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COURT OF APPEALS

No. 2022AP2042

IN THE WISCONSIN COURT OF APPEALS
DISTRICT IV

JANE DOE 4,
Plaintiff-Appellant,

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 the Dane County Circuit Court, the Honorable
Judge Frank D. Remington, Presiding,
Case No. 2020-CV-454

BRIEF OF AMICI CURIAE PROFESSORS OF
EDUCATION ADMINISTRATION IN SUPPORT OF
DEFENDANT-RESPONDENT & INTERVENORS-
DEFENDANT-RESPONDENT

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INTRODUCTION AND STATEMENT OF INTEREST

Wisconsin public schools are subject to a range of state and federal laws, regulations, and guidance that prohibit discrimination based on sex and gender identity, and that require school leaders to cultivate inclusive, supportive school communities that promote each pupil's success and well-being. Schools that run afoul of these requirements face consequences ranging from administrative intervention to termination of funding to lawsuits for money damages and injunctive relief. Complying with these requirements is a complex task, requiring both professional judgment and nuanced understanding of individual students, communities, and circumstances. Wisconsin law empowers local school leaders—both democratically elected school board members, and professional administrators with advanced degrees in education leadership¹—with authority both to

¹ Wisconsin regulations require applicants for licensure as school administrators to demonstrate competency in a range of skills and dispositions, including “act[ing] ethically and according to professional norms to promote each pupil’s academic success and well-being,” “striv[ing] for equity of educational opportunity and culturally responsive practices to promote each pupils academic success and well-being,” “cultivat[ing] an inclusive, caring, and

craft policy and to make informed case-by-case decisions to ensure they meet their legal obligations to each one of their students.

School district leaders in Madison acted upon that responsibility by crafting the “Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students” (“Guidance”) at issue in this case. The Guidance’s provision for encouraging, but not mandating, family notification reflects a careful calibration. It promotes family involvement in the majority of cases where such involvement will be positive for the child, while ensuring that in *all* cases, including the minority of cases where family involvement could be counterproductive or harmful, the district meets its legal responsibility to provide its pupils an inclusive and nondiscriminatory school environment. To enjoin this flexible approach, as the appellant would have this court do, would almost certainly result in situations where school officials

supportive school community to promote each pupil’s academic success and well-being,” and “engag[ing] families and the community in meaningful, reciprocal and mutually beneficial ways to promote each pupil’s academic success and well-being.” Wis. Admin. Code §§ PI 34.003.

are effectively forced to violate student rights and risk legal exposure.

As professors of education administration responsible for training new generations of Wisconsin public school leaders, *Amici* have a substantial professional interest in ensuring that school leaders can continue to craft flexible, proactive local policy and make individualized decisions that ensure schools protect the rights of each one of their students. This Court should reject the appellant's request for a preliminary injunction in order to preserve school leaders' ability to protect the rights of all children as they are required to do by law.

ARGUMENT

I. Schools that do not proactively affirm students' gender identities risk legal consequences.

Legal protections for transgender and gender-nonconforming students have evolved rapidly in the last several years, based on expanded interpretations of already-existing civil rights laws. Courts and agencies are clearly signaling to school districts that, to remain in compliance with these laws, they must proactively support students participating in school in a manner

that aligns with their gender identities. Schools that do not support students in this manner face legal consequences ranging from administrative intervention to money damages.

A. Title IX

At the federal level, Title IX of the Education Amendments of 1972 provides that “[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1682(a). The Seventh Circuit has already held that Title IX protects transgender students from discrimination. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-1050 (7th Cir. 2017);² see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based

² Part of *Whitaker*’s analysis of the standard for obtaining preliminary injunctive relief has been abrogated. See *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020), cert denied, 141 S. Ct. 1754 (2021). However, its analysis of Title IX remains good law.

on sex.”) Accordingly, if a student is “excluded from participation in,” “denied the benefits of,” or “subjected to discrimination” because of their gender identity in a covered program or activity, a school district that receives federal funds—as the Madison Metropolitan School District and virtually all Wisconsin public school districts do³—may be found to have violated Title IX. See also 86 Fed. Reg. 32,638 (June 22, 2021) (U.S. Department of Education Notice of Interpretation establishing that OCR interprets Title IX to prohibit discrimination based on gender identity in education programs that receive federal financial assistance).

Federal agencies, including the U.S. Department of Justice and the U.S. Department of Education Office for Civil Rights (OCR), have the authority to remedy Title IX violations “through ‘any . . . means authorized by law,’ including ultimately the termination of federal funding.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280-281 (1998) (quoting 20 U.S.C. 1682)

³ See National Center for Education Statistics, *Madison Metropolitan School District*, available at https://nces.ed.gov/ccd/districtsearch/district_detail.asp?ID2=5508520&details= (last accessed May 17, 2023).

(alteration in original). Further, where a school official with the authority to institute corrective measures “has actual notice of, and is deliberately indifferent to” the fact that a violation has occurred, Title IX also provides a private right of action for damages and injunctive relief. *Hansen v. Board of Trs. Of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 605 (7th Cir. 2008) (quoting *Gebser*, 524 U.S. at 277) (emphasis omitted).

Multiple federal courts and agencies have determined that a school district’s failure to use the name and pronouns that accord with a student’s gender identity can form the basis of a Title IX claim, especially where such failure results in transgender or gender-nonconforming students feeling targeted and dehumanized. See, e.g., *Kluge v. Brownsburg Cmty. Sch. Corp.*, 584 F. Supp. 3d 814 (S.D. Ind., 2021), *aff’d* on other grounds, 64 F.4th 861 (7th Cir. 2023)(district continuing to allow a teacher to address students by last name instead of by preferred names and pronouns after transgender students complained that the practice made them feel targeted and dehumanized could have subjected the district to a Title IX lawsuit brought by one of the students); *John & Jane Doe Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 2022

U.S. Dist. LEXIS 149021 at *36-37 (D. Md., 2022) (school district gender support guidelines, which included provision for using appropriate names and pronouns for transgender and gender nonconforming students, survive strict scrutiny in part because district has compelling interest in preventing discrimination against students protected by Title IX); *Willits Unified School District Resolution Agreement*, No. 09-16-1384 (U.S. Dep't of Educ. Office for Civ. Rts. 2017) (district must ensure that "referring to the Student by other than her female name and by other than female pronouns is considered harassing conduct"); *City College of San Francisco Resolution Agreement*, No. 09-16-2123 (U. S. Dep't of Educ. Office for Civ. Rts. 2017) (school policy should reflect that harassment "can include refusing to use a student's preferred name or pronouns when the school uses preferred names for gender-conforming students").

The U.S. Department of Education has also issued specific guidance as to how schools should support transgender and nonbinary students, which includes

adopting policies that respect all students' gender identities—such as [using] the name a student goes by, which may be different than

their legal name, and pronouns that reflect a student's gender identity—and implementing policies to safeguard students' privacy—such as maintaining the confidentiality of a student's birth name or sex assigned at birth if the student wishes to keep this information private, unless the disclosure is legally required.

U.S. Dep't of Educ. Office of Civ. Rts., Supporting Transgender Youth in School (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf>. The

Department of Education is also currently reviewing comments on proposed revisions to the regulations implementing Title IX, which make clear that preventing someone from equitable participation in school programs consistent with their gender identity would cause harm in violation of Title IX. See 34 CFR Part 106; U.S. Dep't of Ed., Fact Sheet: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations (June 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>. Given these developments, federal Title IX enforcement against school districts that fail to affirm students' gender identities is likely to only increase in the near future.

B. Wisconsin Law

A school's failure to support a student's participation in school in the manner that aligns with their gender identity would also likely violate Wisconsin law. Wisconsin's pupil nondiscrimination statute provides that "no person may . . . be denied participation in, be denied the benefits of, or be discriminated against [in any public school program or activity] because of the person's sex." Wis. Stat. § 118.13(1). For purposes of this statute, the Wisconsin Department of Public Instruction ("DPI") defines "discrimination" to include "any action, policy or practice . . . which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles or rewards based, in whole or in part, on sex." Wis. Admin. Code § PI 9.02(5). Students who experience discrimination in violation of § 118.13 can appeal to DPI. Wis. Stat. § 118.13(2)(b). If DPI finds the district discriminated against a student, it can order the school district to develop a corrective action plan and monitor the district's implementation of the plan. Wis. Admin. Code § PI 9.08(1)(a)4. Further, § 118.13 and its implementing regulations affirmatively require school districts to develop policies prohibiting

discrimination against pupils. Wis. Stat. § 118.13(2)(a); Wis. Admin. Code § PI 9.03(1).

While DPI has not issued any decisions in appeals under § 118.13 that address transgender students' rights, it has indicated that OCR case resolutions and guidance documents relating to federal nondiscrimination statutes inform its interpretation of § 118.13. *Burlington Area School District*, No. 20-PDA-02, 12-13, 18-22 (Wisconsin Department of Public Instruction, 2021). Thus, as OCR moves to implement its guidance regarding application of Title IX to transgender students, DPI is likely to follow suit by encompassing discrimination against transgender students within §118.13's prohibition of discrimination based on sex. Indeed, DPI has published guidance on its website encouraging school districts to adopt nondiscrimination policies that specifically address gender identity and expression. Wisconsin Dep't. of Pub. Inst., "Safe Schools for Lesbian, Gay, Bisexual and Transgender Students," available at <https://dpi.wi.gov/sspw/safe-schools/lgbt> (last accessed May 15, 2023).

Finally, Wisconsin law also requires schools to affirmatively teach students to protect their mental health and to recognize and

avoid psychologically damaging situations and relationships. Wisconsin Statute § 118.01(2) sets forth a list of statewide educational goals as a complement to the state's financial contribution to public education, and creates a mandatory duty for school boards to develop instructional programs designed to meet these goals. Under these statutes, school districts must design instructional programs that give pupils, *inter alia*, "the skills needed to make sound decisions" and "knowledge of the conditions which may cause and the signs of suicidal tendencies," § 118.01(2)(d)7, and "knowledge of effective means by which pupils may recognize, avoid, prevent and halt physically or psychologically intrusive or abusive situations which may be harmful to pupils," § 118.01(2)(d)8. Subsection (2)(d)7 also requires districts to design instruction "to help prevent suicides by pupils by promoting the positive emotional development of pupils." Given the close and well-researched link between LGBTQ+ identity and youth suicidality, subsection (2)(d)7's requirement that schools provide instruction that helps prevent suicide by promoting positive emotional development demands some measure of instruction on positive emotional development around LGBTQ+

identity. Because these standards impose mandatory duties on school boards, a school board's failure to provide instruction aligned with the enumerated goals could invite a mandamus action. *Voces de la Frontera v. Clarke*, 2017 WI 16, ¶ 11.

II. Mandatory disclosure of student gender status to parents will create legal exposure for school districts.

Appellant seeks to enjoin school leaders from exercising discretion regarding disclosure of student gender information to parents—which would have the effect of mandating automatic disclosure of such information to parents in every case. Such mandatory disclosure is overwhelmingly likely to result in school districts violating civil rights laws and facing legal consequences. *Cf. Montgomery Cnty.*, 2022 U.S. Dist. LEXIS 149021 at *37-38 (school district guidelines encouraging but not mandating disclosure of student gender identity to parents survives strict scrutiny because narrowly tailored to school districts compelling interest in protecting transgender students from discrimination); *Kluge*, 548 F. Supp. 3d at 846 (school district not obligated to exempt teacher from policy requiring use of pronouns aligned with

student gender identity where such accommodation could subject district to a Title IX discrimination lawsuit).

First, mandating disclosure to parents as appellants request will likely exacerbate the pervasive gender-based inequality of educational opportunity that transgender and gender nonconforming students already experience. Knowledge that expressing their gender identity will result in *automatic* disclosure—regardless of the student’s wishes or the likely consequences of the disclosure—will, if anything, make transgender students feel even *less* safe at school and *less* able to focus on their learning. *Cf. Montgomery Cnty.*, 2022 U.S. Dist. LEXIS 149021 at *39. Those students who fear their parents’ reactions are also unlikely to avail themselves of any supportive measures the school makes available to prevent or counteract gender discrimination. The combination of heightened fear of disclosure plus deprivation of supportive measures will doubly compound the effects of any discrimination these students face at school.

Second, mandatory disclosure to parents will limit schools’ ability to intervene in situations where students face harassment

based on their gender identity but do not wish to participate in formal harassment investigation or remediation procedures because they do not want to disclose their gender identity. Schools that know, or reasonably should know, that a student is experiencing discriminatory harassment and do not reasonably act to end the harassment, prevent its recurrence, and remediate its effects can be found responsible for tolerating a hostile environment and face sanctions under Wis. Stat. § 118.13 and potentially under OCR's proposed revisions to the Title IX rules.

Third, school districts that impose burdens like mandatory parent disclosure on students seeking to go by a different-gender name but do not impose the same burdens on students seeking to go by a same-gender nickname may face claims of gender-based disparate treatment under Wis. Stat. § 118.13 or Title IX—especially where the disclosure requirement causes anxiety or distress to the impacted students, or otherwise limits their learning opportunity.

Fourth, a school board that instructs students to disclose their gender identity to their families in all cases without regard for harm or abuse or rejection that might result from the disclosure

could be found to violate the mandate of Wis. Stat. § 118.01(2)(d)8 that schools design instruction to give students “knowledge of effective means by which pupils may recognize, avoid, prevent and halt physically or psychologically intrusive or abusive situations which may be harmful to pupils.” Similarly, a school district that instructs students to disclose their gender identity to their families even when such disclosure creates risk of suicidality for that student, or a school district that conditions a students’ access to supports intended to reduce or prevent suicidality on that student’s compliance with an unwanted or dangerous mandatory disclosure, could be found to violate the mandate of Wis. Stat. § 118.01(2)(d)7 that schools design instruction to give students “the skills needed to make sound decisions,” “knowledge of the conditions which may cause and the signs of suicidal tendencies,” and “to help prevent suicides by pupils by promoting the positive emotional development of pupils.”

In short, mandating that school districts disclose students’ gender identity to their parents in every case would create immense legal risk for districts. Wisconsin school administrators are trained and certified to exercise professional judgment in case-

by-case decisions on issues like these, and MMSD's Guidance strikes a carefully calibrated balance---encouraging family involvement in *most* case, while giving administrators the flexibility they need to ensure legal compliance in *all* cases. Consistent with the Wisconsin tradition of deference to local school officials, the Court should not disturb this careful balance.

CONCLUSION

The Court should reject Appellant's request for a temporary injunction.

Respectfully submitted on May 17, 2023.

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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 2,699 words.

Electronically signed by Elisabeth Lambert
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