UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PETER VLAMING, Plaintiff, v. WEST POINT SCHOOL BOARD; LAURA ABEL, in her official capacity as Division Superintendent; JONATHAN HOCHMAN, in his official capacity as Principal of West Point High School; and SUZANNE AUNSPACH, or her successor in office, in her official capacity as Assistant Principal of West Point High School, Defendants.	)	Civil Action No. 3:19-cv-00773 Judge John A. Gibney Jr.

MEMORANDUM OF LAW IN SUPPORT
OF JOHN DOE'S MOTION TO INTERVENE

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John Doe (hereinafter "John" or "Doe"), the student at the center of Vlaming's complaint, seeks by his next friend Jane Roe to intervene in this case to safeguard both his own right and the right of all students in West Point Public Schools, including transgender students and students with disabilities, to equal and respectful treatment by school personnel. John has a personal interest in ensuring that he will have access to fair and equal educational opportunities at West Point High School and a school environment free from discrimination and harassment on the basis of his transgender identity and disability. John does not seek to present any additional requests for relief against Vlaming or the School Board, only to defend against claims already in the case.

The Court should permit John to intervene as of right, pursuant to Federal Rule of Civil Procedure 24(a)(2), or alternatively, grant John permissive intervention per Federal Rule of Civil Procedure 24(b). Although John appreciates Defendants' good-faith efforts to provide a supportive educational environment for him and other transgender students, his significant legal interests in this matter do not fully align with and would not be adequately represented by the current parties. Specifically, Defendants are not likely to present to the Court the full range of arguments that John intends to raise or the evidence he would introduce should this matter proceed to discovery. And even if John's interests and those of the existing defendants were fully aligned, John should be granted permissive intervention because the defenses John intends to raise share common questions of law and fact with the underlying case.

Finally, John's motion is timely and will cause no prejudice to any parties. This case is still in a very early posture—dispositive motion practice and responsive pleadings have been deferred pending resolution of the Plaintiff's motion to remand and are unlikely to be briefed until next year. In addition, both parties are likely to seek discovery from John and his family members if this case proceeds into discovery. Given that motions to dismiss or other dispositive motions

are still considerably far in the future and John's participation will not materially add to the complexity of discovery, there is no prejudice to the existing parties from granting the motion.

FACTUAL BACKGROUND

John Doe is a young transgender boy and has been living as male for more than one year. *See* Declaration of John Doe in Support of Motion to Intervene and Motion to Proceed Under a Pseudonym ("Doe Intervention Decl.") at ¶¶ 1-6. Over that time, he has legally changed his name and corrected his identity documents to accurately reflect that he is male. (*Id.* ¶ 7.)

John began his freshman year at West Point High School ("West Point") in fall 2018, a few months after coming out as transgender to his family and friends. (*Id.* ¶¶ 3, 9.) John decided to continue taking French, a subject he began studying with Vlaming in seventh grade, to fulfill his foreign language requirement. (*Id.* ¶ 8.) Before the start of the school year, John's parent spoke with Vlaming about his transition and requested that Vlaming use John's male name and male pronouns when referring to him. (*Id.* ¶ 8.)

On several occasions throughout the fall semester, Vlaming referred to John using the incorrect pronouns or the feminine versions of French words when speaking to or about John. (*Id.* ¶¶ 12–13.) When Vlaming was not using female pronouns to refer to John, he refused to use pronouns at all to refer to him. (*Id*. ¶ 12.) He referred to John using his first name to avoid using "he" or "him." (*Id*. ¶ 12.) This was different from the way Vlaming referred to and addressed other students in his class, thereby singling out Doe for different treatment. (*Id*. ¶ 12.) John also came to learn that Vlaming had referred to him using the female gender and/or a female name on at least three different occasions to other students, including at times when John was absent. (*Id*. ¶ 13.)

After Vlaming consistently refused to follow John's request that Vlaming treat him as male, John met with Vlaming to express his discomfort with being singled out by Vlaming's

conduct. (*Id.* ¶ 14.) During this meeting, Vlaming told Doe he was "mourning the girl" John "used to be." (*Id.*) When John's parent spoke with Vlaming on the phone later that evening, Vlaming told the parent that he was refusing to acknowledge Doe as male because of his religious beliefs. (*Id.* ¶ 15)

Being singled out by one of his teachers in this manner, including in class and in the presence of other students, caused John significant emotional strain and distress. (*Id.* ¶ 16.) John began to dread attending Vlaming's class. (*Id.*) John worried that other students would observe Vlaming's behavior and conclude that it would be acceptable to refer to John as female as well. (*Id.*) The strain and mental fatigue made it difficult for John to focus on school because he was so anxious and worried about Vlaming's behavior. (*Id.*)

Throughout the Fall 2018 semester, John spoke with several administrators at West Point about his treatment by Vlaming. (*Id.* ¶ 17.)

These tensions ultimately led to John's withdrawal from Vlaming's class. On October 31, 2018, John participated in an activity in Vlaming's class that required him to use virtual reality goggles. (*Id.* ¶ 18.) John was paired with a student who did not know John is transgender. (*Id.*) As John walked around the school hallway with the goggles, Vlaming called out, "Don't let her hit the wall!" in reference to John. (*Id.*) John was embarrassed and upset, both because of the continued pattern of Vlaming's conduct and its effect of identifying him as transgender to other students, including his partner for the exercise. (*Id.*) After class, John approached Vlaming to express that he was upset by this continued pattern of conduct. (*Id.* ¶ 19.) Vlaming laughed and told John that was "a touchy subject." (*Id.*) This experience upset John, and he did not return to Vlaming's class after that day. (*Id.*)

John's experience in Vlaming's class led to a difficult year for Doe. (*Id.* ¶ 20.) Doe's grades and self-esteem both suffered. (*Id.*) He has faced bullying and threats from some other students at school and online, which attacks escalated in the wake of Vlaming's dismissal. (*Id.*) Despite these challenges, West Point's anti-discrimination policies, and school administrators' and teachers' willingness to enforce those policies, have helped and continue to help make John feel more safe and welcome at school. (*Id.* ¶ 22.) John does not believe that he can risk going through another school year like the one he just experienced. (*Id.* ¶ 23.) He considers West Point's anti-discrimination and anti-harassment policies, and their application by teachers and administrators at his school, to be critical to his well-being and academic success. (*Id.* ¶ 24.)

According to the Plaintiff's Complaint, the West Point School Board suspended Vlaming from his teaching position on November 1, 2018. Complaint, ECF No. 1-2 at ¶ 109. Following an administrative investigation and a hearing, the Board dismissed Vlaming from his teaching position. Complaint, ECF No. 1-2 at ¶¶ 127-128.

Vlaming filed suit against the West Point School Board in the Circuit Court for the County of King William, Virginia on or around September 27, 2019. Notice of Removal, ECF No. 1 (Oct. 22, 2019), at 1 ¶ 1-2. The Complaint seeks, *inter alia*, a judicial declaration that the School Board's policies protecting students from harassment and discrimination on the basis of gender identity are facially unlawful and that it lacked authority to adopt and enforce those policies. *See* Complaint, ECF No. 1-2 at ¶¶ 293-298. Vlaming also seeks declarations that that under the Virginia State Constitution, under various theories, the School Board's policies are unconstitutional as applied to his conduct towards Doe. *See* Complaint, ECF No. 1-2 at ¶¶ 213-283.

The Defendants filed a notice of removal in this Court on October 22, 2019. *See* Notice of Removal, ECF No. 1. On October 29, 2019, the Court ordered a briefing schedule on an

anticipated motion to remand by Vlaming, which would be fully briefed no later than December 11, 2019. *See* Consent Order Extending Time to Answer or Otherwise Respond to Complaint and Scheduling Order Regarding Plaintiff's Motion for Remand, ECF No. 3 (Oct. 29, 2019). The Court's October 29, 2019 Order extends the time for the Defendants to Answer or otherwise respond to the Complaint until a date set by the Court after resolving the anticipated motion to remand. *Id*.

LEGAL STANDARD

Federal Rule of Civil Procedure 24 establishes two avenues for a party to intervene in pending litigation: intervention of right or permissive intervention. Fed. R. Civ. P. 24 (a)–(b). The Fourth Circuit has recognized that "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 803 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

ARGUMENT

John readily satisfies the requirements for both intervention of right and permissive intervention and the Court should grant leave to intervene here.

I. DOE'S INTERVENTION IS TIMELY.

Whether intervention is of right or permissive, intervention must be timely under Federal Rule of Civil Procedure 24. *See Atkins v. State Bd. of Ed. of N.C.*, 418 F.2d 874, 876 (4th Cir. 1969). Whether a motion to intervene is timely is evaluated in light of the following factors: "(1) how far the suit has progressed; (2) the prejudice that delay might cause other parties; and (3) the reason for the tardiness in moving to intervene." *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 494 (M.D.N.C. 2017) (citing *Scardelletti v. Debarr*, 265 F.3d 195, 202 (4th

Cir. 2001), *rev'd on other grounds sub nom. Devlin v. Scardelletti*, 536 U.S. 1 (2002)) (internal quotation marks omitted).

Here, John diligently prepared and filed his intervention motion at a very early procedural stage in the case. The case was removed to this Court only roughly a month ago. Briefing on a motion to remand by Vlaming is just now commencing, and will not be concluded until mid-December. Under the Court's October 29, 2019 scheduling order, any responsive pleadings or dispositive motions in this case will likely not be filed for several weeks, if not months. *See, e.g.*, *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park and Planning Comm'n*, 303 F.R.D. 266, 270 n.4 (D. Md. 2014) (noting that there was no dispute intervention was timely where proposed intervenors "moved to intervene shortly after Defendant answered the complaint and prior to any discovery"). Given that responsive motions or pleadings are still far in the distance and discovery has not yet begun, John's intervention in the case will have no effect on the schedule and will not prejudice any party to the case. *See, e.g., Wright v. Krispy Kreme Doughnuts, Inc.*, 231 F.R.D. 475, 478 (M.D.N.C. 2005) (holding that intervention would not be "disruptive or prejudicial to the case's progress" where the motion to intervene was filed nine months after initial filing of the Complaint, but "the parties present[ed] no argument that [the] case [was] close to any resolution"). Thus, the motion is plainly timely. Indeed, courts within this circuit routinely grant intervention to parties who seek to intervene much later in the litigation. *See, e.g.*, *id.*; *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, 323 F.R.D. 553, 557 (E.D. Va. 2018) (allowing intervention even where parties had already engaged in "extensive fact discovery, with the close of expert discovery and summary judgment soon approaching").

II. DOE IS ENTITLED TO INTERVENE IN THIS ACTION AS OF RIGHT.

To intervene as a matter of right, a proposed intervenor must show "(1) an interest in the subject matter of the action, (2) disposition of the action would impair or impede the movant's

ability to protect that interest, and (3) that interest is not adequately represented by the existing parties." *Newport News Shipbuilding and Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 120 (4th Cir. 1981) (citing Fed. R. Civ. P. 24(a)(2); other citations omitted). John meets each of these requirements.

First, John has "an interest in the subject matter" of this case. *Id.* Courts in this district have found a sufficient interest where a challenge to the interpretation of a statutory scheme at issue in the proceeding would affect the statute or policy's application to the proposed intervenor. *See Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510, 514 (E.D. Va. 2007). Here, Vlaming's challenge to the School Board's anti-discrimination and anti-harassment policies will affect Doe's interests in the most direct way. The policies that Vlaming's Complaint challenges serve to protect John and similarly situated students from unequal treatment by students, teachers, and other district personnel. *See, e.g.*, *Grutter v. Bolinger*, 188 F.3d 394, 397 (6th Cir. 1999) (allowing beneficiaries of race-conscious admissions policies to intervene in suit challenging policies where proposed intervenors had a "specific interest in the subject matter of [the] case, namely their interest in gaining admission to the University").

Indeed, courts in other circuits have encountered this precise situation—a request by a transgender student to intervene to preserve their educational institution's policies protecting them from discrimination or harassment against claims that those policies are unlawful—and held such interests to constitute a sufficient basis for intervention under Rule 24. S*ee Bd. of Educ. of the Highland Local Sch. Dist.* v. *U.S. Dep't of Educ.* , No. 2:16-CV-524, 2016 WL 4269080 (S.D. Ohio Aug. 15, 2016) (allowing intervention of transgender student where student's right to be free from discrimination under Title IX was at issue); *Privacy Matters v. U.S. Dep't of Educ.*, No. 16-cv-3015, 2016 WL 6436658 (D. Minn. Oct. 27, 2016) (granting intervention where transgender

student sought to defend district policy that allowed students to use private facilities, such as locker rooms and restrooms, that corresponded to their gender identity); *see also Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 334 (E.D. Pa. 2017) (noting that LGBT youth advocacy group was allowed to intervene as defendant in case challenging school district policy allowing students to use facilities corresponding to their gender identity).

Meriwether v. Trustees of Shawnee State University is especially instructive. In *Meriwether*, the plaintiff was a professor who had singled out a female transgender student in class by refusing to use honorifics and pronouns that aligned with her gender identity, ultimately leading the university to discipline the professor by issuing him a formal warning letter pursuant to the university's nondiscrimination policy. No. 1:18-cv-753, 2019 WL 2052110, at *4, *9 (S.D. Ohio May 9, 2019). The court permitted the transgender student whose complaint gave rise to the lawsuit to intervene in the case as a defendant, reasoning that the student "ha[d] a substantial interest in seeing that the [anti-discrimination] policy . . . [was] not struck down in the face of [plaintiff's] constitutional challenges." *Id.* The same situation is presented here: like the student in *Meriwether*, John has a significant interest in ensuring that this Court upholds the anti-discrimination and anti-harassment policies in the face of Vlaming's facial and as-applied challenges.

Second, denying John's request to intervene would impair his ability to protect his interests. If Vlaming's claims were successful, John would face the prospect of a court order either invalidating district policies that currently protect John's rights to equal educational opportunities, or dramatically limiting Defendants' ability to apply those policies in a meaningful manner. Such an outcome would leave John exposed to harassment and discrimination by other teachers, students, and district personnel without meaningful recourse. Further, a victory for Vlaming would

inhibit John from pursuing in a future case his own claims that conduct directed at him at school as a transgender boy violates Title IX, the Equal Protection Clause, or other applicable local, state, or federal anti-discrimination laws. While John appreciates steps taken by teachers and the school administration, as well as the fact that many of his fellow students have been supportive or accepting, he continues to face bullying at school. Doe Decl. ¶ 21. The legal theories presented in Vlaming's Complaint, if accepted in whole or in part, could deprive John of his ability to seek remedies arising out of such conduct. Thus, John satisfies the impairment requirement.

Fourth, although John would in many respects be aligned with the Defendants, the School Board will not fully or adequately represent John's interest in the case. "The burden on the applicant of demonstrating a lack of adequate representation is relatively minimal." *Nish & Goodwill Servs., Inc. v. Cohen*, 191 F.R.D. 94, 97 (E.D. Va. 2000). That minimal burden is satisfied here. The School Board is Vlaming's former employer and, as a result, has significantly different interests in this case than John. Seeking to limit its legal liability, the School Board will defend its authority to enforce anti-discrimination policies like the one at issue in this case. But that same interest—limiting its legal liability—also gives the School Board an incentive to limit the extent of its affirmative legal obligations to maintain and enforce anti-discrimination and anti-harassment policies that protect transgender students. In contrast, John intends to argue that disparate treatment of students solely because they are transgender is barred by Title IX, the Equal Protection Clause, and disability discrimination laws. This issue is relevant to whether the School Board has articulated a constitutionally sufficient basis for its policies. The School Board, however, may be reluctant to advance these arguments, or to advance them as aggressively, given that it would be the defendant in any Title IX, Equal Protection Clause, or disability discrimination claim concerning the treatment of transgender students.

In addition, Vlaming's Complaint includes claims that the School Board's policies are facially unlawful under Virginia State Law, including under the Dillon Rule and Va. Code Ann. § 15.2-965. *See* Complaint, ECF No, 1–3 at 36 ¶¶ 293–99. While John anticipates that the School Board will oppose these arguments on state-law grounds, John also intends to argue that the United States Constitution does not permit application of these authorities to authorize school staff or faculty to subject transgender students to discrimination or harassment. The School Board, as a Virginia governmental entity, may not have an interest in taking the position that federal law preempts Virginia state law in this manner.

At a minimum, the parties' arguments are likely to have a different focus, given that the School Board is a public entity and the proposed intervenor is not. The Fourth Circuit has consistently held that the possibility that a private intervenor may make different arguments from a governmental litigant is sufficient to establish inadequate representation. *See Feller*, 802 F.2d at 730 (finding the Department of Labor would provide inadequate representation in part because "the government's position is defined by the public interest," not the interests of the intervenors); *Nish & Goodwill*, 191 F.R.D. at 98 (holding intervention appropriate where the "government interests in the case [were] not identical in many respects" to the interests of the intervenors and the government was "likely to take a different approach to the litigation" than intervenors). Here, the School Board will likely emphasize a public school's right to control the conduct of its employees. Doe intends to make that argument as well, but he would also emphasize the specific harms of Vlaming's conduct to transgender students—a perspective he is ideally situated to offer—as well as emphasize the legal protections for transgender students and students with a disability under federal law. Thus, John must be permitted to intervene so that he can protect his unique interests, interests that the current parties cannot and will not adequately represent.

III. IN THE ALTERNATIVE, DOE SHOULD BE ALLOWED TO INTERVENE PERMISSIVELY.

Pursuant to Federal Rule of Civil Procedure 24(b), the Court also "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)(B). Permissive intervention lies in the sound discretion of the trial court, and courts in this district have exercised their discretion liberally to grant permissive intervention. *See Students for Fair Admissions, Inc.*, 319 F.R.D. at 494; *see also Aziz v. Trump*, 231 F. Supp. 3d 23, 28–9 (E.D. Va. Feb. 3, 2017) (finding that proposed intervenors met standard for permissive intervention where they shared "many questions of law and fact with the original petitioners" and filed their request to intervene early in the proceedings).

John has defenses that share common questions of law and fact with the existing action. For example, John intends to argue that the Virginia State Constitution and state law permit the School Board's policy as a matter of law. Likewise, if this case proceeds to discovery, he intends to argue, as a factual matter, that the conduct engaged in by Vlaming caused meaningful harm to his ability to access an education. These arguments will address core questions of law and fact in this case.

John's participation would also promote efficiency and judicial economy. John believes that this case should be resolved on the pleadings without discovery. However, if this case proceeds to discovery, there is a strong probability that either party will subpoena John, and a reasonable probability that they will subpoena John's parent, given that both are involved in important allegations in the Complaint. Permitting John to intervene will not delay the case because he will likely be required to participate even without intervention. Rather, it will allow him to advocate for his own interests instead of being a bystander as important questions affecting his rights are determined by the Court. Therefore, the intervention should be granted.

IV. THE COURT SHOULD PERMIT DOE TO MOVE TO DISMISS

Federal Rule of Civil Procedure 14(c) states that a motion to intervene must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." In this case, where John is moving to intervene many weeks (and possibly months) *before* responsive pleadings or motions are due from the underlying Defendants in the case, application of this rule would lead to John submitting an Answer long before it would be required of the existing parties. Nonetheless, to ensure technical compliance with this requirement, John is lodging a conditional Answer with the Court as an exhibit to this Motion. However, it is presently John's intention to join the School Board defendants in filing a motion to dismiss. If the Court grants this motion to intervene, John respectfully requests that he be afforded the opportunity to move to dismiss Vlaming's Complaint under Federal Rule of Civil Procedure 12(b)(6) before his Answer is filed on the docket, and, if responsive pleadings in this case are filed by the Defendants, that John be afforded the opportunity to substitute and file an Answer at that time.

CONCLUSION

WHEREFORE, for the reasons stated above, John Doe, by his next friend Jane Roe, respectfully requests that this Court to grant his intervention.

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Dated: November 25, 2019

Respectfully submitted,

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/s/ Colleen M. Quinn, Esq.

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CERTIFICATE OF SERVICE

I hereby certify on the 25th day of November, 2019, I electronically filed the foregoing John Doe's Motion to Intervene, using the Court's CM/ECF system, which will send a notification of such filing (NEF) to all attorneys of record:

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