FILED
04-02-2020
CIRCUIT COURT
DANE COUNTY, WI
2020CV000454

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JOHN DOE 1, et al.

Plaintiffs,

Case No.: 20-CV-454
The Honorable Frank D. Remington

v.

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant.

DEFENDANT MMSD'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION TO PROCEED USING PSEUDONYMS

Defendant Madison Metropolitan School District ("MMSD" or "District"), through counsel, submits this brief in support of its Motion to Dismiss (Doc. 42) and in opposition to Plaintiffs' Motion to Proceed Using Pseudonyms (Doc. 9). The Complaint should be dismissed because Plaintiffs fail to state a claim: They do not allege facts that support standing, and their claims are unripe. Dismissal is further warranted because fictitious entities such as 'John and Jane Doe' lack the capacity to sue, and the Complaint fails to join all necessary parties. Wisconsin law provides a statutory mechanism for sealing and redacting sensitive information in appropriate cases, including party names and addresses, but Plaintiffs did not follow that procedure here. The Wisconsin rules simply do not permit Plaintiffs to withhold their identities from the Court itself.

Dismissal would obviously moot Plaintiffs' motion "to proceed using pseudonyms." If this Court advances to the merits, however, then it should reject Plaintiffs' highly unusual (and seemingly unprecedented, at least in this State) attempt to mask their identities permanently—even from the parties and the Court. Party names are generally public information, and Plaintiffs have not overcome the strong presumption favoring disclosure. Plaintiffs' motion should be denied.

FACTS AS ALLEGED

On February 18, 2020, Plaintiffs filed a declaratory judgment action against MMSD, challenging as unconstitutional the District's affirming approach to support transgender, non-binary, and gender-expansive students at school. (Doc. 1.) According to the Complaint, Plaintiffs are fourteen adults, referred to only as "John Doe" and "Jane Doe" 1 through 8, from eight families with children enrolled at various public schools in the District. (Compl. ¶¶ 2–9.)

Plaintiffs' challenge is focused on a document that MMSD made available on its website in April 2018 entitled, "Guidance & Policies to Support Transgender, Non-Binary & Gender-Expansive Students" (referred to here as the "Guidance"). (*See* Compl., Ex. 1.)[1] The Guidance states that MMSD is committed "to providing all students access to an inclusive education that affirms all identities." (Guidance at 1.) It also states that "families are essential in supporting our LGBTQ+ students," and that, "with the permission of our students, we will strive to include families along the journey to support their LGBTQ+ youth." (*Id.* at 16.) The Guidance encourages staff to give families the resources, consultation, and support they need; and it states that families can at any time request a meeting with staff to discuss their child's gender support plan. (*Id.*)

The Guidance provides that "[a]ll MMSD staff will refer to students by their affirmed names and pronouns." (Guidance at 18.) A student's name and gender may be changed in District systems with a parent's or guardian's permission, but "[s]tudents will be called by their affirmed name and pronouns regardless of parent/guardian permission to change their name and gender in MMSD systems." (*Id. See also* Compl., ¶¶ 40, 41.)

[1] Plaintiffs characterize this document as a "policy" and assert that it "sets forth [MMSD's] official position on the nature of sex and gender." (*See, e.g.*, Compl., ¶ 32.) But Plaintiffs admit that the Guidance has not been adopted by the Madison School Board, as would be required to establish formal MMSD policy. (Compl., ¶ 61.) *See, e.g.*, MMSD Policy 1301, available at https://bit.ly/33WtFAC (requiring that new policies and procedures "shall be adopted by a simple majority vote"). The Guidance does, however, lay out relevant District policies, including MMSD Policy 4510 against bullying and MMSD Policy 4620 against discrimination. (Guidance at 10–11.)

According to the Complaint, "Plaintiffs do not share the District's views about how to properly respond if their children experience gender dysphoria." (Compl., ¶ 63.) Specifically, Plaintiffs allege that if their children "ever begin to experience gender dysphoria," then most of them "would not immediately 'affirm' their children's beliefs about their gender identity and allow them to transition to a different gender role…." (*Id.*, ¶ 64.)[2] But Plaintiffs do not explain how the Guidance presently affects them or any of their children. Plaintiffs do not allege that their children have in the past or are currently struggling with gender-identity issues; nor do Plaintiffs allege that they have tried unsuccessfully to meet with a teacher or another MMSD staff member to discuss those issues. Instead, Plaintiffs allege that they "have no way to know in advance whether their children will experience gender dysphoria," and they fear that "if their children begin to wrestle with this issue, [MMSD] will . . . enable their children to change gender identity at school without their consent and prevent teachers from notifying Plaintiffs about it." (*Id.*, ¶¶ 67, 68.)

Plaintiffs repeatedly mention the mental-health diagnosis "gender dysphoria" in the Complaint, even though that term is barely used in the Guidance.[3] According to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5"),[4] gender dysphoria "refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." DSM-5 at 451. For

[2] Apparently Plaintiffs 'John and Jane Doe 6' have a different view and "may or may not allow their child to transition, depending on the circumstances and the recommendations of mental health professionals . . . ." (Compl., ¶ 64 n.5.)

[3] In fact, the *only* reference in the Guidance is: "For our transgender, non-binary, and gender-expansive youth who are experiencing body dysphoria, swimming may not be a safe, affirming option for them." (Guidance at 25.)

[4] As Judge William Conley noted in *Flack v. Wisconsin Department of Health Services*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019), the DSM-5 "is the handbook used by health care professionals in the United States and much of the world as the authoritative guide to the diagnosis of mental disorders." *Id.* at 1004 n.4 (internal quotation marks and citation omitted). Regarding gender dysphoria specifically, the court stated that the DSM-5 "contains the psychiatric consensus as to its definition, diagnostic criteria and [other] features." *Id.* at 1004. This court may take judicial notice of the DSM-5 pursuant to Wis. Stat. § 902.01. *Cf. Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1040 n.4 (7th Cir. 2017) (taking judicial notice of the DSM-5 under Fed. R. Evid. 201).

children, the condition "is associated with **clinically significant distress** or impairment in social, school, or other important areas of functioning." *Id.* at 452 (emphasis added). Diagnostic criteria for children includes "[a] marked incongruence between one's experienced/expressed gender and assigned gender, **of at least 6 months' duration**, as manifested by at least six" of eight identified factors, including "a strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one's assigned gender)." *Id.* (emphasis added).[5] The DSM-5 makes clear that gender nonconformity **is not** the same as gender dysphoria:

> Gender dysphoria should be distinguished from simple nonconformity to stereotypical gender role behavior by the strong desire to be of another gender than the assigned one and by the extent and pervasiveness of gender-variant activities and interests. The diagnosis is not meant to merely describe nonconformity to stereotypical gender role behavior (e.g., "tomboyism" in girls, "girly-boy" behavior in boys, occasional cross-dressing in adult men). Given the increased openness of atypical gender expressions by individuals across the entire range of the transgender spectrum, it is important that the clinical diagnosis be limited to those individuals whose distress and impairment meet the specified criteria.

DSM-5 at 458. The American Psychiatric Association makes clear that "[g]ender nonconformity is not a mental disorder," and that gender dysphoria "is also not the same as being gay/lesbian."[6] Prevalence of gender dysphoria in adults is between 0.002% and 0.014%. DSM-5 at 454.

Shortly after filing the Complaint, Plaintiffs moved to proceed using pseudonyms and for a temporary injunction. (Docs. 8, 28.) Plaintiffs submitted affidavits in support of their motions, with Plaintiffs' names and signatures redacted. (Docs. 14–27.) The affidavits do not provide much information about Plaintiffs or their children, apart from identifying the schools their children attend. Many state that "[i]f my children ever express a desire to transition to a different gender identity, I would not immediately allow them to do so, but would instead pursue a treatment

[5] The diagnostic criteria are different for children than for adolescents and adults. *See Gibson v. Collier*, 920 F.3d 212, 217 (5th Cir. 2019) (summarizing DSM-5 diagnostic criteria for gender dysphoria in adults).

[6] American Psychiatric Association, *What Is Gender Dysphoria?*, available at: https://bit.ly/2QT9Bd9.

approach to help my children identify and address the underlying causes of the dysphoria and learn to embrace their biological sex." (*See, e.g.*, Affidavit of Jane Doe 1 (Doc. 20) at ¶ 11.) Plaintiffs state they are "concerned that the District's policy prohibiting staff from communicating with me about how my children process gender identity issues at school will prevent me from learning that my children are dealing with gender dysphoria . . . ." (*Id.* at ¶ 22.) According to Plaintiffs, they are "concerned that if teachers and staff at the District learn that I am opposing the Policy they will retaliate against me and/or my children," and they worry about harassment if other students, parents, or members of the public learn of their role in this lawsuit. (*Id.* at ¶¶ 24, 25.)

Governor Tony Evers closed all schools in the State on March 18, 2020 because of the COVID-19 pandemic, and schools "shall remain closed for the duration of the public health emergency or until a subsequent order lifts this specific restriction."[7] MMSD has announced that it expects students to transition to virtual learning beginning on Monday, April 6, 2020.[8]

ARGUMENT

Plaintiffs' Complaint should be dismissed on several grounds. Plaintiffs fail to state a claim because they have not alleged an injury to a personal interest and therefore lack standing. It is not enough for Plaintiffs to allege that they are parents of MMSD students and they object to the District's approach to support transgender, non-binary, and gender-expansive students. Similarly, Plaintiffs' claims are unripe because they allege only a speculative injury that depends entirely on the hypothetical that someday their child *might* develop gender dysphoria. Standing and ripeness are fundamental prerequisites in a declaratory judgment action, and Plaintiffs' claims fail those standards. Furthermore, by withholding their real names, Plaintiffs have not met basic statutory requirements, they lack competency to sue, and they have failed to join real parties in interest.

[7] Emergency Order #5 (Mar. 17, 2020), available at https://bit.ly/3dh306b.

[8] *See* Jane Belmore, Update on virtual learning and device access (Mar. 20, 2020), available at https://bit.ly/3bBK0xx.

Plaintiffs' attempt to litigate anonymously should be rejected, assuming the issue does not otherwise become moot based on dismissal. There is no statutory basis for Plaintiffs to withhold their names from the Court, from MMSD, or from the public. Plaintiffs have not overcome the strong presumption favoring public disclosure, and they have not explained how complete and permanent anonymity comports with the administration of justice. This Court, MMSD, and the public have a fundamental right to know who brings these claims, and Plaintiffs have failed to establish that the harm that may follow from public disclosure outweighs the likely harm to the court system, to MMSD's due-process rights, and to the public from withholding that information.

I. Plaintiffs' Complaint Fails to State a Claim on which Relief Can Be Granted.

A. Legal Standards

A motion to dismiss under Wis. Stat. § 802.06(2)(a)6 tests the legal sufficiency of the complaint. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 N.W.2d 665, 849 N.W.2d 693. A court evaluating such a motion "must 'accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom.'" *Cattau v. Nat'l Ins. Servs. of Wis.*, 2019 WI 46, ¶ 4, 386 Wis. 2d 515, 926 N.W.2d 756 (quoting *Data Key Partners*, 2014 WI 86, ¶ 19).

This is an action for declaratory judgment, which is governed by Wis. Stat. § 806.03. A court may entertain a complaint seeking declaratory judgment only if a justiciable controversy exists. In order to show that a justiciable controversy exists, a plaintiff must establish that:

(1) A controversy exists in which a claim of right is asserted against one who has an interest in contesting it;

(2) The controversy must be between persons whose interests are adverse;

(3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest;

(4) The issue involved in the controversy must be ripe for judicial determination.

Loy v. Bunderson, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982) (citing Edwin Borchard, *Declaratory Judgments*, at 26–57 (2d ed. 1941)).

These requirements are statutory. *See Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶ 35, 244 Wis. 2d 333, 627 N.W.2d 866. And the "failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court's competency to adjudicate the particular case before the court." *Vill. of Trempaleau v. Mikrut*, 2004 WI 79, ¶ 9, 273 Wis. 2d 76, 681 N.W.2d 190. *See also Sipl v. Sentry Indem. Co.*, 146 Wis. 2d 459, 465, 431 N.W.2d 685 (Ct. App. 1988) ("Failure to fulfill any of these prerequisites is fatal to a claim for declaratory relief."). Plaintiffs' claims are not justiciable because they have failed to satisfy the third and fourth elements necessary bring a declaratory judgment.

The third element, the legal-interest requirement, "has often been expressed in terms of standing." *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81 (citing *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1982)). "'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517 (citation omitted). As the Wisconsin Supreme Court stated in *Foley-Ciccantelli v. Bishop's Grove Condominium Association, Inc.*, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789:

> [T]he essence of the determination of standing, regardless of the nature of the case and the particular terminology used in the test for standing, is that standing depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged.

Id. ¶ 40 (footnotes omitted).

The concepts of standing and ripeness (the fourth element) are somewhat intertwined, except that the focus of ripeness is on timing. In declaratory judgment cases, Wisconsin courts lack competency to exercise jurisdiction over unripe claims. *See, e.g.*, *DSG Evergreen Family Ltd. P'ship v. Town of Perry*, 2020 WI 23, ¶ 42 ("'Courts will not declare rights until they have become fixed under an existing state of facts . . . .'") (quoting *Voight v. Walters*, 262 Wis. 356, 359, 55 N.W.2d 399 (1952)). A declaratory judgment action is not a mechanism for deciding hypotheticals and cannot rest on speculation. *See State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998); *Tammi v. Porsche Cars N. Am. Inc.*, 2009 WI 83, ¶ 3, 320 Wis. 2d 45, 768 N.W.2d 783 (quoting *Armstead*).

B. Plaintiffs Do Not Have a Personal Stake in the Outcome and Are Not Directly Affected by the Issues in Controversy.

Under established Wisconsin law, "a party must be directly affected by the issues in controversy" in order to have standing to seek declaratory relief. *Ramme v. City of Madison*, 37 Wis. 2d 102, 116, 154 N.W.2d 296 (1967) (citing *Wis. Pharm. Ass'n v. Lee*, 264 Wis. 325, 58 N.W.2d 700 (1953); *Dean Milk Co. v. Madison*, 257 Wis. 308, 43 N.W.2d 480 (1950), *vacated on other grounds*, 340 U.S. 349 (1951)). The Complaint fails to allege anything that, if proven, would show any Plaintiff has been or will be impacted by the Guidance. Even if this Court were to look beyond the four corners of the Complaint and consider Plaintiffs' affidavits submitted in support of their temporary injunction motion, Plaintiffs have not shown that they have a personal stake in the controversy, which is necessary to bring a declaratory judgment action.

Nothing in Plaintiffs' allegations (nor in the inferences to be drawn from them) suggests that Plaintiffs or their children are or will be directly affected by the District's approach to affirm all identities at school. Plaintiffs do not allege that any of their children have been diagnosed with gender dysphoria or are struggling with gender-identity issues. Indeed, counsel for Plaintiffs

admitted at the telephone hearing before this Court on March 23, 2020 that there is nothing atypical about Plaintiffs or their children, apart from the fact that they object to MMSD's Guidance. Plaintiffs appear to believe that it is enough to allege that they are parents of students at MMSD and that they disagree with the District's approach. But that is plainly insufficient to confer standing. *See Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 23, 259 Wis. 2d 107, 655 N.W.2d 189 (holding that disagreement with government decisions "is insufficient to confer standing"). There would be nothing left of the standing doctrine if parties could proceed on such bare allegations. Plaintiffs do not have any legally protected interest that is directly affected by the Guidance, and therefore they lack standing to challenge it.

C. Plaintiffs' Claims Are Unripe.

Plaintiffs' claims are also doomed under the ripeness inquiry. The Complaint lacks any allegation of present or imminent harm. Instead, Plaintiffs attempt to rely on speculation and conjecture. It is settled, however, that "[i]f the resolution of a claim depends on hypothetical or future facts, the claim is not ripe for adjudication and will not be addressed by this court." *Armstead*, 220 Wis. 2d at 631 (citations omitted).

None of Plaintiffs' allegations explain how the Guidance directly and immediately affects them or their children. Plaintiffs' theory of injury appears to be that one of their children might someday "begin to experience gender dysphoria," and if that ever happened, then MMSD staff would purportedly "enable their children to change gender identity at school without their consent and prevent teachers from notifying Plaintiffs about it." (Compl., ¶¶ 64, 68.) Plaintiffs allege that they "cannot wait to challenge this Policy until one of their children experiences gender dysphoria," because "[b]y the time Plaintiffs learn the truth, the District may have already enabled their children to transition socially to a different gender without their consent . . . ." (*Id.*, ¶ 69.) That is pure speculation and conjecture. It does not suffice to establish a justiciable claim.

The DSM-5 states that the prevalence of gender dysphoria, at least in adults, is between 0.002% and 0.014%. DSM-5 at 454. Plaintiffs do not allege that any of their children currently have gender-identity issues or exhibit any symptoms of gender dysphoria. In fact, the Complaint provides no information whatsoever about the children, apart from the schools they attend. The diagnostic criteria for children with gender dysphoria require a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration . . . ." DSM at 452. Even assuming, against the odds, that one of Plaintiffs' children were to manifest gender dysphoria at some point in the future, MMSD's approach to affirm all students' self-identities at school would not infringe upon Plaintiffs' rights as parents or their religious liberties. It is fundamentally the parents' role to seek diagnosis and treatment for their children, and the Guidance does not interfere with that role in any way.

Stripped bare, Plaintiffs' position appears to be that teachers and other school officials have a duty to warn parents about any gender-nonconforming behavior that students engage in at school. There is plainly no such duty. Teachers and other school officials by statute have a duty to report suspected child abuse or neglect,[9] but they have no duty to warn parents of suspicions that a child may be struggling with their gender identity, just as they have no duty to report that a child may be suffering from depression, anxiety, or other mental-health conditions (except, perhaps, when there is an imminent risk of harm, which is not alleged to be an issue here). School officials are not competent to make such a diagnosis, and in any event, Plaintiffs falsely assume that any gender-nonconforming behavior in a child is a sign of gender dysphoria. It is important to emphasize that gender nonconformity is not a mental-health disorder and does not in itself reflect problems with a student's health or well-being.

[9] *See, e.g.*, Wis. Stat. § 48.981(2)(a)14–16m (listing school teachers, school administrators, school counselors, and other school employees as persons required to report).

As the Wisconsin Court of Appeals has observed, "[t]he teaching profession is not ordinarily associated with psychotherapy," and it is not part of most teachers' training, education, or experience. *State v. Ambrose*, 196 Wis. 2d 768, 778 & n.3, 540 N.W.2d 208 (Ct. App. 1995). Dr. Stephen B. Levine, the expert Plaintiffs offered in support of their motion for temporary injunction, stated in his affidavit that "[i]t is not realistic to expect educators or school counselors" to have the qualifications necessary to diagnose a child with gender dysphoria. (Doc. 31 ("Levine Aff."), ¶ 20.) MMSD and its staff do not diagnose students' mental-health conditions or provide treatment without parental consent—indeed, federal law prohibits them from doing so.[10] Clearly, then, MMSD officials have no way to know whether a student has gender dysphoria unless a parent also knows that information too. Therefore, Plaintiffs' speculation that District staff could "know the truth" about their child's diagnosis and keep it secret from Plaintiffs is entirely unfounded.

If Plaintiffs are concerned that their children are struggling with gender-identity issues, then they should talk with their children about it, and perhaps seek professional guidance. Plaintiffs have already retained the services of Dr. Levine, who asserts expertise in the diagnosis and treatment of gender dysphoria in children. (Levine Aff., ¶ 6.) Surely he could assess whether any of Plaintiffs' children currently suffer from gender dysphoria. MMSD does not stand in the way of parents seeking diagnosis or treatment for their children. And the Guidance does not impact Plaintiffs' rights to direct the upbringing of their children or their religious beliefs. A ruling on Plaintiffs' challenge, based only on a hypothetical future manifestation of gender dysphoria in one of Plaintiffs' children, would be advisory; and "[c]ourts will not render merely advisory opinions." *City of Janesville v. Rock County*, 107 Wis. 2d 187, 199, 319 N.W.2d 891 (Ct. App. 1982).

[10] *See* 20 U.S.C. § 1232h(b) ("No student shall be required . . . to submit to a survey, analysis, or evaluation that reveals information concerning . . . mental or psychological problems of the student or the student's family . . . without the prior written consent of the parent.").

II. Plaintiffs' Complaint Should Be Dismissed Because Pseudonyms Have No Capacity to Sue and Plaintiffs Failed to Join the Real Parties in Interest.

No Wisconsin statute permits an individual to file an anonymous complaint. To the contrary, that practice would contravene at least three statutory provisions that require the identity of the actual parties be disclosed in order to initiate a lawsuit. First, Wis. Stat. § 802.04 states that the caption of the Complaint "shall include the names and addresses of all the parties." Second, the listed plaintiffs are fictitious and, as such, plainly have no capacity whatsoever, including the capacity to sue. *See* Wis. Stat. § 802.06(2)(a)1. Third, by failing to name the actual individuals asserting claims against MMSD, Plaintiffs have failed to join the real parties in interest as necessary parties under Wis. Stat. §§ 802.06(2)(a)7, 803.01, and 803.03.[11]

This Court cannot assess whether it has competence to exercise jurisdiction over the asserted claims unless and until it knows the identities of all the parties in the case. As discussed in greater detail in the next section, Wis. Stat. § 801.21 sets forth the process for seeking to redact or seal court records or information from public access and includes the ability to file materials temporarily under seal until the court rules on the motion to seal or redact the information. Plaintiffs did not follow that procedure and have not adequately explained why they cannot do so. Plaintiffs' failure to disclose their names in the Complaint even to the Court under temporary seal is a fatal procedural defect that compels dismissal.

[11] Wis. Stat. § 803.03(1) states:

> A person who is subject to service of process shall be joined as a party in the action if:
> (a) In the person's absence complete relief cannot be accorded among those already parties; or
> (b) The person claims an interest in relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
> 1. As a practical matter impair or impede the person's ability to protect that interest; or
> 2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her claimed interest.

III. Plaintiffs' Request to Proceed Anonymously Is Contrary to Wisconsin Law and Not in the Interests of Justice.

Plaintiffs styled their motion as a request to use pseudonyms, but it is much more ambitious than that. As noted above, Plaintiffs seek to conceal their identities from everyone including the Court. Plaintiffs concede (albeit understatedly) that their request is "an exception to the normal procedure," but they insist that "[a]nonymous litigation has become an accepted method of proceeding in appropriate cases, both in Wisconsin and around the country." (Pls.' Pseudonym Mot. at 1, 2.) That is not so. "Anonymous litigation," at least as Plaintiffs attempt it here, is contrary to Wisconsin law and is not in the interests of justice. Plaintiffs' motion must therefore be denied.

Plaintiffs correctly identify the controlling precedent—*State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 334 N.W.2d 252 (1983)—but fail to heed its teachings. (Pls.' Pseudonym Mot. at 2, 7.) The Wisconsin Supreme Court stated in *Bilder* that public access to government is a "basic tenet of the democratic system" and held that denying the public the opportunity to examine court records "is contrary to the public policy and the public interest." *Id.*, 112 Wis. 2d at 553. The Court also held that Wis. Stat. § 59.20(3)[12] enshrines this policy by giving the public "an absolute right" to inspect court records, *Bilder*, 112 Wis. 2d at 553, subject only to three recognized exceptions:

(1) "a statute authoriz[es] the sealing of otherwise public records";
(2) "disclosure [would] infringe[] on a constitutional right"; or
(3) the circuit court in its "inherent power" determines that "the administration of justice requires it."

Id. at 554–56. *See also Krier v. EOG Envt'l, Inc.*, 2005 WI App 256, ¶ 9, 288 Wis. 2d 623, 707 N.W.2d 915 (discussing *Bilder*); *cf.* Wis. Stat. § 19.31 (declaring that the "denial of public access generally is contrary to the public interest" and is permitted only "in an exceptional case").

[12] The Court in *Bilder* referred to Wis. Stat. § 59.14(1), which was later renumbered to 59.20(3). *See State v. Stanley*, 2012 WI App 42, ¶ 30 & n.9, 340 Wis. 2d 663, 814 N.W.2d 867.

Plaintiffs argue that "Wisconsin appellate courts have not yet established a test for when a lawsuit may be filed anonymously" and urge this Court to adopt instead the analysis that some federal courts have applied. (Pls.' Pseudonym Mot. at 5.) True, Plaintiffs have not identified any Wisconsin case addressing whether a plaintiff may remain anonymous to the parties and the court; but perhaps the dearth of cases is because that practice is contrary to statute. As shown in the preceding section, Wisconsin law requires the parties to identify themselves in order to initiate a lawsuit. Names and addresses of all the parties are essential elements of the caption, *see* Wis. Stat. § 802.04(1); fictitious persons lack capacity to sue, *see id.* § 802.06(2)(a)1; and the real party in interest must be joined in the action whenever feasible, *see id.* §§ 803.01(1), 803.03(1).

Even setting aside those procedural defects, the Wisconsin Supreme Court's analysis in *Bilder* governs any effort to withdraw court records from public scrutiny, including Plaintiffs' attempt to shield their identities in this case. But *Bilder* does not provide a basis for the Court to grant Plaintiffs' request for complete anonymity here. There is no statute that authorizes the sealing of Plaintiffs' real names; publicly revealing them would not infringe on any constitutional right; and, most important of all, the administration of justice does not require it.

Before examining those three exceptions to public disclosure more closely, it may be helpful to note that while federal case law sometimes may be "persuasive authority in construing an analogous state rule," *State v. King*, 205 Wis. 2d 81, 92, 555 N.W.2d 89 (Ct. App. 1996), it does not support Plaintiffs here, on an issue that involves state policy. *See State v. Muckerheide*, 2007 WI 5, ¶ 7, 298 Wis. 2d 553, 725 N.W.2d 930 ("Although a Wisconsin court may consider case law from such other jurisdictions, obviously such case law is not binding precedent in Wisconsin, and a Wisconsin court is not required to follow it."). Federal case law obviously cannot overrule *Bilder*, and in any event, it does not point to a different outcome in this case.

Federal courts generally disfavor anonymous filings. *See* Charles Alan Wright & Arthur R. Miller, 5A *Federal Practice & Procedure* § 1321 (4th ed. 2018). According to an Arkansas Law Review article that Plaintiffs reference in their motion, "[f]ederal procedural practices" regarding pseudonyms "are not uniform." Donald P. Balla, *John Doe Is Alive and Well: Designing Pseudonym Use in American Courts*, 63 Ark. L. Rev. 691, 706 (2010) (cited at Pls.' Pseudonym Mot. at 4). Some federal courts encourage *ex parte* hearings to obtain court permission before a party may use pseudonyms. *See id.* at 706 n.107 (citing *James v. Jacobson*, 6 F.3d 233, 235 (4th Cir. 1993); *Qualls v. Rumsfeld*, 228 F.R.D. 8, 10 (D.D.C. 2005)). Others allow parties to submit a motion shortly after the complaint is filed. *See id.* at 706 n.108 (citations omitted).

For its part, the Seventh Circuit has "repeatedly voiced [its] disfavor of parties proceeding anonymously, as anonymous litigation runs contrary to the rights of the public to have open judicial proceedings and to know who is using court facilities and procedures funded by public taxes." *Doe v. Village of Deerfield*, 819 F.3d 372, 376–77 (7th Cir. 2016). According to the Seventh Circuit, "[o]nly 'exceptional circumstances' justify the use of a fictitious name for an adult party." *E.A. v. Gardner*, 929 F.3d 922, 926 (7th Cir. 2019) (citations omitted); *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) (rejecting use of pseudonyms in part because plaintiff was not a minor). Seventh Circuit precedent is similar to *Bilder* in that the strong presumption favoring disclosure of a party's identity may be overcome only by showing that the harm to the plaintiff resulting from disclosing their identity exceeds the likely harm resulting from concealing it. *Doe*, 360 F.3d at 669.

This case is factually and procedurally different than the cases Plaintiffs cite. (Pls.' Pseudonym Mot. At 7.) The Seventh Circuit largely based its decision in *Elmbrook School District* on sworn testimony that the plaintiffs and their children had suffered direct, targeted retaliation in the past for their beliefs. *See Doe ex rel. Doe v. Elmbrook School Dist.*, 658 F.3d 710, 723–24 (7th

Cir. 2011), *vacated on other grounds*, 687 F.3d 840 (7th Cir. 2012). The Fifth Circuit in *Stegall* upheld anonymity based on specific documentary evidence showing a risk of harassment or violence. *See Doe v. Stegall*, 653 F.2d 180, 182 n.6 (5th Cir. 1981). The district court in *Madison School District* met with the plaintiff in chambers before allowing her to proceed anonymously. *See Doe v. Madison School Dist. No. 321*, 147 F.3d 832, 834 n.1 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc). In *Porter*, the Sixth Circuit affirmed a protective order preserving the plaintiffs' anonymity that enabled the defendants to access the plaintiffs' names and did not limit the scope of discovery. *See Doe v. Porter*, 370 F.3d 558, 560-61 (6th Cir. 2004). And finally, the district court in *Harlan County School District* approved the use of pseudonyms in part because the litigants themselves were minor children. *See Doe v. Harlan County School Dist.*, 96 F.Supp.2d 667, 671 (E.D. Ky. 2000). The circumstances of those cases are different from those here.

Unless there is a clear statutory exception, common law limitation, or overriding public interest in keeping a public record confidential, public records are open to everyone. *See Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 394, 397, 342 N.W.2d 682 (1984). In *Hathaway*, the Wisconsin Supreme Court explicitly held that a list of parents' names whose children attend public school constitutes a public record. *Id.* at 394. It is therefore a matter of public record that Plaintiffs are parents whose children attend MMSD schools, and Plaintiffs' Complaint does not reveal any other detail about them or their children. And the public has a right to know who is using the court system to challenge MMSD's Guidance. Allowing Plaintiffs to proceed using pseudonyms would deny the public this fundamental right and contradict longstanding policies of open access to court records under Wisconsin law.

A. No Wisconsin Statute Authorizes Plaintiffs to Seal their Identities.

Plaintiffs have not satisfied the requirements for withholding their names from public disclosure under Wisconsin law. Wis. Stat. § 801.21 details the process for seeking to protect certain information from public disclosure. Subsection (2) states:

> A party seeking to protect a court record not protected by s. 801.19 or included on the list described in s. 801.20 shall file a motion to seal part or all of a document or to redact specific information in a document. The motion must be served on all parties to the action. The filing party shall specify the authority for asserting that the information should be restricted from public access. The information to be sealed or redacted may be filed under a temporary seal, in which case it shall be restricted from public access until the court rules on the motion.

In ruling on such a motion, the court "shall determine whether there are sufficient grounds to restrict public access according to applicable constitutional, statutory, and common law." Wis. Stat. § 801.21(4). If the court restricts public access, then "the court will use the least restrictive means that will achieve the purposes of this rule and the needs of the requester." *Id.*

Plaintiffs did not follow this procedure. Instead of filing a Complaint under a temporary seal with Plaintiffs' names and addresses, as the statute permits, Plaintiffs excluded that information from their Complaint and filed redacted affidavits in support of its temporary injunction motion without submitting unredacted copies to the parties or to the Court. Plaintiffs' request for complete and total anonymity does not comport with *Bilder* and is not the "least restrictive means" as required by Wis. Stat. § 801.21(4).

Wis. Stat. § 801.21 is a rule of procedure, not substance, and does not independently provide a statutory basis to use pseudonyms. It does not "expand or limit the confidentiality concerns that might justify special treatment of any document," but "is intended to make it clear

that filing parties do not have the unilateral right to designate any filing as confidential and that permission from the court is required." Comment to Wis. Stat. § 801.21 (2015).[13]

As required by Wis. Stat. § 801.20, the Director of State Courts maintains a list of commonly filed documents or case types that are automatically treated as confidential without the need for a motion to seal.[14] Plaintiffs do not fit any of the categories on the list. And they do not point to any other substantive statute that authorizes the court to withhold their identities.

There is no statute authorizing parents to file a complaint without disclosing their true names to their adversary and the Court. Plaintiffs reference statutory protections for pupil records, *see* Wis. Stat. § 118.125(2); adoption cases, *see* Wis. Stat. § 48.93(1d); paternity proceedings, *see* Wis. Stat. § 767.853; and proceedings involving children or juveniles in need of protection or services, *see* Wis. Stat. §§ 48.396(2)(a), 938.396(2)(a). (Pls.' Pseudonym Mot. at 3.) But clearly none of those statutes apply to the facts as Plaintiffs have alleged them.

Plaintiffs exposed themselves to public scrutiny when they filed this lawsuit. As the Wisconsin Supreme Court observed in *Bilder*, "[a]ny use of the judicial process opens information about a party's life to the public's scrutiny, and such information may be damaging to reputation." *Bilder*, 112 Wis. 2d at 557. Plaintiffs chose to walk through the courthouse doors and invoke this Court's jurisdiction to seek declaratory relief; they were not dragged into court involuntarily.

B. Disclosure Would Not Infringe on a Constitutional Right.

Plaintiffs are not entitled to shield their identities from disclosure just because they bring constitutional claims against MMSD. This exception to the "absolute right" of public access to court records is actually quite narrow. Courts have found that the Constitution may override the

[13] Wisconsin Sup. Ct. Order No. 14-04 states that these comments "are not adopted, but will be published and may be consulted for guidance in interpreting and applying the statute."

[14] *See* https://www.wicourts.gov/services/attorney/docs/conf_flyer.pdf.

need for public disclosure when doing so would effectively destroy the cause of action itself. For example, in *State ex rel. Ampco Metal, Inc. v. O'Neill*, 273 Wis. 2d 530, 78 N.W.2d 921 (1956), the Wisconsin Supreme Court ruled that it would undermine the very point of bringing a trade-secrets case if a plaintiff were required to disclose to the public the underlying trade secrets, and therefore allowed *in camera* inspection. *See id.* at 533. In this case, however, Plaintiffs' claims would survive disclosure of their names. This case clearly falls outside the second exception.

C. Withholding Plaintiffs' Names Would Not Further Administration of Justice.

Wisconsin courts exercise their inherent authority to redact names and use pseudonyms in public filings only in limited circumstances—and even in those cases, parties must identify themselves to the parties and the court. None of the Wisconsin cases that Plaintiffs cite present even remotely similar facts. In three cases Plaintiffs rely on, the Supreme Court allowed minor victims of sexual assault to proceed using pseudonyms when bringing claims against their perpetrators. *See Doe 56 v. Mayo Clinic Health Sys.--Eau Claire Clinic, Inc.*, 2016 WI 48, ¶ 1, 369 Wis. 2d 351, 880 N.W.2d 681; *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 318, 565 N.W.2d 94 (1997); *Doe v. Certain Interested Underwriters at Lloyds London*, No. 2011AP739, 2012 WL 694940, at *1 (Wis. Ct. App. Mar. 6, 2012). In other cases, the Wisconsin Court of Appeals permitted the use of pseudonyms when reviewing denial of a protective order to an HIV-positive plaintiff, *see Doe by Doe v. Roe*, 151 Wis. 2d 366, 368, 444 N.W.2d 437 (Ct. App. 1989); and when discussing the sentencing modification of a defendant who provided valuable information to law enforcement during a homicide investigation. *State v. Doe*, 2005 WI App 68, ¶¶ 1, 4, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101.[15] Those cases clearly are irrelevant.

[15] It does not appear that any party challenged the use of pseudonyms in the cases Plaintiffs rely on, and they do not contain any discussion of the issue. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

1. Plaintiffs have not shown a sufficient need for anonymity.

A party requesting that the public be denied access to the court record must establish that such inherent power is necessary for the court to function effectively and must specify the reasons that justify closure of the record. *See State v. Melton*, 2013 WI 345, ¶ 54, 349 Wis. 2d 48, 834 N.W.2d 345; *Bilder*, 112 Wis. 2d at 556–57, 559. Reasons of reputation or privacy are generally insufficient to overcome the legislatively mandated public policy favoring full disclosure and open records under Wisconsin law. *See Bilder*, 112 Wis. 2d at 557, 559; *Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶ 31, 277 Wis. 2d 208, 689 N.W.2d 644; *C.L. v. Edson*, 140 Wis. 2d 168, 185, 409 N.W.2d 417 (Ct. App. 1987).

Plaintiffs have not shown that exceptional circumstances justify their attempt to proceed anonymously. Privacy or reputation interests do not warrant complete concealment of Plaintiffs' identities from this Court, MMSD, and the public. To fully develop its defenses, MMSD has a right to know the names of the individuals bringing claims against it. To render a meaningful and fair decision on the merits, this Court must learn the names of the parties. And to uphold the integrity of the judicial process, the public has a right to access a fully disclosed court record.

Here, Plaintiffs have not shown that this Court should deny public access to a full, open court record. Plaintiffs allege that pseudonyms are required "to protect their privacy and the privacy of their minor children, and to prevent retaliation against them for raising this sensitive issue." (Compl., ¶ 10.) But Plaintiffs have not substantiated those concerns with any facts specific to them. Plaintiffs give no concrete reasons that could justify closing the public's access to their identities in the court record. Claiming a "substantial need for privacy" and citing examples of harassment that others have experienced is insufficient. (Pls.' Pseudonym Mot. at 9–14.)

Plaintiffs do not allege any facts that distinguish their children from any other student at MMSD. And Plaintiffs are no different than other parents, except perhaps for their objection to the District's approach to affirm all students' identities. Plaintiffs have not shown that they are more exposed to retaliation or even harassment than any Plaintiff in a civil matter would be. By choosing to bring this action, Plaintiffs assumed the general obligation to disclose their identities.

2. Plaintiffs' request would harm MMSD, the court system, and the public.

Plaintiffs argue that "[t]he identities of the Plaintiffs and their children are not relevant to the legal issues in this case, so anonymity will not prejudice the Defendant in any way." (Compl., ¶ 11.) But that is simply not true. Plaintiffs' failure to disclose their full names clearly interferes with MMSD's ability to conduct the discovery necessary to test Plaintiffs' claims and factual assertions. And Plaintiffs' concealment violates MMSD's fundamental right to know the name of the party who is bringing claims against it. Furthermore, MMSD's attorneys cannot verify whether there may be a conflict of interest. Plaintiffs' request is unjustified and should be denied.

The right to discovery is an essential element of the adversary system. *Sands v. Whitnall School Dist.*, 2008 WI 89, ¶ 17, 312 Wis. 2d 1, 754 N.W.2d 439. Wisconsin statutes create a broad scope of pretrial discovery to ensure that parties and courts are able to ascertain the truth. *See Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2001 WI 45, ¶ 13, 243 Wis. 2d 119, 625 N.W.2d 876 (discussing the provisions governing discovery under Wis. Stat. Ch. 804). Discovery is effective only if each party has the opportunity to fully inform itself of the facts of the case and the evidence that may come out at trial. *See id.* ¶ 14; *see also City of Chicago*, 360 F.3d at 669 (establishing that a party's identity is a fact of the case). Wisconsin courts have a responsibility to ensure that each litigant has that opportunity. *See Sands*, 2008 WI 89, ¶ 17.

By using pseudonyms rather than their real names, Plaintiffs severely limit MMSD's opportunity to fully inform itself of the facts of this case. Plaintiffs' identities are essential facts that are crucial to deciding the claims Plaintiffs assert. MMSD cannot conduct depositions of nameless plaintiffs, use interrogatories from anonymous persons, or request documents from unknown individuals with no listed addresses. And unless MMSD and this Court know Plaintiffs' true names, this Court cannot find that Plaintiffs actually suffered an injury to a legally protectable interest. Plaintiffs' identities are necessary so that MMSD may conduct reasonable discovery.

Disclosure of Plaintiffs' identities is also necessary to ensure that MMSD's counsel adheres to its responsibilities under the Wisconsin Rules of Professional Conduct. Specifically, Rule 20:1.7 instructs lawyers to assess whether their representation involves a concurrent conflict of interest. SCR 20:1.7(a). Plaintiffs' failure to disclose their identities prevents MMSD's counsel from determining whether any "John Doe" or "Jane Doe" is a current client of MMSD's counsel that is now directly adverse to MMSD. And, as the Seventh Circuit has recognized, disclosure of each party's name is necessary for a judge to determine recusal. *See Coe v. County of Cook*, 162 F.3d 491, 498 (7th Cir. 1998). If this Court permits Plaintiffs to proceed using pseudonyms, and it is later revealed that there is a conflict or an appearance of one, that fact could cast a shadow over any ruling this Court makes. Plaintiffs' privacy interests do not outweigh the strong value in upholding the integrity of the judicial process and this Court's ability to reach a fair decision.

Granting Plaintiffs' request to proceed using pseudonyms would ignore well-established principles in favor of open public access to judicial proceedings. Our judicial system is premised on the notion that the public has a right to know who is using the courts. Absent full disclosure of Plaintiffs' true names in an open court record, the public's understanding of this case will be

compromised. Because the harm to the public interest outweighs any potential harm to Plaintiffs from disclosing their identities, Plaintiffs' motion to proceed using pseudonyms should be denied.

Furthermore, Plaintiffs' attempt to shield their true identities from MMSD, this Court, and the public is not the least restrictive means, notwithstanding Plaintiffs' argument to the contrary. (Pls.' Pseudonym Mot. at 16.) Complete secrecy is not necessary for this Court to function effectively, and even if Plaintiffs could demonstrate that their privacy or reputation interests require *some* protection, Plaintiffs have not shown how disclosing their identities to the parties and this Court will be detrimental to them. Plaintiffs broadly assert that revealing their identities will subject them and their children to ostracism, harassment, and other risks that allegedly would be avoided by using pseudonyms. (*Id.* at 13.) But, again, Plaintiffs do not offer any specifics that substantiate a particular threat they are likely to experience. And Plaintiffs could have avoided those risks by not bringing this lawsuit in the first place.

Plaintiffs' attempt to use pseudonyms in this case is not justified. The circumstances of this case are not the same as any other circumstance where Wisconsin courts have approved it. Plaintiffs are not minors bringing claims of sexual assault, HIV-positive patients, or persons who served as police informants. Plaintiffs are adult parents challenging a school practice that does not even impact their children. Plaintiffs have not identified any authority that would justify shielding such information from the public under the facts of this case, let alone keeping it permanently hidden from MMSD as a party and from this Court. Furthermore, Plaintiffs have not shown that proposal to proceed anonymously to the parties and the court is the "least restrictive means" to achieve the purposes of the rule and Plaintiffs' privacy interests, as required by Wis. Stat. § 801.21. Plaintiffs' motion to proceed using pseudonyms should be denied.

CONCLUSION

For the reasons set forth in this brief, this Court should dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted under Wis. Stat. § 802.06(2)(a)6, for lack of capacity to sue pursuant to Wis. Stat. § 802.06(2)(a)1, and for failure to join a necessary party under Wis. Stat. § 802.06(2)(a)7. Alternatively, if this Court denies MMSD's motion to dismiss, then the District respectfully requests that this Court deny Plaintiff's motion "to proceed using pseudonyms," and order that Plaintiffs disclose their identities in order to maintain this litigation.

Date: April 2, 2020

Respectfully submitted,

BOARDMAN & CLARK LLP

By

/s/ Electronically signed by Barry J. Blonien

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