No. 22AP2042, 23AP305, 23AP306

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. LA FOLLETTE HIGH SCHOOL,
INTERVENORS-DEFENDANTS-RESPONDENTS.

On Appeal from the Dane County Circuit Court,
The Honorable Frank D. Remington, Presiding,
Case No. 2020-CV-454

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. Plaintiff Has Standing

Plaintiff has standing (and harm for an injunction) because the District's Policy allows it to secretly treat children as the opposite sex and *conceal this from parents*, such that, without a preemptive lawsuit and injunction, parents "have no way of becoming involved in such a fundamental decision." *Doe 1 v. MMSD*, 2022 WI 65, ¶92, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting). There is at all times a threat that the District is or will apply this Policy to Plaintiff's child, because any child can begin struggling with gender identity at any time, unbeknownst to the parents. Pl.Br.20–21, 24. And many experts believe a transition can cause long-term harm. Pl.Br.22–23, 34.

Defendants do not dispute that a threat of injury is sufficient for standing in Wisconsin, *especially* for declaratory judgment actions which are *primarily* "preventative in nature." Pl.Br.19. Instead, they argue, *on the facts*, that there is no threat of injury to Plaintiff, but they completely disregard the standard of review—that all facts must be construed in Plaintiff's favor. Pl.Br.18. Rejecting their arguments does not "require this Court to find facts," Resp.Br.22, but simply to apply that standard of review.

Plaintiff provided expert and anecdotal evidence that this can arise "out of the blue" to parents, and even Defendants' expert [redacted] Pl.Br.17, 20. They criticize this evidence as "non-scientific," Resp.Br.18, 21, ignoring both the standard of review and *their own expert*.[1] Their argument that Plaintiff "has no real support" for this, Resp.Br.23, is bizarre given this evidence.

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[1] They also repeatedly emphasize that Dr. Levine's affidavit was stricken. That was erroneous, Pl.Br.37–44, *infra* Part III, but regardless it was not stricken when the case was dismissed, so that is state of the record for purposes of Plaintiff's appeal.

Defendants also assert "[t]here is no scientific evidence that the use of a different name or pronouns at school will lead a student to become transgender," Resp.Br.31, yet Plaintiff's expert details that evidence. R.31 ¶¶60–69; R.142 ¶¶18–19. And when Defendants' expert [redacted]. Pl.Br.15. Again, these factual issues must be construed in Plaintiff's favor.

Defendants argue the threat is low because there are "only two situations" where it has treated a child as the opposite sex without the parents' awareness. Resp.Br.3–4. Also not true. While the District admitted to only two situations *with a Gender Support Plan*, it does not know how often it does this *without a plan* (and there is evidence it does). Pl.Br.11–12. And the District has yet to explain what it did to search or whether it completed its search. *Id*. Defendants do not address either point. Regardless, given how serious this is—"changing the life path of [a] child," Pl.Br.34—that the District will do this at all is a sufficient threat for standing for declaratory relief.

Regarding the effects of a transition on minors, it is indisputable that many experts believe a social transition during childhood can cause long-term harm. Many have said so publicly, Pl.Br.12–14—even Defendants' expert [redacted], Pl.Br.14–15. Much is unknown, given how novel this is—which Defendants do not dispute—but the experimental nature of this only magnifies the risk of harm. Pl.Br.13, 15.

Defendants argue there is no threat because, when Plaintiff was deposed, she acknowledged she did not have any current indications that her child was dealing with gender identity issues. That is irrelevant for multiple reasons. First, it was based on *her knowledge*. If the District is concealing this from her—as it is in some situations—she would not necessarily know about it, as she testified. R.231 110:13–111:6. Second, it was a snapshot in time, now half a year ago. Children change. As she

testified [redacted], she does not know the future. Pl.Br.21. Her child may have begun struggling with this since, might currently be, or might soon. The existence of the Policy, which she and her child are subject to, creates a present and ongoing threat that the District is or will "conceal[ ] [this] from [her] purposely." R.23 ¶¶21–22; R.231 181:7–9, 195:6–11.

Defendants falsely assert that Plaintiff testified "she does not believe her child would *ever* explore his/her gender." Resp.Br.24–25. She did not. Rather, she testified: "All I can say is I don't know now. … I can't really predict … the future." R.231 109:15–110:8. And while she "would like to think" her child would tell her, she was "not sure" her child would, given "[her] beliefs on [this topic]." *Id.* 110:13–111:6. Again, all this must be construed in her favor.

Finally, Defendants argue that Plaintiff's ex-husband's past behaviors warrant excluding him from this decision. Resp.Br.6–8. They also reference her own discipline, mental health, and false accusations by her ex-husband, to imply *she too* is the kind of parent they would hide this from. *Id.* 7, n.3. This argument only reinforces Plaintiff's standing, and perfectly illustrates why the Policy is unconstitutional. While Plaintiff disagrees with some of her ex-husband's parenting, he has never physically abused their child, R.231 42:10–11, 43:9–11, he retains his parental authority, *id.* 139:1–139:8, and Plaintiff does not want the District withholding information from him, *id.* 104:8–15. A school district is not a family court, nor can it decide on its own, independent of any court process, which parents have authority over which decisions. Indeed, Defendants even invoke some social media posts as justification for usurping his parental authority. Resp.Br.7. The idea that a school can review parents' social media and on that basis exclude them from decisions involving their own children is terrifying.

II. This Court Should Grant an Injunction

A. Defendants Cannot Justify Concealing a Major Health-Related Decision From Parents.

Defendants do not dispute that parents have a fundamental right "to make decisions" concerning their own children, Resp.Br.41, but argue Plaintiff must be more specific—even though that is how the Wisconsin and United States Supreme Courts have articulated the right. *E.g.*, *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶20, 387 Wis. 2d 1, 927 N.W.2d 486 (quoting *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (plurality op.)).

In reality, Defendants frame the right too broadly, not Plaintiff. They argue parents "do not have a constitutional right to control each and every aspect of their children's education." Resp.Br.42–43. That is not Plaintiff's position. Courts have repeatedly defined the right in terms of decision-making authority. Pl.Br.25–28; *e.g.*, *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998) ("the primary role in decisions"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("broad parental authority"). Plaintiff does not seek to "override" school "programs, functions and activities," Resp.Br.42, but she does expect that school officials will defer to her about significant decisions involving her child.

The cases they cite did not involve an infringement on parents' core decision-making role but are almost all challenges to curriculum. *Larson v. Burmaster*, involved a challenge to "summer homework." 2006 WI App 142, ¶1, 295 Wis. 2d 333, 720 N.W. 134. The Court rightfully held there is no right to a "homework-free summer" because curriculum decisions "are uniquely committed to the discretion of local school authorities." *Id.* ¶¶ 41–42. The federal cases are similar: *Torlakson* involved a challenge to social sciences curriculum; *Fields* and *C.N.*, to a survey; *Brown*, to an assembly program, and *Fleischfresser*, to a reading program. Resp.Br.42–45. This case, by contrast, involves a significant and controversial health-related decision for a particular child behind the

parents' back. One case even draws this distinction, emphasizing that a survey is not "of comparable gravity" to "depriv[ing] [parents] of their right to make decisions concerning their child"—exactly what is at stake here. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184–185 (3d Cir. 2005).

Defendants argue this Court should give "no credence" to Plaintiff's argument that a social transition is a major, health-related decision with long-term implications, Resp.Br.46, yet they have no answer to the many experts who believe that addressing a child as the opposite sex is an "active intervention" and "a form of psychosocial treatment." Pl.Br.12–14. To distance their Policy from these experts, Defendants assert, citing Dr. Leibowitz, that "using a different name and/or pronoun set does ***not*** amount to a social transition." Resp.Br.31. But Plaintiff already explained that his quirky definition of "social transition" is inconsistent with how most experts use that phrase (even WPATH). Pl.Br.16–17.[2] Regardless, whether characterized as medical treatment or not, this a serious decision unrelated to curriculum, exactly the kind that parents "can and must make." *Parham*, 442 U.S. at 603.

Their comparison to nicknames, Resp.Br.46, is meritless. Nicknames and gender-identity changes are easily distinguishable (the pronouns are an easy giveaway), and these are not remotely comparable in terms of their gravity. Moreover, the District does not treat nicknames and "affirmed" transgender names equally. Teachers can ask parents about a nickname, whereas the Policy *prohibits* staff from discussing a child's requested name with parents if it would "reveal a student's gender identity." R.10:14 (Policy); R.253:7 n.6 (trainings); R.184:2 (email).

[2] To avoid this definitional dodge, Plaintiff asked specifically about "adopting a name [and pronouns] associated with the opposite biological sex," and Dr. Leibowitz

Defendants falsely assert that Plaintiff did not plead an Article I, §18 claim. Resp.Br.46 n.12. As they know, there was a typo in the original complaint, but Plaintiff fixed that, *with Defendants' consent*. R.261; 262. They argue Plaintiff is still able to "teach her child her religious beliefs," Resp.Br.46 n.12, but that ignores the gravamen of Plaintiff's argument. The Policy violates her right to *make decisions* for her child in accordance with her beliefs. Pl.Br.26, 31. Defendants do not respond to that.

Defendants hint, in a footnote, without making any argument, that strict scrutiny does not apply to parents' rights claims, Resp.Br.47 n.14, but they have no answer to *A.A.L.*, which squarely (and unanimously) held otherwise. 2019 WI 57, ¶22.

Defendants briefly argue their Policy furthers a compelling interest in "preventing discrimination." Resp.Br.47–48. But they cite nothing in support, and the idea that requiring parental consent is "discriminatory" does not make sense. Plaintiff is not asking for some students to be treated differently than others—all minor students must obtain parent permission before changing gender identity at school, just like they need permission to change their name in school records or take medication. Pl.Br.33. Some parents will say yes and others no, but the District cannot override parents in the name of uniformity. *See Parham*, 442 U.S. at 603.

Finally, truly exposing the constitutional problem, Defendants suggest that the Policy is necessary to keep children "safe," Resp.Br.2, 29 n.7, 48—which can only mean *from their parents*. That is what this boils down to. The District believes it knows better than parents how to respond when a child desires to change gender, and it will always say yes, though many experts believe it can be appropriate to say no. The District flips the presumption that parents will act in their child's best interests on its head and usurps their role without any of the procedural protections required to displace parents.

B. Defendants' Other Arguments Against an Injunction Are Meritless

As explained above, *supra* Part I, the threat of irreparable harm to Plaintiff is based on the fact that the District will conceal the constitutional violation when it is occurring and the seriousness of adults treating children as the opposite sex. Moreover, an injunction requiring parental notice and consent is perfectly tailored to preventing the harm and preserving the status quo.[3] It would only have force in situations where a child wants to change name and pronouns at school and the District would otherwise do so without parental notice and consent.

And the District is currently treating some children as the opposite sex without the parents' awareness. Defendants urge this Court to disregard this ongoing constitutional violation because Plaintiff has not proven she is one of those parents (although only the District knows which parents' rights it is violating).

This Court should consider the harms to all parents because the harmed parents *do not know who they are*. If the only parents who can obtain an injunction are those who are unaware they need to, the District's unconstitutional Policy would be immune. Courts regularly allow individual plaintiffs to bring claims for declaratory and injunctive relief against unlawful policies without requiring a class action, and typically enjoin *the defendant* from applying it to anyone. *E.g.*, *James v. Heinrich*, 2021 WI 58, ¶14, 397 Wis. 2d 517, 960 N.W.2d 350; *Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, ¶12, 396 Wis. 2d 434, 957 N.W.2d 261. Even Defendants appear to concede this is appropriate when a government policy is facially unconstitutional, as the District's is

[3] Defendants argue the relevant status quo is the District's unconstitutional policy. Resp.Br.36–38. That cannot be right. If an illegal policy is the "status quo," no one would ever get an injunction. An injunction will prevent the District from *changing* a child's identity without parental consent—i.e., preserve the status quo.

here. Resp.Br.22 n.6. The Policy is equally unconstitutional as to all parents; requiring each to sue is unmanageable and unnecessary.

Defendants suggest that some unidentified other parents might *want* the District to hide decisions about their own children from them. Resp.Br.29 n.7. This argument would be laughable if the issues were not so serious. Even if such parents exist, nothing prevents them from affirmatively authorizing the District to keep secrets from them—that is what parental consent forms do. But a school district cannot unilaterally usurp their authority.

Limiting an injunction to Plaintiff is not possible without violating the protective order, which does not allow District staff to learn who she is to protect her. R.84; 95:24; 197:4–5. The Circuit Court acknowledged this point last time this case was on appeal and held its partial injunction (which is no longer in place) applicable to all parents, for precisely this reason. R.157 (order); R.153:46.

III. The Circuit Court's Discovery Orders Were Erroneous

Defendants now concede that their position below, which the Circuit Court accepted—that the work-product doctrine *never* applies to any communications with a testifying expert[4]—is wrong. Resp.Br.51. They now claim that, for testifying experts, *Dudek* limited work-product protection to certain things, but it did not. The Court gave *examples*, but also held, broadly, that anything reflecting a lawyer's mental impressions, strategies, etc. should be protected. Pl.Br.39–40. A testifying expert's *report* is discoverable under *Dudek*—and under the statute, "facts known and opinions held"—but Defendants have that.

[4] R.276:2–3 (arguing that "a party waives *any* work product protection … when it discloses that expert"); R.310:21; R.310:37–38 ("I agree with Ms. Zylstra's analysis … *Dudek* doesn't apply.")

Blakely is not to the contrary. Resp.Br.51. That case revolved around an allegedly defective product. 65 Wis. 2d at 470–71. The defendant hired an expert to inspect it and promised to turn over the report, but then changed his mind. *Id.* 472–73, 476–77. Because of the *agreement*, and because the expert did not produce a report, the Court required the attorney to turn over communications *from the expert to the attorney* (not the other way around) that contained his *conclusions*. *Id.* 479. Notably, the Court did not require the attorney to produce his "actual notes" on their conversations, but only a summary of the expert's conclusions "because of the absence of … of any written communication from the expert after agreement had been made to furnish such a written report." In other words, the Court only required disclosure of the expert's findings and opinions. And there is no similar agreement here.

Defendants then misrepresent Plaintiff's position in an attempt to change the issue. Plaintiff has never argued that "*any* communication between counsel and a disclosed expert [is] work product." Resp.Br.51. Plaintiff's separate, overarching objection was that §804.01(2)(d) does not generally authorize discovery into attorney-expert communications, but only "facts known and opinions held" by an expert. R.277:6–9; 310:18, 23. Plaintiff objected separately that most (but not all) of the communications were protected by the work-product doctrine, and the remainder were irrelevant (like scheduling emails). *Id.*

Because Defendants moved to compel on the theory that every attorney communication with a testifying expert is automatically discoverable, the parties never reached any details about particular communications.[5] Thus, if this Court agrees that §804.01(2)(d) is limited to discovering "facts known and opinions held," or that the work-product

[5] Regardless, contrary to Defendants' assertion that Plaintiff did not review the communications or establish that any contain work-product, counsel described the communications and why they were protected. R.310:17–18, 23, 27.

doctrine does apply to testifying experts, either holding would warrant reversing the order to compel.

Regarding the strike order, Defendants cite no authority permitting a court to strike materials after a case has been dismissed and appealed, and they have no answer to the fact that Plaintiff was never in violation of any order. They also misrepresent the timing of the orders. *Compare* Resp.Br.13 *to* Pl.Br.38–39.[6]

Finally, regarding the seal order, Defendants do not point to anything that overcomes the "strong presumption in favor of openness." Pl.Br.44. Contrary to their representation to this Court, Dr. Leibowitz's affidavit (R.347) does not specifically identify any sensitive information in the transcript. They object to the kinds of questions Plaintiff asked, but they yielded numerous, highly relevant concessions, which the public has a right to see, given his voluntary, public participation in this case. Pl.Br.14–17.

CONCLUSION

This Court should reverse on all issues and direct the entry of an injunction.

Dated: April 24, 2023.

Respectfully submitted,

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Electronically signed by Luke N. Berg

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[6] The court stamp on R.311 shows it was *filed* on the 23rd. Plaintiff received it five minutes before the dismissal.

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CERTIFICATION

I hereby certify that this reply conforms to the rules contained in Wis. Stat. § 809.81 for a document produced with a proportional serif font. The length of this reply is 3,000 words.

Dated: April 24, 2023.

Electronically signed by Luke N. Berg
LUKE N. BERG