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You are hereby notified that the Court has entered the following order:

2020AP1032 John Doe 1 v. Madison Metro School District (L.C. # 2020CV454)

Before Blanchard, Kloppenburg, and Nashold, JJ.

The appellants, John Does and Jane Does, are parents of children attending schools in the Madison Metropolitan School District. Their appeal presents the issue of whether they may proceed anonymously in their underlying lawsuit against the School District. The parents move for injunctive relief pending appeal. They ask that we enjoin the School District from adhering to certain provisions in the School District's "Guidance & Policies to Support Transgender, Non-

binary, & Gender-Expansive Students." The respondents, the School District and three student groups, oppose the parents' motion. We deny the motion because the parents fail to persuade us that they are entitled to injunctive relief pending appeal beyond that already granted to them by the circuit court.[1]

Background

In February 2020, the parents sued the School District, alleging that the School District's Guidance & Policies violate their constitutional rights. The Guidance & Policies include a provision that prohibits School District staff from disclosing a student's gender identity to parents, unless legally required or with the consent of the student. The Guidance & Policies also include a provision that allows staff to use a student's self-chosen name and gender pronouns in the school setting while using a different name and pronouns with the child's family.[2] The parents assert in their suit that the Guidance & Policies allow School District staff to deceive and withhold information from them, in violation of their constitutional rights to direct the upbringing of their children and to raise their children in accordance with the parents' religious beliefs.

The parents filed a motion requesting that they be permitted to proceed anonymously. The circuit court denied the request in part. The court entered an order requiring the parents to

[1] The parents have also filed a motion for permission to file a reply in support of their motion for injunctive relief pending appeal. We grant the motion for permission to file a reply.

[2] The parents refer to these provisions as allowing students to "socially transition," and the respondents take issue with that characterization. We refer to these provisions as the "gender identity" provisions, and use the phrase "socially transition" as used by the parents in their arguments, without resolving at this time any disputes regarding this terminology.

disclose their identities to the court and to party attorneys, while also providing that the parents' identities would remain sealed and confidential from the public. The parents filed a notice of appeal and a petition for leave to appeal the circuit court's order on the anonymity issue. The circuit court agreed to stay that order pending appeal, thereby allowing the parents to remain anonymous to the court and opposing counsel while their appeal is pending.

We took jurisdiction over the appeal on the anonymity issue. We determined that, even if the circuit court's order on the anonymity issue was not a final appealable order, we would grant leave to appeal the order.

In the interim, the parents filed a motion in the circuit court for injunctive relief pending appeal pursuant to WIS. STAT. § 808.07(2).[3] Section 808.07(2) provides:

> (a) During the pendency of an appeal, a trial court or an appellate court may:
>
> 1. Stay execution or enforcement of a judgment or order;
>
> 2. Suspend, modify, restore or grant an injunction; or
>
> 3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

The parents requested that the circuit court enjoin the School District from: "(1) enabling children to socially transition to a different gender identity at school by selecting a new 'affirmed named and pronouns,' without parental notice or consent"; "(2) preventing teachers and other

[3] The parents also filed a separate motion in the circuit court for a temporary injunction pursuant to WIS. STAT. § 813.02. The parents ask that we decide whether the circuit court erred by declining to hear their motion for a temporary injunction under § 813.02 within a reasonable time, but they concede that we need not decide this issue in order to resolve their motion for relief pending appeal. Given this concession, we decline to address the issue.

staff from communicating with parents that their child may be dealing with gender dysphoria, or that their child has or wants to change gender identity, without the child's consent", and "(3) deceiving parents by using different names and pronouns around parents than at school."

The parents argued to the circuit court that they were entitled to injunctive relief pending appeal because they satisfied each of the requirements for a temporary injunction, including the requirement that they show a likelihood of irreparable harm absent injunctive relief. The parents asserted that the School District's Guidance & Policies created the potential for significant harm both to their children and to themselves. The parents argued that a child's social transition to a different gender identity can be self-reinforcing and make a full transition more likely. They contended that transitioning and transgender children are at an increased risk for a number of physical and psychological harms. They argued that the School District's Guidance & Policies interfered with their right to choose a course of treatment for any of their children who might experience gender dysphoria or otherwise need mental health support. Additionally, the parents argued that a violation of their constitutional rights as parents was itself an irreparable harm.

The respondents contended that the parents failed to satisfy the requirements for injunctive relief. Among other arguments, the respondents contended that the parents failed to show that there was a likelihood of irreparable harm absent injunctive relief.

The circuit court partially granted and partially denied the parents' motion for injunctive relief pending appeal. The circuit court determined that, by remaining anonymous to the court, the parents had failed to provide sufficient facts for the court to find that they or their children would suffer irreparable harm. The court further determined that, by remaining anonymous to the court, the parents had deprived the respondents of a meaningful opportunity to challenge

factual assertions underlying the parents' requests for injunctive relief. The court also determined, however, that a partial injunction would preserve the status quo while the parents' appeal on the anonymity issue remains pending. The court enjoined the School District, pending the parents' appeal, from "applying or enforcing any policy, guideline, or practice reflected or recommended in" the Guidance & Policies "in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school."

Discussion

In the motion now before this court, the parents seek relief pending appeal under WIS. STAT. § 808.07(2) and WIS. STAT. RULE 809.12. As noted, § 808.07(2) provides that, "[d]uring the pendency of an appeal," the circuit court or this court may "[s]uspend, modify, restore or grant an injunction" as well as make "any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered." RULE 809.12 provides that a party aggrieved by a circuit court order granting relief under § 808.07 may file a motion for relief from that order in this court. *See* RULE 809.12 ("A person aggrieved by an order of the trial court granting the relief requested may file a motion for relief from the order with the court.").

As an initial matter, we question whether the injunctive relief that the parents seek in this court is an available form of relief under WIS. STAT. § 808.07(2) and WIS. STAT. RULE 809.12. Although these provisions authorize the circuit court and this court to grant broad forms of relief, including injunctive relief, "[d]uring the pendency of an appeal," the pending appeal here pertains only to the anonymity issue. The circuit court stayed its order on that issue. The

injunctive relief the parents now seek pending appeal goes beyond the scope of their appeal and beyond the relief they could expect to achieve even if they fully prevail in the appeal. The parents do not direct our attention to authority that clearly supports the view that relief pending appeal pursuant to § 808.07(2) and RULE 809.12 can reach so broadly.

Regardless, we will assume without deciding that the injunctive relief the parents seek is an available form of relief pending their appeal. Even so, for the reasons we now discuss, the parents do not persuade us that they are entitled to injunctive relief beyond that already granted to them by the circuit court.[4]

The parties agree that the criteria for injunctive relief pending appeal are the same as the criteria for a temporary injunction. The parties further agree that, to obtain a temporary injunction, the party seeking the injunction must show a likelihood of success on the merits, a likelihood of irreparable harm absent an injunction, and no other adequate remedy at law. *See* ***Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.***, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. The parties dispute whether recent Wisconsin Supreme Court rulings have eliminated an additional requirement that injunctive relief is necessary to preserve the status quo. For purposes of this order, we need not and do not resolve that dispute.

The parties agree that we review the circuit court's grant or denial of a temporary injunction for an erroneous exercise of discretion. *See* ***id.***; ***School Dist. of Slinger v. Wisconsin***

[4] The parents request in the alternative that we grant the injunctive relief they seek under WIS. STAT. § 813.02 and WIS. STAT. RULE 809.14. However, the parents do not explain why this court would have authority to grant injunctive relief under § 813.02. Regardless, we need not address whether we have authority under § 813.02 because the parents argue that the criteria for granting temporary injunctive relief under § 813.02 are the same as the criteria under WIS. STAT. § 808.07(2) and WIS. STAT. RULE 809.12.

Interscholastic Athletic Ass'n, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). Thus, "[t]he test is not whether [we] would grant the injunction but whether there was an erroneous exercise of discretion by the circuit court." ***School Dist. of Slinger***, 210 Wis. 2d at 370.

Here, we conclude that the parents fail to show that the circuit court misused its discretion because the parents do not establish a likelihood of irreparable harm absent additional injunctive relief pending appeal. We need not decide whether the parents also fail to satisfy the other requirements for temporary injunctive relief.

First, as far as we can tell at this stage of the proceedings, the harms the parents assert are not likely harms but are instead potential harms that are uncertain and speculative. The parents' own argument sometimes reflects as much. In summarizing their harm argument, the parents assert: "The odds that 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." (Emphasis added; footnote omitted.) Likewise, the parents make other arguments using terminology that reflects the uncertain nature of the asserted harms. For example, the parents argue that affirming a child's gender identity during childhood "can be" self-reinforcing, and that the School District's Guidance & Policies "may" do lasting harm to them or their children.

As we understand the parents' more detailed arguments, the asserted harms depend on a chain of events, each of which is uncertain to occur: one of their children might now or in the future start to socially transition at school; the School District might apply its Guidance & Policies to withhold information about the child's social transition from that child's parent or parents; and the child's social transition might increase the child's risk for negative physical and

psychological health outcomes before the parent or parents can intervene and exercise their constitutional rights to direct the child's treatment and other aspects of the child's upbringing.

Second, the partial injunctive relief that the circuit court already granted largely addresses what appears to be the parents' most compelling concern, namely, that the School District will withhold information from the parents or actively deceive them in a manner that will prevent them from timely addressing the needs of one of their children in whatever way the parent or parents see fit. As noted, the circuit court enjoined the School District, pending the parents' appeal, from "applying or enforcing any policy, guideline, or practice reflected or recommended in" the Guidance & Policies "in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school."

Although the circuit court's ruling places a burden of inquiry on the parents, it does so only on a temporary basis, and it provides the parents with an avenue to avoid asserted harms while their case is pending. The parents concede that they do not seek injunctive relief that would go so far as to place an "*affirmative duty*" (their emphasis) on School District staff "to notify parents about any indication that a child may be wrestling with their gender identity."

As a final matter, we note that the respondents assert that injunctive relief pending appeal is especially unnecessary now, because the School District has announced that it will continue virtual learning for all grades until January 22, 2021. Although we do not rely on this assertion in denying the parents' motion, we agree that the absence of in-person learning could only weaken the parents' argument as to irreparable harm, and the parents do not argue to the contrary in their reply.

Therefore,

IT IS ORDERED that the motion for permission to file a reply is granted.

IT IS FURTHER ORDERED that the motion for injunctive relief pending appeal is denied.

Sheila T. Reiff
Clerk of Court of Appeals