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CIRCUIT COURT
DANE COUNTY, WI
2020CV000454

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

JOHN and JANE DOE 1, et al.,

Plaintiffs,

v. Case No. 20-CV-454

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

and

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

Defendant-Intervenors.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR AN INJUNCTION PENDING APPEAL

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[*] *Pro hac vice* motion granted.

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INTRODUCTION

Plaintiffs' injunction motion demonstrated that childhood transitions may have life-altering consequences and even do lasting harm. Many experts believe, and for good reason, that "therapy for young children that encourages transition … is an experimental procedure that has a high likelihood of changing the life path of the child, with highly unpredictable effects on mental and physical health, suicidality, and life expectancy." Levine Aff. (Dkt. 31) ¶ 69. Defendants do not dispute that Dr. Levine's opinion is shared by others in the field, nor could they, given public statements to that effect. *See* Kenneth J. Zucker, *The Myth of Persistence: Response to "A Critical Commentary on Follow-Up Studies & 'Desistance' Theories about Transgender & Gender Non-Conforming Children" by Temple Newhook et al.*, 19:2 Int'l J. of Transgenderism 231 (2018) ("[P]arents who support, implement, or encourage a gender social transition … are implementing a psychosocial treatment that will increase the odds of long-term persistence.").

The science is still unsettled and these issues are currently being debated, as Defendants' response and expert affidavit show, but this Court does not need to resolve that debate. The very fact that professionals disagree about the proper approach reinforces why parents must be involved, in the same way a school could never give a child an experimental drug without parental consent. Even WPATH—which *Defendants*' expert says is the go-to source[1]—acknowledges that childhood transitions are "controversial," that the "current evidence base is insufficient to predict long-term outcomes," and that *mental health professionals* should *defer to parents* "as they work through the options and implications." WPATH Guidelines (Dkt. 11) at 24. How much more

[1] Leibowitz Aff. (Dkt. 141) ¶ 14.

should school staff defer to parents, given Defendants' concession that they have no expertise whatsoever in these matters. Dkt. 48:11.

Defendants argue that these harms are too speculative because children may not seek to transition while this case is pending on appeal, but the injunction Plaintiffs request is conditional, and therefore perfectly tailored to the harm they seek to avoid. *If*, while this case is pending, a child seeks to formally transition at school, to be officially treated by all District staff as if he or she were the opposite sex (or already has sought this treatment), the injunction would require the District to notify the child's parents and obtain their consent before facilitating (or continuing to facilitate) this major life change. If this never comes up, then the injunction will not require the District to do anything at all. But the Intervenors' affidavits show that this already has come up, that gender identity transitions are presently being facilitated in District schools without parents' knowledge or consent. Dkt. 60 ¶¶ 13–14; Dkt. 61 ¶¶ 11–12; Dkt. 62 ¶¶ 8, 11.

An injunction is especially necessary here because the District's policy requires secrecy from parents, even to the point of active deception, simply if the student wants it. Policy at 16 (instructing staff to use one name at school and another around parents). The District's "Gender Support Plan" reveals how far the District is willing to go to maintain the deception, directing staff to overtly violate state and federal record-keeping laws to prevent parents from accessing the Support Plan. Pls. Inj. Br. (Dkt. 124) 22. And the District is not a passive player, neutrally deferring to students about whether to include their parents, as Defendants would characterize it. The District is teaching children from kindergarten on that their "gender is something for only [them] to decide," Pls. Inj. Br. 6–7, and openly promoting in all schools that students have a "right" to change gender identity at school and a right to "privacy" about their transition (which can only mean

privacy *from those not at school*, like their parents). *See* "Know Your Rights" Poster, MMSD.[2] If Plaintiffs' children are persuaded by this campaign, absent an injunction, Plaintiffs may not learn that their child has transitioned until harm has been done.

What Plaintiffs ask for—deference to parents—is the norm for *every other* decision involving a minor student, many of which are much less significant than changing gender identity: taking medication of any kind, athletics, prom, field trips, participating in special classes and programs, and leaving school during study halls; all require parents' sign-off. Pls. Inj. Br. 23. And the law mandates parental consent for comparable things, like legal name changes, Wis. Stat. § 786.36, name changes in official school records, 34 CFR §§ 99.3; 99.4; 99.20(a), and medical treatment, *In re Sheila W.*, 2013 WI 63, ¶¶ 16–24, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring). Indeed, Defendants do not offer any examples in which schools conceal an important issue from parents. Even more troubling, the District's policy allowing secrecy from parents applies to students of *any age*, five on up.

Finally, an injunction will not *cause* any harm, unless one assumes—as the District openly does—that parents themselves will harm their children if they are included. But courts have held unequivocally that government may not make that assumption: "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Parham v. J. R.*, 442 U.S. 584, 603 (1979); *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (plurality op.) ("[T]here is a presumption that fit parents act in the best interests of their children … the Superior Court applied exactly the

[2] https://drive.google.com/file/d/0BxQaX4hYfVJaajE3SjhvbWQ3T29yNi1XSkhMWXJjNWR6OUdv/view

opposite presumption.”). Defendants do not have a persuasive response to any of this, so this Court should grant Plaintiffs’ requested injunction.

ARGUMENT

I. Defendants Cannot Explain How Concealing a Serious Mental Health Issue from Parents Is Necessary or Constitutional.

As Plaintiffs argued in their opening brief, parents have a constitutional right to be the primary decision makers with respect to their minor children, especially for big decisions with long-term implications. Pls. Inj. Br. 12–17. Whether to transition to a different gender identity is both serious and consequential, and therefore “falls squarely within ‘the heart of parental decision-making authority.’” Pls. Inj. Br. 2–5, 17 (citation omitted). The District’s Policy to exclude parents and conceal this decision from them violates their constitutional rights in multiple ways, most obviously by eliminating their authority over the decision itself, but also, through the deception, by preventing parents from guiding their children through this and by interfering with their ability to provide professional assistance their children may need. Pls. Inj. Br. 17–20. The District’s Policy is also completely anomalous and in violation of, or inconsistent with, numerous state and federal laws designed to protect parents’ role. Pls. Inj. Br. 20–23. Finally, the District’s policy does not serve a compelling interest, nor is it narrowly tailored. Pls. Inj. Br. 23–27.

A. Defendants Mostly Respond to Arguments Plaintiffs Do Not Make.

Defendants do not dispute that parents are the primary decision makers with respect to their minor children. *See* Defs. Resp. Br. 24. Nor do they dispute that gender dysphoria is a serious issue. And they do not provide any comparable examples of major decisions enabled at school in secret from parents.

Defendants are also unable to distinguish *Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000), the most on-point case. Pls. Inj. Br. 16–17. Defendants emphasize that the mother in that

case raised a Fourth Amendment search claim, which is true, but she *also* separately claimed that the school violated her rights as a parent by "fail[ing] to notify" and defer to her about how to address her daughter's pregnancy, which "obstructed [her] right to choose the proper method of resolution." *Id*. at 306. The Third Circuit agreed that she "sufficiently alleged a constitutional violation." *Id*. at 307. Defendants have no answer to the court's treatment of *this* claim.

The only other thing Defendants say about *Gruenke* is that it "str[uck] at the heart of parental decision-making authority on matters of the greatest importance," whereas, they assert, "that is not the situation here." Defs. Resp. Br. 24. But Defendants do not explain how this is different. And, in fact, they contradict themselves on this point. When later attempting to justify the policy, they argue that transitioning can be "immense[ly] benefi[cial]." Defs. Reps. Br. 6, 31. Defendants cannot have it both ways. Changing gender identity *is* a major and significant decision, but it is also controversial and not the only option for children struggling with gender identity issues. Pls. Inj. Br. at 2–5; Levine Aff. ¶¶ 22–44; Levine Rebuttal Aff. ¶¶ 25, 27. So, when a child says he or she is transgender and wants to transition, parents must be involved to help "choose the proper method of resolution." *Gruenke*, 225 F.3d at 306.

Rather than countering Plaintiffs arguments, Defendants spend the majority of their response attacking straw men. Defendants start with a line of cases holding that parents do not have a "right to dictate the *curriculum* at the public school" because, courts have reasoned, such a right would be unmanageable, requiring schools to "cater a curriculum for each student." Defs. Resp. Br. (Dkt. 140) 21–23 (citation omitted).[3] But this case has nothing to do with "dictating

[3] *Larson v. Burmaster*, 2006 WI App 142, 295 Wis. 2d 333, 720 N.W. 134 (cited by the Defendants at p. 21) is of a piece, and therefore equally inapposite. The father in *Larson* alleged that his son's school violated his rights as a parent by "assigning summer homework." *Id*. ¶ 1. The Court of Appeals rightfully held that there is no fundamental right to a "homework-free summer." *Id*. ¶¶ 41–42.

curriculum." Plaintiffs have not challenged the District's curriculum, but instead argue that the District must defer to parents when their children face a major life decision, a decision completely unrelated to the school's choices concerning curriculum or education plans. Nor is there any equivalent concern that accepting Plaintiffs' argument will require schools to "cater [to] each student." Plaintiffs seek a simple, one-size-fits-all rule that is consistent with parents' constitutionally protected role: if a minor student wants to change gender identity at school, parents must be notified and deferred to. While there may be no right to "dictate curriculum," there *is* a "fundamental right to direct the upbringing of [one's] child," *Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 16, 387 Wis. 2d 1, 927 N.W.2d 486; *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998) ("Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children."); Pls. Inj. Br. 12–16. Parents can expect and demand that schools will defer to them on major decisions involving their children.

Defendants' response to Plaintiffs' Conscience Clause claim, Defs. Resp. Br. 26–28, is equally directed at an argument Plaintiffs do not make. Defendants do not dispute that whether to transition and what treatment approach to pursue are decisions that "raise[ ] profound moral and religious concerns." *Bellotti*, 443 U.S. at 640. Instead, Defendants assert that parents do not have "the right to demand a public school to change its education practices." Defs. Resp. Br. 27. Again, that is not what Plaintiffs are seeking. Instead, they simply want to preserve their ability to choose a treatment approach and to guide their children through difficult issues in light of their beliefs. Pls. Inj. Br. 27–30.

Even more beside the point, Defendants cite *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), for the proposition that parents do not have the "right to bar transgender students from using restrooms and locker rooms consistent with their gender identity." Defs. Resp. Br. 23.

This case has absolutely nothing to do with what *other* students can do—that is up to their parents. Plaintiffs simply ask to be consulted and deferred to with respect to *their* children.

The only reason there are not more cases like *Gruenke* is because *schools never do this sort of thing*. Ever. Defendants have not offered a single comparable example where a school facilitates a major, controversial, and potentially life-changing decision at school, and simultaneously works to keep it hidden from parents. Schools generally do the opposite, requiring parent permission for even seemingly insignificant things (e.g., displaying student art[4]). Pls. Inj. Br. 23.

B. Defendants Cannot Justify the District's Blatant Violation of Parents' Right to Access Their Children's Education Records.

As an illustration of how far the District is willing to go to keep this from parents, Plaintiffs highlighted the District's "Gender Support Plan" form, which directs teachers to openly violate state and federal record-keeping laws. Pls. Inj. Br. 24. Defendants try to justify this, arguing that this form "would not *necessarily* fall into … either of the two categories of student records parents are allowed to access," Defs. Resp. Br. 25–26, but this hedged defense fails. The form *clearly* does not fit either of the two narrow categories parents cannot access. It is not a record "necessary for, and *available only to* persons involved in, the psychological treatment of a pupil," Wis. Stat. § 118.125(d)(2)—the District provides the form to all staff, *see* MMSD's Answer ¶ 45. Nor is it "notes or records maintained for *personal use* by a teacher … [that] are *not available to others*," Wis. Stat. § 118.125(d)(1)—the form is designed to record how *all teachers and staff* will refer to the student going forward, enforced by the non-discrimination policy, Dkt. 3:36; Policy at 18. Defendants also conveniently ignore that the definition of "behavioral records" contains a catch-

[4] https://finearts.madison.k12.wi.us/files/finearts/String%20Parents%20Permission%20Slip.English.2015.pdf

all for "any other pupil records that are not progress records," which would include this form. Wis. Stat. § 118.125(1)(a).

C. Defendants' Attempts to Minimize the Seriousness of Transitioning Fall Flat.

Defendants seek to minimize the Policy's intrusion into parents' role in various ways, but none are persuasive. Notably, Defendants fail to cite *even a single source* or professional association endorsing childhood social transitions without parental involvement or a careful assessment by a medical professional, or suggesting that transition is right for every minor or adolescent, or advocating that schools should conceal this from parents. Instead, the sources Defendants invoke (WPATH) recommend *the opposite*. Pls. Inj. Br. 4–5.

Defendants argue that facilitating a transition at school cannot be considered "treatment" because it is being done by "school staff and teachers, not medical providers." Defs. Resp. Br. 24. But that is exactly the point. District staff are not qualified to decide whether transitioning is appropriate for a given child. Mental health professionals with years of experience working with gender dysphoria view transitioning as a form of treatment. *See* Levine Aff. ¶ 65; Zucker, *supra* ("[P]arents who support, implement, or encourage a gender social transition … are implementing a psychosocial treatment."). Defendants' expert asserts otherwise, *see* Defs. Resp. Br. 24 (citing Leibowitz Aff. ¶¶ 9, 13, 30), but in so doing he contradicts the very guidance he claims to rely on. *See* Leibowitz Aff. ¶ 14 (endorsing the WPATH standards); WPATH Standards at 9 (listing first among "treatment options," "[c]hanges in gender expression and role"). And Defendants even contradict themselves on this point, asserting that transitioning at school "creates a healthy therapeutic environment," Defs. Resp. Br. 5, "reduces depressive symptoms [and] suicidal ideation," Defs. Resp. Br. 5, aids "psychological development," Defs. Resp. Br. 8, and is "a useful and important tool used by clinicians," Leibowitz Aff. ¶ 22. But Defendants cannot plead that their

policy is necessary for the mental health of children, while simultaneously denying that it represents an important psychotherapeutic "treatment." Levine Rebuttal Aff. ¶ 17.

Defendants and their expert also spend a great deal of energy arguing that not every student who wants to transition is necessarily experiencing gender dysphoria. This is true, but irrelevant. Defendants do not dispute that gender dysphoria is a serious issue requiring professional help. Compl. (Dkt. 2) ¶ 17; MMSD's Answer (Dkt. 94) ¶ 17; *see* Levine Aff. ¶¶ 16, 19–20, 41, 54–59, 73, 79, 80–82, 114. The fact that a child wants to adopt a new name and present to everyone at school as the opposite sex is "well recognized as a 'yellow flag'" that the student *may* be dealing with gender dysphoria and should be evaluated. Levine Rebuttal Aff. ¶ 11; Levine Aff. ¶¶ 71–79. Thus, "a claim or expression of interest in a transgender identity by a child must be the beginning … of a careful diagnostic and therapeutic process." Levine Aff. ¶¶ 71, 79. Even Defendants' expert recommends a similar evaluation by a professional. Leibowitz Aff. ¶¶ 16–18.

Defendants then boldly assert that its policy of *hiding* from parents that their child has or wants to transition at school "will not prevent Plaintiffs or any other parent from getting their children the medical treatment needed." Defs. Resp. Br. 24. But it should go without saying that parents cannot help their children through an issue that is concealed from them. Gender dysphoria may first manifest at school and may surprise parents, as Dr. Levine notes, Levine Aff. ¶ 78; Levine Rebuttal Aff. ¶ 13, and as a parent who has experienced this testifies, Keck Aff. (Dkt. 32) ¶¶ 3–7. But even putting aside the roadblock to proper diagnosis and treatment caused by the deception, a transition at school is directly at odds with treatment approaches that purposefully do not include immediate transition, such as "watchful waiting" or psychotherapy to help a child identify and address the underlying causes of the dysphoria and hopefully find comfort with his or

her biological sex. Levine Aff. ¶¶ 29–44 (describing the competing treatment approaches). Parents cannot effectively pursue these therapeutic approaches if their school is working against them.

D. None of Defendants' Justifications for the Policy are Persuasive, Much Less Overcome Parents' Rights.

Defendants offer three justifications for the Policy: "Educating, keeping safe, and preventing discrimination against students." Defs. Resp. Br. 28–32. Defendants never explain how excluding parents from a serious mental health issue is necessary to "educate" students, and their remaining two justifications are both legally unavailable and fail on their own terms.

Defendants' arguments about keeping students safe and preventing discrimination *from their parents* fail at the gate because government may not assume that parents will harm their children. Pls. Inj. Br. 25. Rather, the state "has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1019 (7th Cir. 2000); *see A. A. L.*, 2019 WI 57, ¶ 37 (noting that the "presumption in favor of a fit parent's decision" can only be overcome by "clear and convincing evidence that the decision is not in the child's best interest"). If a school has a concrete reason to believe that specific parents are not "fit parents" within the meaning of the law, there are legal steps they can take. Pls. Inj. Br. 25–26. What they cannot do is arrogate important decisions to themselves.

Even putting that legal point aside, Defendants' primary justification (safety) is based entirely on their belief that anything other than an immediate and total "affirmation" of a child's assertion of a transgender identity is harmful. Defs. Resp. Br. 31. But many experts believe the opposite, that *enabling a transition* can be harmful, and Defendants do not dispute that this view is held by many professionals in the field. *See* Levine Aff. ¶¶ 60–69, 98–120; Levine Rebuttal Aff. ¶¶ 16–19, 30–32; *infra* Part II. It does not matter who is ultimately correct. The fact that this is

"controversial" and that current evidence "is insufficient to predict outcomes," WPATH Guidelines at 17, simply reinforces why parents must be involved. Indeed, "[n]ot a single [medical professional organization] has endorsed the idea that adults responsible for the well-being of children during much of the day (that is, school authorities) should conceal from parents the fact that a child or adolescent is struggling with gender identity, or is living under a transgender identity at school." Levine Rebuttal Aff. ¶ 26.

Moreover, whether transitioning will be helpful or harmful may depend on the individual child's circumstances. As Dr. Levine explained, "[t]here is no single pathway of development and outcomes governing transgender identity," so it is "not possible to make a single, categorical statement about the proper treatment." Levine Aff. ¶¶ 54–59. Parents must be involved for "accurate and thorough diagnosis," Levine Aff. ¶¶ 71–79, for "effective psychotherapeutic treatment and support," Levine Aff. ¶¶ 80–82, and to provide informed consent, Levine Aff. ¶ 83–84. Defendants' expert agrees that an assessment of the "entire life experience of the child, adolescent, and family" is necessary when "assisting in decision-making relating to gender issues." Leibowitz Aff. ¶¶ 16–17. And Defendants concede that school staff "are not trained and capable to undertake th[is] kind of diagnostic process," Levine Rebuttal Aff. ¶ 21; *see* Dkt. 48:11, so the District's Policy is "clinically indefensible," Levine Rebuttal Aff. ¶¶ 20–29.

Defendants' assertion that the Policy is necessary to avoid "discrimination" against students is especially puzzling. Plaintiffs are not asking for some students to be treated differently than others—the claim is that all students must obtain parent permission before transitioning at school, just as they need parent permission to change their names in school records, to participate in athletics, to attend prom, etc. Some parents will say yes and others no, but that does not give the District leeway to circumvent parents and impose its view in the name of uniformity. *See Parham*,

442 U.S. at 603 ("Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."). Defendants attempt to illustrate their discrimination argument with examples of other information the District is "under no obligation to share." Defs. Resp. Br. 30. But none of these examples are comparable. Plaintiffs are not seeking to impose a duty on the District to notify parents every time a student "participate[s] in [an LGBT] group" or "express[es] their … beliefs" about such issues. Defs. Resp. Br. 30. Plaintiffs *are* demanding that the school notify them if their children exhibit a behavior (seeking to transition) that is well-recognized as a potential indicator of a serious mental health issue (gender dysphoria) and as calling for careful analysis and diagnosis by a mental health professional. Levine Rebuttal Aff. ¶¶ 11–15. And Plaintiffs also expect that the school will obtain their consent before school staff participate in what is well-recognized to be an important and controversial psychotherapeutic intervention in the lives and minds of their children. Levine Rebuttal Aff. ¶¶ 16–19.

Finally, Defendants attempt to justify the policy as simply "defer[ring] to the judgment of the students." Defs. Resp. Br. 31–32. But schools do not "defer to students" on related decisions (e.g., name changes in school records, medication at school) or even much less significant ones (e.g. athletics, prom, field trips), they defer to *parents*. And the reason, the Supreme Court has explained, is that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions … Parents can and must make those judgments." *Parham*, 442 U.S. at 603. That rationale has scientific support: "[I]t is well established from many studies that adolescents chronically fail to appropriately balance short term desires against their longer term interests as they make decisions … [thus] the consent of parents or legal guardians is almost

invariably required for even minor medical or psychiatric interventions." Levine Rebuttal Aff. ¶ 28.

Defendants' defer-to-students justification is especially inapt when considering that the District's policy has *no age limit*. Six-year-olds should not be "deferred to" on any decision of anywhere near this significance. Indeed, Defendants do not offer any meaningful defense of the Policy as it applies to young children, instead focusing almost entirely on "adolescents." *E.g.*, Defs. Resp. Br. 5–7. The only thing Defendants say about young children is that they are unlikely to ask their schools to help them transition in secret from their parents. Defs. Resp. Br. 7. But to the extent that is true, the challenged portions of the Policy are completely unnecessary. And the injunction Plaintiffs request will not require the District to do anything *unless* this issue comes up. Additionally, while gender-identity issues among young children may have been relatively rare in the past, schools have never, until recently, actively promoted the idea that children have a "right" to "choose their own gender." *See supra* pp. 2–3; Pls. Inj. Br. 6–7. Recent statistics suggest these messages are having an effect. Pls. Inj. Br. 35–36; Gordon Rayner, *Minister orders inquiry into 4,000 per cent rise in children wanting to change sex*, The Telegraph (Sept. 16, 2018) (noting a "4,400 per cent increase in girls being referred for transitioning treatment in the past decade").[5]

II. The District's Policy May Do Lasting Harm While this Lawsuit Is Pending, and the Injunction Plaintiffs Seek Is Perfectly Tailored to Preventing that Harm.

In their opening brief, Plaintiffs explained that many professionals in the field believe that enabling a gender-identity transition during childhood can cause gender dysphoria to become self-reinforcing, to persist when it otherwise might have resolved itself, in turn leading to a variety of long-term consequences and harms. Pls. Inj. Br. 32–34. Dr. Levine's affidavit discusses these

[5] https://www.telegraph.co.uk/politics/2018/09/16/minister-orders-inquiry-4000-per-cent-rise-children-wanting/

consequences in much greater detail. Levine Aff. ¶¶ 60–69; 98–120; Levine Rebuttal Aff. ¶¶ 6–10. Plaintiffs also explained that children experiencing gender dysphoria often need mental health support, regardless of whether they transition, and the District's policy of secrecy prevents parents from providing their children with assistance they may urgently need. Pls. Inj. Br. 34–35. Enabling children to lead a "double life" is also "psychologically unhealthy in itself" and harmful to the integrity of the family. Levine Aff. ¶ 82; Levine Rebuttal Aff. ¶ 32. Finally, the District's Policy directly interferes with parents' ability to select a treatment approach that does not involve an immediate transition and usurps their constitutionally protected role. Pls. Inj. Br. 31–32, 35. Defendants do not directly address any of this in the harm section of their brief.

Defendants briefly assert elsewhere that "Dr. Levine cites no authority that supports his opinion that use of a different pronoun set and name in one setting … increases the likelihood that [gender dysphoria] would endure." Defs. Resp. Br. 25; *see also* Defs. Resp. Br. 4 (similar assertion in the fact section). That is simply not true. Dr. Levine cited and discussed multiple studies "suggest[ing] that a therapy that encourages social transition dramatically changes outcomes." Levine Aff. ¶¶ 60–69. He also surveyed various researchers in the field who have hypothesized a causal relationship between childhood transitions and persistence of gender dysphoria. Levine Aff. ¶¶ 63–68 (e.g., "The gender identity affirmed during puberty appears to predict the gender identity that will persist into adulthood.") (quoting C. Guss et al., *Transgender and Gender Nonconforming Adolescent Care:Psychosocial and Medical Considerations*, 26(4) Curr. Opin. Pediatr. 421 at 421 (2015)); Levine Rebuttal Aff. ¶¶ 18–19. The research is still nascent, as Dr. Levine acknowledges, but that is largely because childhood transitions are a relatively recent trend. Still, the fact that "the rapid spread of quickly 'affirming' therapeutic practices has coincided with an extraordinarily sharp drop in 'desistence' from gender dysphoria in children and adolescence" strongly suggests

a causal relationship. Levine Rebuttal Aff. ¶ 18. In any event, the important point is that many professionals in the field, like Dr. Levine, believe that transitioning may have long-lasting effect.

The fact that the science is unsettled does not diminish the potential harms, but instead *magnifies* them. No one would argue that there is no harm in secretly administering an experimental drug to young children merely because the effects are unknown. Experimental treatments typically require *more* rigorous informed consent procedures, Levine Aff. ¶¶ 131–39, precisely because of the unknown risks. Even WPATH openly admits that the "long-term outcomes" of transitioning are unknown and accordingly recommends deferring to parents even if they "do not allow their young child to make a gender-role transition." WPATH Guidelines at 17; Levine Rebuttal Aff. ¶¶ 22–25.

Rather than responding to the harms Plaintiffs identified, Defendants devote the entirety of their harm section to arguing that these harms are too "speculative" because Plaintiffs have no reason to believe their children are presently dealing with gender dysphoria or wanting to transition. But it is *the District's policy of secrecy* that requires them to seek an injunction now. Plaintiffs have no way to know in advance when or if this will become an issue for their children, and the first manifestation of it may come at school. Levine Aff. ¶ 78; Levine Rebuttal Aff. ¶ 13; Keck Aff. ¶¶ 3–7. Plaintiffs cannot wait, because the District's Policy requires staff to hide this from them and even actively deceive them, preventing them from learning when harm is imminent, or worse, realized. Given the District's policy of deception, Defendants' assertion that "Plaintiffs do not need interim relief to protect their rights" is surprising, to say the least. Without an

injunction, how exactly are Plaintiffs supposed to "protect" their decision-making role if the District will conceal this decision from them? Defendants do not explain.[6]

Defendants' expert briefly suggests that there is no harm in hiding from parents what is happening at school because a child in need of help will "demonstrate more signs of … distress" that should adequately warn parents to seek treatment. Leibowitz Aff. ¶ 45. "This suggestion is irresponsible," because both parents and school staff "too often … fail to recognize signs of emotional or psychiatric distress," "as is regularly observed after a teen suicide." Levine Rebuttal Aff. ¶ 13. Thus, "[i]f a teacher or other school authority becomes aware of a potential indicator of mental pathology, he or she cannot safely assume that some other indicator will come to the parents' attention and prompt them to seek professional help." Levine Rebuttal Aff. ¶ 13.

Importantly, the injunction Plaintiffs seek is perfectly tailored to the harm they seek to avoid because it is conditional—it only requires the District to notify and defer to parents *if* this issue arises while the case is pending. If it does not, then the injunction will not require the District to do anything at all. The odds that Plaintiffs' children will seek to transition at school while this case is pending may be "low," but the consequences if they do could be enormous and life-long. To return to the simple analogy already mentioned, if the District's policy were to secretly administer an experimental drug to students reacting to a bee sting, a court would not deny an

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[6] Defendants re-raise an equivalent argument that Plaintiffs lack standing and that their claims are unripe because their children are not yet dealing with gender dysphoria or want to transition (that Plaintiffs are aware of). Defs. Resp. Br. 19–21. Plaintiffs already addressed this argument in depth in response to Defendants' motion to dismiss and will not repeat those arguments here. Dkt. 50:6–17. Briefly, however, *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866, which is most directly on point, establishes that plaintiffs need not "[w]ait until [harm] actually occur[s]" because that "would defeat the purpose of the declaratory judgment statute." *Id.* ¶¶ 45–46; Dkt. 50:13–14.

injunction simply because a parent's child has not yet been stung by a bee. The point of a temporary injunction is to *avoid* irreparable harm; that is all Plaintiffs seek.

At various points Defendants argue that an injunction would be improper because it "would grant Plaintiffs the ultimate relief they seek." Defs. Resp. Br. 12, 16–17, 34–35. That is simply not true. The injunction Plaintiffs seek merely requires the District to notify and defer to parents before facilitating a transition while this case is pending. A permanent injunction will require the District to rewrite its Policy, re-train its staff, etc. And, of course, a temporary injunction is *temporary*, and can be discarded later if Defendants provide further support for their policy that changes the analysis. Regardless, courts regularly issue temporary injunctions that are similar to the permanent injunction ultimately sought. *See*, *e.g.*, Decision and Order Granting Temporary Injunction in Part, *SEIU v. VOS*, No. 19-cv-302 (Dane County Cir. Ct., March 26, 2019).

III. The District's Policy Disrupts the Status Quo; Plaintiffs' Injunction Preserves It.

Perhaps recognizing weaknesses in their arguments on the merits and on harm, Defendants' first and primary response is about whether an injunction will preserve the "status quo." Response Br. 13–14. They argue that an injunction would improperly disrupt the status quo, which they contend is the District's recently adopted Policy, even though the Policy was not adopted via the normal process (a vote by the school board), but was developed internally and posted to the District's website, avoiding input from parents, *see* Compl. ¶¶ 61–62, MMSD's Answer ¶¶ 61–62.

But it is the District's Policy that disrupts the status quo. Plaintiffs seek to preserve the names that they thoughtfully and lovingly gave to their children at birth and the sexual identities their children were born with. That "status quo" both predates the District's 2-year-old, anomalous Policy, and far exceeds in importance maintaining the new paradigm the District has created by fiat, without the normal oversight. Plaintiffs simply want the opportunity to participate in the

decision before the District facilitates a major change to their children's identities. Nothing could be more directly related to "preserving the status quo."

An injunction is also necessary to preserve parental decision-making authority over minor children, a "status quo" that preceded the District's policy by well over a century. *See Yoder*, 406 U.S. at 232 (an "enduring American tradition"); *Troxel*, 530 U.S. at 65 (plurality op.) ("the oldest of the fundamental liberty interests recognized by the [Supreme] Court").

Regardless, as Plaintiffs explain in their opening brief, the Wisconsin Supreme Court's most recent cases do not treat "preserving the status quo" as a requirement for a temporary injunction. *See* Order Granting Temporary Injunction, *Wisconsin Legislature v. Evers*, No. 2020AP608 (Apr. 6, 2020) (listing the requirements without mentioning the status quo)[7]; *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 732 N.W.2d.

CONCLUSION

Plaintiffs therefore respectfully ask this Court to enter an injunction pending appeal as set forth in Plaintiffs' motion.

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[7] Available online at https://www.wpr.org/sites/default/files/2020ap608o3_-_final-.pdf.

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