BY THE COURT:

DATE SIGNED: June 1, 2022

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT- BRANCH 8 WAUKESHA COUNTY

T.F., et. al.,

Plaintiffs,

vs.

Case: 2021CV1650

KETTLE MORAINE SCHOOL DISTRICT,

Defendant.

DECISION AND ORDER

The Complaint alleges that the Kettle Moraine School District (hereinafter "Kettle Moraine") violated parental rights by adopting 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. *(See Doc. #2, ¶1)* Kettle Moraine responds that there is no justiciable controversy as one set of plaintiffs (T.F. and B.F.) are no longer in the district and the other set of plaintiffs (P.W. and S.W.) do not currently have a child for which the policy would have a current application and therefore they do not have standing or a claim which is ripe for determination. *(See Doc. #19, p. 3)*

RELEVANT BACKGROUND

In December of 2020, T.F. and B.F.'s daughter, then twelve years old, began questioning her gender identity. Her parents temporarily pulled her from school to get her professional counseling. After some counseling, she expressed to her parents and District staff that she wanted to adopt a new male name and male pronouns when she returned to school. *(See Doc. #2, ¶¶ 28–32)* Her parents determined that an immediate transition would not be in her best interest. They wanted her to take more time to explore and process the cause of these feelings before taking such a profound and fraught step. *(See id. ¶ 32)* Shortly before their daughter returned to school, T.F. and B.F. informed the Kettle Moraine of their decision that school officials should refer to their daughter by her legal name and female pronouns. *(See id. ¶ 33)* Kettle Moraine

responded, however, that pursuant to District policy, the school would not follow their decision, but would instead refer to their daughter using whatever name and pronouns she wanted. *(See id. ¶¶ 34–35)* In light of this decision, and to avoid the potential damage that being addressed by teachers and staff with a male name and pronouns could do to their daughter, B.F. and T.F. withdrew her from school and sought a different therapist that would help their daughter process her feelings. *(See id. ¶¶ 36–37)* After just two weeks of this different environment, their daughter changed her mind about her identity, telling her parents that "affirmative care really messed [her] up" and that the rush to affirm that she was really a boy added to her confusion. *(See id. ¶¶ 38–40)* Although they would have stayed in Kettle Moraine, but for the policy, B.F. and T.F. then enrolled their daughter in another district. *(See id. ¶¶ 41–42)* Plaintiffs, P.W. and S.W., have two children currently enrolled in Kettle Moraine and their children are subject to the policy. *(See id. ¶¶ 45–46)*

LEGAL STANDARD

Wisconsin's current pleading standard requires that all pleadings contain both: "a short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief," and "a demand for judgment for relief the pleader seeks." *Wis. Stat. §* 802.02 (1) (2019-20); *See also* Fed. R. Civ. P. 8 (a).

"A motion to dismiss tests the legal sufficiency of the complaint." *Ladd v. Uecker*, 2010 WI App 28, ¶ 7, 323 Wis. 2d 798, 780 N.W.2d 216. In reviewing a motion to dismiss, the Court accepts as true "all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. The Court also liberally construes the complaint in favor of the plaintiff and in favor of stating a claim. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981). However, the Court may not consider facts outside the complaint "in the process of liberally construing the complaint." *Doe 67C v. Archdiocese of Milwaukee*, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180. And legal conclusions are insufficient to survive a motion to dismiss. *Data Key*, 2014 WI 86, ¶ 19. Ultimately, a motion to dismiss should not be granted, unless "it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979).

The Wisconsin Supreme Court in *Data Key* adopted the heightened plausibility pleadings standard, where a plaintiff must "allege facts that, if true, plausibly suggest a violation of applicable law." *Data Key*, 2014 WI 86, ¶ 21. Further, the sufficiency of the complaint depends on the underlying law of the claims, which also determines what facts must be pled. *Data Key*, 2014 WI 86, ¶ 31 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The facts must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Data Key*, 2014 WI 86, ¶ 25 (citing *Twombly*, 550 U.S. 544, 555). Factual assertions describe the "who, what, where, when, why, and how" of the claim. *Data Key*, 2014 WI 86, ¶ 173 n.9 (citing *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433). For example, in *Voters with Facts v. City of Eau Claire*, the Wisconsin Supreme Court held that when the complaint only establishes the possibility of entitlement to relief and lacking any further evidence, the complaint fails to meet the plausibility

required to survive a motion to dismiss. 2018 WI 63, ¶ 55, 382 Wis. 2d 1, 913 N.W.2d 131. Whether a complaint raises a justiciable controversy is appropriately determined on a motion to dismiss. *See In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 410, 466 N.W.2d 227, 230 (Ct. App. 1991)

DISCUSSION

Kettle Moraine argues that there exists no justiciable controversy between the parties as the Plaintiffs lack standing to bring their claims, their claims are not ripe for determination, and the claims are moot.

In order bring an equitable claim for declaratory or injunctive relief in Wisconsin pursuant to *Wis. Stat. §§* 806.04 and 813.01, there must exist a justiciable controversy. That is, the plaintiff must demonstrate:

> (1) A controversy 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 protectible interest.
> (4) The issue involved in the controversy must be ripe for judicial determination.

Vill. of Slinger v. City of Hartford, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 865-66, 650 N.W.2d 81, 83-84. 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. "Failure to fulfill any of these prerequisites is fatal to a claim for declaratory relief." *Sipl v. Sentry Indem. Co.*, 146 Wis. 2d 459, 465, 431 N.W.2d 685 (Ct. App. 1988).

I. T.F. and B.F. have standing to pursue their claim

It is clear in Wisconsin that this Court is construe standing "liberally," not "narrowly or restrictively, e.g., *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶38, 333 Wis. 2d 402, 797 N.W.2d 789, and that even a "trifling interest" can suffice. *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. The purpose of the standing inquiry is simply to ensure that the "the issues and arguments presented will be carefully developed and zealously argued." *Id.* at ¶16. There are only two basic requirements for standing—"plaintiffs must show [1] that they suffered or were threatened with an injury [2] to an interest that is legally protectable." *Marx v. Morris*, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112.

For purposes of a motion to dismiss, T.F. and B.F.'s allegations are that they were forced to withdraw their daughter from Kettle Moraine to protect her and preserve their parental role when Kettle Moraine refused to honor their decision about what was best for their daughter. *(See Doc. #2, ¶¶ 32-40)* Wisconsin courts recognize that parents have a right to make "decisions regarding the education and upbringing of their children," "free from government intervention." *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 43, 426 N.W.2d 329 (1988); *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998); *Barstad v. Frazier*, 118 Wis. 2d 549, 567, 348

N.W.2d 479 (1984); *Matter of Visitation of A. A.L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486. T.F. and B.F. allege that Kettle Moraine violated their right to make decisions regarding the upbringing of their daughter when they were told by Kettle Moraine that the school would not honor the parent's request to not refer to their daughter by a male name or pronouns.

This allegation, viewed in the light most favorable to T.F. and B.F., demonstrates a potential violation of their rights as parents to direct the upbringing of their child and is sufficient to survive a motion to dismiss on the issue of standing.

II. T.F. and B.F.'s claims are not moot.

Kettle Moraine argues that T.F. and B.F.'s claims are moot due to the fact that their daughter no longer attends the district. The heart of T.F. and B.F.'s claims are a declaratory judgment that their constitutional rights as parents were violated when Kettle Moraine refused to honor T.F. and B.F.'s judgment for their daughter due to the school's policy. Now that their daughter is no longer enrolled in Kettle Moraine, T.F. and B.F. do not face continuing potential harm from Kettle Moraine's policy, but it does not change that T.F. and B.F. allege that they have already suffered a harm. T.F. and B.F. need only show nominal damages to sustain a claim. ". . .[N]ominal damages suffice for the vindication of a legal title or right." *Dahlman v. City of Milwaukee*, 131 Wis. 427, 111 N.W. 675, 677 (1907). *See also, Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).

When viewed in the light most favorable to T.F. and B.F., the claim of at least nominal damages for a potential violation of their rights as parents to direct the upbringing of their child and is sufficient to survive a motion to dismiss on the issue of mootness.

III. P.W. and S.W., like any other parent, may petition for declaratory relief.

Plaintiffs, P.W. and S.W., have two children currently enrolled in Kettle Moraine and their children are subject to the policy. *(See Doc. #2. ¶¶ 45–46)* Unlike T.F. and B.F., P.W. and S.W. do not allege that they have a child grappling with gender dysphoria or that they have already suffered harm from the current Kettle Moraine policy. P.W. and S.W. simply allege that by virtue of the fact that they have children at Kettle Moraine, they may challenge a policy of the district that they believe interferes with their parental rights.

Kettle Moraine argues that to have standing a party must have a personal stake in the outcome of a case and must be directly affected by the issues in controversy. *Vill. of Slinger*, 2002 WI App 187, ¶ 9. They further argue that a plaintiff's complaint "must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S. Ct. 2312, 2317, 138 L.Ed.2d 849, 858 (1997). Kettle Moraine argues that "[m]erely being a parent in a school district and disagreeing with an alleged policy is insufficient to confer standing as a matter of law." *See Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶23, 259 Wis.2d 107. Generally, Kettle Moraine's view is correct – a party must have a personal stake in the outcome of a case, but what Kettle Moraine confuses is that injury is necessary to claim a personal stake.

P.W. and S.W. seek declaratory relief that Kettle Moraine's policy infringes on their parental rights. "A plaintiff seeking declaratory judgment need not actually suffer an injury before seeking relief." *Putnam v. Time Warner Cable of SE Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶ 44. The Declaratory Judgment Act's stated purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Wis. Stat. §* 806.04(12). The Act "is primarily anticipatory or preventative in nature." *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 307 (1976). It is expressly designed to "allow courts to … resolve identifiable, certain disputes between adverse parties … prior to the time that a wrong has been threatened or committed." *Putnam*, 2002 WI 108, ¶ 43. The Act itself says it "is to be liberally construed and administered," *Wis. Stat. §* 806.04(12), such that declaratory relief is appropriate "wherever it will serve a useful purpose." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 42.

The Wisconsin Supreme Court has provided guidance on how to analyze standing and ripeness in declaratory judgment actions. *See Milwaukee District Council 48 v. Milwaukee County*, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866. In that case, a union preemptively challenged Milwaukee County's process for denying vested pension benefits to employees who were terminated for cause. *Id.*, ¶¶ 2–3. The Court held that the union had standing and that its claim was ripe, emphasizing that the same would be true for "the vast majority of individual employees," even though "[v]ery few individuals [were] in a position to assert that their termination for 'cause' [was] imminent and that their loss of pension [was] imminent." *Id.*, ¶¶ 45–46. "Waiting until both events actually occur," the Court explained, "would defeat the purpose of the declaratory judgment statute." *Id.*, ¶ 46. The union's goal was to establish "the decision-making process in which an employee is discharged," and both "judicial economy and common sense dictate[d]" that the union could seek a declaration preemptively to avoid the "potential denial of [its members'] pensions," *Id.*, ¶¶ 44–45, 47 (emphasis added).

Like the individual employees in *Milwaukee District Council 48*, P.W. and S.W. need not wait for potential harm from Kettle Moraine's policy to occur for their children before they are entitled to seek declaratory relief on whether the policy violates their parental rights. This is different than the conclusion drawn in *Lake Country Racquet & Athletic Club, Inc.* In that case, the Court concluded Lake Country failed "to bring forth any facts demonstrating any pecuniary loss or the risk of any substantial injury to its interests." *Lake Country Racquet & Athletic Club, Inc.*, 2002 WI App 301, ¶17. [emphasis added] P.W. and S.W. allegation of an infringement on their fundamental right to parent their children is a risk of substantial injury to their interests and is sufficient to survive a motion to dismiss.

IT IS HEREBY ORDERED,

1) Kettle Moraine's motion to dismiss is DENIED.
2) Kettle Moraine shall have 20 days from the date of this Order to file an Answer to the Complaint.
3) The Court shall set this matter for a scheduling conference.