

No. 2020AP1032

IN THE WISCONSIN SUPREME COURT

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

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

JOHN DOE 6, JANE DOE 6, JOHN DOE 8 AND JANE DOE 8,
Plaintiffs,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
Defendant-Respondent,

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

RESPONDENT APPENDIX

BOARDMAN & CLARK LLP
Sarah A. Zylstra
Sarah J. Horner
1 S. Pinckney St., Suite 410
P.O. Box 927
Madison, WI 53701-0927
Attorneys for Defendant-Respondent
Madison Metropolitan School District

QUARLES & BRADY LLP
Emily M. Feinstein
Adam Prinsen
33 East Main Street, Suite 900
Madison WI 53703

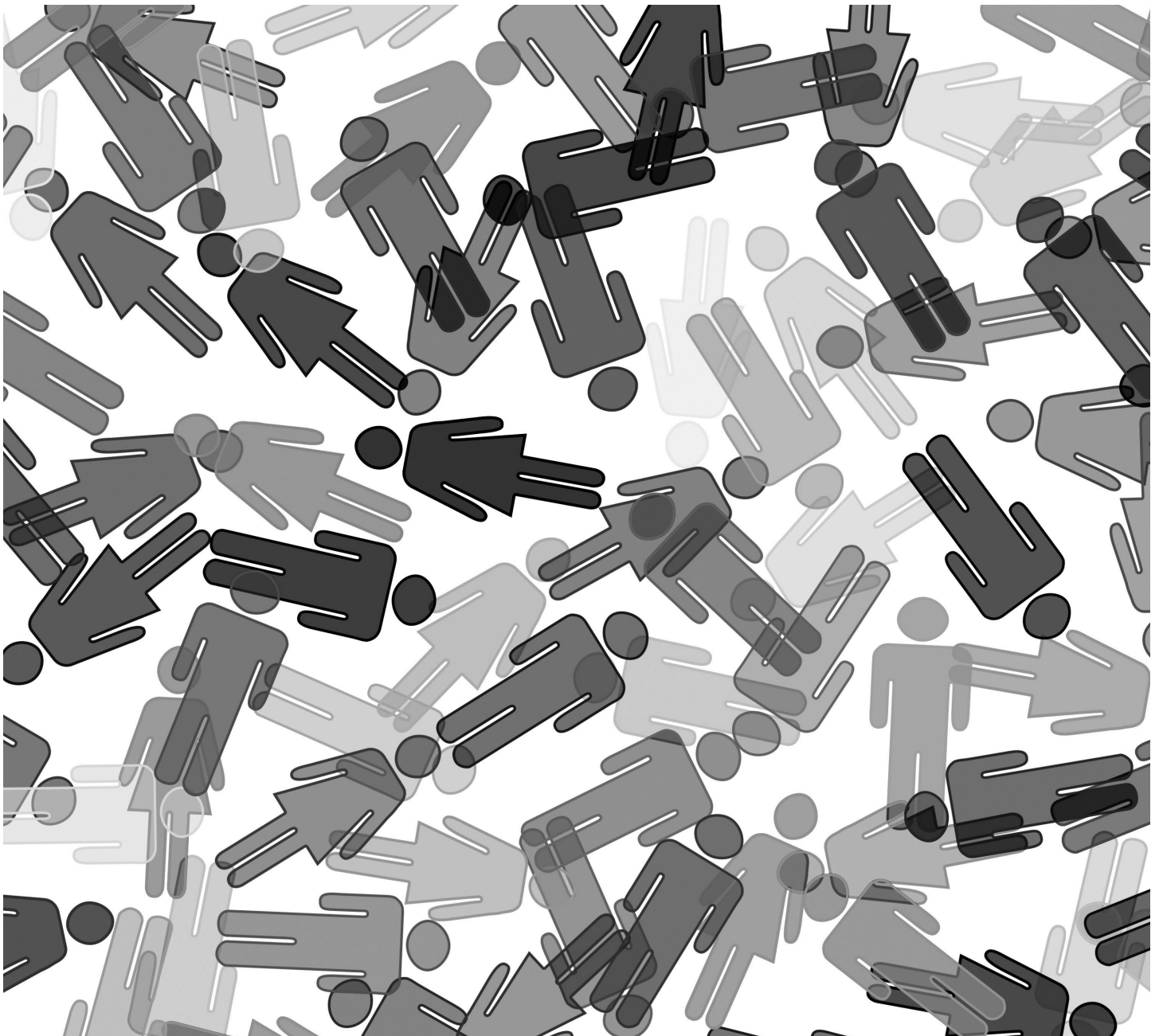
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
Lesbian Gay Bisexual Transgender Project
John A. Knight (*admitted pro hac vice*)
150 North Michigan Avenue, Suite 600
Chicago, Illinois 60601

AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION
Laurence J. Dupuis
207 E. Buffalo Street, Suite 325
Milwaukee, WI 53158
(414) 207-4032

Attorneys for Intervenors-Defendants-Respondents
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

INDEX TO APPENDIX

<u>Description of Document</u>	<u>Pages</u>
MMSD Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students	R.-App. 1-35
Excerpts from Transcript of Oral Arguments May 26, 2020	R.-App. 36-46
<i>State v. Mathis</i> , Docket No. 2008AP2614-CRNM	R.-App. 47-51



MADISON METROPOLITAN
SCHOOL DISTRICT



Guidance & Policies to
Support Transgender,
Non-binary & Gender-
Expansive Students

April 2018

Table of Contents

1 Message from the Superintendent

2 Purpose of this Guidance

- 3...Staff Training & Professional Development
- 4...Rationale / Data
- 5...Safety
- 5...Lack of Support
- 6...Negative Remarks About Gender Expression
- 7...Effects on School Achievement
- 8...Data in support of LGBTQ+ Inclusive Curriculum and Positive School Climate

9 Policies & Laws

- 9...Federal Laws
- 10...State Laws
- 10...District Policies
- 12...Dress code

13 Gender 101

15 Best Practices for Student Gender Transitions

- 15...Gender Support Plan
- 16...Family Communication

17 Privacy & Confidentiality

18 Names and Pronouns

- 18...MMSD-Based Name Change
- 18...Legal Name Change
- 19...Email Address
- 19...School Publications
- 19...Student ID
- 19...Transcripts
- 20...Diplomas
- 20...Standardized Tests

21 Safety & Bullying

22 School Facilities

23 Inclusive Classroom Practices

- 23...Welcoming Schools
- 23...Course Accessibility & Instruction
- 24...Language
- 24...Grouping Students
- 25...Physical Education
- 27...Health Education
- 28...Athletics
- 29...Clubs and Extracurricular Activities
- 30...Field Trips
- 31...School Dances, Courts, and Other Historically Gender-Based Traditions

32 Acknowledgements

33 Resources



Message from Superintendent



Dear Madison Community,

As a school district, MMSD is committed to creating inclusive and welcoming learning communities to ensure that all students are able to graduate college, career, and community ready. We take seriously our responsibility to provide safe and nondiscriminatory environments for all students.

We have incredible transgender, non-binary, and gender-expansive students, staff, and families throughout our district, and we want our schools to be places where every child thrives.

To that end, we have worked hard to support transgender, non-binary, and gender-expansive youth in MMSD.

- We have progressive, enumerated policies in place to prevent bullying, harassment, and discrimination.
- We have expanded our Welcoming Schools program, committed to building a new generation of students who embrace diverse identities and are allies to their peers.
- We are training all of our student services staff on strategies to support our transgender, non-binary, and gender-expansive youth so they can guide student gender transitions with ease.
- We are committed to training MMSD staff on this expanded guidance so they have the knowledge and skills to not only support our transgender, non-binary, and gender-expansive youth, but to promote gender-inclusive practices districtwide.
- We have single-stall All Gender Restrooms in every MMSD school building.

We are proud to present this guide as a resource for schools, families, and youth to ensure all students' identities are recognized and treated with respect and fairness at school. We also want to ensure that all students have access to the support they need to thrive.

In this guide you will find information on creating inclusive classroom environments, district policies and practices, and additional resources or places to seek support.

The Madison Metropolitan School District will not waver in our commitment to providing all students access to an inclusive education that affirms all identities. It is our goal that these resources will improve our efforts to provide safe, healthy and positive school environments for all transgender, non-binary, and gender-expansive youth.

Sincerely,

Jennifer Cheatham
Superintendent



“We have incredible transgender students, staff and families throughout our district. We will always support and be proud of our trans communities. We are also dedicated to creating inclusive and welcoming learning communities and we take seriously our responsibility to provide safe and nondiscriminatory environments for all students, including students of all gender identities. This includes our practice of allowing students to use facilities consistent with their gender identity. We will not waver in our commitment to this and all other inclusive practices in our schools.”



Purpose of this Guidance

In an effort to support all students in MMSD, it is essential that we provide comprehensive guidance for youth, families, and staff so that students who identify as transgender, non-binary, and gender-expansive experience an inclusive, equitable, and high-quality education.

This guide provides:

- The rationale for inclusive policies and practices to support transgender, non-binary, and gender-expansive students.
- Detailed information on protective federal, state, and district laws and policies.
- Educational resources to build knowledge and inclusive language around gender identity.
- Best practice guidelines to support students' school-based gender transitions including: gender support planning, confidentiality, name/pronoun changes, and restrooms/changing spaces.
- Inclusive classroom and schoolwide practices that affirm students of all gender identities.

Staff Training & Professional Development

The district shall conduct ongoing training for all staff members so they can best support and affirm students of all gender identities. Training needs to include professional learning on the policies and best practices found within this guidance document.

Professional development shall include, but not be limited to:

- Classroom engagement strategies, curriculum, and resources that educators can integrate into their classrooms to help foster a more gender-inclusive environment for all students.
- School and district policies regarding bullying, harassment, discrimination, and suicide prevention as well as strategies for prevention and intervention.
- Terms, concepts, and current developmental understandings of gender identity, gender expression, and gender diversity in children and adolescents.
- Strategies for communication with students and families to support transgender, non-binary, and gender-expansive youth.





Rationale/Data

Based on the adverse health outcomes for transgender youth as indicated in the Dane County Youth Assessment and the Gay Lesbian Straight Education Network’s (GLSEN) National School Climate Survey, we consider it our obligation to ensure safe, affirming learning environments for our transgender youth in MMSD.

As reported on the 2015 Dane County Youth Assessment (DCYA) , MMSD high school students who identified as transgender had adverse outcomes compared to their cisgender peers. Please note we do not have data on non-binary or gender-expansive youth because there is not research available at this time. The 2018 Dane County Youth Assessment (DCYA) will be inclusive of multiple gender identities, and we will update our data once it is available.

Dane County Youth Assessment Cis vs. Trans Comparison	Cisgender Youth	Trans Youth
Family Support & Home Experiences		
• Homeless in last 12 months	4%	19%
• Parents talk with me about future plans	98%	71%
• Hit by a parent	9%	27%
School Experiences & Connectedness		
• In Special Education	10%	32%
• Skipped school in past month	32%	45%
• I have an adult I can talk to	82%	59%
Mental Health		
• Report having long-term mental health problems	27%	38%
Physical Safety and Systems Involvement		
• Carried a weapon to school in last month out of fear for safety / need for protection	5%	29%
• Juvenile corrections for 30+ days in past year	1%	9%



The National School Climate Survey is administered every other year by GLSEN (Gay Lesbian Straight Education Network) and documents the experiences of LGBTQ+ youth. The most recent survey was done in 2015 and published in 2016; the final sample included over 10,000 students with a spectrum of gender identities in grades 6 to 12 from all 50 states and the District of Columbia from more than 3,000 unique school districts. The following are the themes, identified by GLSEN, based on the 2015 survey administration:

Safety

- Three-quarters of transgender students felt unsafe at school because of the way they expressed their gender. Of the youth who identified as “another gender” or “genderqueer,” 61% felt unsafe at school.
- Two-thirds (65%) of transgender and non-binary students report being verbally harassed at school; one in four (25%) were physically harassed. One in ten (12%) were physically assaulted.

Lack of Support

- Almost two-thirds (60%) of transgender students had been denied access to restrooms or locker rooms consistent with their gender identity.
- Half (51%) of transgender students were prevented from using their names or pronouns that align with their gender identity.
- One out of four (28%) transgender students had been prevented from wearing clothes that aligned with their gender expression.
- 63.5% of LGBTQ+ students who had reported an incident said that school staff did nothing in response.
- The most common reasons given for not reporting incidents of victimization to school personnel were:
 - doubts that staff would effectively address the situation and
 - fears that reporting would make the situation worse



Negative Remarks
About Gender Expression

Virtually all LGBTQ+ students heard negative remarks about gender expression sometimes (not acting “masculine enough” or “feminine enough”) with two-thirds hearing them regularly.



One in ten heard these kinds of remarks regularly from their teachers or other school staff.



Effects on School Achievement

LGBTQ+ students who experienced higher levels of victimization because of their gender identity and/or gender expression:

- Were almost three times as likely to have missed school in the past month than those who experienced lower levels (59.6% vs. 20.8%).
- Had lower GPAs than students who were less often harassed (2.9 vs. 3.3).
- Were twice as likely to report that they did not plan to pursue any post-secondary education (e.g., college or trade school; 9.5% vs. 5.4%).
- 42.5% of LGBTQ+ students who reported that they did not plan to finish high school, or were not sure if they would finish, indicated that they were considering dropping out because of the harassment they faced at school.





Data in support of LGBTQ+ Inclusive Curriculum and Positive School Climate

Based on the National School Climate Survey, one strategy that educators can employ to promote safe and affirming school environments is including positive representations of LGBTQ+ people, history, and events in the curriculum. Among the LGBTQ+ students in GLSEN's 2009 National School Climate Survey, attending a school with an LGBTQ+ inclusive curriculum was related to a less-hostile school experience for LGBTQ+ students as well as increased feelings of connectedness to their school communities.

1. Inclusive curriculum contributes to a safer school environment for LGBTQ+ youth.

- GLSEN's 2009 National School Climate Survey revealed that when educators include positive representations of LGBTQ+ people, history, and events in their curricula, students experienced school as a less-hostile place.
- Less than a fifth of students at schools with inclusive curriculum reported high levels of verbal harassment, physical harassment, and physical assault, compared to about 1 in 3 other students. LGBTQ+ students in schools with an inclusive curriculum were also:
 - Half as likely to experience high levels of victimization because of sexual orientation or gender expression.
 - About half as likely to miss school because of feeling unsafe or uncomfortable. Less than a fifth (17.1%) of students with inclusive curricula stayed home from school for at least one full day, compared to nearly a third (31.6%) of other students.

2. Inclusive curriculum helps LGBTQ+ students feel more connected to their schools.

- Students in schools with an inclusive curriculum feel a greater sense of connectedness to their school communities than other students.
- By including LGBTQ+ related content in their curriculum, educators can send a message that they are a source of support for LGBTQ+ students.
 - For example, almost three-quarters (73.1%) of students with an inclusive curriculum felt comfortable talking to a teacher about LGBTQ+ related issues, compared to half (50.1%) of students without this resource in school.

3. Inclusive curriculum can reinforce peer acceptance of LGBTQ+ students.

- The inclusion of LGBTQ+ people, history, and events in the classroom curriculum educates all students about LGBTQ+ issues and may help to reduce prejudice and intolerance of LGBTQ+ people.
 - When educators work to cultivate greater respect and acceptance of LGBTQ+ people among the student body, their efforts can result in a more positive school experience for LGBTQ+ students.
 - GLSEN research consistently shows that an inclusive curriculum is associated with increased peer support for LGBTQ+ students.



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.



State Laws

Wisconsin Statute 118.13:

This state statute prohibits discrimination against students. It states that no one “may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person’s sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.”

Wisconsin Statute 118.46:

This state statute explains Wisconsin school districts must have student anti-bullying policies and what must be included in such policies.

Wisconsin Administrative Code Chapter 9:

This administrative code establishes procedures for enforcing Wisconsin Statute 118.13. It also indicates when the Wisconsin Department of Public Instruction may review discrimination complaints.

District Policies

Student Anti-Bullying Board Policy 4510:

The Madison Metropolitan School District strives to provide an environment where every student feels safe, respected and welcomed and where every staff member can serve students in an atmosphere that is free from significant disruptions and obstacles that impede learning and performance.

Bullying can have a harmful social, physical, psychological and/or academic impact on students who are the victims of bullying behaviors, students who engage in bullying behaviors and bystanders that observe acts of bullying. The Madison Metropolitan School District does not allow bullying behavior toward or by students, school employees or volunteers on school/District grounds, at school/District-sponsored activities or in transportation to and from school or school/District-sponsored activities.

MMSD defines bullying as the intentional action by an individual or group of individuals to inflict physical, emotional or mental harm or suffering on another individual or group of individuals when there is an imbalance of real or perceived power. Bullying behavior creates an objectively hostile or offensive environment. Such an environment may cause, or be likely to cause, negative and harmful conditions.



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 \(Full Policy\)](#)



Dress code:

Students have the right to dress and present themselves in a way that is consistent with their gender identity, as long as they follow the dress code for all students. The MMSD Dress Code states that students may dress in any style they desire as long as their chosen attire does not cause a disruption or distraction in the school environment, reveal intimate body parts, or pose a safety risk to the student or others.

Schools may enforce dress codes in accordance with MMSD policy, but any such dress codes should not be based on gender. Students shall have the right to dress in accordance with their gender identity and expression, including maintaining a gender-neutral appearance within the constraints of the dress codes adopted by the school. School staff shall not enforce a school's dress code more strictly against transgender, non-binary, or gender-expansive students than other students. Gender-neutral dress codes apply to regular school days as well as special events, such as dances and graduation ceremonies.



Gender 101

Agender: A term that describes a person who does not identify with any gender.

Cisgender: A term that describes a person whose gender identity aligns with the sex assigned to them at birth.

Coming Out: The process in which a person first acknowledges, accepts and appreciates their sexual orientation or gender identity and begins to share that with others.

Gender: A person's internal sense of self as male, female, both or neither (gender identity), as well as one's outward presentation and behaviors (gender expression). Gender norms vary among cultures and over time.

Gender-expansive: An umbrella term used for individuals that broaden their own culture's commonly held definitions of gender, including expectations for its expression, identities, roles, and/or other perceived gender norms. Gender-expansive individuals include those with transgender and non-binary identities, as well as those whose gender in some way is seen to be stretching society's notions of gender.

Gender Expression: How a person expresses their gender through outward presentation and behavior. This includes, for example, a person's clothing, hairstyle, body language and mannerisms.

Gender Fluid: People who have a gender or genders that change. Gender fluid people move between genders, experiencing their gender as something dynamic and changing, rather than static.

Gender Identity: An internal, deeply felt sense of being male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves. One's gender identity can be the same as or different from their sex assigned at birth.

Gender Spectrum: The broad range along which people identify and express themselves as gendered beings or not.

Genderqueer: People that typically reject the binary categories of gender, embracing a fluidity of gender identity. People who identify as "genderqueer" may see themselves as being both male and female, neither male nor female or as falling completely outside these categories.

Gender Transition: The process by which some people strive to more closely align their outward identity with the gender they know themselves to be. To affirm their gender identity, people may go through different types of transitions.

- **Social transition:** This can include a name change, change in pronouns, and/or change in gender expression (appearance, clothes, or hairstyle).
- **Legal transition:** The process of updating identity documents, such as birth certificates and drivers' licenses, to reflect a person's authentic gender and name.
- **Medical transition:** For adolescents in the early stages of puberty, this may include the use of puberty blockers to pause puberty. Medical supports may also include gender-affirming hormones to foster secondary sex characteristics (such as breasts, facial hair, and laryngeal prominence, or an "Adam's apple") that are aligned with the teen's gender identity. Some adults may undergo gender-affirmation surgeries.



LGBTQ+: An acronym for lesbian, gay, bisexual, transgender, queer and/or questioning. Additions to this acronym can include A, for “asexual” or “ally,” and I, for “intersex.”

Non-binary: An umbrella term for gender identities that are not necessarily boy/man or girl/woman. People who identify their gender as non-binary may feel they have more than one gender, don’t identify with a specific gender, or something else all together.

Outing: Exposing someone’s sexual orientation or gender identity to others without their permission.

Queer: A term some people use to identify themselves with a flexible and inclusive view of gender and/or sexuality. Also used interchangeably with LGBTQ+ to describe a group of people such as “queer youth.” It is also seen in academic fields, such as queer studies or queer theory. Historically it has been used as a negative term for LGBTQ+ people. Some people still find the term offensive while some embrace the term as an identity.

Sexual Orientation: Describes a person’s emotional, romantic, or sexual attraction to other people. Some examples of sexual orientations are gay, lesbian, bisexual, asexual or pansexual.

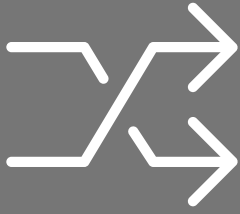
Sex Assigned at Birth: This is generally determined by external genitalia at birth—female, male, or intersex.

Transgender or Trans: A term used to describe people who identify as a different gender from the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation; transgender people may identify as straight, gay, lesbian, bisexual, etc.

Transphobia: The fear or hatred of, or discomfort with, transgender people.

Two-Spirit: An umbrella term indexing various indigenous gender identities in North America.

*Please keep in mind that language around gender and sexual orientation is continually evolving, thus compelling us to be ongoing learners. This list has been compiled with resources from Welcoming Schools and Gender Spectrum as of February 2018.



Best Practices for Student Gender Transitions

Gender Support Plan

When a student comes out as transgender, non-binary, genderfluid, etc., we strongly recommend the completion of a gender support plan. A Gender Support Plan is a document that creates shared understanding about the ways in which a student's authentic gender will be accounted for and supported at school. School staff, caregivers, and the student can work together to complete this document. All MMSD Student Services staff have been trained to support transgender youth and gender support planning; additional assistance can be provided through the MMSD LGBTQ+ Lead.

Gender Support Plans include:

- Student's gender identity, name, and pronouns
- Level of privacy desired
- Staff communication / Communication to peers
- Key contacts at home and at school
- Curriculum considerations
- Access to restrooms, locker rooms, and other school activities
- District policies and guidance that support trans transgender, non-binary, and gender-expansive youth
- Staff professional development



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.





Privacy & Confidentiality

Staff Communication

In some cases there may only be one or two staff members who know a student's gender story and directly support that student. It is up to the student and their family to decide who at school is informed. Schools must ensure confidentiality by adhering to FERPA guidelines.

Substitute Teachers

To avoid harmful misgendering or misnaming, teachers should ensure that all information shared with substitute teachers is updated and accurate. For example, make sure attendance rosters, shared include accurate student names and pronouns, keeping in mind that not all students have their affirmed names and genders updated in Infinite Campus.

Coming out to Staff and Peers

It takes a lot of courage and interpersonal strength to socially transition in school, and every student's journey is unique. When/if ready, we want to support our students to identify a safe, individualized plan for how they will inform their teachers and peers about their transition, if they choose to do so. Transgender, non-binary, and gender-expansive students may request time to address their class about their gender identity and pronouns. Students may share this information with their classes based on the student's preferences or as outlined in their gender support plan. Students have the right to speak freely about their identity, but school staff do not.

Please see appendix for additional resources from Gender Spectrum: "[Communicating a Change in Gender Status](#)" and "[Student Gender Communication Plan](#)"



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.



Email Address

Students can have their school-based email address changed when they complete their [Name/Gender/Email Change Form](#).

- Changes take 3-5 business days to complete.
- Students will receive an email notifying them when their email address has been changed. All emails, contacts, and Google Drive contents will be transferred.
- Please contact the LGBTQ+ Lead for assistance.

School Publications

After a student transitions their name and/or gender, they may need assistance updating their name and/or gender in school-based student publications, such as yearbooks.

- These changes are completed at the student's school.
- When completing a gender support plan, it is important that a school-based staff member is assigned to assist them in changing their name/picture in publications in a time-sensitive manner.

Student ID

After a student transitions their name and/or gender, they may need an updated student ID and picture.

- These changes are completed at the student's school.
- When completing a gender support plan, it is important that a school-based staff member is assigned to assist them in accessing a new photo ID in a time-sensitive manner.

Transcripts

MMSD uses a program called Parchment to capture all student transcripts.

- Parchment records will have students' MMSD-based name and gender information, which may or may not be consistent with a student's legal name and gender.
- This can become confusing for some students when applying for post-secondary education, since they would like to have consistent student information on records.
- Some students may choose to consider a legal, court-based name change to alleviate this concern. Others may choose to change their name back in Infinite Campus (IC) for a short period of time.
- MMSD is advocating for changes with IC so that this barrier does not exist for our transgender and non-binary youth.

MMSD alumni who have transitioned are welcome to request an updated transcript with their affirmed name and gender.

- Alumni must first update their information with MMSD on Infinite Campus. This requires submitting their updated birth certificate, state ID, or passport to the LGBTQ+ Lead, who will work with the MMSD Registrar to adjust their legal name in school records.
- Alumni can then register on Parchment with their affirmed name and gender, and access updated transcripts.



Diplomas

Students can request to have their affirmed name listed on their high school diploma.

- Students who have obtained a legal name change or have made an MMSD-based name change will have their affirmed name on their diploma.
- Students under the age of 18 who have not completed an MMSD-based name change may still have their affirmed name read during graduation and listed on their diploma.
 - As a universal practice, schools shall inform all students about their right to have their affirmed name on their diploma and communicate the process for requesting this accommodation.
 - When a student requests a diploma-based name change, it is best practice to connect them with a trusted student services team member to discuss potential outcomes with their family and support system.

- MMSD Alumni can request a new diploma by submitting their updated birth certificate, state ID, or passport to the LGBTQ+ Lead, who will work with the MMSD Registrar and former high school to obtain a new diploma.

Standardized Tests

We are committed to ensuring that our students have accurate identifying information on all standardized tests. To guarantee this and avoid harmful misgendering, the LGBTQ+ Lead, Registrar, and Assessment department communicate on a regular basis to make sure all student name and gender changes are updated on assessment labels.





Safety & Bullying

Transgender, non-binary, and gender-expansive students are disproportionately targeted for teasing, bullying, harassment, and physical violence. MMSD staff must consistently confront and report suspected bullying or other behaviors that contribute to an unsafe school community. This may include name calling, misgendering, microaggressions, and bullying based on gender stereotypes, gender identity, and/or gender expression.

The district is responsible for providing a safe and supportive environment for all students. To help meet this responsibility, the district has created a student anti-bullying policy (#4510) and a bullying policy to protect staff (#8013). You can find more information on [student anti-bullying here](#). More information is available under the “Policies and Laws” section above.





School Facilities

Restrooms

Having safe and respectful access to restroom facilities is important to the health and wellbeing of those who identify as transgender, non-binary, or gender-expansive. Students shall have access to the restroom that corresponds to their gender identity consistently asserted at school.

All MMSD schools have at least one single stall All Gender Restroom in their building that all students have the right to use. No student shall be required to use such a restroom. The All Gender Restroom may not be given as the only option for students who identify as transgender, non-binary, or gender-expansive.

It can be emotionally harmful for transgender, non-binary, and gender-expansive youth to be questioned or interrogated when using the restroom. We shall assume that our students are using the restroom that is consistent with their gender identity. Therefore, staff shall not confront students about their gender identity upon entry to the restroom. Only if there are behavioral incidents in the restroom should administration resort to the implementation of the Behavior Education Plan.

Changing Areas

All students must have access to changing facilities that correspond to their gender identity. MMSD is committed to having safe all gender changing areas. This will be assessed in the 2017-18 school-year and implemented during the 2018-19 school year. Students will have access to changing spaces that ensures safety and success for the course.

For detailed information specific to physical education, athletics, and extra-curricular activities, please see “Physical Education” section below.





Inclusive Classroom Practices

Welcoming Schools

Welcoming Schools is a comprehensive approach to creating respectful and supportive elementary schools with resources and professional development to:

- **Embrace Family Diversity**
- **Create LGBTQ+ inclusive schools**
- **Prevent bias-based bullying**
- **Create Gender-Inclusive Schools for all students**
- **Support transgender, non-binary, and gender-expansive students.**

We are committed to the Welcoming Schools approach and believe it is a valuable, proactive social-emotional learning program that embraces the diverse identities of our students, staff, and families. As of the 2017-2018 school year, we have 16 MMSD partner schools dedicated to this important equity work, and we will continue to grow Welcoming Schools districtwide. For more information on Welcoming Schools lessons, books, and overall program, visit our website at mmsd.org/welcoming-schools.

Course Accessibility & Instruction

Students have the right to equitable learning opportunities in their school. Students shall not be required to take and/or be denied enrollment in a course on the basis of their gender identity in any educational and academic program.



Language

In MMSD, we will strive to model gender-inclusive language that affirms the gender diversity of our MMSD students, staff, and families and disrupts the gender binary.

Adapted from Gender Spectrum's 12 Easy Steps towards Gender Inclusion, here are some ideas:

- Teach about gender! Include books and lessons that are inclusive of all identities and send messages of empowerment to students.
- Do not use gender as a way to divide groups, tasks, or people. (e.g., In addition to not grouping by gender, we will not say “boys will bring crayons and girls will bring markers” on a school supply list).
- Limit gendered and binary language, because it excludes people. When referring to the whole group, use “students” or “scholars” instead of “boys and girls” or “ladies and gentlemen.”
- Model the use of non-binary pronouns (e.g., they/them/theirs and ze/hir/hirs) and non-binary honorifics (e.g., Mx.)
- Ask all students to share their affirmed names and pronouns, either in writing or aloud.
- Have visual images and posters that send messages of gender inclusion.
- When hearing misconceptions about gender or language that reinforces the gender binary, find a way to be an ally and disrupt it! Use the opportunity as a teachable moment, address it with the group, or have a conversation in private – but do something.
- When hearing biased language, bullying, or harassment, follow MMSD policy and address immediately.

Grouping

Teachers should use non-gendered methods for grouping students. Instead of grouping by boys and girls, ideas might include birth month, length of hair, color of clothing, favorite season, shoelaces versus no shoelaces, count off by numbers, clock partners, pre-planned groups, etc. Asking your students for suggestions of grouping is a great way to gain more ideas as well.



Physical Education

Participation in physical activity plays an integral role in developing a child's fitness and health, self-esteem, and general well-being. Physical Education teachers in MMSD are committed to ensuring all students learn in a safe, inclusive environment where gender does not play a role in student learning expectations or structure of activities for learning.

Physical Education teachers should evaluate all activities, rules, policies, and practices to ensure that gender-inclusive practices are in place.

Fitness Testing

By performing health-related fitness assessments, one is able to identify strengths and areas in need of improvement relating to physical health. Teachers are encouraged to use fitness testing results as a way for students to set personal fitness goals to strive for improvement versus meeting a gendered healthy fitness zone score. Fitness testing software often identifies healthy fitness zones in a binary capacity, only offering male or female options. Students who identify as transgender, non-binary, or gender-expansive should be able to use the healthy fitness zones that are consistent with their gender identity. MMSD is committed to establishing healthy fitness zones that do not categorize students based on gender.

Clothing

Per Board Policy 3651, students must come to physical education class in appropriate clothing consistent with the health, safety, and instructional needs of the program. Appropriate attire includes athletic shoes and clothing that allows for full movement in class activities. This may not require students to physically change clothing prior to class. If other accommodations are needed, students should consult their physical education teacher or the LGBTQ+ Lead.

Physical Education attire should not be gendered. For example, teachers can list the type of attire that is appropriate for swimwear, but shall not say "girls must wear x and boys must wear y."

Swimming

MMSD strives to ensure all students have access to all curricular opportunities for learning where they are safe and supported. Some students who identify as transgender, non-binary, and gender-expansive may require accommodations to access participating in swimming. Examples of accommodations include alternative swimwear, smaller environments, and privacy for changing. Communication between students, teachers, and families is encouraged to develop a plan to meet the needs of the individual student.

For our transgender, non-binary, and gender-expansive youth who are experiencing body dysphoria, swimming might not be a safe, affirming option for them. In these cases, we will offer students an alternative learning opportunity aligned with student learning outcomes. For additional guidance around this topic, students and families can contact their building administrator or LGBTQ+ Lead.

Changing Areas

All students must have access to changing facilities that correspond to their gender identity. MMSD is committed to having safe all gender changing areas; this will be assessed in the 2017-18 school year and implemented during the 2018-19 school year. Students will have access to changing spaces that ensure safety and success for the course.



Universal Practices for Inclusion:

- At the start of each semester, Physical Education teachers will have a whole-class discussion to inform all students of behavioral expectations as well as all available options for changing areas.
 - Review expectations for respecting the privacy and personal space of other people in the changing area. Make clear what appropriate conduct is in spaces where students are changing clothes and consequences for not adhering to them.
 - For example: The girls changing area is located _____, the boys changing area is located _____. An all gender changing area is located _____ for any student seeking additional privacy.
- The teacher will also invite students to communicate with the teacher if additional accommodations are needed or if they have any questions.

Student Accommodations:

- When requested, schools will provide access to a reasonable alternative changing facility that is more private and not gendered. This is an accommodation we would provide for any of our MMSD students, not just students who identify as transgender, non-binary, and gender-expansive.
- Reasonable accommodations may include:
 - Single, locked stalls within binary changing spaces.
 - Separate changing spaces that are not gendered; also including single, locked stalls. These all gender spaces should be located in proximity to Physical Education class and/or extracurricular activities.

Considerations:

- Students who are asking for accommodations should have voice in determining the changing area that best fits their individual needs.
- Students' needs may change, so it is important to check in regularly to determine if their gender support plan needs to be updated.
- Keep in mind that spaces inside of binary changing areas may not feel comfortable to some students, including transgender and non-binary youth; therefore, this may require a separate space where students do not have to enter through a binary changing area.





Health Education

All students will have access to high-quality Human Growth & Development curriculum that focus on student skill-development to promote lifelong healthy lifestyles. MMSD is committed to providing Health Education curricula that provides students with skills-based learning opportunities that are inclusive, age-appropriate, medically accurate, and non-stigmatizing.

Health education teachers should evaluate all curricular materials, such as lesson activities, assessments, videos, and so on to ensure that gender-inclusive practices are in place. It is essential that LGBTQ+ students see themselves in the curriculum.

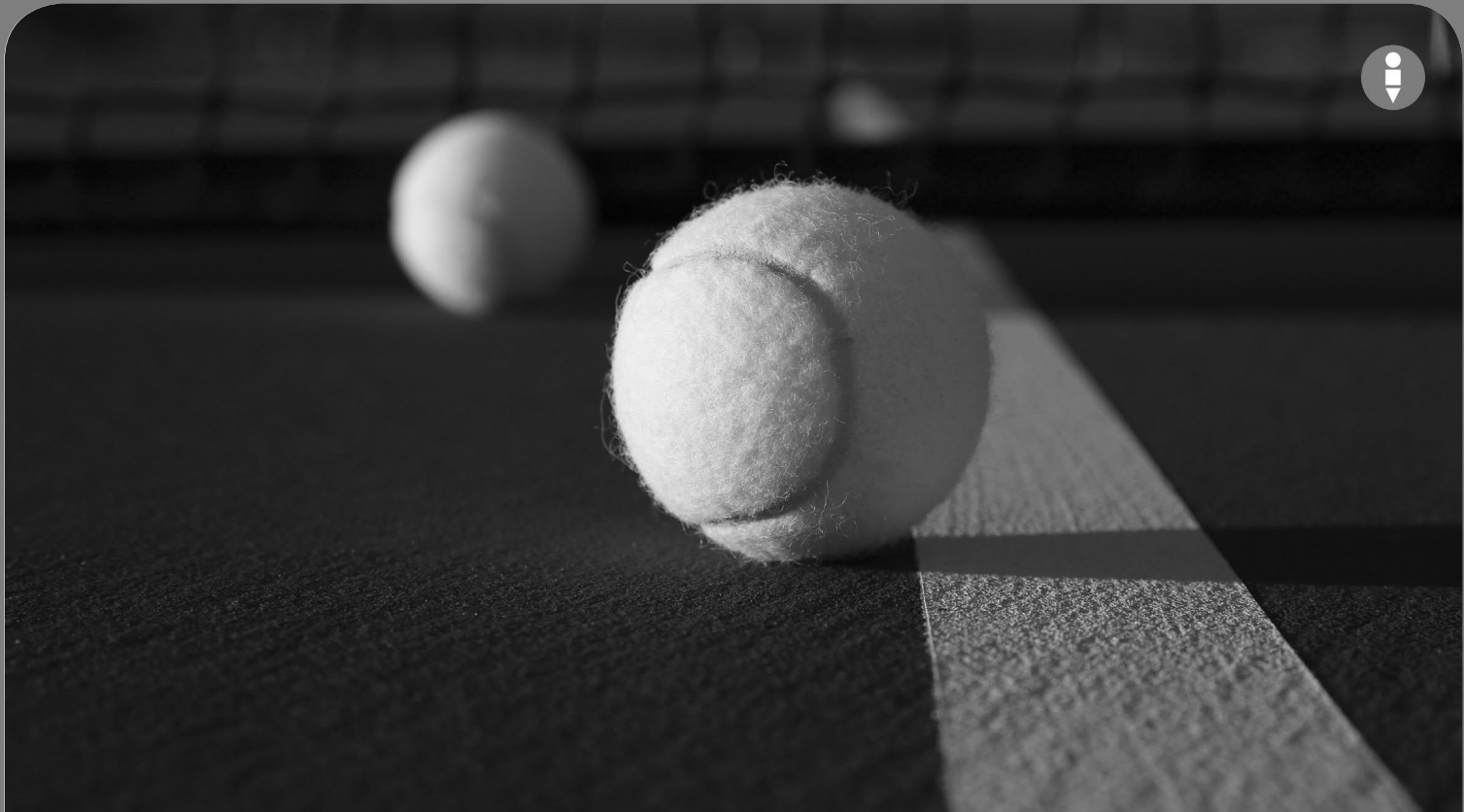
Human Growth and Development

Instruction should include educating students on various vocabulary related to biology, gender identity, gender expression, and sexual orientation.

Examples of inclusive practices:

- When teaching about bodily changes with biological sex relating to puberty, use terms such as “people with penises” and “people with vaginas/vulvas/uteruses” instead of “girls and boys” or “girl-bodied / boy-bodied.”
- When teaching about families and relationships, discuss the concept of multiple pathways to relationships and family. Include multiple family structures – people who are raised by adopted parents, foster parents, grandparents/family members, single-parent household, same-sex parents, divorced parents, etc.
- When age-appropriate, educate students on the multiple pathways to family, including concepts of In vitro fertilization, artificial insemination, adoption, etc.

For more information on health education curriculum, contact the Physical Education, Health, and Wellness Coordinator.



Athletics

MMSD, in collaboration with the Wisconsin Interscholastic Athletic Association (WIAA), is committed to increasing the participation of students who identify as transgender, non-binary, or gender-expansive in athletics.

- Students are able to participate on a team consistent with their gender identity.
- At this time, we do not have many non-binary athletic options for our students; therefore, students who identify as non-binary or gender-expansive can participate on the team that feels like the best fit for them.
- There are some circumstances where students may participate on the team consistent with the sex they were assigned at birth in order for them to feel safe, supportive, and successful. Open communication is encouraged among the student, their family, and their coach to ensure the best option for the student based on their individual goals.
- If students, families, or educators need support in this area, please contact the MMSD Physical Education, Health, and Wellness Coordinator.

If more information is needed, contact your administrator to seek guidance from Central Office Student Services.



Clubs and Extracurricular Activities

All students of all genders should have access to opportunities for clubs and extracurricular activities to enrich their educational experience.

Inclusive Access and Participation in Clubs & Activities:

- Model inclusive messaging when promoting clubs and extracurricular activities to encourage access and participation for our gender-expansive students. Sometimes clubs and activities might be marketed specifically to “boys” or “girls.” This practice excludes many of our transgender, non-binary, and gender-expansive youth.

Examples:

- All genders are encouraged to participate in Ultimate Frisbee.
- Handing out the karate club flyer to all students, not just the boys (even if the host organization asks you to just send out to “boys”)
- A poster that is representative of diverse students to promote math club.

Inclusive Language and Practice in Clubs & Activities:

- Make sure club leaders are aware of MMSD policies and guidance to support our transgender, non-binary, and gender-diverse youth.
- Leaders should review all club materials to ensure they are inclusive of gender-diverse youth.
- Model gender-inclusive language that affirms the gender diversity of our MMSD students, staff, and families and disrupts the gender binary. See Language section for additional examples.
- Clubs and activities are not to be separated by gender.
 - Make sure all genders have access to all clubs and activities.
 - Avoid using gender as a characteristic for divisions.
 - For clubs that have been traditionally divided by binary gender (e.g., Boy Scouts, Girl Scouts, Girls on the Run), we must not discriminate against or exclude our transgender, non-binary, and gender diverse youth. Students should be able to participate in all desired clubs and activities. See Title IX policies for additional information.



Field Trips

It is the responsibility of the adult in charge of the trip to guarantee the safety and inclusion of all students. This includes checking in advance for all gender restrooms, all gender changing facilities, and inclusive room assignments.

Day Field Trips

- Gender should not be used when dividing students into groups on field trips, and field trips must be accessible and planned to be inclusive for students of all gender identities.
- If a location does not have accessible facilities (all gender restrooms, private changing areas, etc.), communicate in advance with all of your students in case accommodations are needed.
- Accessibility should be a consideration when choosing a field trip site.

Overnight & Extended Field Trips

As a universal practice, staff shall begin by developing expectations for appropriate conduct with all students (i.e. respect for privacy, personal space, and boundaries; modesty; physical contact).

- When traveling on overnight school-related trips where room sharing may be required, our transgender, non-binary, and gender-expansive students' comfort level with sleeping arrangements will largely dictate the manner in which related issues are addressed

- It is strongly recommended to first ask the student their rooming preference.
 - Transgender students have the right to room with other students who share the gender identity they consistently assert at school.
 - Transgender, non-binary, and gender-expansive students should be able to have options such as friend, social, or leadership pairings.
 - In some cases, a student may want a room with fewer roommates or another alternative suggested by the student or the student's family. Trip organizers will work with the student, school staff, and/or the student's parents/guardians to make appropriate arrangements. The school should honor these requests whenever possible. In all circumstances, the arrangements are to be made with the student's consent.
- Regardless of whether any roommates know about the student's gender identity, the school has an obligation to maintain the student's privacy and cannot disclose information about the student's identity.
- If students who identify as transgender or non-binary, or gender-expansive are uncomfortable with all options above regarding changing facilities and travel accommodations, it is strongly recommended that the student be able to choose other activities in lieu of activities requiring changing facilities or room shares. It is recommended that all reasonable alternatives suggested by the student or parents/guardians be considered.



School Dances, Courts, and Other Historically Gender-Based Traditions

School traditions are important to all students. Transgender, non-binary, and gender-expansive students are no exception. The First Amendment and the right to equal protection grant transgender, non-binary, and gender-expansive students protection from discrimination based on sexual orientation and gender identity and allow students the right to authentically show their gender identity and gender expression at prom, homecoming, and similar school events.

- With an expectation of inclusivity, schools shall evaluate school traditions such as dances, homecoming/prom courts, etc. to determine whether these activities are inclusive for all genders. Schools may decide to revise existing traditions or establishing new traditions.
- For example, the tradition of having a male homecoming king and a female homecoming queen and gendered court was once commonplace. Most MMSD schools have moved away from binary gender courts because they exclude the gender diversity of their student body. Instead of electing a homecoming king and homecoming queen, some schools have chosen to nominate “prom ambassadors,” “homecoming court,” or “homecoming royalty.”
- Transgender, non-binary, or gender-expansive youth have the right to fully participate in all school activities and social events without discrimination.





Acknowledgements

MMSD would like to acknowledge the support from across the country that has influenced and enhanced this guidance document. Thank you to the following school districts and organizations for the best practice recommendations, model policies, and support:

- ACLU
- DC Public Schools
- Gay, Lesbian, Straight, Education Network (GLSEN)
- Gender Spectrum
- Los Angeles Unified School District (LAUSD)
- Minnesota School Safety Technical Assistance Council
- Minus18
- Welcoming Schools

We would also like to thank the MMSD Action Team to Support Transgender, Non-binary, and Gender-expansive Youth. Representatives include participants from:

- GSAFE: Creating Just Schools for LGBTQ+ Youth
- MMSD Building Services
- MMSD Chief of Schools Office
- MMSD Curriculum & Instruction
- MMSD Legal Services
- MMSD Office of the Registrar
- MMSD Student Leaders
- MMSD Student Services
- MMSD Superintendent's Office
- Transparent Group of Wisconsin



Resources

1. Gender 101 Concepts & Vocabulary

- [Welcoming Schools' Definitions to help understand gender and sexuality](#)
- [Genderbread Person](#) from It's Pronounced Metrosexual
- [Trans 101](#) video from Minus18
- [What are Pronouns?](#) article, app, & video from Minus18

2. MMSD Gender Support Resources

- [MMSD Gender Support Plan](#)
- [MMSD Name/Gender/Email Change Form](#)
- [MMSD flowchart to guide gender transition process](#)
- [Communicating a Change in Gender Status](#) from Gender Spectrum
- [Student Gender Communication Plan](#) from Gender Spectrum

3. Local Resources for Students and Families

- Madison Metropolitan School District Resources
 - Your child's School Team
 - Districtwide resources: LGBTQ+ Lead, Title IX, Coordinator of PE/Health/Wellness
- Community Resources in Madison
 - [Youth Resource List](#)
 - [Transparent Group](#)

4. National Resources on Gender Inclusive Schools for Educators and Administrators

- Welcoming Schools' [Checklist for a Welcoming and Inclusive School Environment](#)
- Gender Spectrum's [Schools in Transition: A Guide to Supporting Trans Youth](#)
- Gender Spectrum video: [How to design a Gender Support Plan](#)
- [Supporting & Caring for Transgender Children](#)

5. Resources for Families

- Local
 - [Transparent Group](#): Monthly Support Group & Google Group
 - [Pediatric & Adolescent Transgender Health \(PATH\) Clinic](#)
 - [PFLAG](#) Monthly Support Group
 - [GSAFE](#): Creating Just Schools for LGBTQ+ Youth
 - [Orgullo Latinx](#)
- National
 - Advocates for Youth~ [10 Tips for Parents of LGBTQ+ Youth](#)
 - Welcoming Schools~ [Gender Inclusive Schools & Supporting Transgender and Non-binary Youth](#)
 - [Gender Spectrum](#)
 - [GLSEN](#)
 - [The Family Acceptance Project](#)
 - PFLAG: [Guide to be a Trans* Ally](#)
 - [Trans Youth Family Allies](#)
 - [Families in Transition: A Resource Guide for Parents of Trans Youth](#)

6. Policies

- Board Policy [4510: Student Anti-Bullying](#)
- Board Policy [4620: Student Non-Discrimination](#)
- Board Policy [8012: Staff-Visitors Non-Discrimination](#)
- Board Policy [8013: Workplace Bullying](#)

1 that directly discusses this issue; is that correct?

2 MR. BERG: That's correct. The only thing I
3 would note is there has been a series of cases that have
4 appeared to have allowed plaintiffs to proceed
5 anonymously and one recent from Dane County Circuit Court
6 as well. But none of the cases that I'm aware of have
7 actually discussed the grounds for doing so.

8 THE COURT: All right. So let's then
9 disassemble your term proceed anonymously. I read all
10 the cases that you cited in your initial brief for the
11 proposition that Wisconsin courts have allowed civil
12 plaintiffs to sue anonymously by using pseudonyms in a
13 number of cases.

14 There are cases, Mr. Berg, where the court has
15 allowed civil plaintiffs to be anonymous where the court
16 has sealed their identity. And my question to you is,
17 there are two ways I've looked at your issue. One is I
18 could say, okay, I agree that I have the discretion, and
19 the facts support the exercise of that discretion; and as
20 far as I'm concerned, nobody needs to know the identity
21 of the plaintiffs.

22 Alternatively, I believe that another way of
23 looking at it is for the court to say there is precedent
24 to seal certain court documents under specific factual
25 basis.

1 Why not proceed by requiring the plaintiffs to
2 identify themselves under a protective order that
3 preserves their confidentiality of their identity but for
4 attorneys' eyes only for the parties in this case?

5 I believe there is ample precedent to do that.
6 There is -- on page 3 of your brief there's a series of
7 cases where essentially that had been done, I believe,
8 although not discussed directly, where there is a legal
9 basis to preserve the identity of the party.

10 For example, in the first case, *Doe 56 versus*
11 *Mayo Clinic*, a case involving minors, it is -- I believe
12 it's possible that the parties and the court knew who the
13 minor was; but to protect the identity of the minor under
14 substantive law, his or her identity was stripped from
15 the caption and presumably prohibited from dissemination
16 by the laws pertaining to juvenile proceedings.

17 Similarly, in the *Milwaukee Teachers'*
18 *Education Association*, it seems to me that in that case
19 the parties knew who the individual employees were whose
20 personnel files were subject to the public records case,
21 but yet the court accepted the nomenclature of using the
22 John and Jane Doe under the well-established authority to
23 protect individual personnel files.

24 And I could go on in the *Doe versus Roe* cases
25 that strip the identity of the parties; although, it

1 appears to me by reading the case, the lawyers knew who
2 they were; the court knew who they were; but because the
3 court was dealing with confidential medical records and
4 HIV testing, the plaintiffs' names were not contained in
5 the caption, and the identification to the public was
6 protected under the substantive privacy rights of medical
7 records.

8 So, Mr. Berg, you I think hinted at
9 acknowledging that we could proceed in this fashion
10 because you suggested, I think at one point, well, we
11 could tell the court who these people's names are.

12 Why not have the court enter a protective
13 order requiring that if the plaintiffs do identify
14 themselves, that their identities be kept confidential?
15 The caption can remain the same and that only the
16 attorneys can see those identities, and that the
17 attorneys under the protective order should endeavor to
18 and protect the confidentiality of the individual
19 plaintiffs' identity.

20 Are you asking me to proceed in that fashion?
21 If not, why not?

22 MR. BERG: So a few things I'd like to say,
23 Your Honor. First, the plaintiffs would be happy to turn
24 over their identities to the court. We're not opposed to
25 that at all. We do oppose revealing their identities to

1 the lawyers in the case for a few reasons.

2 THE COURT: Why do you do that? I mean,
3 there's many cases and longstanding precedence for the
4 courts issuing protective orders, and the standard
5 protective orders that have been entered into hundreds if
6 not thousands of cases do categorize certain documents,
7 the confidentiality of which should be limited to
8 attorneys' eyes only carrying with it the legal
9 compulsion to protect the information in those documents.

10 Why are you concerned about that? Because in
11 those situations it would seem to me that it would
12 address the factual bases that you support your motion
13 with and the threats of retaliation. Nobody is going to
14 know who they are except the lawyers involved.

15 MR. BERG: Right. I have no doubt that the
16 lawyers would follow that protective order to the best of
17 their ability.

18 I think, however, that the reaction to this
19 lawsuit has shown that the risk is very serious and very
20 real, and every additional person who knows the
21 plaintiffs' identities increases the risk that their
22 identities will be leaked, even inadvertently.

23 We've been very, very careful. Even the
24 plaintiffs themselves do not know each other. So we've
25 put forth a lot of effort to preserve their anonymity to

1 make them feel comfortable, and the district hasn't
2 provided any reason that it needs to know their
3 identities, right?

4 If later in the case there becomes an actual
5 need for them to know the plaintiffs' identities, we can
6 revisit this issue. But from the very beginning we've
7 offered to stipulate to any fact that the district thinks
8 it may need to know about the plaintiffs. I think we've
9 done that already. And the district hasn't provided any
10 good reason that it needs to know them now.

11 This entire case turns on the
12 constitutionality of the policy. And I think that's part
13 of what distinguishes this case from the other cases that
14 the court identified and that we cited in our briefs in
15 Wisconsin where, you know, facts about the plaintiffs
16 mattered.

17 In this case the plaintiff -- the facts about
18 the plaintiffs don't matter at all. All that matters is
19 is the policy constitutional or not, and that's why in
20 the federal cases we've cited courts have allowed
21 plaintiffs to proceed anonymously even as against the
22 lawyers.

23 So I think there is precedent around the
24 country for what we've asked for. I think it would
25 provide the maximum amount of protection for the

1 plaintiffs. And, again, we can revisit this issue later
2 if we need to.

3 THE COURT: Mr. Berg, this is not a trick
4 question because I looked, and my staff attorney looked.

5 Is there a single published case in Wisconsin
6 that discusses or gives the court authority to allow a
7 plaintiff to proceed without telling either the court or
8 the defendant their identity?

9 MR. BERG: Well, as I've said, we would be
10 more than happy to reveal the identities of the
11 plaintiffs to the court.

12 There is a case in Dane County Circuit Court
13 just recently where the court allowed a plaintiff to
14 proceed anonymously even as against the defendant's
15 counsel. The case number is 19CV3166.

16 THE COURT: Hold on. Hold on. 19CV what?

17 MR. BERG: 3166.

18 THE COURT: That's a case against the Madison
19 Metropolitan School District. The school district
20 opposed the petitioner's motion to proceed anonymously,
21 and Judge Anderson allowed it at an oral ruling in
22 February.

23 The basis -- there's no way that I could tell
24 the basis for that, but okay. So I guess Judge Anderson
25 allowed it. But is there any -- I didn't find any Court

1 of Appeals published appellate decision that said in
2 Wisconsin a party can proceed without telling the court
3 or the defendants their identity.

4 Is that your understanding too, that this
5 would be a question of first impression?

6 MR. BERG: Yes, yes, it is.

7 THE COURT: Then let me get to the next basis
8 for my analysis. Assuming for purposes of argument,
9 Mr. Berg, that it's allowed in the federal court. The
10 federal court have allowed parties to proceed without
11 telling one their identity.

12 You agree, though, that the federal practice
13 is trumped by applicable state statute. That is, the
14 Wisconsin legislature and the Wisconsin courts control my
15 analysis, right?

16 MR. BERG: That's absolutely right.

17 THE COURT: All right. So because I believe
18 there is a current statutory process for sealing the
19 identity of parties and a statutory recognition of the
20 court's authority to enter protective orders to preserve
21 the confidentiality of information in documents,
22 including parties' identities, why do you believe I am
23 not bound by these statutes drafted by the state
24 Legislature and approved by the governor and codified in
25 state law as the principal way of proceeding in this

1 matter?

2 MR. BERG: So I read 801.21 as essentially
3 Mr. Blonien does, as a procedural catchall for any sort
4 of anonymity request that isn't otherwise covered by the
5 statute. And 801.21 specifically says in (4) that the
6 court can rely on the common law. And I think you have
7 that in federal court. You have a series of cases that
8 are unanimous actually around the country holding that in
9 facts like this where parents are challenging a
10 controversial school policy, they're allowed to proceed
11 anonymously.

12 So I think through 801.21(4) and its
13 invocation of the common law in those such cases, this
14 court has more than sufficient authority. But even if
15 you don't want to rely on 801.21, *Builder* recognizes that
16 the court has inherit; and although there's no case
17 discussing proceeding anonymously as against even the
18 defendants, I think this issue just hasn't come up in
19 this state yet. But it has around the country, and
20 courts are unanimous about it.

21 THE COURT: So, Mr. Berg, my last question for
22 you is then -- it's a repetitive of what I already asked.

23 I asked you why doesn't a protective order
24 that seals the identity of the named plaintiffs and
25 allows disclosure only for attorneys' eyes only, I asked

1 you why doesn't that get you everything that you wanted
2 in terms of the threats of retaliation. And your answer
3 to me was, I think just generally, and correct me if I'm
4 wrong, that, well, but the plaintiffs would rather not.

5 My question is, if I entered a protective
6 order that required the plaintiffs to identify themselves
7 but seal the document and provided that the identity of
8 those named plaintiffs be for attorneys' eyes only with
9 the usual standard argument, in the end, what is the
10 plaintiff concerned about other than just more people
11 know their identity?

12 MR. BERG: I think that's the concern, Your
13 Honor, that every additional person who knows who they
14 are creates additional risk that their name will be even
15 accidentally leaked, right?

16 We have two attorneys who have appeared for
17 the district. We have six attorneys who have appeared
18 for the intervening defendants, so that's already eight
19 different people who will know who they are. It will be
20 on different servers and different systems, and the more
21 places their names are available, the more people know
22 who they are.

23 It creates risk. It creates some risk that
24 their names will be leaked, and there's no point in
25 creating that risk when the District hasn't given any

1 reason that it needs to know their identity.

2 Again, this case turns entirely on the
3 policies. There's nothing to do with the facts about the
4 plaintiffs. But if something comes up in the future that
5 the district needs to know and it can't be solved in
6 another way, then we can revisit this.

7 THE COURT: So, Mr. Berg, I said I had one
8 last question, but your answer generated another one.

9 You know, from my experience before taking the
10 bench, I worked on the state's pharmaceutical litigation;
11 before that, I worked on the state's tobacco litigation.

12 And as you might imagine, in both of those
13 cases the court entered detailed protective orders, and
14 in both of those cases the lawyers received and reviewed
15 Tier 1 confidential documents that were deemed to be for
16 attorneys' eyes only.

17 And to my knowledge, the attorneys in that
18 case, dozens and dozens of attorneys, who had access to
19 the confidential materials from the tobacco defendants
20 and the pharmaceutical defendants, preserved the
21 confidentiality of that information as required by court
22 order.

23 Do you have any reason to believe that there
24 is any risk in this case with these defendants or these
25 lawyers that makes this court's analysis different than

1 what the precedent would have been for highly
2 confidential pharmaceutical information or tobacco
3 information?

4 MR. BERG: No. I have no reason to doubt that
5 the lawyers in this case will make every effort to
6 preserve the plaintiffs' anonymity and follow a court
7 order.

8 That said, I think there is still some risk
9 that their identities will be inadvertently leaked. And
10 unlike those cases this court is discussing, this case is
11 unique in that there's no need -- there is no fact,
12 there's no reason to identify the plaintiffs.

13 This is a case about the policy. The entire
14 case is going to turn on whether the policy is
15 constitutional or not. And if there is any fact that the
16 district needs to know, we can get it to the district in
17 other ways or we can revisit this.

18 Although it may be a small risk, there is some
19 risk, and there is no need on the other side. And the
20 test that federal courts apply is essentially a balancing
21 test, the need for anonymity versus the need on the other
22 side.

23 And I think even though the risk is small to
24 revealing their identities to the lawyers, there is some
25 risk, and there's no need on the other side. So I think

2009 WL 2952779

Only the Westlaw citation is currently available.

UNPUBLISHED OPINIONS MAY NOT BE
CITED IN ANY COURT OF WISCONSIN
AS PRECEDENT OR AUTHORITY,
EXCEPT FOR THE LIMITED PURPOSES
SPECIFIED IN WIS. STAT. RULE 809.23(3).

Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff–Respondent,

v.

Norbert Aaron MATHIS, Defendant–Appellant.

No. 2008AP2614–CRNM.

|
Sept. 16, 2009.

Synopsis

Background: After defendant's felony conviction, the Circuit Court, Walworth County, [James L. Carlson, J.](#), ordered defendant to provide a DNA sample and pay statutory DNA analysis surcharge. After defendant filed appeal, defense counsel filed no-merit report and sought to be relieved from further representation of defendant.


Holding: The Court of Appeals held that issue would be certified to Supreme Court of whether it was frivolous for defendant to argue that circuit court was required to state on the record its reasons for imposing the surcharge.

Issue certified.

West Headnotes (1)

[1] **Courts**  [Wisconsin](#)

Court of Appeals would certify issue to Supreme Court of whether it was frivolous, for purposes of defense counsel's no-merit report seeking relief from representation of defendant, for defendant to argue on appeal that circuit court erroneously exercised its discretion by ordering that defendant provide a DNA sample under

statute requiring convicted felons to provide such samples, and at the same time order defendant to pay the statutory DNA analysis surcharge without stating on the record its reasons for imposing the surcharge. [W.S.A. 809.61](#),  [973.046](#), [973.047](#).



Certification by Wisconsin Court of Appeals.


Before [BROWN, C.J.](#), [NEUBAUER, P.J.](#), and [ANDERSON, J.](#)

Opinion

*1 Pursuant to [WIS. STAT. RULEE 809.61](#) this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

We certify this appeal to the Wisconsin Supreme Court pursuant to [WIS. STAT. RULEE 809.61](#) (2007–08),¹ to resolve a conflict among the districts of the court of appeals that has arisen as a result of our decision in  [State v. Cherry](#), 2008 WI App 80, ¶¶ 8–9, 312 Wis.2d 203, 752 N.W.2d 393. We require guidance on whether a circuit court that orders a defendant to provide a deoxyribonucleic acid (DNA) sample under [WIS. STAT. § 973.047\(1f\)](#) and at the same time orders the defendant to pay the DNA surcharge under  [WIS. STAT. § 973.046\(1g\)](#), must state on the record its reasoning for imposing the surcharge.

This issue arises in the context of a no-merit appeal. In a no-merit appeal, the issue before the court of appeals is whether to accept the no-merit report and relieve appellate counsel from further representation of the appellant, or to reject the no-merit report and order counsel to pursue, through the usual adversarial process, any issue of arguable merit. An issue has “arguable merit” if it is not “wholly frivolous,” meaning that it would be unethical for counsel to make the argument. *See*  [McCoy v. Court of Appeals](#), 486 U.S. 429, 436–39, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988).

There are two statutes that establish when a court must order a defendant to provide a DNA sample and pay the
R-App. 47

DNA analysis surcharge. [WISCONSIN STAT. § 973.047](#) requires the circuit court to order anyone convicted of a felony to provide a DNA sample. The statute also directs the department of justice to promulgate rules governing the procedures for collecting these samples. [Section 973.047](#) provides in part:

(1f) If a court imposes a sentence or places a person on probation for a felony conviction or for a conviction for a violation of s. 940.225(3m), 944.20, or 948.10, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

....

(2) The department of justice shall promulgate rules providing for procedures for defendants to provide specimens when required to do so under this section and for the transportation of those specimens to the state crime laboratories for analysis under s. 165.77.

The second statute, [WIS. STAT. § 973.046](#), gives the circuit court discretion to impose a DNA surcharge on persons convicted of most felonies, but mandates that the surcharge be imposed upon a defendant convicted of certain sex offenses.

[State v. Jones, 2004 WI App 212, ¶ 6, 277 Wis.2d 234, 689 N.W.2d 917.](#) [Section 973.046](#) provides in part:

(1g) Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a deoxyribonucleic acid analysis surcharge of \$250.

(1r) If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02(1) or (2) or 948.025, 948.085, the court shall impose a deoxyribonucleic acid analysis surcharge of \$250.

*2 The interplay between these two statutes has raised a number of questions in different factual scenarios. We have already decided that [WIS. STAT. § 974.046\(1g\)](#) allows a circuit court to require a defendant to pay the surcharge even when the court is not requiring the defendant to provide a sample. [Jones, 277 Wis.2d 234, ¶¶ 3, 7, 689 N.W.2d 917.](#) In *Jones*, we concluded that “[t]he language of the statute plainly states that the trial court has the discretion to order a DNA surcharge upon the entry of judgment in this felony

case. Nothing in [§ 973.046\(1g\)](#) requires a DNA sample to be collected before the court can order the payment of the surcharge.” [Jones, 277 Wis.2d 234, ¶ 7, 689 N.W.2d 917.](#) We further noted that, although [WIS. STAT. § 973.047](#) requires the circuit court to order a defendant convicted of a felony to provide a sample, and the statute does not make an exception for anyone who has already provided a sample, the State Crime Laboratory could not use more than one sample. [Jones, 277 Wis.2d 234, ¶ 5, 689 N.W.2d 917.](#)²

In *Cherry*, we held that the surcharge statute, [WIS. STAT. § 973.046](#), gives the circuit court discretion to order the surcharge in many cases, and when the trial court exercises this discretion, it must explain why. [Cherry, 312 Wis.2d 203, ¶¶ 8–9, 752 N.W.2d 393.](#) We held that [§ 973.046\(1g\)](#) “clearly contemplates the exercise of discretion by the trial court,” and that when the circuit court orders a defendant to pay the surcharge, it “should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision for imposing the DNA surcharge in that case.” [Cherry, 312 Wis.2d 203, ¶¶ 8–9, 752 N.W.2d 393.](#)

We further stated:

Thus, in exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can. We also do not find the trial court's explanation that the surcharge was imposed to support the DNA database costs sufficient to conclude that the trial court properly exercised its discretion. To reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning. We are not going to attempt to provide a definite list of factors for the trial courts to consider in assessing whether to impose the DNA surcharge. We do not want to limit the factors to be considered,

nor could we possibly contemplate all the relevant factors for every possible case. In an effort to provide some guidance to the trial courts, however, we conclude that some factors to be considered could include: (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

*3 *Id.*, ¶ 10.

We concluded that the record in *Cherry* did not “reflect a process of reasoning before the trial court imposed the \$250 DNA surcharge,” and we remanded for the court “to conduct proceedings necessary to reassess whether the \$250 DNA surcharge should be imposed in this case and to set forth the factors and rationale it considered in making such a determination.” *Id.*, ¶ 11.

The factual situation presented by this no-merit appeal is slightly different from either *Jones* or *Cherry*. It is, however, representative of a fact situation that arises in many no-merit appeals, and in direct appeals as well. The defendant was convicted of a felony, but not one of the sex offenses listed in [WIS. STAT. § 973.046\(1r\)](#). The circuit court, therefore, was statutorily obligated under [WIS. STAT. § 973.047\(1f\)](#) to order the defendant to provide a sample, but the court was not required under [§ 973.046\(1r\)](#) to impose the surcharge. The court ordered both the sample and the surcharge, saying: “You’re to provide for DNA, surcharges, [and] restitution....” The court arguably did not “set forth the factors and rationale it considered” in deciding to impose the surcharge, other than to say that defendant was to provide the sample and the surcharge. See [Cherry](#), 312 Wis.2d 203, ¶ 11, 752 N.W.2d 393.

The different districts of the court of appeals have reached contrary conclusions on whether such a situation creates a potential issue of arguable merit in the no-merit context. District IV has concluded that, in situations such as the one

presented by this appeal, the issue of whether the circuit court properly exercised its discretion, is not “wholly frivolous” for the purposes of a no-merit appeal, relying on *McCoy*. The position taken by District IV also suggests that an appellant might be successful on an appeal to this court.

The three other districts have concluded, however, that when the circuit court is required to order a defendant to provide a DNA sample under [WIS. STAT. § 973.047\(1f\)](#), and at the same time orders the defendant to pay the DNA surcharge without offering further explanation for ordering the surcharge, the circuit court has properly exercised discretion under the statutes. An appellant, therefore, would not succeed on an appeal to this court on this issue. The other districts believe that it would not be administratively prudent, therefore, to send these cases back to the circuit court for a further hearing on the issue.

Districts I, II, and III acknowledge that the position taken by District IV suggests that an argument on this issue would not be wholly frivolous in the no-merit context. But the three other districts are convinced that simply answering the question of whether the issue is frivolous in the no-merit context does not resolve the underlying dispute among the districts, nor does it provide needed guidance to the circuit courts on what they must consider when imposing the surcharge to satisfy the statutory requirements. The need for guidance is even more compelling given the high volume of no-merit appeals currently pending in the court of appeals and the frequency with which this issue occurs.³ Further, it seems unduly burdensome to repeatedly send this issue back to the circuit courts until the issue can make its way to the court of appeals in a direct appeal. An opinion from the supreme court on the underlying issue, however, would establish both whether the issue is frivolous, and give needed direction to the circuit courts on the merits of the issue. Consequently, we ask the supreme court for guidance on the underlying issue.⁴

*4 Specifically, under the facts presented by this case, Districts I, II, and III have concluded that a circuit court does not erroneously exercise its discretion when it orders a defendant to pay the surcharge, without offering additional reasons for imposing the surcharge, when the court was required by [WIS. STAT. § 973.047\(1f\)](#) to order the defendant to provide a sample. In other words, the very fact that a defendant *must* provide a DNA sample where that defendant has not previously provided it, is ample justification for the circuit court to also order the defendant to pay the surcharge, since one logically flows from the other as a matter of

R-App. 49

common sense. Therefore, the three districts believe that ordering payment for the actual taking of DNA *is* the act of discretion, standing by itself. The circuit court need not utter magic words on the record to make the connection that, if a DNA sample must be provided, the defendant is statutorily required to pay for it. Consequently, when a no-merit appeal presents these facts, these districts would not require appellate counsel to further pursue the issue.

District IV, on the other hand, concludes that, when a circuit court imposes the DNA surcharge, even when it is required to order the sample under [WIS. STAT. § 973.047\(1f\)](#), without stating any reason or applying potentially relevant factors described in [Cherry, 312 Wis.2d 203, ¶ 10, 752 N.W.2d 393](#), it may not be frivolous to file a postconviction motion arguing that the court erroneously exercised its discretion.⁵

All the districts agree that when a circuit court orders a defendant to pay the surcharge without requiring him or her to provide a sample, the circuit court must explain its reasons for doing so as discussed in *Cherry*. But the districts disagree about whether the circuit court must explain its reasons for imposing the surcharge when it is statutorily obligated under [WIS. STAT. § 973.047\(1f\)](#), as it is in all felony cases, to require the defendant to provide a DNA sample.

A related issue presented by this appeal involves a regulation issued by the Department of Justice, [WIS. ADMIN. CODE § JUS 9.08 \(Sept.2001\)](#). It provides, in relevant part, that if a court orders a defendant to provide a DNA sample, then “the court shall impose a DNA analysis surcharge.” This regulation has been used to support the proposition that a circuit court has not erroneously exercised its discretion when it orders the surcharge without explaining its reasoning when the court is required to order the sample under [WIS. STAT. § 973.047\(1f\)](#).

District IV questions whether an administrative rule setting court fees is outside the scope of the rulemaking authority conveyed to the Department of Justice by [WIS. STAT. § 973.047\(2\)](#), and whether the rule is invalid because it conflicts

with the current statute by making the surcharge mandatory under circumstances in which [WIS. STAT. § 973.046\(1g\)](#) has made the surcharge discretionary.⁶ While the regulation has been used to support the position taken by Districts I, II, and III, those districts do not believe that the regulation is necessary to support the position that the circuit court has not erroneously exercised its discretion by imposing the surcharge without further explanation when the court orders that a sample be provided under [§ 973.047\(1f\)](#). Guidance on whether the regulation is valid, however, would also be helpful to the court of appeals and to the circuit courts.

CONCLUSION

*5 The districts have reached contradictory conclusions about whether it is frivolous for a defendant to argue that a circuit court erroneously exercises its discretion when it orders a defendant to provide a DNA sample under [WIS. STAT. § 973.047\(1f\)](#), and at the same time orders the defendant to pay the surcharge under [WIS. STAT. § 973.046\(1g\)](#), without stating on the record its reasons for imposing the surcharge. The resolution as to whether this issue is frivolous depends on the resolution of the underlying issue. Because this issue has appeared and will continue to appear in many no-merit appeals, as well as in direct appeals, we ask for guidance. If the court of appeals is to remain true to the ideal that it is a unified court, we cannot continue to issue contradictory orders on no-merit opinions. And, to allow the present situation to fester will cause confusion in the circuit courts because how to handle DNA surcharge orders will be dependent on where the circuit court happens to be located, the very reason why the court of appeals was designed to be a unified court. We respectfully certify the issue to the supreme court.

All Citations

Not Reported in N.W.2d, 2009 WL 2952779

Footnotes

¹ All references to the Wisconsin Statutes are to the 2007–08 version unless otherwise noted.

- 2 This explains why even though [WIS. STAT. § 973.047\(lf\)](#) requires a circuit court to order a defendant convicted of a felony to provide a sample, the courts often state that a defendant need not provide a sample if he or she has previously given one.
- 3 Because of the high volume of no-merit appeals in District I, some of these appeals are routinely transferred to other districts. Because of the conflict among the districts, a circuit court may receive conflicting decisions from the court of appeals on whether there is an arguable issue about the appropriate way to exercise discretion under [WIS. STAT. § 973.046\(1g\)](#) when imposing the DNA surcharge when also ordering a defendant to provide a DNA sample under [WIS. STAT. 973.047\(1f\)](#).
- 4 Conflict among court of appeals' decisions is recognized as an appropriate ground for granting petitions for review, see [WIS. STAT. RULE E 809.62\(1r\)\(d\)](#).
- 5 Consequently, District IV directs appellant's counsel to review the issue and consult with the defendant. If the defendant wants to raise the issue, counsel must either raise it or explain why it is frivolous in a supplemental no-merit report. District IV does not adopt the conclusion that such a postconviction motion is always frivolous if the circuit court also ordered a DNA sample to be provided, because no statute or published case law provides to that effect. District IV also has concluded that an arguable issue may exist when the circuit court orders a defendant to provide a sample and pay the surcharge only if the defendant has not previously provided a sample or paid the surcharge, but the court does not state any reason for ordering the surcharge.
- 6 The rule was clearly consistent with the statute when it was issued in July 1997. At that time, the statute required imposition of the DNA surcharge in all cases where a DNA sample was ordered. See [WIS. STAT. § 973.046\(1\)](#) (1995–96).