’ motion for injunctive relief or an adverse ultimate determination in this case could possibly have an effect on DeStefano should he choose to attend a public event at the high school and desire to use the privacy facility for the gender in which he identifies, this possibility also equally applies to any member of the public and could therefore apply to a non-transgender individual who is also opposed to the current policy of the school district and plans on attending public events at the school while the current policy is in effect. Additionally, while DeStefano indicates that he intends to be at the high school for certain events during the upcoming year (and possibly thereafter), this litigation does not involve issues with attendance at the high school by members of the public and DeStefano appears to equate attending school events as necessitating that he use the locker room or restroom facilities while there. Unfortunately, equating attendance with the use of the privacy facilities is too speculative. For example, even if DeStefano attends his sister’s graduation ceremony at the school, this does not mean that he will be inside of the school and have to use the locker room or restrooms while there. Moreover, with regard to watching and supporting his friends on the basketball team, as already indicated, it is unclear as to what the school district’s policy is regarding members of the public entering the locker room and it is once again speculative as to whether DeStefano will have to use restroom facilities while there or whether the policy affects his ability to use the locker room. At bottom, his interests are too speculative and remote. While the court does not doubt DeStefano’s assertion of the negative effect that having to use either a same biological sex facility or a neutral facility would have on him, he has not demonstrated that he has an interest that will be directly affected in a substantially concrete fashion by the relief sought by the plaintiffs here.

Although the court’s resolution of the second element obviates the need to address the fourth element, the court does so for sake of completeness. As for this element, the plaintiffs argue that DeStefano cannot establish this element because the court has allowed PYC to intervene in this case and, thus, DeStefano’s interests are adequately represented by an existing party. *Opp. Br.* at 3-4. DeStefano persuasively addressed this element in his original memorandum of law (as applied to the defendants), but did not address it again in his supplemental memorandum because, understandably, the plaintiffs did not bring it up as a point of objection during the court’s telephone conference on May 19, 2016. Nonetheless, he also did not file a reply brief (or seek leave to file a reply brief) in support of the motion upon receiving the plaintiff’s submission in opposition.

Concerning the fourth element for intervention as a matter of right, [t]he adequacy of representation element requires the applicant to demonstrate “‘that his interests are not adequately represented by the existing parties.’” [*Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992)] (quoting *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982)). Inadequate representation can be based on any of three possible 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.” *Id.* A presumption of adequacy attaches, however, “if one party is a government entity charged by law with representing the interests of the applicant for intervention.” *Id.* (citing *Del. Valley Citizens’ Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 973 (3d Cir.1982)). In such an instance, a potential intervenor can only overcome the presumption and thereby intervene by making a “‘compelling showing ... to demonstrate why [the government’s] representation is not adequate.’” *Mountain Top Condo. Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir.1995) (quoting 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909 (1986)).

United States v. Territory of Virgin Islands, 748 F.3d 514, 519-20 (3d Cir. 2014) (first alteration to original; internal footnote omitted).

As pointed out by the plaintiffs, PYC more than adequately represents DeStefano's interests in this matter even though DeStefano is no longer a student in the school district. As indicated by the declaration of Jason Goodman ("Goodman"), PYC's executive director and president of the board, PYC, "[a]mong other things, . . . advocates for the adoption of policies and practices that allow transgender youth to choose single-sex school facilities that correspond with their gender identity." See Declaration of Jason Goodman in Supp. of Mot. by Pa. Youth Cong. Found. for Leave to Intervene at ¶ 7, Doc. No. 7-4. Boyertown has a gay straight alliance/gender and sexuality alliance ("GSA"), which is a member organization in PYC. *Id.* at ¶¶ 11, 17. According to Goodman, "there are several students at Boyertown Area Senior High School who identify as transgender, some of whom use the single-sex restroom and/or locker facilities that correspond with their gender." *Id.* at ¶ 18. Goodman also asserts that "[i]n addition to its own interest in supporting access for all transgender students to facilities that correspond to their gender identity, PYC represents the interest of its member organization, the Boyertown GSA, in preserving these policies and/or practices at Boyertown Area Senior High." *Id.* at ¶ 20. Based on these representations and without any argument by DeStefano to the contrary, DeStefano has not satisfied the fourth element for Rule 24(a)(2) intervention because he has not demonstrated that his interests are inadequately represented by an existing party. Accordingly, the court denies the motion to intervene insofar as DeStefano seeks to intervene under Rule 24(a)(2).

Concerning DeStefano's request for permissive intervention, under Rule 24(b) of the Federal Rules of Civil Procedure, the court may, upon a timely motion "permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). When addressing a motion under Rule 24(b), "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Per Rule 24(b), a proposed permissive intervenor must establish (1) that the motion was timely, (2) there is a common question of law or fact between the movant's claim or defense and the main action, and (3) the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

In support of his request for permissive intervention, DeStefano contends (and this is again undisputed) that he and PYC timely filed the motion seeking intervention. Intervenor's Mem. at 14. He also claims that allowing him to intervene would preserve judicial economy insofar as it would "obviate the need for either party to file a separate action in the future to protect their interests." *Id.* He notes that he need not demonstrate a legally cognizable interest to permissively intervene; instead, he is required to assert a defense that shares a common question of law or fact with the main action. Supplemental Mem. at 3. He argues that his defense, *i.e.* that the school district's existing practice "is consistent with the law and does not infringe the rights of any student" directly relates to the plaintiffs' claims in this case. Intervenor's Mem. at 14.

The plaintiffs, in opposing DeStefano's motion for permissive intervention, focus mostly on the fact that as a recent graduate from the high school, DeStefano's interest is now "no different than that of the public at large." Opp. Br. at 5-6. They also argue that if DeStefano is claiming an interest because of a possible emotional impact that a change in the school district's policy could have on him, permissive intervention would be improper. *Id.* at 6. They also again assert that insofar as DeStefano's interest overlaps with PYC's, the association adequately represents his interest in this litigation. *Id.* at 6-7. The plaintiffs further seemingly assert that precluding DeStefano from intervening would "keep the issues narrowed to those that are legally relevant." *Id.* at 7.

The court notes that "[a] district court has wide discretion in determining whether to grant permissive intervention pursuant to Fed.R.Civ.P. 24(b)." *Halderman v. Pennhurst State Sch. and Hosp.*, 97 F.R.D. 522, 525 (E.D. Pa. 1983) (citing 7A Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1913 at 511 ("[E]ven though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention.")). While the court understands and sympathizes with DeStefano's desire to participate in this lawsuit as a transgender, now-former student at the high school who intends to visit friends still attending the school, attend events there, and observe his sister's graduation, the issues he would present as a former student at the school and general member of the public would detract from the focus of the arguments in the amended complaint. While the amended complaint focuses on the school district's bathroom policy, it is particularly concerned with the policy as it relates to students attending the school and DeStefano (unfortunately for his desire to participate in this litigation) no longer attends the high school. As of the date of this order, there are no allegations as to what the school district's policy is for non-students or other members of the public with respect to the use of restrooms and locker rooms (to the extent that members of the public are allowed access to those areas). Therefore, even if DeStefano asserts a common question of law or fact between his defense and the main action, his participation in this case would unnecessarily expand the scope of this litigation beyond the setting established by the complaint, which pertains to the policy and its effect on four current students at the high school. As such, the court also denies DeStefano's request to permissively intervene in this action.