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SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN
APPEAL NO. 2020AP1032

JOHN DOE 1, JANE DOE 1, JANE DOE 3, and JANE DOE 4,
Plaintiffs-Appellants-Petitioners,

JOHN DOE 5 and JANE DOE 5,
Plaintiffs-Appellants,

JOHN DOE 6, JANE DOE 6, JOHN DOE 8 and JANE DOE 8,
Plaintiffs,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
Defendant-Respondent,

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL and GENDER SEXUALITY ALLIANCE OF ROBERT M. LAFOLLETTE HIGH SCHOOL,
Intervenors-Defendants-Respondents.

On appeal from a non-final order of the Dane County Circuit Court
Case No. 20-CV-454
The Honorable Frank D. Remington, Presiding

AMICUS BRIEF OF MADISON TEACHERS INC. IN OPPOSITION TO PETITIONERS' REQUEST FOR INTERIM INJUNCTIVE RELIEF

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INTRODUCTION

Even though this lawsuit seeking declaratory and injunctive relief was filed over two years ago (R.1), procedurally it is in the very early stages. As the Joint Brief of Defendants-Respondents (hereinafter, "MMSD's brief") details at pages 3-7 and 28-30,[1] the parties and courts have been caught up in the issue of Petitioners' wish to keep their identities hidden from everyone--including the courts--and Petitioners' efforts to expand an injunction pending appeal. Most importantly, because of Petitioners' continuing complete anonymity, MMSD and the courts have been unable to determine whether a justiciable controversy exists, including whether Petitioners have children who are implicated in any way by the guidance they challenge.

The parties have also been prevented from developing a record of relevant facts, such as what if any communication has occurred between the Petitioners and their children, and the Petitioners and various MMSD employees on this topic; and whether, how and when MMSD would require the guidance to be followed, and by whom. To date, there simply is no factual record. To date, the circuit court has neither granted nor denied Petitioners' motion for temporary injunction pursuant to Wis. Stat. § 813.02. Instead, that motion, like discovery, is in abeyance while Petitioners take the appeal on their request to pursue their claims anonymously.

Because of the lack of an adequate factual record, and because the relief sought is both legally unfounded and unworkable, this Court should

[1] See also Supp.Appx.1-3 summarizing the procedural history.

reject the Petitioners' requests for further injunctive relief. Instead, all that the Court should address at this time is whether or not the Petitioners may proceed anonymously.

I. This Court should deny further interim injunctive relief for lack of a factual record.

A. Identification of Petitioners is needed to determine if there is a justiciable controversy.

Identification of the Petitioners, and evidence that they are parents of MMSD students, is necessary for the circuit court, or any, to determine whether it can properly exercise jurisdiction over Petitioners' request for a declaratory judgment. Whether Petitioners have alleged a justiciable controversy is an important threshold question because before a Wisconsin court may exercise its jurisdiction to grant a declaratory judgment like the one Petitioners seek, "a justiciable controversy must exist." *Fabick v. Evers,* 2021 WI 28, ¶ 9, 396 Wis. 2d 231 (citing *Loy v. Bunderson,* 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982)).

> A controversy is justiciable when four conditions are met: (1) "A controversy in which a claim of right is asserted against one who has an interest in contesting it"; (2) "The controversy must be between persons whose interests are adverse"; (3) "The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest"; and (4) "The issue involved in the controversy must be ripe for judicial determination."

Id. All four conditions must be satisfied. *Id.* Without knowing who Petitioners are, and evidence that they are parents of MMSD students, how can any court determine whether ***any*** of these conditions are met? Unless they are all met, it is improper for a court to entertain the action. *See Olson v. Town of Cottage Grove,* 2008 WI 51, ¶ 29, 309 Wis. 2d 365.

B. Discovery is needed to consider more expansive interim relief.

Likewise, factual development is also necessary before a court could consider granting the kind of interim injunctive relief Petitioners seek. This Court knows well the showing a moving party must make to obtain a temporary injunction:

1. A likelihood of success on the merits;
2. A likelihood of irreparable harm absent temporary injunction;
3. A temporary injunction is needed to preserve the status quo;
4. There is no other adequate remedy at law.

Milwaukee Deputy Sheriffs' Ass'n. v. Milwaukee County, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644.

Without knowing whether Petitioners' children have expressed a desire to be referred to at school by a name or gender identity other than that assigned at birth, and if so, how the students' parents were involved in the discussion, a court cannot assess the likelihood of irreparable harm to Petitioners. The potential harms identified by the Petitioners are nothing other than uncertain and speculative if none of Petitioners' children have expressed such a desire, at least without knowing which MMSD employees and under what circumstances (if any) the employees would be required to and responsible for applying MMSD's guidance and what other resources they would access should one of the Petitioners' children express such wishes in the future. Without knowing whether Petitioners have communicated with relevant MMSD staff about their children's names and gender identities and how they wish for MMSD employees to

interact with those students on those topics, no court could determine that there is no other adequate remedy—at law or otherwise.[2]

Before these and other facts could be developed,[3] Petitioners chose to file an interlocutory appeal on the anonymity issue. (R.84) In conjunction with that appeal, they sought and obtained from the circuit court an injunction pending appeal, pursuant to Wis. Stat. § 808.07(2). (R.89 and App.53-55) Their efforts to expand the Wis. Stat. § 808.07(2) injunction at the court of appeals and at this Court having failed (Supp.Appx.42-47 and 48-58), and after the court of appeals rejected the merits of their interlocutory appeal on the anonymity issue (App.2), they have now brought their grievances (again) to this Court.

Although the § 808.07(2) injunction is not as expansive as Petitioners wanted, once this Court rules, the interlocutory appeal will have concluded and the matter will be returned to the circuit court. This Court should not rule on Petitioners' request to review the injunction pending

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[2] As for the status quo, no factual development is necessary as the parties appear to agree that MMSD's guidance has been in place since April 2018—nearly two years before Petitioners brought their lawsuit. The injunctive relief Petitioners seek is to alter it, not preserve it, through a court order imposing an affirmative duty on MMSD employees to out gender nonconforming students to their parents. The likelihood of success on the merits of the claim that such a duty already exists is well-addressed in MMSD's brief, and also discussed in Section II.A., below.

[3] Petitioners claim that parents are entitled to access to "pupil records," and thus, MMSD's direction to keep a form in a staff member's "confidential file" is an evasion and violation of parental right to pupil records access under Wis. Stat. § 118.125. (Pet. Br. at 10, 20) Petitioners are mistaken about the reach of Section 118.125. This statute entitles parents access to the "pupil's **progress** records," a different category of records than "pupil records." *Compare* Wis. Stat. § 118.125(2)(a) (emphasis added) *with* Wis. Stat. §§ 118.125(1)(c) and (d). Parents are not entitled to view *all* "pupil records." The factual record should be developed on how the form may be used, to permit the court to determine whether it qualifies as a pupil record at all, and if so, whether one that may be or must be available to parents.

appeal, for the moment that ruling is made, the issue will be moot: the appeal will be over and the dispute returned to circuit court for further proceedings. Moreover, upon remand, the parties should have the opportunity to develop a factual record and obtain a ruling on the currently stayed motion for temporary injunction. This Court should not jump the gun to take up the motion for temporary injunction before the record is developed and the circuit court has ruled on the motion.

Finally, it bears highlighting that the present interlocutory appeal is on the issue of anonymity, and the circuit court stayed its order on anonymity pending the appeal. (R.91; Supp.Appx.52) Logically, that is the only relief pending appeal to which Petitioners are entitled under Wis. Stat. § 808.07(2). As the court of appeals noted, the expanded injunctive relief Petitioners seek pending the appeal goes well beyond the issue on appeal—anonymity—and is unrelated to the relief they could possibly obtain on that issue. (Supp.Appx.53) Rather, the expanded injunctive relief Petitioners seek pending their appeal bears directly on the merits of their challenge--merits their own strategic choices have prevented the circuit court from reaching to date, even on a preliminary basis in the context of their motion for temporary injunction. The circuit court did not erroneously exercise its discretion in declining to grant an injunction pending appeal that went far beyond any relief Petitioners could secure through their appeal. If anything, the circuit court exceeded its authority under Wis. Stat. § 808.07(2) by granting interim injunction on the merits when the appeal is only on the anonymity issue and pending the appeal, the Petitioners' anonymity is preserved.

II. The relief sought by Petitioners is for the legislative process and at a practical level would be unworkable.

A. Teachers have no affirmative duty to "out" students.

Petitioners ask this Court for an interim order directing teachers and other MMSD employees to "out" to their parents those students who express a wish to be referred to at school by a name or gender identity other than that assigned at birth. As aptly addressed in MMSD's brief, they have pointed to no statute, Constitutional provision, or other law that provides for that affirmative duty. There is none. Consequently, the guidance at issue does not compromise any such duty. Petitioners ask this Court to create such a duty out of whole cloth, using the MMSD guidance as a springboard. The Court must not do so. Such a policy decision is squarely within the purview of the legislature.

Should the legislature wish to take up and pass a bill creating the kind of duty sought here, it is certainly capable of doing so. For instance, in 2013, an early "Don't Say Gay" bill was introduced in Tennessee. That bill, among other things, would have classified information "inconsistent with natural human reproduction" as "inappropriate" for students through eighth grade and prohibited schools from providing it. It also would have required certain school employees to report to parents if the employees advise a student in connection with activities or potential activities "injurious to the physical or mental health and well-being of the student." Tenn. HB 1332/SB 234 (2013). The intent of this language was

widely recognized to impose an affirmative duty on school employees to out gay students to their parents.[4] The bill was never enacted.

Another "Don't Say Gay" bill was recently passed by the Florida Legislature. Fl. HB 1557 (2022). This bill has now been presented to Florida's Governor for consideration. Like Tennessee's failed 2013 bill, Florida's bill would constrain schools from instruction on gender and sexuality. It would require school boards to "adopt procedures for notifying a student's parent if there is a change in the student's services or monitoring related to the student's mental, emotional, or physical health or well-being," would "require school district personnel to encourage a student to discuss issues relating to his or her well-being with his or her parent or to facilitate discussion of the issue with the parent," and would bar a school district from adopting procedures "that encourage or have the effect of encouraging a student to withhold from a parent" information about the student's "mental, emotional, or physical health or well-being, or a change in related services or monitoring." Florida's bill has received national attention, and although the language itself is vague and could be read to require reports to parents on a wide variety of topics, it is widely recognized to be aimed at requiring school employees to report to parents any students who question their gender identity, and to forbid those employees from affirming a deviation from the gender assigned at birth.[5]

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[4] *See* https://www.usatoday.com/story/news/nation/2013/01/31/tennessee-bill-revives-dont-say-gay-fight/1879637/; https://www.aclu.org/press-releases/harsher-version-tennessee-dont-say-gay-bill-re-introduced; https://www.huffpost.com/entry/tennessee-dont-say-gay-bill_n_2582390 (all links last visited 3/24/22).

[5] *See* https://www.nytimes.com/2022/03/23/us/what-does-dont-say-gay-actually-say.html; https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html;

School districts accused of violating these vague prohibitions and mandates risk being sued by disgruntled parents, including for injunctive relief, damages, and attorney's fees. A similar bill is also pending before the Georgia Legislature. *See* Georgia SB 613 (2022).

The fact that legislatures around the country are seeking to create a ***statutory*** duty to out LGBTQ+ students to their parents demonstrates that such a duty does not already exist under the Constitution, or otherwise.

B. The guidance does not interfere with parents' rights; a finding that it does will lead to impossible situations.

To be clear, the MMSD guidance document (1) encourages and supports parental involvement in supporting LGBTQ+ youth and recognizes that family support is essential to their physical and mental health outcomes; and (2) encourages respect for student and family wishes when it comes to who and what to share with others with respect to the student's preferred name and gender identity. (Supp.Appx.21-22) It ***does not***, and ***cannot*** be read in any way to, prevent parents from observing their children's behavior, moods, and activities; talking to their children; providing religious education to their children; choosing where their children live and go to school; requiring their children to receive medical care and counseling; monitoring their children's communications on computers, via text message and other messaging platforms, in social media, and in person; choosing who their children may socialize with; and deciding what their children may do in their free time. The world is

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https://abcnews.go.com/US/floridas-controversial-dont-gay-bill-inside-proposed-law/story?id=83525901; (all links last visited 3/24/22).

complex and presents many challenges to youth, regardless of their gender identity, sexual orientation, race, or class. Parents must do all of these things if they hope to raise healthy people. They must be involved in their children's lives.

If parents fail to be involved in their children's lives, there is no affirmative obligation for others, such as teachers, to clue parents in on what they may be missing. More specifically, teachers have no affirmative duty to report a student's deviations from their birth name or gender identity to their parents. The MMSD guidance simply presents no restraint on parents at all.

Petitioners characterize a theoretical wish by one of their children to be referred to by a name or gender other than that assigned at birth as a health care issue, claim that it calls for the mental health diagnosis of "gender dysphoria," and call an MMSD employee's theoretical respect for the student's request a "treatment decision."[6] (Pet. Br. at 11-12, 18-21, 23-26) They argue that consequently, they have a legal right to that information. There is no evidence in this record that such a wish should properly be characterized as a health care issue or diagnosed as gender dysphoria, or that an MMSD employee's support should be considered a treatment decision. If a fact specific inquiry supported such conclusions, then it is important to note that a parent's right to health care information about their minor child is not absolute.

The Wisconsin Legislature has explicitly recognized that minors have a right to keep certain health care records from their parents. Under

[6] This claim is contested, as discussed in MMSD's brief at 45-49.

Wis. Stat. § 51.30(5)(b)1., minors aged fourteen or older may direct that their treatment records for mental illness, developmental disabilities, alcoholism, or drug dependence ***not*** be shared with their parents or legal guardians. *See also* the discussion of *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980) in MMSD's brief at 44.

A finding that the guidance causes MMSD employees to interfere with parental rights by failing to tell parents when a student expresses a wish to be referred to by a different name or gender than that assigned at birth will lead to absurd results. When Patricia or Patrick asks to be called "Pat" and Pat remarks during class that "gender is a social construct" (a theory in feminism and sociology) must a teacher inform Pat's parents? What about if an educational assistant hears one student refer to Chris, another student, as "them" (a gender-neutral singular pronoun), and Chris wears clothing that both boys and girls wear (such as t-shirts and jeans). Does the employee have a duty to alert Chris's parents? What is the duty of a principal who notices that Jamie, a student new to Madison who often wears dresses, also on occasion chooses to wear a bow tie, trousers and suspenders—perhaps signaling some gender fluidity? Is the answer different if the principal sees this same student attend a meeting of the Gender Equity Association at Memorial High School? Is there an obligation for a teacher to inform 5-year-old Sarah's parents when she announces, "I'm going to be BATMAN today!"? What is next down this slope of parents' Constitutional rights to control what happens at school: 15 different parent-approved curricula for 25 different students at once? Cameras in the classroom? Only locally grown, organic produce in the cafeteria?

The Court should not wade into this morass. Certainly not on an interlocutory appeal of a circuit court's limited denial of Petitioners' request to proceed while hiding their identities from everyone—not just the public, but from opposing parties, opposing counsel and judges, too. Certainly not in the absence of any factual record to apply to novel legal arguments that no court has ever considered in similar circumstances before. Certainly not where a few anonymous people claiming to have children in MMSD schools seek class-type remedies affecting people who are not involved in this litigation and may not even be aware of it. Courts are designed to address specific disputes between specific parties on a case-by-case basis. It is the Legislature's purview to sculpt public policy aimed at addressing circumstances that involve the conflicting or differing interests of many people within a community. It is not the Court's proper role.

CONCLUSION

The Court should address the anonymity issue, decline to address Petitioners' request for further injunctive relief, and remand this case to the circuit court for further proceedings.

Respectfully submitted this 25th day of March 2022.

PINES BACH LLP

Electronically signed by: Tamara B. Packard

_____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b),(bm), and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,965 words.

Electronically signed by: Tamara B. Packard

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Electronically signed by: Tamara B. Packard

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