

FILED
11-17-2021
Clerk of Circuit Court
Waukesha County
2021CV001650

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH __

B [redacted] and T [redacted] F [redacted]
[redacted]

P [redacted] and S [redacted] W [redacted]
[redacted]

Declaratory Judgment
Case Code: 30701
Case No. 21-CV-

Plaintiffs,

v.

KETTLE MORaine SCHOOL DISTRICT
563 A.J. Allen Circle
Wales, WI 53183

Defendant.

COMPLAINT

Plaintiffs B [redacted] and T [redacted] F [redacted] and P [redacted] and S [redacted] W [redacted], by their undersigned attorneys at the Wisconsin Institute for Law & Liberty, Inc. and Alliance Defending Freedom, hereby allege as follows:

INTRODUCTION

1. This action seeks to vindicate one of the most fundamental constitutional rights every parent holds dear: the right to raise their children. The Kettle Moraine School District has violated this foundational right by undermining and overriding parents' decision-making role with respect to a major and controversial issue. Specifically, the District has adopted a policy to allow, facilitate,

and “affirm” a minor student’s request to transition to a different gender identity at school—without parental consent and even over the parents’ objection. This policy forced Plaintiffs B [REDACTED] and T [REDACTED] F [REDACTED] to withdraw their daughter from the District to protect her and to preserve their parental role. No parent should be forced to make that difficult choice.

PARTIES

2. Plaintiffs B [REDACTED] and T [REDACTED] F [REDACTED] daughter attended the Kettle Moraine Middle School until the school violated the F [REDACTED]’ constitutional rights as parents. They reside at [REDACTED].

3. Plaintiffs P [REDACTED] and S [REDACTED] W [REDACTED] are the parents of two children currently enrolled in the Kettle Moraine School District. They reside at [REDACTED].

4. Defendant Kettle Moraine School District (“the District”) is a public school district in the State of Wisconsin under Wisconsin Law. The District violated the F [REDACTED] constitutional rights as parents, and has adopted a policy that is challenged in this lawsuit. The District’s principal address is 563 A.J. Allen Circle, Wales, Wisconsin, 53182.

JURISDICTION AND VENUE

5. This is an action for declaratory and injunctive relief under Wis. Stat. §§ 806.04 and 813.01, and for nominal damages for a violation of constitutional rights under Article 1, § 1 of the Wisconsin Constitution.

6. Venue in this Court is proper pursuant to Wis. Stat § 801.50(2).

STATEMENT OF FACTS

Background on Gender Dysphoria in Children

7. “Transgender” individuals believe they have a “gender identity” that does not match their biological sex.

8. “Gender dysphoria” refers to the psychological distress often associated with the mismatch between a person’s biological sex and his or her perceived gender identity.

9. Gender dysphoria can be a serious mental-health condition that requires professional help.

10. There is no one-size-fits-all approach when a child experiences gender dysphoria.

11. The causes of transgenderism and gender dysphoria are still largely unknown. *E.g.*, Kenneth J. Zucker, *Gender Dysphoria in Children and Adolescents*, in PRINCIPLES AND PRACTICE OF SEX THERAPY 395, 402–05 (6th ed., 2020)¹; Stephen B. Levine, *Reflections on the Clinician’s Role with Individuals Who Self-identify as Transgender*, Arch. Sex. Behav. (2021).²

12. Mental health professionals disagree about the proper approach when a child experiences gender dysphoria. *E.g.*, Zucker, *supra* ¶ 10, at 406–09 (surveying competing treatment approaches).

¹ Available at <https://www.scribd.com/document/516620519/Principles-and-Practice-of-Sex-Therapy-Sixth-Edition-by-Kathryn-S-K-Hall-Yitzchak-M-Binik>

² Available at <https://doi.org/10.1007/s10508-021-02142-1>

13. Some mental health professionals believe that children experiencing gender dysphoria can learn to find comfort with their biological sex and therefore support psychotherapy to help identify and address the underlying causes of the dysphoria. *E.g.*, Zucker, *supra* ¶ 10, at 414–15; Levine, *supra* ¶ 10.

14. Other medical and psychiatric professionals believe that the best response is to “affirm” a child’s perceived gender identity and to support a social transition to that identity.

15. “Social transition” refers to presenting to others as the opposite sex, primarily by adopting a new name and pronouns. *E.g.*, Zucker, *supra* ¶ 10, at 407.

16. Some mental health professionals believe that socially transitioning to a different gender identity during childhood, and “affirmation” of an alternate identity by adults, can become self-reinforcing and have profound long-term effects on the child’s psyche and identity. *E.g.*, 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)³ (“I would argue that parents who support, implement, or encourage a gender social transition (and clinicians who recommend one) are implementing a psychosocial treatment that will increase the odds of long-term persistence.”)

17. Multiple studies have found that the vast majority of children (roughly 80–90%) who experience gender dysphoria ultimately find comfort with their

³ <https://www.researchgate.net/publication/325443416>

biological sex and cease experiencing gender dysphoria as they age—assuming they do not transition. *E.g.*, Zucker, *supra* ¶ 10, at 407 (summarizing studies); Levine, *supra* ¶ 10 (same).

18. Even among those in the “affirming” camp there is no consensus on whether children should be allowed or encouraged to transition socially to a different gender.

19. The World Professional Association for Transgender Health (“WPATH”), for example, a transgender advocacy organization that strongly endorses transitioning, acknowledges that “[s]ocial transitions in early childhood” are “a controversial issue” and that “health professionals” have “divergent views” on this issue. World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* at 17 (version 7, 2012) (“WPATH Guidelines”).⁴

20. WPATH also recognizes that “[t]he current evidence base is insufficient to predict the long-term outcomes of completing a gender role transition during early childhood.” WPATH Guidelines, *supra* ¶ 19, at 17.

21. And WPATH characterizes social transition as a “therapeutic” “treatment option” for gender dysphoria. *Supra* ¶ 19, at 9 (listing “changes in gender expression and role” *first* in its list of “options for psychological and medical treatment of gender dysphoria.”).

⁴ Available at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?t=1613669341

22. Many other medical professional voices in the field have also repeatedly described social transition of children as a “medical treatment.”

23. In other words, even though there is disagreement about when and whether a social transition is appropriate for children, medical professionals on both sides of that debate generally agree that social transitions are a significant psychotherapeutic intervention that can change outcomes.

24. Given the lack of evidence and divergent views on this sensitive issue, WPATH recommends that health professionals defer to *parents* “as they work through the options and implications,” even if they ultimately “do not allow their young child to make a gender-role transition.” WPATH Guidelines, *supra* ¶ 19, at 17.

25. Teachers and school administrators in the Kettle Moraine School District have no expertise in these issues.

26. Teacher and school administrators have no lawful authority to make treatment decisions for minor students in their care during the school day.

**The Kettle Moraine School District’s Policy to Facilitate
Gender Identity Transitions at School Without Parental Consent**

27. Upon information and belief, the Kettle Moraine School District has a policy, whether written or unwritten, allowing minor students to socially transition to a different gender identity at school without parental consent, and even over the parents’ objection.

28. In December 2020, the F [REDACTED] then 12-year-old daughter began to experience significant anxiety and depression, and also began questioning her gender.

29. The F [REDACTED] temporarily withdrew her from Kettle Moraine Middle School to allow her to attend a mental health center where she could process what she was feeling.

30. But instead of helping her work through her questions about her gender, the center quickly “affirmed” that she was really a transgender boy and encouraged her to transition to a male identity.

31. In late December, the F [REDACTED] daughter expressed to her parents and school staff that she wanted to adopt a new male name and use male pronouns when she returned to school.

32. The F [REDACTED], however, decided that immediately transitioning would not be in their daughter’s best interest, based on their knowledge of her and extensive research into this issue. They wanted their daughter to take time to explore the cause of her feelings before allowing such a significant change to her identity.

33. On January 18, two days before their daughter was going to return to school, T [REDACTED] F [REDACTED] emailed the school’s guidance counselor, Christina Cowen, indicating that she and B [REDACTED] had made a decision regarding their daughter’s name and pronouns at school when she returned, and she followed up with a phone call the following morning.

34. In the afternoon of January 19, principal Michael Comiskey and Christina Cowen called T [REDACTED] F [REDACTED]. On that phone call T [REDACTED] told them that she and B [REDACTED] wanted teachers and staff to refer to their daughter using her legal name and female pronouns when she returned to school. Principal Comiskey said

they would have to check with District administration about the District's policy in this situation, and asked the F [REDACTED] to wait an extra day before sending her back to school.

35. On January 20, principal Comiskey called T [REDACTED] F [REDACTED] to inform her that Kettle Moraine School District would not follow the F [REDACTED] decision, but instead, when their daughter returned to school, school staff would refer to her using whatever name and pronouns she wanted while at school, even over her parents' objection.

36. In light of this policy, and to avoid daily affirmation of this new identity by teachers and staff, the F [REDACTED] felt they had no choice but to immediately withdraw their daughter from the Kettle Moraine Middle School, and they started looking for another school that would respect their decision as parents.

37. The F [REDACTED] also cut ties with the mental health center and began searching for therapists that would not rush to "affirm" an alternate gender identity, but would help their daughter process her feelings.

38. For the next few weeks, the F [REDACTED] daughter remained at home and did not attend any school.

39. During that time, her demeanor quickly began to change, and about two weeks later, she changed her mind about wanting to transition to a male identity, deciding instead that she wanted to continue using her birth name and female pronouns.

40. She expressed to her mother that “affirmative care really messed me up,” explaining that the rush to affirm that she was really a boy added to her confusion and fueled anger towards her mother, but after taking more time to process her feelings, she realized her mother had been right to slow down the decision to transition.

41. Given what had happened, the F [REDACTED] decided to enroll their daughter in a different public school district, rather than send her back to Kettle Moraine Middle School.

42. But for this significant breach of trust, the F [REDACTED] had intended to continue sending their daughter to a Kettle Moraine School District school.

43. Staff at the new school district told the F [REDACTED] that they also have the same policy as the Kettle Moraine School District, and would follow the same approach if their daughter ever wanted to transition at school again.

44. The F [REDACTED] are concerned that, without a judicial decision establishing their constitutional rights as parents, they may be forced to go through this whole experience again.

45. Plaintiffs P [REDACTED] and S [REDACTED] W [REDACTED] have two children currently enrolled in the Kettle Moraine School District.

46. As parents of children in the District, the W [REDACTED] are subject to the District’s unconstitutional policy, and they seek a declaration and injunction against the District’s policy to ensure that the Kettle Moraine School District will respect their role as parents.

47. On May 18, 2021, Plaintiffs F [REDACTED] and W [REDACTED] sent the Kettle Moraine School District a letter and notice of claim explaining that the District's policy, as exemplified by their decision with respect to the F [REDACTED], violates parents' constitutional rights, and asking to the District to, among other things, acknowledge the violation and change the policy to require parental consent before a minor student transitions at school.

48. The District did not respond to Plaintiffs' letter.

CAUSES OF ACTION

CLAIM ONE: Violation of Article 1, § 1 of the Wisconsin Constitution

49. Plaintiffs reallege and incorporate the preceding allegations.

50. Article 1, Section 1 of the Wisconsin Constitution provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness."

51. The Wisconsin Supreme Court has interpreted Article 1, Section 1 as providing "the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution." *See Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678.

52. One of the oldest and longest recognized "inherent rights" protected by both Article 1, Section 1 and the Fourteenth Amendment is the right of parents "to direct the upbringing and education of children under their control." *See, e.g., Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486.

53. The U.S. Supreme Court has described this right as “essential,” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), a “basic civil right[] of man,” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), “far more precious . . . than property rights,” *May v. Anderson*, 345 U.S. 528, 533 (1953), and “established beyond debate as an enduring American tradition,” *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

54. Likewise, the Wisconsin Supreme Court has “long [] recognized” the rights of parents “to rear their children according to their own system of beliefs,” *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 43, 426 N.W.2d 329 (1988), describing parents’ rights as “substantial,” *In Interest of D.L.S.*, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983), and “of constitutional magnitude.” *K.F.*, 145 Wis. 2d at 43; *see also Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998).

55. Importantly, courts have recognized that parents are the primary decision-makers with respect to their minor children—not their school, or even the children themselves. *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected . . . broad parental authority over minor children.”).

56. And the fact that “the decision of a parent is not agreeable to a child or . . . involves risks” “does not diminish the parents’ authority to decide what is best for the child,” nor does it “automatically transfer the power to make that decision from the parents to some agency or officer of the state.” *Parham*, 442 U.S. at 603–04.

57. Courts recognize that “parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions,” *id.*, and that parents, not government officials, “hav[e] the most effective motives and

inclinations and [are] in the best position and under the strongest obligations” to decide what is best for their children. *Jackson*, 218 Wis. 2d at 879.

58. A parent’s constitutional right reaches its peak on “matters of the greatest importance.” See *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005); *Yoder*, 406 U.S. at 233–34.

59. Medical and health-related decisions, for example, are generally reserved for parents: “Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.” *Parham*, 442 U.S. at 603; *In re Sheila W.*, 2013 WI 63, ¶¶ 16–24 (Prosser, J., concurring) (noting that the “general rule” in Wisconsin “requir[es] parents to give consent to medical treatment for their children.”).

60. Given the importance of parents’ right to parent, any governmental action that “directly and substantially implicates a fit parent’s fundamental liberty interest in the care and upbringing of his or her child” is “subject to strict scrutiny review.” *A. A. L.*, 2019 WI 57, ¶ 22.

61. The Kettle Moraine School District’s policy to facilitate and “affirm” a minor student’s transition to a different gender identity at school, without parental consent and even over the parents’ objection, violates parents’ constitutional rights by taking a major, controversial, psychologically impactful, and potentially life-altering decision out of parents’ hands and puts it into the hands of school employees, who have no relevant expertise in these issues, and/or children who lack the

“maturity, experience, and capacity for judgment required for making life’s difficult decisions.” *Parham*, 442 U.S. at 602.

62. The Kettle Moraine School District’s policy fails strict scrutiny.

63. The Kettle Moraine School District violated the F [REDACTED] constitutional rights as parents by disregarding their decision about the name and pronouns staff would use to refer to their daughter while at school.

64. The Kettle Moraine School District’s policy violates the W [REDACTED] constitutional rights as parents.

REQUEST FOR RELIEF

Plaintiffs therefore request the following relief:

A. Declare that the Kettle Moraine School District’s policy to enable and “affirm” a minor student’s transition to a different gender identity at school without parental consent violates parents’ constitutional rights;

B. Declare that the Kettle Moraine School District violated the F [REDACTED] constitutional rights as parents by refusing to respect their decision with respect to the name and pronouns staff would use to refer to their daughter while at school;

C. Declare that the Kettle Moraine School District’s policy violates the W [REDACTED] constitutional rights as parents.

D. Enjoin the Kettle Moraine School District from allowing or requiring staff to refer to students using a name or pronouns at odds with their biological sex, while at school, without parental consent;

E. Nominal damages to the F [REDACTED] for the violation of their constitutional rights as parents;

F. Costs; and

G. Such other relief as the Court deems appropriate.

Dated: November 17, 2021

WISCONSIN INSTITUTE FOR LAW & LIBERTY

Electronically signed by Luke N. Berg

Rick Esenberg (WI Bar No. 1005622)
Luke N. Berg (WI Bar No. 1095644)
Anthony F. LoCoco (WI Bar No. 1101773)
Katherine Spitz (WI Bar No. 1066375)
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Luke@will-law.org
ALoCoco@will-law.org
Kate@will-law.org

ALLIANCE DEFENDING FREEDOM

Roger G. Brooks* (NC Bar No. 16317)
Katherine L. Anderson* (AZ Bar No. 033104)
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
rbrooks@adflegal.org
kanderson@adflegal.org

*Pro Hac Vice application forthcoming.

Attorneys for Plaintiffs