STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case Nos. 2022AP2042, 2023AP305, 2023AP306

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
Case No. 20-CV-454
The Honorable Frank D. Remington, Presiding

AMICUS BRIEF OF MADISON TEACHERS INC.

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INTRODUCTION

Plaintiff-Appellant Jane Doe 4 ("Doe 4") asks the Court for a temporary injunction ordering Respondent Madison Metropolitan School District ("MMSD") to require teachers to obtain a parent's consent before honoring their students' preferred names and pronouns. (Opening Brief of Appellant at 35) The apparent intent of the requested relief is to force teachers to "out" transgender, gender nonconforming, and non-binary students to their parents, but it would also require far more. Because the relief sought is both legally unfounded and unworkable, this Court should reject Appellant's request for a temporary injunction.

I. Teachers have no affirmative duty to "out" students; creation of such a duty is for the legislative process, not the courts.

Doe 4 asks this Court for a temporary injunction 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. She has pointed to no statute, Constitutional provision, or other binding authority that provides for that affirmative duty. There is none. Consequently, the guidance at issue does not compromise any such duty. Doe 4 asks 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 and not the courts. *See, e.g., Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 69, 399 Wis. 2d 623, 663 ("Because the people gave the legislature its power to make laws, the legislature alone must exercise it.").

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. *See* Tenn. HB 1332/SB 234 (2013). 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. *Id.* 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." *Id.* The intent of this language was widely recognized to impose an affirmative duty on school employees to out gay students to their parents.[1] The bill was never enacted.

Another "Don't Say Gay" bill was recently enacted into law in the State of Florida. *See* Fl. HB 1557 (2022); Fla. Stat. § 1001.42(8)(c). Like Tennessee's failed 2013 bill, Florida's new law constrains schools from providing instruction on gender and sexuality. It requires 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" and bars 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

[1] *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 4/10/23).

"mental, emotional, or physical health or well-being, or a change in related services or monitoring." *Id.*

Florida's law 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 so much as question their gender identity, and to forbid those employees from affirming a deviation from the gender assigned at birth.[2] 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. *See id.*

In Alabama, a newly enacted statute addresses the issue of parental notice regarding students' gender identities even more squarely. *See* Ala. S.B. 184 (2022); Ala. Code § 26-26-5. The law specifically prohibits public and private school personnel from "[w]ithhold[ing] from a minor's parent or legal guardian information related to a minor's perception that his or her gender or sex is inconsistent with his or her sex." *Id.* Even more on point, a bill currently being considered by the Indiana legislature would require a school to notify parents within 10 business days if a student discloses that they have "conflicted feelings about" or "difficulty handling or coping with" their gender identity or expression; or if the student indicates a desire to change their name, attire, or pronoun "in a manner

[2] *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; https://abcnews.go.com/US/floridas-controversial-dont-gay-bill-inside-proposed-law/story?id=83525901; (all links last visited 4/10/23).

that is inconsistent with the student's biological sex at birth." *See* Ind. S.B. 354 (2023).

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. It further demonstrates that the appropriate branch of government to provide the relief sought by Doe 4 is the legislative branch, not the judicial branch.

II. 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. 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 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.

Doe 4 characterizes a theoretical future wish by her child to be referred to by a name or gender other than that assigned at birth as a health care issue, claims that such a wish it amounts to "transitioning during childhood," calls for the mental health diagnosis of "gender dysphoria," and calls an MMSD employee's theoretical respect for the student's request a "treatment decision."[3] (Opening Brief of Appellant at 22-23, 29-30, 34-35). She argues that consequently, parents have a legal right to be informed by teachers and other school staff if her child wishes to be referred to by a different name or gender other than that assigned at birth. 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.

[3] This claim is contested, as discussed in the Joint Brief of Defendants-Respondents at 8-9, 22, 30-31, 34, 39-40.

The Wisconsin Legislature has explicitly recognized that minors have a right to keep certain health care records from their parents. Under 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 Doe v. Irwin,* 615 F.2d 1162, 1166-69 (6th Cir. 1980) (rejecting a constitutional challenge by parents to a state clinic's condom distribution program for minors that did not notify parents that their children were using its services, explaining that the desire of parents to know of such activities is understandable but not constitutionally required).

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 and unworkable 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 educational assistant 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 where a single person with a child in MMSD schools and for whom MMSD confirms it does not have a Gender Support Plan seeks 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 reject Appellant's request for a temporary injunction.

Respectfully submitted this 21st day of April 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 1,769 words.

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