No. 2020AP1032

In the Wisconsin Supreme Court

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

APPENDIX TO PETITION FOR REVIEW

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INDEX TO APPENDIX

Description of Document	**Page(s)**
Court of Appeals Decision (July 22, 2021)	1–26
Court of Appeals Decision and Order Denying Injunctive Relief (Nov. 9, 2020)	27–35
Circuit Court Order on Anonymity (June 3, 2020) (R. 74; Dkt. 84)	36–37
Excerpts of May 26, 2020, Hearing Transcript (R. 93; Dkt. 95)	38–52
Circuit Court Order Partially Granting and Partially Denying Motion for Injunction Pending Appeal (Sept. 28, 2020) (Dkt. 157)	53–55
Excerpts of September 23, 2020, Hearing Transcript (Dkt. 153)	56–65
Excerpts of MMSD's Policy (R. 2:1–35; Dkt. 3:1–35)	66–69
MMSD's "Gender Support Plan" Form (R. 2:36–37; Dkt. 2:36–37)	70–71

COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2020AP1032 **Cir. Ct. No. 2020CV454**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JOHN DOE 1, JANE DOE 1, JANE DOE 3, JANE DOE 4, 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.

APPEAL from an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed*.

Before Blanchard, Kloppenburg, and Nashold, JJ.

¶1 KLOPPENBURG, J. Several parents of students attending schools in the Madison Metropolitan School District (collectively, the parents) commenced this action by filing a complaint in which they identified themselves only by "John/Jane Doe" pseudonyms, along with a "motion to proceed using pseudonyms." The circuit court denied the parents' motion and ordered the parents, if they wished to proceed with the action, to file under seal an amended complaint stating their names and addresses (information that we refer to as their "identities"). The court explained that it would approve a protective order sealing the parents' identities from the parties and the general public and permitting disclosure of their identities only to the court and the attorneys for the parties; the court memorialized its decision to allow filing under seal in that manner in a written order. The parents appeal the written order, which we refer to as the "order to file under seal," arguing that the court erred in requiring them to disclose their identities to the attorneys for the parties when filing their amended complaint. We conclude that the parents fail to show that the circuit court erroneously exercised its discretion in issuing the order to file under seal. Therefore, we affirm.

BACKGROUND

¶2 The parents brought this action for declaratory and injunctive relief under WIS. STAT. §§ 806.04 and 813.01, challenging the District's "Guidance &

Policies to Support Transgender, Non-binary & Gender-Expansive Students."[1] The parents allege that the Guidance, by allowing students to "change gender identity" and select new names and pronouns for themselves "regardless of parent/guardian permission," interferes with the parents' "fundamental right" under Article I, § 1 of the Wisconsin Constitution and the Fourteenth Amendment to the U.S. Constitution to "direct the upbringing" of their children.[2]

¶3 The complaint filed by the parents identifies the parents only by pseudonyms. The complaint alleges that this is necessary "to protect [the parents'] privacy and the privacy of their minor children, and to prevent retaliation against them for raising this sensitive issue." The parents also filed a "motion to proceed using pseudonyms," and a supporting brief and affidavits, requesting permission to proceed using only pseudonyms in all filings and reiterating their argument that bringing this action exposes them and their minor children to a "substantial risk of harassment or retaliation." In their motion, the parents explained that they were submitting the affidavits with their names redacted and offered to submit "the original, unredacted versions" of the affidavits for the circuit court's in camera inspection "[i]f this Court needs to know the Plaintiffs' identities."

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] For context, we note the following events that occurred after the filing of the complaint containing only the parents' pseudonyms, although none of these events are at issue in this appeal. The District filed a motion to dismiss the parents' complaint. In addition, three student clubs from three high schools in the District jointly filed a motion to intervene as defendants in this suit. The circuit court denied the motion to dismiss and granted the motion to intervene.

¶4 We relate in some detail the ensuing proceedings pertinent to the circuit court's adjudication of the parents' motion to provide context for our analysis of the parents' appeal of the order to file under seal.

¶5 On May 26, 2020, the circuit court held a hearing at which it heard oral argument and issued its decision on the parents' motion. At the hearing, the circuit court denied the parents' "motion to proceed using pseudonyms." The court explained that the statutory procedure for protecting a party's identity under Wisconsin law is a motion to seal and that Wisconsin law does not authorize plaintiffs to litigate a case without filing, even under seal, a court record that includes their identities. The parents agreed that there is no Wisconsin case law authorizing the parents to proceed using pseudonyms in the manner requested in their motion, that any federal law on the issue is "trumped by applicable state statute," and that "the Wisconsin legislature and the Wisconsin courts control" the analysis in this case. The parents argued that the circuit court should nonetheless apply a balancing test, which they represented is used in federal courts, that weighs "the need for anonymity versus the need [for the identifying information] on the other side." The parents asserted that their motion should be granted because "this case is going to turn on whether the policy is constitutional" and "there is no need [for] the other side" to have the identifying information.

¶6 The circuit court explained that it was "not comfortable transporting into Wisconsin jurisprudence" the purported "practice of the federal courts in similar circumstances," and that Wisconsin's "longstanding practice of the public's having a right to know under the public records law and the common law … militate dramatically against allowing the parties [to tell] no one who they are" when they file an action with the court. The court therefore ordered the parents, if

they wished to proceed with the action, to file an amended complaint stating their identities (the "amended complaint").

¶7 The circuit court explained, in addition, that it has the "authority" and "discretion" to protect the parents' identities as revealed in the amended complaint under seal. It acknowledged Wisconsin's "longstanding" public policy of open court records but explained that "the public's right to know [who is using its courts] is balanced off against situations where that right is outweighed by other concerns." The court found that the parents had made a "demonstrable factual showing" that unsealed public records containing their identities posed a risk that the parents "would likely be subject to threats and intimidation, which would be wholly inappropriate and frustrate the orderly function of the court case." Accordingly, the court ordered the parents, if they wished to proceed, to file an amended complaint under seal and ordered that pseudonyms be used in unsealed documents "during the course of litigation." The court specified that its contemplated protective order sealing the parents' identities in the amended complaint would permit disclosure of the parents' identities only to the court and to the attorneys for the parties.

¶8 The parents requested that the circuit court's order limit access to their identities as revealed in the amended complaint to the court and to a "single attorney from the [D]istrict and a single attorney from the intervening defendants." The court rejected that request, explaining: "That would entangle me [in] … the local and national counsel relationship and create a conflict of interest possibl[y] between lawyers and their firms as to how they would share information and divide their workload …. And to limit which attorneys have access to that information would be an unnecessary intrusion into their practice of law."

¶9 In the alternative, the parents asked the circuit court to order that access to their identities as revealed in the amended complaint be limited to the court and the attorneys for the District, thus barring disclosure to attorneys for the intervenors. The court rejected this request, explaining that this would make counsel for the intervenors "essentially a second class behind [counsel for the District]," deny counsel for the intervenors "information that [counsel for the District] can be trusted with," and impede the ability of counsel to work together.

¶10 The parents took the position that the circuit court's order was insufficiently protective because it would allow the law firms for the District and the intervenors to learn the parents' identities and "every additional person who knows who they are creates additional risk that their name[s] will be even accidentally leaked." The court asked the parents whether there was any reason to believe that any attorneys in this case would not comply with the court's order and counsel assured the court that the parents had no reason to "distrust" the attorneys and in fact had "every reason" to believe that the attorneys would "make every effort to preserve the plaintiffs' anonymity and follow a court order." The court found that all of the attorneys involved in the litigation could be expected to honor the court's order and, accordingly, rejected the parents' request to limit disclosure to fewer than all counsel for the parties. The court determined that its order would adequately protect the parents' identities and guard against potential "fallout" for the parents and their children in pursuing this action.

¶11 At the conclusion of the hearing, the circuit court directed counsel for the parents to draft a protective order under which the parents' identities as revealed in the amended complaint would be sealed "for attorneys' eyes only," such that the parents' identities would not be disclosed to the parties or to "anyone

else, period …. And that includes expert witnesses. That includes [the attorneys'] other clients."

¶12 On June 3, 2020, the circuit court issued the written order to file under seal. That order reads as follows:

> this Court denies [the parents'] request [to proceed using pseudonyms] for the reasons stated at the [May 26, 2020] hearing. [The parents] must disclose their identities to the Court and attorneys for the litigants. However, the Court is satisfied that there is sufficient need to keep the [parents'] names sealed and confidential from the public. Therefore, on or before June 9, 2020, [the parents] must file, under seal, an amended complaint that states the names and addresses of the [parents] that are proceeding in this action. [The parents] also must promptly circulate a draft protective order to opposing counsel, and all parties are required to negotiate the terms of a protective order in good faith.

¶13 Pertinent to this appeal, the parents and the circuit court, in subsequent proceedings, addressed the terms of the order to file under seal. On June 5, 2020, the parents submitted to the court a proposed protective order providing that the parents' identities in the amended complaint would "be available only to the Court and to counsel for the parties who have direct functional responsibility for the preparation and trial of the lawsuit and who have appeared in this action" and that those lawyers would be prohibited from disclosing the parents' identities to "any lawyers" without "direct functional responsibility" for the case and to "any other staff of the law firms participating in this case."

¶14 The circuit court held a status conference at which it addressed the parents' proposed protective order. The court rejected the parents' request to limit access to their identities in the amended complaint to only those lawyers "who

have direct functional responsibilities for preparation and trial of the lawsuit and who have appeared in this action," and rejected their request to prohibit disclosure to non-lawyers associated with the parties' attorneys. The court repeated its "entanglement" reasoning: that any lawyer to whom the parents' identities were disclosed would have to sign and be bound by the court's protective order and permitting disclosure only to certain lawyers would "entangle" the court in "micromanagement" of the defense and contravene the pro hac vice appearance of non-Wisconsin lawyers for the intervenors. The court also noted that, under SCR 20:5.3(a)-(c), each of the lawyers in this case is responsible for compliance with the court's protective order by non-lawyer assistants. The court directed counsel for the District to confer with the parents and draft a protective order "protecting the secrecy of the [parents' identities], but otherwise allowing [for] the [plaintiffs', defendant's, and intervenors' lawyers'] ability to practice law."

¶15 Before the District submitted any draft protective order, the parents filed a notice of appeal of the circuit court's order to file under seal and also petitioned this court for leave to appeal that order. We granted the parents' petition for leave to appeal under WIS. STAT. § 808.03(2) ("Appeals by permission").[3]

¶16 The parents moved the circuit court to stay, pending appeal, its order to file under seal. The circuit court held a motion hearing at which it reiterated the basis for its order, again explaining that, "in balancing the considerations sought

[3] In our order granting the parents' petition for leave to appeal under Wis. Stat. § 808.03(2), we directed the parties to include argument in their appellate briefs addressing whether the circuit court's order to file under seal is a final order appealable as of right under Sec. § 808.03(1). Upon review of the briefing, we conclude that we need not decide that issue.

by the [parents]," it determined that the "appropriate course of conduct was to require disclosure of the names under seal with a protective order for attorneys' eyes only." The court continued:

> I don't think this is very complicated. I understand … the plaintiffs' concern over the preservation of their anonymity. The fact that I did not do as they asked does not mean that I do not understand. It's simply that as I said and I'll say it again is that I did not believe that what they were requesting was supported by current Wisconsin law. And … even if it had been supported by Wisconsin law or that I could create this law, I wouldn't do it in this case under the facts of this case…. But I structured the communication of [the parents' identities] in such a way as I hoped and believed that it would maximize the [parents'] individual interest [in] protecting themselves from the threat of retaliation by entering a protective order and allowing [their identities] to be filed under seal.

The circuit court granted the parents' motion for a stay pending appeal of the court's order to file under seal. No amended complaint has been filed, nor has a new protective order been submitted.[4]

DISCUSSION

¶17 The only portion of the circuit court's order to file under seal that the parents challenge on appeal is the provision that the parents' identities in the amended complaint be revealed to the attorneys for the District and the intervenors. We begin by explaining the standard of review governing a circuit

[4] We note for context the following additional events, none of which is at issue in this appeal, which occurred after the parents appealed the circuit court's order to file under seal. The circuit court granted in part and denied in part the parents' motion for injunctive relief pending appeal as to the District's adherence to the Guidance challenged in this case. We denied the parents' motion in this court seeking relief pending appeal beyond that granted by the circuit court. The parents then filed in the Wisconsin Supreme Court a petition for review of both courts' rulings on their motions for injunctive relief pending appeal, and the supreme court denied the petition in March 2021.

court's decision to seal information in a court record. We next explain the Wisconsin law governing access to court records, including the statutory procedure for protecting information in a court record and the substantive law interpreting that procedure. Before applying those legal principles to this case, we address and reject the parents' proposal that we instead apply what they represent are the legal principles in federal law that specifically govern protection of a party's identity. Finally, we analyze the circuit court's order pursuant to Wisconsin law and explain why we affirm.

I. Standard of Review

¶18 We review for an erroneous exercise of discretion the circuit court's order to seal the parents' identities except from the court and the attorneys for the parties. *See* ***Krier v. EOG Env't, Inc.***, 2005 WI App 256, ¶¶1, 23, 288 Wis. 2d 623, 707 N.W.2d 915 (decision to seal court records reviewed for erroneous exercise of discretion). We will affirm so long as the circuit court "examines the relevant facts, applies the proper legal standard, and uses a rational process to reach a reasonable conclusion." ***State v. Richard J.D.***, 2006 WI App 242, ¶5, 297 Wis. 2d 20, 724 N.W.2d 665. An erroneous exercise of discretion occurs if the court fails to exercise its discretion, the record demonstrates that the facts do not support the court's decision, or the court applies the incorrect legal standards. ***Krier***, 288 Wis. 2d 623, ¶23. We do not "fulfill a fact finding function" or "exercise the [circuit] court's discretion," ***id.***, ¶24, and we uphold unless clearly erroneous the circuit court's findings of fact. ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 368, 752 N.W.2d 748 (We uphold a circuit court's finding of fact unless it is clearly erroneous, that is, if "it is against the great weight and clear preponderance of the evidence.").

II. Wisconsin Law Governing Access to Court Records

¶19 Wisconsin statutory and case law mandate open court records. *See* WIS. STAT. §§ 19.31-32 (declaring the legislature's policy behind Wisconsin's public records law and specifying that "any court" is among the governmental authorities subject to the public records law); WIS. STAT. § 59.20(3) (providing that every clerk of the circuit court must permit any person to examine court records); ***State ex rel. Bilder v. Delavan Twp.***, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983) (Wisconsin statutory law "reflects a basic tenet of the democratic system that the people have the right to know about operations of their government, including the judicial branch."). In general, a party cannot file a lawsuit in Wisconsin's courts without revealing its identity because the complaint initiating the action must "include the names and addresses of all the parties," WIS. STAT. § 802.04(1), and, once a document is filed with the court it is "a judicial record, subject to the access accorded such records." ***Matter of Ests. of Zimmer***, 151 Wis. 2d 122, 134, 442 N.W.2d 578 (Ct. App. 1989) (internal quotation marks and quoted source omitted). Thus, a party seeking redress in our courts generally must reveal its identity to the public. *See* ***Bilder***, 112 Wis. 2d at 557 ("Any use of the judicial process opens information about a party's life to the public's scrutiny.").

¶20 However, there are exceptions to this general rule of open court records. See Wis. Stat. § 19.35(1)(a) (mandating open access to records "except as otherwise provided by law"); Bilder, 112 Wis. 2d at 553-55 ("absolute right" of public to inspect court records is "not without exception" and yields where sealing is authorized by statute or where disclosure would infringe on a constitutional right); e.g., Wis. Stat. §§ 801.19 and 801.20 (listing information and documents customarily treated as confidential). The legislature has provided a sealing

procedure for information in a court record that is not required by statute to be treated as confidential, but that a party asserts needs to be protected. Our case law has provided a substantive legal test that interprets that procedure. We now describe that procedural and substantive law.

A. Procedure Governing Motions to Protect Information in Court Records

¶21 WISCONSIN STAT. § 801.21 provides:

> A party seeking to protect a court record … shall file a motion to seal part or all of a document or to redact specific information in a document … [and] shall specify the authority for asserting that the information should be restricted from public access. The information to be sealed or redacted may be filed under a temporary seal, in which case it shall be restricted from public access until the court rules on the motion.

Sec. 801.21(2). Upon a motion to seal, the circuit court "shall determine whether there are sufficient grounds to restrict public access according to applicable constitutional, statutory, and common law." Sec. 801.21(4). If the court determines that there are sufficient legal grounds to protect information in a court record, it "will use the least restrictive means that will achieve the purposes of this rule and the needs of the requester." Sec. 801.21(4).

¶22 Wisconsin Stat. § 801.21 is "intended to make it clear that filing parties do not have the unilateral right to designate any filing as confidential and that permission from the court is required." Comment, 2015, § 801.21. The court's permission "may flow from a statute or rule explicitly requiring that a particular document or portion of a document be filed confidentiality or from an analysis of the facts of the case and the applicable law." Id. The statute merely sets out the "procedural prerequisites" for protecting information in a court document. Id. The substantive legal tests for determining whether to issue an

order to seal come from our case law interpreting our legislature's laws that mandate open court records.

B. Substantive Law Governing Motions to Seal Information in Court Records

¶23 Wisconsin case law makes clear that, except as otherwise authorized by law, the sealing of information in court documents is disfavored. *See* ***Zimmer***, 151 Wis. 2d at 131 (exceptions to the rule of public access to court records "must be narrowly construed" and "will be tolerated only in the 'exceptional case'") (quoted source omitted); ***Bilder***, 112 Wis. 2d at 556-7 (a party seeking to protect information in a court record must "overcome the legislatively mandated policy favoring open records"); ***Krier***, 288 Wis. 2d 623, ¶23 ("When examining the contours of the open records presumption and particularly as it applies to court records and the court's control over those records, there is a strong presumption favoring access ….").

¶24 However, even when not specifically authorized by other law, the rule of open court records may yield in cases where "the administration of justice requires" protecting information in the court record, ***Bilder***, 112 Wis. 2d at 556-57, or where an "overriding public interest" in protecting the information

outweighs the presumption of public access, ***Krier***, 288 Wis. 2d 623, ¶23.[5] We now explain in turn each of these two exceptions.

¶25 In ***Bilder***, 112 Wis. 2d 539, our supreme court explained that, in addition to the power to issue protective orders governing court records as authorized by statutory or constitutional law, ***id.*** at 554-55, "[t]he circuit court under its inherent power to preserve and protect the exercise of its judicial function of presiding over the conduct of judicial proceedings has the power to limit public access to judicial records when the administration of justice requires it." ***Id.*** at 556. This standard sets a high bar: "the party seeking to close court records bears the burden of demonstrating, with particularity, that the administration of justice requires that the court records be closed…. Even then [a protective] order is appropriate only when there is no less restrictive alternative available." ***Id.*** at 556-57.

[5] The administration of justice test comes from our supreme court's interpretation in ***State ex rel. Bilder v. Delavan Twp.***, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983) of WIS. STAT. § 59.14 (1979-80) (renumbered sec. 59.20 (2019-20)), which requires the "clerk of the circuit court" to open all court records to public examination. The overriding public interest test comes from Wisconsin case law, *e.g.*, ***C.L. v. Edson***, 140 Wis. 2d 168, 181-82, 409 N.W.2d 417 (Ct. App. 1987), interpreting our public records law, WIS. STAT. §§ 19.31-19.37, which declares "a presumption of complete public access" to records of "any court of law." Secs. 19.31-19.32(1). When analyzing issues involving the protection of court records, we have used both tests. *See, e.g.*, ***C.L.***, 140 Wis. 2d at 181-82 (applying only the public interest test to a request to seal court documents); ***Estates of Zimmer***, 151 Wis. 2d 122, 128-30, 131-32, 442 N.W.2d 578 (Ct. App. 1989) (separately applying each test and concluding that both tests required opening the pertinent court records); ***Krier v. EOG Env't, Inc.***, 2005 WI App 256, ¶¶9, 18, 23-25, 288 Wis. 2d 623, 707 N.W.2d 915 (concluding that the circuit court failed to consider an element of the administration of justice test and remanding for consideration of both tests); ***State v. Stanley***, 2012 WI App 42, ¶¶29-31, 340 Wis. 2d 663, 814 N.W.2d 867 (discussing both tests but applying the administration of justice test only in analyzing newspaper's request to unseal court records). Here, we need not determine which test to use because the result is the same under either test.

¶26 When no statutory or common law exceptions to the rule of openness exist, we have also approved protective orders governing court records when "permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." ***Zimmer***, 151 Wis. 2d at 132. Under this exception, the party seeking a protective order governing a court record bears the "burdening oar of proof" to show an "overriding public interest in closure." ***Krier***, 288 Wis. 2d 623, ¶¶23-24. That party may not rely on his or her *individual* privacy interest, but rather only on "the public's interest in protecting [the individual's] privacy." ***Zellner v. Cedarburg Sch. Dist.***, 2007 WI 53, ¶17, 300 Wis. 2d 290, 731 N.W.2d 240. The "public interest in protecting the reputation and privacy of citizens … is *not* equivalent to an individual's personal interest in protecting his or her own character and reputation," and "the public interest in protecting individuals' privacy and reputation arises from the public effects of the failure to honor the individual's privacy interests, and not the individual's concern about embarrassment." ***Linzmeyer v. Forcey***, 2002 WI 84, ¶31, 254 Wis. 2d 306, 646 N.W.2d 811.

¶27 This case requires that we analyze the circuit court's order pursuant to the Wisconsin statutory procedure and case law set out above. However, before conducting our analysis, we first address the parents' argument that we should instead apply what they represent to be the federal law on protection of a party's identity.

C. Parents' Proposed Law Governing Protection of a Party's Identity

¶28 The parents represent that the federal courts in some cases permit parties to protect their identities by suing "anonymously" such that even the court

itself does not know the parties' identities. *See, e.g.*, ***Roe v. Wade,*** 410 U.S. 113, 124 (1973) (accepting as true for purposes of her case, Roe's "existence" and "pregnant state"); ***Doe v. Bolton***, 410 U.S. 179, 187 (1973) ("despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state"). Under this procedure, it appears that a plaintiff's identity is protected without a motion to seal and without a protective order from the court because the court record is simply devoid of any information that identifies the plaintiff. *See, e.g.*, ***Roe v. Ingraham***, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973) (permitting plaintiffs to prosecute their suit "only by fictitious names" when "plaintiffs' attorneys have represented to the court" that "these fictitious names are actually representative of real and specific aggrieved individuals" and noting that such a procedure "was given implicit recognition by the United States Supreme Court in ***Roe v. Wade*** ... and ***Doe v. Bolton***").[6] The parents argue that because federal courts in some cases have protected parties' identities by permitting them to proceed "anonymously" as described above, Wisconsin courts must have the power to do the same, asserting, "Surely Wisconsin courts have just as much authority as federal courts to allow anonymity in the right cases."

[6] We note that the majority of the federal cases cited by the parents do not evince the use of such a procedure. Several use pseudonyms without explanation, *see, e.g.*, ***Doe v. Colautti***, 592 F.2d 704, 705 (3d Cir. 1979) (no comment on use of pseudonym); ***Plyler v. Doe***, 457 U.S. 202 (1982) (same), and several others indicate that the federal court, similar to the circuit court here, protected a party's identity through an order to seal that information pursuant to a protective order under which the party's identity was disclosed only to the court and to the attorneys involved in the case. *See*, *e.g.*, ***Doe v. Porter***, 370 F.3d 558, 561 (6th Cir. 2004) (court entered protective order under which only the court and counsel could learn plaintiffs' identities); ***Roe v. Aware Woman Ctr. for Choice, Inc.***, 253 F.3d 678, 687 (11th Cir. 2001) (plaintiff entitled to proceed pseudonymously as to the general public while disclosing her name to defendants under protective order); ***Doe v. Stegall***, 653 F.2d 180, 182 (5th Cir. 1981) (concerning protective order under which plaintiffs challenging prayer in schools would "disclose their identities to the defendants and to the Court" but proceed by using pseudonyms in public filings to prevent "disclosure to the general public").

¶29 The parents represent that the substantive law that the federal courts "uniformly apply" to requests for anonymity is "a balancing test 'that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure.'" *See* ***Sealed Plaintiff v. Sealed Defendant***, 537 F.3d 185, 189 (2d Cir. 2008).[7] The parents cite federal cases in which courts "identify a variety of factors to consider" in applying this balancing test, including whether the litigation involves: (1) minor children; (2) matters of a highly sensitive and personal nature; (3) deeply held beliefs; (4) a danger of retaliation; (5) a challenge to government action; (6) purely legal issues; and (7) a situation in which anonymity will not prejudice the opposing party. They assert, citing ***Krier***, 288 Wis. 2d 623, ¶23, that the federal test as they describe it is "equivalent" to the substantive Wisconsin rule governing orders to seal a court record and that Wisconsin courts should therefore adopt the federal test. We disagree, for the reasons we now explain.

¶30 When addressing Wisconsin law, Wisconsin courts are bound by the decisions of Wisconsin courts. *See* ***State v. Muckerheide***, 2007 WI 5, ¶7, 298 Wis. 2d 553, 725 N.W.2d 930 (case law from other jurisdictions "is not binding precedent in Wisconsin, and a Wisconsin court is not required to follow it."). As to the procedure for protecting a plaintiff's identity, the parents do not identify, and our research does not reveal, any Wisconsin case or statute authorizing a party to proceed "anonymously" in such a way that no filing containing the party's identity is included, even under seal, in the court record. The parents argue that, in

[7] We question whether the purported federal test is in fact "uniform." *See* Donald P. Balla*, John Doe Is Alive and Well: Designing Pseudonym Use in American Courts,* 63 ARK. L. REV. 691, 692 (2010) (discussing "the patchwork approach to pseudonym rules that has plagued the federal circuit courts" and considering what rules the United States Supreme Court should adopt "when it finally resolves the differences among the circuits.").

practice, "Wisconsin courts have regularly allowed plaintiffs to sue using pseudonyms," but the cases they cite merely use pseudonyms in the captions and do not show that Wisconsin courts have permitted parties to proceed under the parents' proposed alternative procedure and without filing a motion to seal the information in the court records at issue. *See* ***Doe 56 v. Mayo Clinic Health Sys.–Eau Claire Clinic, Inc.***, 2016 WI 48, 369 Wis. 2d 351, 880 N.W.2d 681 (no discussion of pseudonyms); ***Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.***, 227 Wis. 2d 779, 596 N.W.2d 403 (1999) (same); ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 565 N.W.2d 94 (1997) (same); ***Doe v. Roe***, 151 Wis. 2d 366, 444 N.W.2d 437 (Ct. App. 1989) (same).

¶31 We decline to adopt such a procedure as a substitute for Wisconsin's clearly delineated statutory procedure, under which a party seeking to protect its identity may do so through a motion to seal, and may file the identifying complaint under temporary seal while awaiting the court's decision on the motion. *See* WIS. STAT. § 801.21(2) ("A party seeking to protect a court record … shall file a motion to seal …. The information to be sealed or redacted may be filed under a temporary seal, in which case it shall be restricted from public access until the court rules on the motion.").[8]

[8] The parents also argue that affirming the circuit court's order here would inappropriately curtail the authority of Wisconsin courts "to allow anonymity in the right cases" and "would have broad ramifications" because it would "force plaintiffs in important but sensitive cases out of state court and into federal court." This argument lacks merit for reasons we have explained. Wisconsin circuit courts have the power to enter as restrictive a protective order as is warranted, taking into account the facts and circumstances of a particular case and the public interest or the administration of justice. The Wisconsin statutory motion to seal procedure allows parties to file sensitive information under temporary seal while awaiting the circuit court's disposition of the motion. WIS. STAT. § 801.21(2) and (4).

¶32 As to the substantive legal principles governing protection of a party's identity, we decline to adopt the purported federal balancing test (assuming without deciding that there is a uniform federal test) because it is contrary to, not equivalent to, the Wisconsin balancing test. As the parents represent it, the federal test, under which "the plaintiff's need for anonymity" is weighed against the public interest in openness, ***Sealed Plaintiff***, 537 F. 3d at 189, is at odds with the Wisconsin balancing test, under which only the public's interest in protecting the party's identity, not the plaintiff's private interest, is weighed in the balance. ***Krier***, 288 Wis. 2d 623, ¶23 (strong presumption favoring access "may be overcome only by a showing of an overriding public interest in closure"); ***Linzmeyer***, 254 Wis. 2d 306, ¶31 ("public interest in protecting the reputation and privacy of citizens … is *not* equivalent to an individual's personal interest").

¶33 Having clarified that Wisconsin law governs our review of the circuit court's order in this case, we now proceed to our analysis applying that law.

III. Analysis

¶34 To repeat, the circuit court ordered the parents, if they wished to proceed, to file under seal and pursuant to a protective order an amended complaint stating their identities such that their identities would be disclosed only to the court and the attorneys for the litigants. Also to repeat, the parents challenge only that portion of the court's order providing for disclosure to the

parties' attorneys.[9] Reviewing the circuit court's order to seal for an erroneous exercise of discretion, *see* ***Krier***, 288 Wis. 2d 623, ¶23, we conclude that the parents fail to show that the circuit court erroneously exercised its discretion in issuing its order.

¶35 The record shows that the circuit court applied the appropriate standard of law in analyzing the parents' request to seal information in the court record. The parents did not in the circuit court and do not now assert that their request is subject to any blanket legal exception to Wisconsin's general rule of open court records. The court considered the "administration of justice" test when it concluded that an unsealed public record of the parents' identities risked frustrating "the orderly function" of the judicial process. *See* ***Bilder***, 112 Wis. 2d at 556 (circuit court has power to restrict access to court records if so required by the administration of justice). The court considered the "public interest" test when it explicitly explained that it was exercising its discretion in fashioning its order and that it was balancing "the public's right to know … against situations where that right is outweighed by other concerns" and concluded that the public's interest in preventing the potential harassment of the parents and disruption of the legal process outweighed the presumption of openness. ***Krier***, 288 Wis. 2d 623, ¶¶23-24 ("overriding public interest in closure" may warrant sealing court records).

[9] The parents assert in their reply brief that they "have offered to disclose their identities to the Court alone in a sealed complaint." The parents cite no portion of the record in support of this assertion. As stated above, the parents did offer to submit unredacted versions of their affidavits for the circuit court's in camera review. Nonetheless, we understand their assertion on appeal to mean that the parents do not object to revealing their identities to the court in a sealed amended complaint.

¶36 As summarized above, the circuit court considered whether an order sealing the parents' identities from some or all of the attorneys for the litigants was necessary to achieve the end of protecting the parents from harassment and ensuring the smooth administration of justice in this case. It concluded that, because the attorneys could be expected to keep the parents' identities confidential and because the parents' proposed restrictions would entangle the court in the attorneys' work and potentially impede the defense, such an order was not appropriate or necessary. *See* WIS. STAT. § 801.21(4) (court will use "least restrictive means necessary" in sealing court records). Based on this record, we conclude that the parents fail to show that the circuit court erroneously exercised its discretion. *See* ***Krier***, 288 Wis. 2d 623, ¶23 ("An erroneous exercise of discretion occurs if the court fails to exercise its discretion, the record demonstrates that the facts do not support the [circuit] court's decision, or the [circuit] court applied the wrong legal standards."). We now address in turn the parents' three arguments to the contrary.

¶37 First, the parents argue that the circuit court failed to conduct an appropriate balancing of considerations or to apply any "legal standard" because it concluded that it "lacked authority" to grant the parents' request. This argument is refuted by the record. The court recognized that it had the "authority" and "discretion" to fashion an order sealing the parents' identities with terms that it concluded were "appropriate," and its multiple questions to the parents regarding whether there was any reason to distrust any of the attorneys involved in this case show that the court was aware of its power to impose a more restrictive order. The court's statements about lacking authority plainly refer only to the parents' request to proceed as initially outlined in their "motion to proceed using pseudonyms," by which the parents sought to litigate this case without filing, even under seal, a

court record stating their identities. As explained, the record shows that the court balanced appropriate considerations and exercised its discretion in evaluating the parents' various requests pursuant to the Wisconsin law described above.

¶38 Second, the parents argue that the circuit court erred because its order to file under seal "would expose [the parents'] identities to an unreasonably large group of people" because the "lawyers (and associates, paralegals, secretaries, interns, etc.)" involved in this litigation number "well over a thousand, if not in the thousands." This argument fails because the court's determination that its order adequately mitigates such risks is supported by its findings of fact that the attorneys involved in this litigation can be expected to honor the court's order and to responsibly supervise non-lawyers performing work on this case. *See* ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (we will uphold the circuit court's exercise of discretion if we can find facts of record that would support the circuit court's decision). The parents point to no evidence in the record that show these findings of fact to be clearly erroneous. *See* ***Arias***, 311 Wis. 2d 358, ¶12 (We uphold a circuit court's finding of fact unless it is clearly erroneous, that is, if "it is against the great weight and clear preponderance of the evidence.").

¶39 The parents assert that, although they "do not mean to suggest, and have no reason to believe, that Defendants' counsel will intentionally violate a protective order," the harm of a leak "cannot be undone" and "contentious, high-profile cases like this provide a strong temptation for a leak." Such speculative harms are not enough to show that the parents' proposed terms for an order to seal are the "least restrictive means" available, WIS. STAT. 801.21(4), to protect the parents from harassment. *See* ***Zimmer***, 151 Wis. 2d at 137 ("speculative reference" to relatives' fear that disclosure of court documents could occasion

further contact with perpetrator of deceased relatives' murders did not justify closure); ***C.L.***, ***v. Edson***, 140 Wis. 2d 168, 174, 184, 409 N.W.2d 417 (Ct. App. 1987) (affirming circuit court's decision to redact identifying references to minor plaintiffs and to deny plaintiffs' request for a more restrictive seal of the court records when plaintiffs showed only "potential harm" for which there was "no factual foundation"). The parents have failed to show "with particularity" that the administration of justice requires a more restrictive protective order. *See* ***Krier***, 288 Wis. 2d 623, ¶¶18, 19 ("necessary element" of particularity "as to the adverse impact disclosure would produce" must be proven by the party seeking closure); ***Bilder***, 112 Wis. 2d at 556–57 ("party seeking to close court records bears the burden of demonstrating, with particularity, that the administration of justice requires that the court records be closed").

¶40 Third, the parents argue that they are entitled to a more restrictive order than that issued by the circuit court because: (1) their identities are "entirely irrelevant" to the "purely legal" issues that this case raises; and (2) their suggested alternative orders would present a "lack of prejudice" to the other parties in this case. These are two of the factors that the parents represent are considered by federal courts. *See* ***Sealed Plaintiff***, 537 F. 3d at 189.

¶41 This argument lacks merit because neither of these two factors are weighed in the balance in Wisconsin case law, under which only an "overriding public interest in closure," ***Krier***, 288 Wis. 2d 623, ¶¶23-24, or the requirements of the "administration of justice," ***id.***, ¶9, can justify an exception to our general public policy of democratic openness.[10] *See* ***Bilder***, 112 Wis. 2d at 553 (policy of

[10] This is not to say that Wisconsin courts may not, in the exercise of their discretion as part of their analysis under the Wisconsin tests, weigh any factors identified by the federal courts.

open court records "reflects a basic tenet of the democratic system that the people have the right to know about operations of their government, including the judicial branch, and that where public records are involved the denial of public examination is contrary to the public policy and the public interest"). "The courts have been the great repositories of personal liberty, and their obligation is not only to see that the conduct and performance of executive and legislative officials is open to public scrutiny, but to maintain for themselves the high standards that they prescribe for others." ***State ex rel. J. Co. v. County Ct. for Racine Cnty.***, 43 Wis. 2d 297, 312-13, 168 N.W.2d 836 (1969)**.**

¶42 Importantly, the parents do not offer any developed argument that Wisconsin law entitles them to a more restrictive protective order. They do not argue that the more restrictive terms they proposed are "required by the administration of justice," ***Bilder***, 112 Wis. 2d at 556-57, or that public interest in keeping their identities confidential from the attorneys for the parties outweighs the court's obligation to protect the parents' identities using the least restrictive means necessary. *See* ***C.L.***, 140 Wis. 2d at 181 (seal permitted when public interest in keeping a court record confidential outweighs the public policy of open court records). Conclusory assertions do not substitute for a developed argument that the circuit court erred. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (this court may decline to consider conclusory and undeveloped arguments that are not adequately briefed).

¶43 Overall, the gravamen of the parents' argument is that we should weigh their asserted grounds for protecting their identities differently than did the circuit court. Contrary to the parents' contentions throughout their briefing, the court weighed the parents' interests in a more restrictive protective order and

explained why it determined that, under "the facts of this case" and "balancing the considerations sought by the [parents]," the "appropriate course of conduct was to require disclosure of the names under seal with a protective order for [the court's and the] attorneys' eyes only." To repeat, as an appellate court we do not reweigh or rebalance the factors considered by a circuit court in fashioning a discretionary protective order. ***Krier***, 288 Wis. 2d 623, ¶22 (we do not "exercise the [circuit] court's discretion.").

¶44 In sum, the parents have failed to show that the circuit court erroneously exercised its discretion in ordering the parents to state their identities in a sealed amended complaint pursuant to a protective order under which the parents' identities would be disclosed only to the court and to the attorneys for the parties.

CONCLUSION

¶45 For all the reasons stated above, we affirm.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

FILED
11-09-2020
CLERK OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

November 9, 2020

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You are hereby notified that the Court has entered the following order:

2020AP1032 John Doe 1 v. Madison Metro School District (L.C. # 2020CV454)

Before Blanchard, Kloppenburg, and Nashold, JJ.

The appellants, John Does and Jane Does, are parents of children attending schools in the Madison Metropolitan School District. Their appeal presents the issue of whether they may proceed anonymously in their underlying lawsuit against the School District. The parents move for injunctive relief pending appeal. They ask that we enjoin the School District from adhering to certain provisions in the School District's "Guidance & Policies to Support Transgender, Non-

binary, & Gender-Expansive Students." The respondents, the School District and three student groups, oppose the parents' motion. We deny the motion because the parents fail to persuade us that they are entitled to injunctive relief pending appeal beyond that already granted to them by the circuit court.[1]

Background

In February 2020, the parents sued the School District, alleging that the School District's Guidance & Policies violate their constitutional rights. The Guidance & Policies include a provision that prohibits School District staff from disclosing a student's gender identity to parents, unless legally required or with the consent of the student. The Guidance & Policies also include a provision that allows staff to use a student's self-chosen name and gender pronouns in the school setting while using a different name and pronouns with the child's family.[2] The parents assert in their suit that the Guidance & Policies allow School District staff to deceive and withhold information from them, in violation of their constitutional rights to direct the upbringing of their children and to raise their children in accordance with the parents' religious beliefs.

The parents filed a motion requesting that they be permitted to proceed anonymously. The circuit court denied the request in part. The court entered an order requiring the parents to

[1] The parents have also filed a motion for permission to file a reply in support of their motion for injunctive relief pending appeal. We grant the motion for permission to file a reply.

[2] The parents refer to these provisions as allowing students to "socially transition," and the respondents take issue with that characterization. We refer to these provisions as the "gender identity" provisions, and use the phrase "socially transition" as used by the parents in their arguments, without resolving at this time any disputes regarding this terminology.

disclose their identities to the court and to party attorneys, while also providing that the parents' identities would remain sealed and confidential from the public. The parents filed a notice of appeal and a petition for leave to appeal the circuit court's order on the anonymity issue. The circuit court agreed to stay that order pending appeal, thereby allowing the parents to remain anonymous to the court and opposing counsel while their appeal is pending.

We took jurisdiction over the appeal on the anonymity issue. We determined that, even if the circuit court's order on the anonymity issue was not a final appealable order, we would grant leave to appeal the order.

In the interim, the parents filed a motion in the circuit court for injunctive relief pending appeal pursuant to WIS. STAT. § 808.07(2).[3] Section 808.07(2) provides:

> (a) During the pendency of an appeal, a trial court or an appellate court may:
>
> 1. Stay execution or enforcement of a judgment or order;
>
> 2. Suspend, modify, restore or grant an injunction; or
>
> 3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

The parents requested that the circuit court enjoin the School District from: "(1) enabling children to socially transition to a different gender identity at school by selecting a new 'affirmed named and pronouns,' without parental notice or consent"; "(2) preventing teachers and other

[3] The parents also filed a separate motion in the circuit court for a temporary injunction pursuant to WIS. STAT. § 813.02. The parents ask that we decide whether the circuit court erred by declining to hear their motion for a temporary injunction under § 813.02 within a reasonable time, but they concede that we need not decide this issue in order to resolve their motion for relief pending appeal. Given this concession, we decline to address the issue.

staff from communicating with parents that their child may be dealing with gender dysphoria, or that their child has or wants to change gender identity, without the child's consent"; and "(3) deceiving parents by using different names and pronouns around parents than at school."

The parents argued to the circuit court that they were entitled to injunctive relief pending appeal because they satisfied each of the requirements for a temporary injunction, including the requirement that they show a likelihood of irreparable harm absent injunctive relief. The parents asserted that the School District's Guidance & Policies created the potential for significant harm both to their children and to themselves. The parents argued that a child's social transition to a different gender identity can be self-reinforcing and make a full transition more likely. They contended that transitioning and transgender children are at an increased risk for a number of physical and psychological harms. They argued that the School District's Guidance & Policies interfered with their right to choose a course of treatment for any of their children who might experience gender dysphoria or otherwise need mental health support. Additionally, the parents argued that a violation of their constitutional rights as parents was itself an irreparable harm.

The respondents contended that the parents failed to satisfy the requirements for injunctive relief. Among other arguments, the respondents contended that the parents failed to show that there was a likelihood of irreparable harm absent injunctive relief.

The circuit court partially granted and partially denied the parents' motion for injunctive relief pending appeal. The circuit court determined that, by remaining anonymous to the court, the parents had failed to provide sufficient facts for the court to find that they or their children would suffer irreparable harm. The court further determined that, by remaining anonymous to the court, the parents had deprived the respondents of a meaningful opportunity to challenge

factual assertions underlying the parents' requests for injunctive relief. The court also determined, however, that a partial injunction would preserve the status quo while the parents' appeal on the anonymity issue remains pending. The court enjoined the School District, pending the parents' appeal, from "applying or enforcing any policy, guideline, or practice reflected or recommended in" the Guidance & Policies "in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school."

Discussion

In the motion now before this court, the parents seek relief pending appeal under WIS. STAT. § 808.07(2) and WIS. STAT. RULE 809.12. As noted, § 808.07(2) provides that, "[d]uring the pendency of an appeal," the circuit court or this court may "[s]uspend, modify, restore or grant an injunction" as well as make "any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered." RULE 809.12 provides that a party aggrieved by a circuit court order granting relief under § 808.07 may file a motion for relief from that order in this court. *See* RULE 809.12 ("A person aggrieved by an order of the trial court granting the relief requested may file a motion for relief from the order with the court.").

As an initial matter, we question whether the injunctive relief that the parents seek in this court is an available form of relief under WIS. STAT. § 808.07(2) and WIS. STAT. RULE 809.12. Although these provisions authorize the circuit court and this court to grant broad forms of relief, including injunctive relief, "[d]uring the pendency of an appeal," the pending appeal here pertains only to the anonymity issue. The circuit court stayed its order on that issue. The

injunctive relief the parents now seek pending appeal goes beyond the scope of their appeal and beyond the relief they could expect to achieve even if they fully prevail in the appeal. The parents do not direct our attention to authority that clearly supports the view that relief pending appeal pursuant to § 808.07(2) and RULE 809.12 can reach so broadly.

Regardless, we will assume without deciding that the injunctive relief the parents seek is an available form of relief pending their appeal. Even so, for the reasons we now discuss, the parents do not persuade us that they are entitled to injunctive relief beyond that already granted to them by the circuit court.[4]

The parties agree that the criteria for injunctive relief pending appeal are the same as the criteria for a temporary injunction. The parties further agree that, to obtain a temporary injunction, the party seeking the injunction must show a likelihood of success on the merits, a likelihood of irreparable harm absent an injunction, and no other adequate remedy at law. *See* ***Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.***, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. The parties dispute whether recent Wisconsin Supreme Court rulings have eliminated an additional requirement that injunctive relief is necessary to preserve the status quo. For purposes of this order, we need not and do not resolve that dispute.

The parties agree that we review the circuit court's grant or denial of a temporary injunction for an erroneous exercise of discretion. *See* ***id.***; ***School Dist. of Slinger v. Wisconsin***

[4] The parents request in the alternative that we grant the injunctive relief they seek under WIS. STAT. § 813.02 and WIS. STAT. RULE 809.14. However, the parents do not explain why this court would have authority to grant injunctive relief under § 813.02. Regardless, we need not address whether we have authority under § 813.02 because the parents argue that the criteria for granting temporary injunctive relief under § 813.02 are the same as the criteria under WIS. STAT. § 808.07(2) and WIS. STAT. RULE 809.12.

Interscholastic Athletic Ass'n, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). Thus, "[t]he test is not whether [we] would grant the injunction but whether there was an erroneous exercise of discretion by the circuit court." ***School Dist. of Slinger***, 210 Wis. 2d at 370.

Here, we conclude that the parents fail to show that the circuit court misused its discretion because the parents do not establish a likelihood of irreparable harm absent additional injunctive relief pending appeal. We need not decide whether the parents also fail to satisfy the other requirements for temporary injunctive relief.

First, as far as we can tell at this stage of the proceedings, the harms the parents assert are not likely harms but are instead potential harms that are uncertain and speculative. The parents' own argument sometimes reflects as much. In summarizing their harm argument, the parents assert: "The odds that children will seek to transition at school while this case is pending *may be low*, but the consequences *if* they do *could* be enormous and life-long." (Emphasis added; footnote omitted.) Likewise, the parents make other arguments using terminology that reflects the uncertain nature of the asserted harms. For example, the parents argue that affirming a child's gender identity during childhood "can be" self-reinforcing, and that the School District's Guidance & Policies "may" do lasting harm to them or their children.

As we understand the parents' more detailed arguments, the asserted harms depend on a chain of events, each of which is uncertain to occur: one of their children might now or in the future start to socially transition at school; the School District might apply its Guidance & Policies to withhold information about the child's social transition from that child's parent or parents; and the child's social transition might increase the child's risk for negative physical and

psychological health outcomes before the parent or parents can intervene and exercise their constitutional rights to direct the child's treatment and other aspects of the child's upbringing.

Second, the partial injunctive relief that the circuit court already granted largely addresses what appears to be the parents' most compelling concern, namely, that the School District will withhold information from the parents or actively deceive them in a manner that will prevent them from timely addressing the needs of one of their children in whatever way the parent or parents see fit. As noted, the circuit court enjoined the School District, pending the parents' appeal, from "applying or enforcing any policy, guideline, or practice reflected or recommended in" the Guidance & Policies "in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school."

Although the circuit court's ruling places a burden of inquiry on the parents, it does so only on a temporary basis, and it provides the parents with an avenue to avoid asserted harms while their case is pending. The parents concede that they do not seek injunctive relief that would go so far as to place an "*affirmative duty*" (their emphasis) on School District staff "to notify parents about any indication that a child may be wrestling with their gender identity."

As a final matter, we note that the respondents assert that injunctive relief pending appeal is especially unnecessary now, because the School District has announced that it will continue virtual learning for all grades until January 22, 2021. Although we do not rely on this assertion in denying the parents' motion, we agree that the absence of in-person learning could only weaken the parents' argument as to irreparable harm, and the parents do not argue to the contrary in their reply.

Therefore,

IT IS ORDERED that the motion for permission to file a reply is granted.

IT IS FURTHER ORDERED that the motion for injunctive relief pending appeal is denied.

Sheila T. Reiff
Clerk of Court of Appeals

FILED
06-03-2020
CIRCUIT COURT
DANE COUNTY, WI
2020CV000454

DATE SIGNED: June 3, 2020

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

JOHN DOE 1, et al.,

Plaintiffs,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

And

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,

Defendant Intervenors.

Case No. 20-CV-454

Honorable Frank D. Remington

ORDER ON PLAINTIFFS' MOTION TO PROCEED ANONYMOUSLY AND PERMANENT PROTECTIVE ORDER

Plaintiffs filed a motion to proceed anonymously using pseudonyms, and a hearing was held on this motion on May 26 before this Court. Having considered the parties' submissions and

arguments, this Court denies Plaintiffs' request as presented for the reasons stated at the hearing. Plaintiffs must disclose their identities to the Court and attorneys for the litigants. However, this Court is satisfied that there is sufficient need to keep the Plaintiffs' names sealed and confidential from the public. Therefore, on or before June 9, 2020, Plaintiffs must file, under seal, an amended complaint that lists the names and addresses of the plaintiffs that are proceeding in this action. Plaintiffs also must promptly circulate a draft protective order to opposing counsel, and all parties are required to negotiate the terms of a protective order in good faith.

So ordered.

It's your motion. I'll give you the last word.

MR. BERG: Yeah. I think the standing issue fully proves my point. You know, Mr. Blonien says, well, we need to know details about the plaintiffs to know their basis for standing.

At our scheduling hearing back in March, I openly acknowledged that there's nothing special about the plaintiffs. We're not acknowledging that they have any special injury. We're not even arguing that their children are presently dealing with gender dysphoria.

All we're arguing is that they're parents of children in the district and challenging this policy now in case their children deal with this issue. That's our entire basis for standing. The plaintiffs' anonymity hasn't prevented the district from filing a motion to have an argument on standing, so it clearly hasn't interfered with their ability to raise the issue.

And the district hasn't identified anything else. And, again, if something comes up later in the case, we can cross that bridge when we come to it.

THE COURT: Hang on a second. The air conditioning isn't working in the courthouse, and I've got to close the windows. I think there's some construction going on.

All right. Thank you very much, gentlemen. I

appreciate the argument. I also want to commend the parties on the briefs. It's always a pleasure to have well-written briefs that discuss the issue in detail in which both the plaintiff and the defendant presented to the court.

In the end, I'm bound by Wisconsin law, both in terms of what the statutes set forth and the Wisconsin common law as established by the Supreme Court. There is no precedent for what the plaintiff is asking for in the current published appellate case law.

I agree with the plaintiff, Mr. Berg, in terms of the factual basis they've demonstrated on the legitimacy and sincerity of their concern over the release of their identities. And so as a factual matter, I believe the plaintiffs have satisfied the court of the need to preserve their confidentiality and, in particular, when analyzed against the backdrop of the relevance or irrelevance of their identity on their ability to challenge the policy in question.

So the plaintiffs, in my opinion, have made that demonstrable factual showing that, as a factual matter, would their names be disclosed, they would likely be subject to threats and intimidation, which would be wholly inappropriate and frustrate the orderly functioning of the court case.

Now, however, the question then is what does the law allow the court to do to address the sincere established factual concerns over their safety and well-being? The plaintiffs suggest that nobody really needs to know.

I disagree, and I am not comfortable transporting into Wisconsin jurisprudence the standing and the practice -- the practice of the federal courts in similar circumstances. I believe that Wisconsin's longstanding practice of the public's having a right to know under the public records law and the common law and, in fact, the Constitution's obligation that the courts be open to the public militate dramatically against allowing parties telling no one who they are to come to court.

But that doesn't mean that everything is available and open to the public. That's not true. Whether we close cases and seal information involving minors or personnel records or medical records, the public's right to know is balanced off against situations where that right is outweighed by other concerns.

And I believe that the statutes in Wisconsin allow the plaintiffs to preserve their confidentiality of their identity in ways under 801.21 on an appropriate motion to seal with a protective order preserving the confidentiality of their identities to the attorneys'

eyes only.

I don't dismiss, Mr. Berg, your concern over the more people that know, the greater risk. That's true. But there's nothing about this case that's different than a trade-secret case or a trade -- a business case where confidential information is made known to the parties but yet its confidentiality is preserved.

So I will do as the plaintiff asks but in a different way. If the plaintiff -- I'm going to deny the plaintiffs' right to proceed in the manner in which you've selected by making anonymous all the plaintiffs. You can file an amended complaint identifying those plaintiffs, as ordinarily done, and that document can be filed under seal.

I will grant your motion to seal that information based on the factual demonstration that you've made, but that information will be shared with the attorneys' eyes only. And you'll draft an order for the court to sign protecting the confidentiality of their identity and precluding the dissemination of their identity to other individuals.

Now, I don't know, Mr. Berg, whether you're right or not. I'm not sure that their identity is completely immaterial to everything that follows in this

case or not. It may be so. But at this point in this juncture it's not for me to say as to how I would control what the lawyers do in defending the policy of the school district or in the discovery that may follow.

So I don't know, Mr. Berg, whether that changes your thoughts in terms of what comes next as to how the plaintiffs would like to proceed; but for the reasons stated, based on the analysis of the briefs and the arguments of the parties, like I said, I will allow their identity to be confidential under current state statutes and well-established practice, but they're not proceeding anonymous to the court or to the defendant's attorneys.

MR. BERG: Can I make one additional request in response to that?

THE COURT: Okay.

MR. BERG: Would it be possible to limit the exposure of the plaintiffs' identities to a single attorney from the district and a single attorney from the intervening defendants if they are allowed to intervene?

THE COURT: I don't have any authority to do that. That would entangle me into, you know, the local and national counsel relationship and create a conflict of interest possibly between lawyers and their firms as to how they would share information and divide their

workload.

Look, Mr. Berg, I like to be an optimist in terms of how I proceed. I know Mr. Blonien. I know Ms. Feinstein. I'm not sure I have had the pleasure of meeting Mr. Prinsen or the other lawyers. But I expect when the court enters an order that demands of them to preserve the confidentiality of the identity of the plaintiffs, they will abide by that order as I expect. And to limit which attorneys have access to that information would be an unnecessary intrusion into their practice of law.

MR. BERG: Very well. My second request is could you give us 14 days to decide? Each of the different plaintiffs has different sensitivities as to this.

And so what I've told them from the beginning is after the court makes a decision, we're going to have a conversation about it and decide. They'll have the option to either do what the court asks, withdraw from the case, or we might file an interlocutory appeal. So we'd ask for 14 days to have that conversation and make that decision.

THE COURT: Well, you'll get that, Mr. Berg, ability, because what I envision next is for you to file an amended complaint, and we'll set that out for 14 days.

didn't ask them. They didn't participate in that part of the court's proceeding.

Now that I've ruled on how you are proceeding and knowing that their participation will in no way hinder or impede the court's scheduling of this case forward, do you oppose the intervention?

MR. BERG: Yes. We said in our filing we wouldn't oppose it if the court granted the anonymity request outright.

But given that the lawyers are going to find out who the plaintiffs are and from their perspective every additional person who knows increases the risk somewhat, yes, we do oppose their intervention. I think they can -- they haven't shown that they are not adequately represented by the district.

As we said in our filing, they haven't shown that they have a legally protected interest in this case, and they don't meet the criteria for permissive intervention because it will actually prejudice the plaintiffs.

There's no reason that they can't participate in this case in an amicus capacity. You know, this case turns entirely on the constitutionality of the policy. They can comment on that, and we wouldn't oppose that at least. That's all.

result if schools are forced to oust students who may face a hostile environment at home, such as rejection or verbal and physical abuse by one or both of their parents or guardians.

The plaintiffs have asserted, albeit in their briefing in support of the motion for preliminary injunction, that there would be no harm resulting if the guidance was -- if the school district was enjoined or the guidance was limited in some fashion, but our clients can provide extremely important, significant, personal, factual evidence to this court that that indeed is not true and that our clients would suffer direct harm.

And the district's interest of protecting their guidance or defending their guidance constitutionally is to protect the very set of students that our clients represent. And our clients could also contribute, Your Honor, with respect to providing expert testimony to contradict those assertions made by Dr. Levine asserted by the plaintiffs in this case as well, Your Honor.

THE COURT: Thank you very much, Mr. Prinsen.

MR. BERG: May I --

THE COURT: Yeah. Okay.

MR. BERG: -- may I have one more -- I forgot to add. I wanted to add that as we said in our brief, we

would not oppose intervention if the plaintiffs could remain anonymous as to the intervenors.

So if this court were willing to hold that district lawyers could find out the identifies of the plaintiffs but not the intervenors, then we would not oppose. I just wanted to add.

THE COURT: So, Mr. Berg, I'll just give you my gut reaction to that.

Assuming Mr. Prinsen, Ms. Feinstein will continue as they always have, to obey the orders of the court, why would I make them essentially a second class behind Attorney Blonien and deny them information that Mr. Blonien can be trusted with?

I think you've respectfully said it's not a question of personal trust. You trust the lawyers will abide by the protective order, which, by the way, Mr. Berg, I want you to draft the court's protective order that contains language in there that protects the anonymity of your clients.

So why would I trust Mr. Prinsen and Attorney Feinstein any less than I trust Mr. Blonien? And, as I said earlier, to the extent that they have a joint defense agreement and work together, why would I put that impediment in their way?

MR. BERG: Not because you should distrust

them any more than Mr. Blonien but for the same reason I argued before, which is that every additional person who knows who the plaintiffs are creates some additional risk for them.

And as I've argued, there is no reason for anyone to know who the plaintiffs are. But given that the district will know who they are, given the court's earlier ruling, the district can raise any defenses or get any information that it needs about the plaintiffs.

So there's no need for the intervenors to know who they are, especially given that their interests are so closely related. Their are arguments are going to be so similar.

THE COURT: Mr. Prinsen, when I looked through your papers, I was curious to see whether your proposed intervening natural person had similar concerns over their anonymity, and I didn't see that.

Are you going to be suggesting later on at some point that the individual students and/or families are anonymous as much as the plaintiffs may want to be?

MR. PRINSEN: Your Honor, I want to make sure I understand your question. Do you mind repeating your question one more time?

THE COURT: You bring together a list of groups and various schools, and I got the impression that

the members of those groups are not proceeding anonymously themselves.

MR. PRINSEN: Your Honor, that is correct. With respect to the representative of those groups, as is clear from our affidavits, the students themselves are not -- the individual students themselves are not who are proceeding in this action in attempting to intervene.

It is the student clubs, first of all, Your Honor, and the representatives, the officers of those clubs who drafted and submitted the affidavits in support of the motion intervention, did indeed identify themselves on the public record.

Your Honor, I will submit that we did do an analysis ourselves of whether or not we were comfortable submitting those affidavits publicly, and we decided in the interest of justice and public access to the courts, there was not a strong enough reason to file or proceed anonymously like the plaintiffs are seeking to do here.

Even though our clients and representatives of the student clubs are students who actually directly benefit from the welcome environment created by the guidance inarguably are also at risk by individuals who are transphobic or whatever it may be, Your Honor.

THE COURT: Thank you very much. Well, I'm going to grant the motion to intervene permissively. I

do think that there's no prejudice that -- for the reasons I've stated, I assume the lawyers, all lawyers, will dutifully comply with the order that, Mr. Berg, you're going to draft for attorneys' eyes only.

Let me say, I'm going to assume every lawyer involved here has some experience in a protective order with the obligations that goes with attorneys' eyes only. That is, the identity is not going to be shared with your clients, with anyone else, period, unless or until you come back to the court and ask to share that information, and then we'll look at it specifically. And that includes expert witnesses. That includes your other clients.

And given the court's expectation that the attorneys comply with that, I can't find any prejudice, and I am not -- I'll pledge to you there will be no delay about the proposed intervenors' participation in this case.

I do think they have an interest in common, and the interest in common, you know, I think could it be adequately defended by MMSD? I think the result is. I think MMSD can defend its guidance and policy just as capably as it endeavors to promulgate it, but I believe that the proposed intervenors do present a perspective that would benefit the court in how they look at the

guidance and policy as it relates to the issues that the plaintiffs bring in this case.

Look, if there's one thing that's very clear in terms of what happened today is I think that I'm not comfortable allowing the parties to come in anonymous to the court, to the parties, to the lawyers to argue their issues.

I've structured a resolution to the concerns, the legitimate concerns, that the plaintiffs had, and I would say, incidentally, Mr. Prinsen, if your clients had similar concerns over, as you bring transphobic reaction to their participation, I would be equally solicitive of how their participation in this case affects them, just as I am solicitive of the plaintiffs, the parents, and/or their children over ramifications and fallout of bringing this I think legitimate and interesting legal question before the court.

And there is precedence in the case -- in the statutes to protect that information but not from the court and not from the lawyers. What they will do with that information, Mr. Berg, I don't know. But I've long since given up trying to anticipate and predict what comes next in terms of motions and the like.

But I think that the plaintiffs have brought a

challenge to this -- in declaratory judgment proceedings to this policy/guidance, and I think they have a right to test it in the court. So far that's what I'm concluding, and that the MMSD will defend it because the plaintiffs have made allegations in a complaint that state a claim and that the intervenors have a similar interest; that all the parties that seem to be affected by the policy/guidance are now in the court; and that one way or the other, at present, the plan is to rule on the legal questions that the parties bring.

I do anticipate this is probably a motion for summary judgment. I don't see necessarily that there are going to be genuine issues of material fact, but I could be wrong. But I need to know that in the format associated with a properly-filed motion for summary judgment in accordance with the procedure; and that one way or the other, when the case is done, we'll know whether it stands or falls based on the arguments and perspectives of the three parties that are now before the court, each representing their own individual and legitimate perspectives.

So for those reasons, I'm going to grant the permissive intervention. That moots out, quite honestly, intervention as a matter of right. I don't need to rule on that. On the one hand, I think as to the issues that

are square in the lap of MMSD, MMSD can do an adequate job, but there might be some other issues that come up in this case that would not be adequately represented by the school district itself that the individual -- individuals who are members of the organization represented by Mr. Prinsen may weigh in on.

But I don't need to get into that given that I believe firmly that the proposed intervenors have met their burden under 803.09(2) to permissively intervene. So I'll grant that motion.

Mr. Blonien, have I ruled on all the -- have I answered all the questions and ruled on all the motions that you presented to the court?

MR. BLONIEN: Well, there are two things I could use some clarification on, Your Honor.

The first is with respect to the protective order that Mr. Berg is preparing for everybody and for the court's review. There are general counsel and attorneys over at MMSD -- (inaudible) --

THE COURT REPORTER: You're cutting out.

THE COURT: You're cutting -- Mr. Blonien, you're cutting in and out.

MR. BLONIEN: I'm sorry.

THE COURT: You're asking about -- you're asking about the lawyers --

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DANE COUNTY, WI
2020CV000454

DATE SIGNED: September 28, 2020

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

JOHN and JANE DOE 1, et al.,

Plaintiffs,

v. Case No. 20-CV-454

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

and

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, et al.,

Defendant-Intervenors.

ORDER GRANTING AND DENYING PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL

On June 25th, 2020, Plaintiffs filed a motion for an injunction pending their appeal of this Court's denial of their request to proceed anonymously in this action. The Court heard arguments on this motion on September 21, 2020. Having considered the parties filings and oral arguments, and for the reasons stated on the record, the Court, pursuant to Wis. Stat. § 808.07(2)(a)(1), hereby partially grants and partially denies Plaintiffs' motion for an injunction pending appeal.

As for that part GRANTING Plaintiffs' motion,

NOW, THEREFORE, Defendant Madison Metropolitan School District is hereby enjoined, pending Plaintiffs' appeal, from applying or enforcing any policy, guideline, or practice reflected or recommended in its document entitled "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school, including information about the name and pronouns being used to address their child at school. This injunction does not create an affirmative obligation to disclose information if that obligation does not already exist at law and shall not require or allow District staff to disclose any information that they are otherwise prohibited from disclosing to parents by any state or federal law or regulation.

As for that part DENYING the remainder of Plaintiffs' motion, (in addition to what was orally stated by the court from the bench[1]),

NOW, THEREFORE, in consideration of the applicable legal standard for obtaining an injunction pending appeal, as to the other relief Plaintiffs' demand, the court finds that Plaintiffs have not demonstrated that they are likely to succeed on appeal. The question on appeal is whether they can prosecute this case anonymously. The court incorporates by reference its earlier ruling denying the motion in the circuit court. Plaintiffs offer nothing new and not much more needs to be said.

Furthermore, the inescapable effect of being anonymous, the court additionally finds that the Plaintiffs have not adequately demonstrated irreparable harm to them. The Plaintiffs demand

[1] Plaintiffs filed a motion for "clarification". This order is given to reflect the court's oral ruling and to clarify why it denied parts of plaintiffs' requested relief.

preliminary relief that would otherwise convert the case to a *de facto* class action, rather than a plea for relief by particular, albeit anonymous, parents. By not identifying themselves, Plaintiffs have not provided facts sufficient for this court to find irreparable harm or to find that they do not have an adequate remedy as to themselves.

Although the court understand why Plaintiffs desire to remain anonymous, anonymous plaintiffs effectively deny the Defendants and the Intervenors the ability to engage in discovery or to otherwise respond to the facts presented by the Plaintiffs in their motion as to the Plaintiffs themselves. By remaining anonymous and by asking this court to make evidentiary findings regarding irreparable harm or an adequate remedy unfairly deprives the Defendants a meaningful opportunity to challenge Plaintiffs' factual assertions. By denying the motion in part, the court concludes that it is preserving the status quo whilst this case winds its way through the appellate court system. By preserving the status quo, rather than by giving Plaintiffs preliminary relief, temporarily denying Defendants' knowledge of the Plaintiffs' identities, does not harm their defense nor does it unnecessarily intrude into the legitimate ability to develop its curriculum and operate its schools.

SO ORDERED.

teachers to be administering mental health care, making diagnoses, or in any way flagging this as an issue that rises to a mental health concern. That doesn't mean that the parents can say, I'm troubled about the student, they've been down lately, they've been sad, I've noticed something off or different about them. There's nothing in the Guidance, even if it were to be interpreted as a binding policy, that would prohibit teachers from sharing the sort of information that Your Honor seems to be concerned about.

THE COURT: Okay. Mr. Blonien, it's your motion, so you get the last word.

MR. BLONIEN: It's Mr. Berg's motion.

THE COURT: Oh, I'm sorry. Too many Bs. I'm looking -- it's like the *Hollywood Squares*. You're up in each corner. Mr. Berg, its your motion, you get the last word.

MR. BERG: Well, Your Honor, I want to just back up a little bit. If I am sort of reading what the Court is saying correctly, it sounds like the Court is considering a sort of limited injunction, holding that district staff have to answer that question truthfully but don't have to notify parents or get their consent before allowing a child to transition at school. And I just want to say for the record that that is insufficient from our

perspective to prevent the harm that we're concerned about for a number of reasons.

First of all, you know, if a parent asks today, the answer may be no, but the child might start dealing with this tomorrow or next week or the following months, and parents should not have to interrogate their teachers on a periodic basis just to ensure that something secret is not happening in school, and that's what I think a limited injunction like that would require.

The harm that we are concerned about is the harm of a transition. Having every single teacher and staff member, people in positions of authority treating the child as if they are the opposite sex has the potential to cause that belief that this is my true identity to set in, to become self-reinforcing, and there are a lot of experts who believe that transitioning as a child can do that harm, and that's why parents need to be deferred to.

And last thing I'd like to add is the documents that even the defendants' expert endorses, the WPATH, acknowledges that this is a controversial issue, that the long-term implications of a childhood transition are unknown, and it recommends deferring to parents. And the District hasn't cited a single professional association that recommends enabling a transition in secret from parents. So our position is parental consent should be

I would say for purposes of going forward in the practice of law, now being on this side of the courthouse door, be very cautious, and this is not to distant yourself from my staff, but be very cautious of asking staff sort of legal questions of strategy and protocol and procedure. I mean, you could have written me at any time and asked for leave to present testimony at this hearing or any later hearing to correct misstatements.

MR. BLONIEN: Your Honor, if I may clarify, and I apologize for interrupting, just so that the record is clear, it's my understanding that someone from Quarles and Brady called and spoke with the office. And the reason that we asked, Your Honor, was because that we did submit evidence in support of our position in this case, namely, an affidavit by an expert, that countered all of the assertions that Mr. Berg is making here today about the nature of these sometimes challenging issues about LGBTQ+ status and science and mental health.

THE COURT: Yeah, but I'm -- I'm not -- but -- and I read all those. But the -- but I'm not talking about those today. I'm talking about only a -- what Mr. Berg correctly discerned in an astute fashion -- a more narrow consideration of an injunction pending appeal on only the question of whether, assuming that the Policy has some force and effect as it appears to be written,

whether teachers can conceal information in response to direct questions asked by parents.

The affidavit talked about the other issues and, you know, appropriate forum for resolving these issues and the undeniable significant impact this area has on people's lives and students in particular.

Look, I'm ready to -- I'm ready to issue my ruling. And, Mr. Berg, you're right. I am inclined to grant the Plaintiffs' Motion for an Injunction Pending Appeal on a very narrow ground. I have considered the plaintiffs' motion in the context of the standards that were set forth, Mr. Berg, in your first motion for preliminary injunction, which, I think, at the just recent hearing you reiterate they're the same -- essentially, the same standards on a motion for relief pending appeal.

"To obtain an injunction pending appeal, the Plaintiff must show 'a likelihood of success on the merits, a likelihood of irreparable harm, and an inadequate remedy of law.'" "The purpose of an injunction pending appeal, like a temporary injunction, is to 'mitigate the damage that can be done during the interim period before a legal issue is finally resolved on its merits.'" When granting an injunction -- "When the granting of an injunction will be of little or no injury to the defendant, and the refusal to grant it will be of great and irreparable

damage to the plaintiff, the courts usually grant injunction pending litigation."

And I guess that is even made more pertinent because now I guess the MMSD's position is that the Plan is not itself binding anyway. It could be rejected by an individual teacher or not enforceable. I didn't read it that way, but that fits quite well into the citation on, Mr. Berg, I'm reading at page 11 of one of your briefs, citing, well, a really old case.

My concern today is -- is not about how the school runs its programs, its curriculum, the things that it does with regard to the -- its employees. I understand the plaintiffs' challenge in that regard, and I'm not rejecting that today, and nothing I say -- I say or do here today should say that I'm making a final ruling. This is a -- sort of a precise question, whether there should be an injunction pending appeal.

I also understand the plaintiffs' position about an affirmative duty to tell, but that's not what concerned me here today.

What concerned me is when I read the reply brief, and, of course, reply briefs really deserve some ability for rejoinder, which I've provided for today, is this notion of concealment. Now, I wouldn't use the word lie or deceive, which has been bandied about, but the

concern for me is in parent -- do parents have an expectation of being provided with accurate and truthful information by faculty and staff when presented with a direct question. It -- it's one thing not to reach out to parents to alert them of -- of an issue regarding his or her child. It's one thing to argue about who ultimately makes decisions about a child. My concern is that under this Plan, as I interpreted it, and believing it has some language in there that implies it's not discretionary, my concern is, is that -- to the Plan that puts the teachers in the difficult and unreasonable position of not providing accurate and truthful information to parents when addressed by the parent.

So let's maybe say, using, Mr. Berg, the terms in your brief, I do not believe that the Plan should allow teachers to conceal information from parent -- from parents. I'm not ruling that -- today that there's any affirmative duty on faculty or staff to affirmatively provide information and solicit opinion from parents. I'm granting the plaintiffs' motion, to the extent that it -- to the extent that the Plan counsels teachers that they should conceal information from the parents in response to an inquiry or a question.

Mr. Berg, that's a very limited injunction, but I think that one is clearly meets the standards of a

likelihood of success.

I do believe in this -- and I'm not saying that the School District does this, I'm not saying the teachers do this, especially now with, Mr. Blonien, your suggestion that it's not mandatory anyway, but I do think that if we had a scenario where perhaps some misguided or misinformed teacher thought that he or she was required to be untruthful, either by omission or deception, I think that would be an irreparable harm to parents, and I don't believe there would be an adequate remedy of law.

I want to step back just for a moment to say, you know, Mr. Blonien, you made a comment about Mr. Berg's use of the word transition, and I want to beg everyone's indulgence. In this area there are terms and to be fluent you need to be understanding in how those terms are used in the situation. I feel like I've, in studying the briefs, I'm comfortable, but I do not intend in anything I say or do to create the impression I'm unsympathetic to the importance of these issues regarding young men and women, boys and girls. I'm not making a decision on, you know, whether I -- I'm not making moral decisions today. I'm not making medical decisions today. The only decision I have is one that I think preserves the trust between teachers and parents of the obligation to be truthful and candid when confronted or directed by an inquiry from a

interpreted to allow or encourage teachers, faculty, and staff to withhold information or answer -- withhold information from or answer questions by parents that would otherwise be available to parents under existing rules, policies, and statutes.

MR. BERG: I think that creates an ambiguity as to whether this information is otherwise available.

THE COURT: Well, I didn't want to -- I didn't want to get into -- this was Mr. Blonien's point. I'm not trying to require the School District to provide information to parents that otherwise would not be available to parents under other existing rules, policies, and statutes. For example, maybe -- I can't think of it, but -- but I'm not trying to create rights to information wholly unrelated to the issues in this case.

MR. BERG: I understand that, just the way it's worded I think could be interpreted by the District to mean if you have no other way to get access to this information then we don't have to answer truthfully.

THE COURT: All right.

MR. BERG: It would be helpful if we could see the language and comment on it maybe over the next couple days.

THE COURT: Okay. Mr. Berg, as prevailing party on the motion, albeit for a limited relief, I'll ask you

to draft an order for the Court's signature. I think you know what I'm intending to do and I think it's fair enough that I don't want to create any ambiguity to all of a sudden require teachers to ignore other areas unrelated to the -- to the -- to the Guidance and Policy. It's just what I'm saying is that I'm setting aside, I'm not telling you how the School District can run its business, whether it's mandatory or voluntary. I'm just saying that to the extent that the Guidance and Policy is interpreted to require or allow concealment, misstatements, or untruthful statements, the Court is enjoining the Guidance and Policy and MMSD from implementing in that fashion, but not creating rights and complicating in areas that are totally unrelated.

I'll go ahead and extend that across the board and beyond the Jane and John Does for the following reason. Although, I'm -- I'm -- I was of a mind to limit the -- the relief to only plaintiffs, Mr. Berg, you make a good point in consistent with the Court's earlier ruling that I was limiting the identity of the plaintiffs to attorneys' eyes only. If I -- if I limited it to just the name -- just the named plaintiffs, then that's really inconsistent with the issue now in the Court of Appeals on whether you can proceed the way you would like.

The other thing is, is this is such a narrow

ruling, and -- and maybe I'm a little Pollyanish or naive, but I would hope that the MMSD Policy does not require teachers to lie to parents or to withhold information. You know, there's sort of -- sort of sins of omission and then there's sins of comission. I mean, it's not saying that -- you know, one way or the other I think there's a bond between parents and teachers, and that the Policy, I hope, is not intended to interfere with the obligation of people who tell the truth when asked, not to affirmatively disclose, not to make things more complicated, but if -- that's why I said maybe naively that MMSD would stipulate to this, because they don't believe that it does that anyway. I don't know. But I think because of the -- the nature of the -- what we're talking about is so universal that I wouldn't want to create a situation where other parents, not non-plaintiff, but other parents somehow or another it was okay to conceal or deceive those parents as well.

So you'll draft -- maybe you can run the language by Mr. Blonien that hopefully doesn't have ambiguities and provides clear instruction within the context of the Guidance and Policies that are at issue in this case.

All right. Anything further on this matter at this time, Mr. Berg?

Policies & Laws

Federal Laws

Family Educational Rights and Privacy Act of 1974 (FERPA):
FERPA protects the privacy of student educational records, and prohibits the improper disclosure of personally identifiable information from students' records. FERPA allows parents of students under 18 years of age to obtain their child's educational records and seek to have the records amended. Former or current students have the right to seek to amend their records if the information in present records is "inaccurate, misleading, or in violation of the student's rights of privacy" (34 C.F.R. § 99.7(a)(2(ii)).

Guidance for Schools, Students, and Families: Educational Records
Students have the right to change their name and/or gender marker on their educational records under this federal law. If under the age of 18, students need the permission of one parent or legal guardian. For more information, please see MMSD-Based Name Change section.

Confidentiality
The district shall ensure that all personally identifiable and medical information relating to transgender, non-binary, and gender-expansive students shall be kept confidential in accordance with applicable state, local, and federal privacy laws. School staff shall not disclose any information that may reveal a student's gender identity to others, including parents or guardians and other school staff, unless legally required to do so or unless the student has authorized such disclosure.

Transgender, non-binary, and gender-expansive students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information. If a student chooses to use a different name, to transition at school, or to disclose their gender identity to staff or other students, this does not authorize school staff to disclose a student's personally identifiable or medical information.

Title IX, Education Amendments of 1972:
Title IX ensures that no person is discriminated against because of their gender in any academic program including, but not limited to, admissions, financial aid, academic advising, housing, athletics, recreational services, health services, counseling and psychological services, classroom assignment, grading, and discipline. Although Title IX does not expressly address gender identity or expression, this law has been used in the protection of students who are transgender and gender-expansive against discrimination because discrimination based on gender identity qualifies as sex discrimination.

District Policies

Guidance for Schools, Students, & Families:
Based on the MMSD Anti-bullying policy above, MMSD must protect our transgender, non-binary, and gender-expansive students from bullying and harassment. Bullying incidents should be reported to a school staff member (by the student who is being targeted, another student, a family member, or staff member) and will be investigated by school staff promptly to determine if bullying exists. We will consider the needs of the targeted student a priority in bullying incidents. Staff will respect student confidentiality throughout the investigation, be careful not to "out" students while communicating with family/peers, and involve the targeted student throughout the intervention process.

Additional resources:
MMSD Anti-bullying Website
MMSD Anti-bullying Report Form
Flowchart for Bullying Investigation
MMSD Bullying Booklet
FAQ for Families

Student Non-discrimination Board Policy 4620:
The Madison Metropolitan School District strives to provide an environment where every student feels supported, respected, and welcomed and where every student can learn in an atmosphere that is free from harassment and discrimination. Discrimination and harassment can have a harmful social, physical, psychological, and/or academic impact on students who are the victims of these actions, students who engage in these behaviors, and bystanders that observe discriminatory and/or harassing acts.

The Madison Metropolitan School District does not allow discrimination or harassment toward or by students on school/district grounds, at school/district-sponsored activities, or in transportation to and from school or school/district-sponsored activities. District policy protects students from discrimination and harassment regarding a person's sex, race, color, age, national origin, ancestry, religion, creed, pregnancy, marital status, parental status, homelessness, **sexual orientation, gender identity, gender expression**, or disability including their physical, mental, emotional, or learning disability and/or retaliation as defined in this policy.

Guidance for Schools, Students & Families:
Based on the MMSD Student Non-discrimination policy above, MMSD must protect our transgender, non-binary, and gender-expansive students from discrimination and harassment. Discrimination should be reported to the MMSD Title IX Investigator and will be investigated to determine if discrimination occurred.

Additional resources:
Equal Opportunity Office Website
Discrimination Complaint Form
MMSD Student Non-discrimination Policy (Full Policy)

Family Communication

Families are essential in supporting our LGBTQ+ students. We believe that families love their children, have incredible dreams for them, and hope to keep them safe from harm. We know that family acceptance continues to have a profound impact on the physical and mental health outcomes of our LGBTQ+ young people. In MMSD, with the permission of our students, we will strive to include families along the journey to support their LGBTQ+ youth.

Communication with Families

We strive to include families in the process of supporting a student's gender self-determination, including transition.

- Families should be made aware of the policies, practices, and guidance that support and protect their child. Families are encouraged to advocate for their child's educational success.
- During a gender support plan meeting, it is best practice to establish a communication plan that meets the needs of the family-school team.
- Families can request a meeting to review their child's gender support plan at any time.

Disclosure to Families

Students identified as transgender, non-binary, and gender-expansive may have not come out to their families regarding their gender identity. Disclosing a student's personal information such as gender identity or sexual orientation can pose imminent safety risks, such as losing family support and housing.

- All staff correspondence and communication to families in regard to students shall reflect the name and gender documented in Infinite Campus unless the student has specifically given permission to do otherwise. (This might involve using the student's affirmed name and pronouns in the school setting, and their legal name and pronouns with family).
- In the event that a student insists on maintaining privacy from their family, student services staff shall discuss with the student contingency plans in the event that their privacy is compromised.
- Student services staff shall provide support and access to resources for transgender, non-binary, and gender-expansive students and their families. The district LGBTQ+ Lead is also available for consultation and support.

Names & Pronouns

Having one's gender identity recognized and validated is important. All MMSD staff will refer to students by their affirmed names and pronouns. Staff will also maintain confidentiality and ensure privacy. Refusal to respect a student's name and pronouns is a violation of the MMSD Non-discrimination policy.

MMSD-Based Name Change

MMSD students have the right to change their name and/or gender in district systems (e.g., Infinite Campus) to their affirmed name and pronouns with the permission of one parent/legal guardian.

- At this time, Infinite Campus (IC) only allows for binary gender classification (Female or Male).
- At MMSD, we are committed to developing an inclusive database that affirms the many genders and pronouns of our students. We intend to roll this out during 2018-19 registration.
- Students will be called by their affirmed name and pronouns regardless of parent/guardian permission to change their name and gender in MMSD systems. See privacy section for additional information.
- For changes in Infinite Campus, please use this Name/Gender/Email Change Form.
- Once the form is completed, please scan and send to MMSD's LGBTQ+ Lead. It typically takes 3-5 business days to complete the name/gender change.

Legal Name Change

Students and families may choose to consider a legal, court-based name change with the Clerk of Courts office in their county.

- Linked here is the Name Change Procedure in Dane County; if born outside Wisconsin, students will need to file with the Clerk of Courts in their birth state.
- A legal name change becomes especially important for many high school students when applying for post-secondary education to ensure that records on MMSD transcripts, ACT/SAT tests, financial aid documents, and applications are all consistent.
- Students may need assistance and information about the legal name change process, especially if they are over 14 years old and pursuing a legal name change on their own. Students might need support filling out court documents, accessing the cost of court filing fees, and advocating for confidential name changes (without publication). Student Services personnel are available to help students and their families navigate this process.

Madison Metropolitan School District

Gender Support Plan

Date: _____ School: _____ Student ID #: _____

Current Student Name as reflected in IC:

_____

NAME & PRONOUNS:

★ What affirmed name and pronouns will the student use? Starting when?

_____

★ Is the student using a different name / different pronouns at home? What name is the student using with siblings or other family members?

_____

★ Is the student using their name and pronouns in all school environments or only a few?

_____

COMMUNICATION PLAN:

What is the communication plan for their name and/or gender change? Who will know? When will they know? How will they know? Who will be the lead school support for the student?

_____

_____

_____

Student is requesting the following change(s):

▢ Name in IC ▢ Gender in IC ▢ Pronoun Change ▢ MMSD Email address ▢ ID Change

For IC & email changes, please complete this form and return to Sherie Hohs, LGBTQ+ Lead for MMSD at shohs@madison.k12.wi.us or to Central Office, 545 W. Dayton St. Attn: Sherie.
One parent/legal guardian must consent to name/gender changes in student records. Students can still use their affirmed name and pronouns in MMSD without parent/legal guardian permission.

FAMILY SUPPORT:

★ Does this student have family support around their gender identity? Is the student supported by some adults in their home life, but not all?

_____

_____

_____

★ Will the family be included in developing a gender support plan? Who else would the student/family like to invite to their gender support plan meeting? (Principal, teacher, social worker, LGBTQ+ Lead, community advocate, etc.)

_____

_____

_____

For best practices on student gender transitions, please refer to: *Guidance to Support Transgender, Non-binary, & Gender-Expansive Youth*, the *Flowchart to Guide Student Gender Transitions*, and the *Supporting Transgender, Non-binary, & Gender-Expansive Youth* google drive folder. Please keep this interview in your confidential file, not in student records.

★ Does the student and family know about name/gender options in student records? Is family on board with the desired changes? Plan for family communication?

_____

_____

★ Has the school connected the student/ family to local resources, if needed? (i.e. the Transparent Group / youth group, Teens Like Us group, the GSA, PATH Clinic, etc.?)

_____

_____

SCHOOL SUPPORT & RELATIONSHIPS:

★ Has the school designated a lead support person for the student who will check in with them at least once a week for the first month, then monthly? Who will be the lead?

_____

★ Does the student have peer support? Staff allies? What supports are needed in this area?

_____

_____

GENDERED FACILITIES AND ACTIVITIES:

★ Which restroom(s) will the student use?_____

★ Will the student need support around where to change clothes for physical education? What locker room / changing area will the student use?

_____

★ Which staff member will coordinate supports for field trips and/or overnight school trips?

_____

★ Which staff member will support the student in being fully included in sports and/or extra-curricular activities?_____

STAFF TRAINING:

★ Has there been professional development planned for the staff (while keeping student confidentiality)? Are staff aware of policies and procedures to support transgender and non-binary students? Anti-bullying/harassment policies? What is needed?

_____

_____

_____

OTHER CONSIDERATIONS:

_____

_____

_____

For best practices on student gender transitions, please refer to: *Guidance to Support Transgender, Non-binary, & Gender-Expansive Youth*, the *Flowchart to Guide Student Gender Transitions*, and the *Supporting Transgender, Non-binary, & Gender-Expansive Youth* google drive folder. Please keep this interview in your confidential file, not in student records.

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. §§ 809.19(13), 809.62(4)

I hereby certify that I have submitted an electronic copy of this appendix, which is identical in content and format to the printed form of the appendix filed as of this date.

I further certify that this appendix complies with s. 809.19 (2) (a) and s. 809.62(2)(f) and contains, at a minimum: (1) a table of contents; (2) the items required by s. 809.62(2)(f), including the decision and opinion of the court of appeals; (3) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court; (4) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: August 13, 2021.

LUKE N. BERG