

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(Northern Division)**

MARY SMITH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:17-cv-02302-ELH
	)	
BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND, et al.,	)	
	)	
Defendants.	)	

**MEMORANDUM IN SUPPORT OF  
MOTION TO INTERVENE AS DEFENDANT**

**I. FACTUAL BACKGROUND**

The Board of Education of Frederick County, Maryland governs the Frederick County Public Schools system, which is charged with overseeing 66 public education elementary, middle, high, public charter, alternative, and special education schools in the county. In June of 2017, the Board of Education revised a policy and issued a new policy to address bullying, discrimination, stigmatization, and harassment of transgender and gender non-conforming students in the County.

The first one, Policy 437, prohibits bullying, harassment, or intimidation on school property, at school functions, or through electronic technology, and prohibits retaliation associated with the witnessing or reporting of such conduct. The second, Policy 443, sets standards for creating a welcoming and inclusive environment for transgender and gender non-conforming students, including by allowing students access to the facilities, restrooms, lockers, and sports teams corresponding to their gender identity. It also provides students who may be

uncomfortable with using a single-sex facility for any reason, irrespective of their gender identity or expression, the use of privacy curtains, private or office restrooms, or a separate changing schedule. In addition, it directs staff to use the preferred names and gender pronouns of students and eliminates separate dress codes for girls and boys.

On August 11, 2017 “Jane Doe,” a minor girl and student at a Frederick County high school, and her mother, “Mary Smith,” brought this action against the Board of Education and the School System, challenging Policies 437 and 443 (the “Policies”) and other actions by the school district as violations of the Constitution and state laws<sup>1</sup>. Plaintiffs ask this Court to declare the challenged Policies unconstitutional and otherwise unlawful and issue a permanent injunction enjoining the Policies.

**Movant J.V.K.**

J.V.K. is a 17-year-old resident of Frederick, Maryland, and a senior at Governor Thomas Johnson High School (“TJ Senior High”). J.V.K. Decl. ¶ 1 (attached as **Exhibit A**). His favorite classes are History and English. *Id.* He is an honor student and has won various awards for school writing competitions and Excellence in Social Studies and English. *Id.* In addition to founding TJ Senior High’s Gender Sexuality Alliance (GSA), J.V.K. is part of TJ Senior High’s Academic Team, and he participates in schools plays and musicals. *See id.* J.V.K. is also a youth spokesperson for the National Center for Transgender Equality and a member of the Gay, Lesbian & Straight Education Network’s National Student Council. *Id.*

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<sup>1</sup> *See* Compl. at pp. 15-32 (asserting violation of constitutional rights to privacy, free speech, parental liberty, and separation of powers; Title IX of the Education Amendments Act of 1972; and Maryland law prohibiting the torts of intrusion upon bodily seclusion and privacy, and state education and building laws).

J.V.K. is a boy who is transgender; he was assigned the sex female at birth, but has known he was a boy since a young age. *See id.* at ¶¶ 3-4. J.V.K. realized that he was transgender when he was thirteen years old. *Id.* at ¶ 4. At that time, he was living in Shepherdstown, West Virginia. *Id.* When others learned that he was transgender, the Principal informed him that he had to use the restroom in the nurse's office and that he was prohibited from going to gym class. *Id.* After that, J.V.K.'s life in Shepherdstown was very difficult. *Id.* at ¶ 5. J.V.K. felt alone and confused, and he could not learn under the circumstances. *See id.*

After coming out as a boy, J.V.K. also began seeing a therapist who diagnosed the distress that J.V.K. felt about not being recognized as a boy as "gender dysphoria." *Id.* at ¶ 6. J.V.K. began dressing as a boy and living as a boy in all aspects of his life, and he started going by the name he chose to match his identity. *Id.*

When J.V.K. started going to school at TJ Senior High in ninth grade, he was known at school by his chosen name, but he was not known as transgender by other students. *Id.* at ¶ 8. The school administration told him that he could use whichever facilities he felt most comfortable using. *Id.* However, J.V.K. felt anxiety and distress about using restrooms at school at that time, so he avoided them. *See id.* J.V.K. did not believe that the school system would help him if he were harassed by students or teachers. *See id.*

As a Sophomore at TJ Senior High, J.V.K. felt more comfortable in school because he helped start the school's GSA. *Id.* at ¶ 9. He felt more comfortable using the boys' restrooms, but he tried to only do so when they were empty, to avoid harassment and ridicule. *See id.*

J.V.K.'s name was changed legally by a Frederick County judge in August 2015. *Id.* at ¶ 7. He changed his gender marker with the United States Social Security Administration, and

after he became an American citizen in 2017, he received a passport with the gender marker ‘male’ and his correct name. *See id.*

At school, teachers frequently used the wrong pronouns for J.V.K. *Id.* at ¶ 11. This left him scared and unsafe, and he felt as though he was not in a position to correct them. *Id.* When he did try to correct them, they responded with hostility. *Id.*

In his Junior year at TJ Senior High, the student body became aware that J.V.K. is transgender after he was thrown out of a Ted Cruz rally because he was wearing a transgender flag; the story was in the local Frederick County news. *Id.* at ¶ 12. He faced bullying by other students. *Id.*

The experiences J.V.K. had during his first three years in high school, along with the Trump Administration’s repeal of the Title IX guidance on restroom access for transgender students, led J.V.K. to join other transgender students who advocated for the School Board to adopt a policy protecting transgender students. *See id.* at ¶ 13. J.V.K. and other transgender students shared their experiences numerous times at School Board meetings. *Id.* They also held rallies before the Board of Education. *Id.*

The passage of Policies 437 and 443 in June 2017 was an incredible moment for J.V.K. *See id.* at ¶ 14. Never before had J.V.K. been recognized and affirmed as a boy by a school system. *Id.* Upon learning that the Policies passed, J.V.K. felt hope for the first time that he would be treated just like any other male student at school. *See id.* J.V.K. felt that all of his prior negative experiences had all been worth it because he knew that younger students would not have to endure the trauma he did. *Id.*

This year, in his Senior year at TJ Senior High, J.V.K. feels that he has support from the School Board by virtue of Policies 437 and 443. *See id.* at ¶ 12. Teachers seem to be making

more of an effort to use the correct pronouns and he feels safer correcting people when they use incorrect pronouns when speaking with or about him. *Id.* at ¶ 11. He is facing fewer problems with other students. *See id.* at ¶ 12.

J.V.K. is now concerned that Policies 437 and 443 will be ended as a result of this lawsuit. *See id.* at ¶¶ 15-18. If the Policies are revoked, J.V.K. would be devastated and would not feel safe going to school. *Id.* at ¶ 15. He fears things will return to the way they were before the Policies were enacted. *See id.* at ¶ 17. And if he were barred from using the boys' restrooms, it would be distressing because it would mean that he is not being recognized as the boy he is.<sup>2</sup> *See id.* at ¶ 16. And he could not use the girls' restrooms any more than other boys could. *See id.* So he would effectively be required to use separate facilities than those used by other students, sending the stigmatizing message to all students that he is not fit to use the facilities used by other students. *See id.* at ¶ 16-18.

J.V.K. has fought so long for the right to be himself. *Id.* at ¶ 17. Revocation of protections provided by Policies 437 and 443 would cause him to feel as if he does not deserve to exist and be himself in public. *See id.* at ¶ 16.

## **II. ARGUMENT**

### **A. J.V.K. SATISFIES THE FOURTH CIRCUIT'S STANDARD FOR INTERVENTION AS OF RIGHT.**

Federal Rule of Civil Procedure 24 governs intervention. Leave to intervene may be granted as a matter of right, under Rule 24(a), or by permission, under Rule 24(b). Judicial economy generally favors the disposition of related issues and claims in a single lawsuit. *See, e.g., Hill v. W. Elec. Co.*, 672 F.2d 381, 387 (4th Cir. 1982); *Board of Educ. of the Highland*

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<sup>2</sup> J.V.K. has never used locker facilities at TJ Senior High or any other public school in Frederick County; he participated in an online gym program. *Id.* at ¶ 10.

*Local Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 U.S. Dist. LEXIS 107614, at \*6 (S.D. Ohio Aug. 15, 2016).

The Fourth Circuit has explained that a district court “must” permit intervention as a matter of right under Rule 24(a)(2) if the proposed intervenor can demonstrate “(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the [movant’s] interest is not adequately represented by existing parties to the litigation.” *Stuart v. Huff*, 706 F.3d 345, 349-50 (4th Cir. 2013) (quoting *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991)). The Fourth Circuit also considers timeliness to be a “cardinal consideration.” *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999).

The motion to intervene should be granted because J.V.K. satisfies each of the factors required by the Fourth Circuit. This motion is timely because it has been filed shortly after commencement of this action, and before a responsive pleading or motion has been filed. J.V.K. seeks intervention because he is a transgender student who depends on the challenged Policies and, thus, has a deeply personal interest in this action, the protection of which would be impaired absent intervention. And his interests are not adequately represented by existing parties in this case.

**1. This motion is timely.**

This motion is timely because it is being filed in the early stages of this litigation. Plaintiffs commenced this action approximately two months ago; no responsive pleadings or motions have been filed; a scheduling order has not yet been issued; and discovery has not begun. Filing this motion prior to these events satisfies the timeliness factor identified by the

Fourth Circuit. *See, e.g., Md. Restorative Justice Initiative v. Hogan*, 316 F.R.D. 106, 111 n.5 (D. Md. 2016).

**2. J.V.K. has a direct and substantial interest in this action, the protection of which would be impaired absent intervention.**

As a transgender student who attends public school in Frederick County, J.V.K. has a legally cognizable interest in this case because the current policies directly protect movants' ability to feel safe and learn at school. The Policies protect transgender students like J.V.K. from bullying and harassment based on his gender identity, allow him to use restrooms consistent with his gender identity, and direct staff to use his correct names and pronouns.

The legal interests of J.V.K. will certainly be affected or impaired by the disposition of this matter because Plaintiffs seek invalidation of Policies 437 and 443. Indeed, Plaintiffs seek a declaratory judgment that the Policies are unconstitutional and otherwise unlawful.

J.V.K. has a direct and substantial interest in anti-harassment and anti-bullying rules that are part of Policy 437 because he has experienced bullying or other hardships during prior school years. He also has a direct and substantial interest in being recognized as a boy by staff and being able to use the boys' restrooms in accordance with Policy 443. As explained above (see Factual Background, *supra*), being prohibited from using the boys' restrooms at school would be distressing and humiliating to J.V.K., and it would deny him full participation in school life.

In *Board of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, a federal district court permitted intervention by a transgender student under analogous circumstances. *See* 2016 U.S. Dist. LEXIS 107614 at \*4. 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).

Like Jane, J.V.K. has a substantial legal interest in being treated in a non-discriminatory manner by his school. And like Jane, his rights might be directly affected or impaired by the disposition of this matter because Plaintiffs seek to halt policies and practices that protect the wellbeing of J.V.K.

**3. The interests of J.V.K. are not adequately represented by the existing defendants.**

The interests of transgender students are not adequately represented by the existing defendants. Even where parties "may share some objectives," possible divergence of interest is sufficient to demonstrate that representation may be inadequate under Rule 24(a). *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991).

While a "putative intervenor must mount a strong showing of inadequacy" when seeking to intervene "in the government's defense of a statute," *Stuart*, 706 F.3d at 351-52, that requirement does not apply in this case. The Fourth Circuit's rationale for applying a more exacting standard in *Stuart* was predicated on the fact that the case involved a constitutional challenge to a state statute that the Attorney General was charged to defend. The court explained, "[T]he need for government to exercise its representative function is perhaps at its apex where, as here, a duly enacted statute faces a constitutional challenge." *Id.* at 351. No such basic representative function is applicable here. The court's rationale does not apply in a case



like this, involving a constitutional challenge to policies enacted by a public school board rather than a legislature.

In *Students & Parents for Privacy v. United States Dep't of Educ.*, a case very similar to this one, the plaintiffs sued the school district and federal defendants, challenging the school district's inclusive facilities policies and the Department of Education's then-guidance concerning transgender students' access to single-sex facilities. No. 16C 4945, 2016 WL 3269001, at \*1 (N.D. Ill. June 15, 2016) (recommendation of magistrate). While the court concluded that putative intervenors had not "overcome the presumption that the *federal defendants* adequately represented their interests," the court observed that there "does not appear to be any dispute that the *District* inadequately represents the movant's interests." *Id.* at \*2-3 (emphasis added). Even with the federal defendants' participation, the court ultimately granted permissive intervention to the transgender students. *Id.* at \*3; *see also Doe v. Boyertown Area Sch. Dist.*, No. CV 17-1249, 2017 WL 3675418, at \*5 (E.D. Pa. Aug. 25, 2017) (noting that motion to intervene in similar case had been granted without objection). In this case, there is no participating federal entity charged by law with advocating for the position of J.V.K. Rather, there is only the Board of Education.

There are other reasons why the Board of Education does not adequately represent the interests of J.V.K. First, the Board of Education has not taken the position that its practice is compelled by established law. Instead, it solicited public comments as part of a deliberative process to determine a policy regarding transgender and gender nonconforming students. Statement from the Bd. of Educ. of Frederick County (Feb. 27, 2017), <http://www.fcps.org/about/news/980783/statement-from-the-board-of-education-of-frederick-county>. J.V.K. intends to show that relief sought by Plaintiffs is not only unwarranted, but also,

if granted, relief requested by Plaintiffs would violate the rights of J.V.K. under Title IX and the Equal Protection Clause. *See* Proposed Mot. to Dismiss at 12-17 (attached as **Exhibit B**).

Second, the Board of Education's charge is to represent the interests of all students—including Plaintiff Mary Smith—whereas J.V.K. is representing the interests and priorities particular to himself. To the extent that the J.V.K.'s interests currently align with the Board of Education's interest in maintaining its policies, their interests are not guaranteed to align in the future. The Board of Education, whose personnel could change, might alter, abandon, or reverse its current position.

More specifically, the interests of J.V.K. are more parochial or personal than the position of the Board of Education in support of a general policy. *See In re Sierra Club*, 945 F.2d at 780 (reversing denial of intervention as of right where proposed intervenor had differing interests because, unlike the government agency party, intervenor did not need to consider interests of everyone in the state). A ruling in Plaintiffs' favor would directly affect J.V.K. in a personal and immediate way: he would be barred from using the boys' restrooms, which for him would be devastating, humiliating, and stigmatizing. And he would return to feeling unsafe at school without having policies in place that he could rely on. Thus, J.V.K. faces real and personal consequences in this case. He will be disadvantaged if Plaintiffs obtain the relief they seek, and that disadvantage is not the same as that faced by the Board of Education. These are precisely the types of interests that are intended to be protected through Rule 24.

**B. J.V.K. ALSO MEETS THE STANDARD FOR PERMISSIVE INTERVENTION.**

Even if J.V.K. did not meet the standard for intervention as a matter of right, permissive intervention under Rule 24(b)(1)(B) would be warranted. When considering whether to exercise discretion to allow permissive intervention, courts consider whether: (1) the motion was timely;

(2) the movant's claims or defenses share a common question of law or fact with the main action; (3) independent grounds exists for subject matter jurisdiction; and (4) intervention will delay or prejudice the adjudication of the original parties' rights. *See Shanghai Meihao Elec., Inc. v. Leviton Mfg. Co.*, 223 F.R.D. 386, 387 (D. Md. 2004).

**1. The motion of J.V.K. is timely, and intervention would not delay or prejudice existing parties.**

With respect to the first and fourth factors identified by this Court in *Shanghai*, this case is in its nascent stages, and intervention by J.V.K. will cause neither delay nor prejudice to the adjudication of any party's rights. J.V.K. is filing his own proposed motion to dismiss simultaneously with his motion to intervene, by the due date for the filing of the Board of Education's responsive pleading. Further, the Board of Education does not object to intervention by J.V.K. And there is no reason to believe that intervention by J.V.K. will materially delay discovery or any proceedings in this case.

**2. J.V.K.'s defenses in this case share common issues of law and fact with the main action.**

Plaintiffs challenge the legality of the Policies that J.V.K. seek to maintain. The legal issues in this case are whether those Policies violate the Constitution or state law as Plaintiffs allege. And any factual presentations that J.V.K. would make would relate to those same legal issues.

Because resolution of Plaintiffs' claims will have a direct bearing on the day-to-day life of J.V.K. at TJ Senior High, it is appropriate that he have the opportunity to assert his defenses in this case. *Cf. Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (granting permissive intervention to current and prospective minority students in case challenging use of race the University's student admission process). Indeed, J.V.K. seeks to

intervene so that he can show that relief requested by Plaintiffs would violate his rights under Title IX and the Equal Protection Clause. *See* Ex. B at 12-17. Accordingly, granting the motion to intervene might avoid a multiplicity of suits by transgender or gender non-conforming students whose rights would be abridged by any relief granted to Plaintiffs in this case. *Cf. United States v. Cont'l Cas. Co.*, No. ELH-16-3047, 2017 U.S. Dist. LEXIS 135691, at \*14-15 (D. Md. Aug. 24, 2017).

**3. Intervention may not be denied based on grounds of jurisdiction.**

J.V.K. merely seeks to intervene as a defendant in this case, which is predicated on federal question jurisdiction rather than diversity of citizenship. Accordingly, there is no basis to exclude him on grounds of jurisdiction. *See, e.g.*, 6-24 Moore's Federal Practice – Civil § 24.22[2]; *Conseco v. Wells Fargo Fin. Leasing, Inc.*, 204 F. Supp. 2d 1186, 1191-94 (S.D. Iowa 2002) (collecting and analyzing authorities).

**III. CONCLUSION**

J.V.K. has personal interests in defending the policies and practices challenged by Plaintiffs. He is a transgender student who has lived through the wrongs that the policies are intended to address—and are addressing—which allows him to provide a distinctly personal perspective in defense of the policies. While he applauds the efforts of the Board of Education in implementing these policies, J.V.K. has the most at stake. In that sense, J.V.K. seeks leave to intervene so that his voice may be heard, and his interests protected, as one of the transgender students in Frederick County who is likely to be most directly affected by the outcome of this case. J.V.K. respectfully requests that this Court grant him leave to intervene and champion his own defense.

Date: October 20, 2017

Respectfully submitted,

/s/

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