

FILED  
05-04-2020  
CIRCUIT COURT  
DANE COUNTY, WI  
2020CV000454

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 8

DANE COUNTY

JOHN DOE 1, et al.,

Plaintiffs,

vs.

MADISON METROPOLITAN  
SCHOOL DISTRICT,

Defendants,

And

Case No. 20-CV-454

GENDER EQUITY ASSOCIATION OF  
JAMES MADISON MEMORIAL HIGH  
SCHOOL,

Honorable Frank D. Remington

GENDER SEXUALITY ALLIANCE OF  
MADISON WEST HIGH SCHOOL, and

GENDER SEXUALITY ALLIANCE OF  
ROBERT M. LA FOLLETTE HIGH SCHOOL,

Proposed Intervening  
Defendants.

**BRIEF IN SUPPORT OF PROPOSED INTERVENING DEFENDANTS'  
MOTION TO INTERVENE**

**INTRODUCTION**

The Proposed Intervening Defendants are student clubs from three different high schools in the Madison Metropolitan School District (the “District”)—the Gender Equity Association from James Madison Memorial High School, the Gender Sexuality Alliance from Madison West High School, and the Gender Sexuality Alliance from La Follette High School (collectively, the “Intervening Student Clubs”). The Intervening Student Clubs include participants who identify as transgender, non-binary, or gender-expansive and who directly benefit from the District’s

“Guidance & Policies to Support Transgender, Non-binary & Gender Expansive students” (the “District’s Guidance”) at issue in this lawsuit.

The Intervening Student Clubs’ participants believe that the District’s Guidance is critical for the safety and wellbeing of all transgender, non-binary, and other gender-expansive students and especially for those students who have not come out to their parents by speaking to them about the fact that they are transgender, non-binary, or gender-expansive. By providing a safe and welcoming space for transgender, non-binary, and other gender-expansive students who are not out to their parents, the District’s Guidance is protecting them from the harm they may experience in a less welcoming or more hostile environment, such as rejection, or verbal or physical abuse, by one or both of their parents or guardians at home.

The relief sought by the plaintiffs will harm the Intervening Student Clubs, their participants, and all transgender, non-binary, and other gender-expansive students by making their schools, and for some, their homes, a less welcome and potentially unsafe place for them. The Court’s decision in this case, therefore, will have a significant impact on the Intervening Student Clubs and their participants. As such, the Intervening Student Clubs seek to intervene in this action under Wisconsin Statute § 803.09 in order to protect the important rights and safety of students enrolled in the District.

### **FACTUAL BACKGROUND**

#### **A. Gender Equity Association of James Madison Memorial High School**

The Gender Equity Association (“GEA”) of James Madison Memorial High School (“Memorial HS”) was formed in 2019 and has approximately 25 Memorial HS student participants. (**Exhibit 1**, Affidavit of Amira Pierotti (hereafter “Pierotti Aff.”) ¶¶ 5-6.) The GEA’s mission is to create a safe and equitable space at Memorial HS for all transgender, non-

binary, and other gender-expansive students, as well as lesbian, gay, bisexual, questioning, femme, and female students, whether they are participants in the GEA or not. (*Id.* ¶ 7.) The GEA engages in community service, educational outreach, and policy advocacy in support of transgender, non-binary, and other gender-expansive individuals. (*Id.* ¶ 8.) The GEA has also engaged in several community service and outreach activities that reach beyond support for transgender, non-binary, and other gender-expansive individuals, such as menstrual equity services, sexual assault prevention, policy advocacy, and education initiatives. (*Id.* ¶ 9.)

The GEA believes that the District's Guidance is critical for the safety and wellbeing of all transgender, non-binary, and other gender-expansive students at Memorial HS and especially for those students who have not come out to their parents by speaking to them about the fact that they are transgender, non-binary, or gender expansive. (*Id.* ¶ 10.)

Some of the GEA's participants identify as transgender, non-binary, or gender-expansive and identify by a different name and/or pronouns at school than what is in their student record and are not out to their parents. (*Id.* ¶ 13.) There are also other transgender, non-binary, and other gender-expansive students at Memorial HS who do not participate in the GEA, but who are also benefiting from the District's Guidance. (*Id.* ¶ 14.) They, too, identify by a different name and/or pronouns at school than what is in their student record and are not out to their parents. (*Id.*) Advocating for the protection of these students, as well as GEA participants, is a central goal of the GEA. (*Id.* ¶¶ 7-8, 10-11.)

#### **B. Gender Sexuality Alliance of Madison West High School**

The Gender Sexuality Alliance ("GSA") of Madison West High School ("West HS") has approximately 12 to 15 "regular" student participants. (**Exhibit 2**, Affidavit of Nora Miesbauer (hereafter "Miesbauer Aff.") ¶ 5.) The GSA's mission is to create a welcoming and safe space at

West HS for all people in the LGBTQ+ community and allies, including people who identify as transgender, non-binary, and other gender-expansive students, whether they are participants in the GSA club or not. (*Id.* ¶ 6.) The GSA at West HS engages in a mix of social, educational, and advocacy activities. (*Id.* ¶ 7.) For example, the GSA has given presentations at District middle schools and in health classes at West HS about what is considered acceptable LGBTQ+ terminology and to raise awareness about situations and/or conversations that may cause anxiety or hurtful feelings to individuals who are transgender, non-binary, or gender-expansive. (*Id.*) In addition, the GSA has provided guidance to participants of the West HS Faculty regarding acceptable LGBTQ+ terminology and appropriate behavior toward LGBTQ+ students. (*Id.*)

The GSA's participants directly benefit from the District's Guidance, as do other students for whom the GSA advocates, but who do not participate directly in the GSA club. (*Id.* ¶ 9.) The GSA participants believe that the District's Guidance is critical for the safety and wellbeing of all transgender, non-binary, and other gender-expansive students at West HS and especially for those students who have not come out to their parents by speaking to them about the fact that they are transgender, non-binary, or gender expansive. (*Id.* ¶ 8.) Some of these students identify by a different name and/or pronouns at school than what is in their student record. (*Id.* ¶ 11.) Advocating for the protection of these students, as well as GSA participants, is a central goal of the GSA. (*Id.* ¶¶ 6-9.)

### **C. Gender Sexuality Alliance of Robert M. La Follette High School**

The Gender Sexuality Alliance ("GSA") of Robert M. La Follette High School ("La Follette HS") has approximately 15 student participants. (**Exhibit 3**, Affidavit of Morgan Post (hereafter "Post Aff.") ¶ 5.) The GSA's mission is to create a welcoming and safe space at La Follette HS for all people in the LGBTQ+ community and allies, which includes students who

identify as transgender, non-binary, and other gender-expansive, whether they participate in the GSA or not. (*Id.* ¶ 6.) The GSA at La Follette HS engages in a variety of social and advocacy activities, such as organizing gender inclusive clothing swaps, advocating for gender neutral locker rooms, participating in the school's Diversity Week by educating other students and faculty about the LGBTQ+ community, and taking field trips to other schools' GSA programs and a Gay Straight Alliance for Safe Schools conference. (*Id.* ¶ 7.) The GSA also raises awareness about the GSA club at Freshman Orientation and Family Nights, advocates for a gender neutral and gender-expansive homecoming and prom court, and has organized a multi-school Day of Silence video to spread awareness about the effects of the bullying and harassment of lesbian, gay, bisexual, transgender, queer, and questioning students. (*Id.* ¶ 7.)

The GSA's participants directly benefit from the District's Guidance, as do other students for whom the GSA advocates, but who do not participate in the GSA club. (*Id.* ¶ 9.) The GSA participants believe that the District's Guidance is critical for the safety and wellbeing of all transgender, non-binary, and other gender-expansive students at La Follette HS and especially for those students who have not come out to their parents by speaking to them about the fact that they are transgender, non-binary, or gender-expansive. (*Id.* ¶ 8.) Some of these students identify by a different name and/or pronouns at school than what is in their student record. (*Id.* ¶ 11.) Advocating for the protection of these students, as well as GSA participants, is a central goal of the GSA. (*Id.* ¶¶ 6-9.)

### **ARGUMENT**

The Intervening Student Clubs' Motion to Intervene should be granted as a matter of right under Wisconsin Statute § 803.09(1) because of the unique and significant interests the Clubs have in this case and the direct impact the outcome of this case may have on the Clubs,

their participants, and the other transgender, non-binary, and other gender expansive students for whom they advocate. In the alternative, this Court should grant permissive intervention under Wisconsin Statute § 803.09(2) because the Intervening Student Clubs' defense and the main action have a question of law and fact in common and intervention will not delay or prejudice the adjudication of the rights of the original parties.

**I. THE PROPOSED INTERVENING DEFENDANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.**

A party has the right to intervene in an existing action under Wis. Stat. § 803.09(1) if four conditions are met: (i) the motion to intervene is made in a timely fashion; (ii) the movant claims an interest sufficiently related to the subject of the action; (iii) the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (iv) the movant's interest is not adequately represented by the existing parties. *See* Wis. Stat. § 803.09(1); *see also Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1; *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994); *State ex rel Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983). No precise formula exists for determining whether a potential intervenor meets the requirements of § 803.09(1). *Helgeland*, 2008 WI 9, ¶ 40. Rather, “[t]he analysis is holistic, flexible, and highly fact-specific.” *Id.* (footnote omitted).

Wis. Stat. § 803.09(1) is based on Rule 24(a) of the Federal Rules of Civil Procedure. *See* Charles D. Clausen and David P. Lowe, *The New Wisconsin Rules of Civil Procedure Chapters 801 – 803*, 59 Marq. L. Rev. 1, 108 (1976). As such, courts are to “look to cases and commentary relating to Rule 24(a)(2) for guidance in interpreting § 803.09(1).” *Bilder*, 112 Wis. 2d at 547. The Wisconsin Supreme Court has explained how courts should construe intervention motions:

Intervention, as a procedural mechanism under Rule 24, is to be construed liberally, and doubts resolved in favor of the proposed intervenor. Some federal courts have stated that the requirements for intervention are to be construed in favor of intervention. Under Rule 24, the intervention inquiry must be flexible, involving a balancing and blending of requirements, often applying them as a group. Intervention as of right may be granted if the applicant's claimed interest may be significantly impaired by the action, even if some uncertainty exists regarding that interest.

*Helgeland*, 2008 WI 9, ¶¶ 161-62 (citations omitted).

The Intervening Student Clubs easily satisfy each of the four factors and therefore are entitled to intervene as a matter of right. The Intervening Student Clubs have acted quickly and have particularized and direct interests in this action because the Clubs' participants directly benefit from the District's Guidance and would be directly harmed by its removal. The Intervening Student Clubs' personal stake in defending the District's Guidance and the protections it affords their participants and other students for whom they advocate, sets them apart from the District in this case. The District is charged with defending its Guidance, but the students are the ones who have a personal stake in the protections that it provides. Unless they are allowed to intervene, the Intervening Student Clubs are left to watch from the sidelines while the unaffected parties decide the question of whether transgender, non-binary, and other gender-expansive students' rights will be protected and whether they can continue to feel safe and included at their schools.

**A. The Intervening Student Clubs' Motion Is Timely**

The first prong of the four-part test is the timeliness of the motion filed by the proposed intervening party. This action was filed on February 18, 2020. The Intervening Student Clubs are filing this motion to intervene while the District's Motion to Dismiss (Doc. 42) and Plaintiffs' Motion to Proceed Using Pseudonyms (Doc. 9) are still pending. Oral argument on the District's and the Plaintiffs' motions is scheduled for May 26, 2020. In light of the

difficulties presented by the current global health pandemic, the Intervening Student Clubs have acted promptly in filing the present motion to intervene prior to that argument date. *Bilder*, 112 Wis. 2d at 550 (“There is no precise formula to determine whether a motion to intervene is timely. . . . The critical factor is whether in view of all of the circumstances the proposed intervenor acted promptly.”). Moreover, neither Plaintiffs nor the District will be prejudiced by the timing of this motion to intervene. *Id.* (“A second factor is whether the intervention will prejudice the original parties to the lawsuit.”). The lawsuit is still at the beginning stages, there have been no substantive rulings, discovery has not commenced, and the Proposed Intervenors will not raise new arguments on the already pending motions, and so allowing them to intervene need not affect the existing briefing and argument schedule.

**B. The Intervening Student Clubs Have Sufficient Interests In This Action**

The Intervening Student Clubs have sufficient interests in the issues being litigated, because they easily satisfy the Court’s “broader, pragmatic approach to intervention as of right,” in which the interest test serves “primarily [as] a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Helgeland*, 2008 WI 9, ¶¶ 43-44 (quoting *Bilder*, 112 Wis. 2d at 548-49). When considering whether an intervening party has stated a sufficient interest in the underlying matter, the court should focus on “the facts and circumstances of the particular case before it as well as the stated interest in intervention and analyze[] these factors against the policies underlying the intervention statute.” *Bilder*, 112 Wis. 2d at 548. The policy considerations underpinning intervention seek to strike a balance between allowing the original parties to conduct and conclude their own lawsuit and allowing persons to join a lawsuit in the interest of the speedy



and economical resolution of controversies without rendering the lawsuit fruitlessly complex or unending.<sup>1</sup> *Id.*

Because the Intervening Student Clubs and their participants directly benefit from the District's Guidance and will be directly and personally injured if the District's Guidance is enjoined at Plaintiffs' behest – a harm that no party currently before the Court will experience – the balance weighs strongly in favor of allowing them to intervene. (Pierotti Aff. ¶¶ 11, 16; Miesbauer Aff. ¶¶ 9, 13; Post Aff. ¶¶ 9, 13.)

For example, in *Armada*, a teacher moved to intervene in a case filed by Armada Broadcasting against his school district to compel disclosure of a sexual harassment investigative report that discussed allegations made against him. 183 Wis. 2d 463. The Court used the pragmatic approach to intervention articulated in *Bilder* and concluded that the teacher had an interest sufficiently related to Armada's action. *Id.* at 472-74. Because disclosure of the report could cause great personal harm to the teacher's reputation and future career, the Court concluded that his "unique and significant interest" in protecting his privacy and reputation justified intervention. *Id.* at 474. The Court reasoned that granting intervention "promotes judicial efficiency in that all interested parties are involved, and it ensures Armada finality to the extent that [the teacher's] rights will be exercised during the mandamus action rather than in later litigation." *Id.* at 475. Although the school district was asserting the privacy interests of the teacher and defending against Armada's mandamus action, its interests were different from "someone who is directly affected by public disclosure of the report." *Id.* at 476.

The Court of Appeals reached a similar conclusion in *Wolff v. Town of Jamestown* when it allowed a town to intervene in a zoning case defended by a county, because the town had

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<sup>1</sup> The Intervening Student Clubs intend to coordinate, to the greatest extent possible, with the District, to avoid duplication of effort or increased complexity in this litigation.

direct *and* different interests from the county, including its responsibility for “services such as fire protection, ambulance service, and law enforcement” for the property at issue. 229 Wis. 2d 738, 749, 601 N.W.2d 301 (Ct. App. 1999).

Similar to the intervenors in *Armada* and *Wolff*, the Intervening Student Clubs in the current action have direct interests that are different than the interests of the existing parties. (See *Pierotti Aff.* ¶¶ 7-14; *Miesbauer Aff.* ¶¶ 6-13; *Post Aff.* ¶¶ 6-14.) Like the intervenor in *Armada*, this action places the Intervening Student Clubs and their participants at risk of personal harm, as compared to the District’s decision to defend its Guidance in order to fulfill its responsibility to provide a safe and affirming environment for *all* of its students. Just as the school district in *Armada* had an interest in protecting its teacher’s privacy, but would not suffer the same direct harm as the teacher who had a “unique and significant interest” in protecting his privacy and reputation, the District has an interest in protecting its students, but would not suffer the same direct harm as its students who have a “unique and significant interest” in protecting their rights and safety. In other words, the District will not be personally injured if its Guidance is removed or limited, whereas the Intervening Student Clubs and their participants, as well as the non-participant students the Clubs strive to protect, will certainly suffer a direct injury. (See *Pierotti Aff.* ¶¶ 10-16; *Miesbauer Aff.* ¶¶ 8-13; *Post Aff.* ¶¶ 8-13.) Given this, the Intervening Student Clubs wish to further their missions to defend their participants’ and all other transgender, non-binary, and other gender-expansive students’ individual rights and safety with a vigor that sets them apart from the District.

In contrast, in *Helgeland*, the Supreme Court denied the municipalities’ motion to intervene, because it concluded that their interests were indirect and similar to those of the state parties already defending the case. 2008 WI 9, ¶ 71. In *Helgeland*, the municipalities sought to

intervene in a constitutional challenge brought by state employees against various state defendants to the exclusion of domestic partners from the statutory definition of “dependent” for purposes of the health insurance and family leave benefits. *Id.* ¶ 22. The municipalities sought to intervene because they worried that a decision in that case might affect their municipal employee benefit plans. *Id.* ¶¶ 23-24. The Court, however, concluded that the municipalities failed to demonstrate that the interests they asserted “relate to the subject of the action in a direct and immediate fashion,” and that they had failed to show any special, personal, or unique interest as compared to the interests of the current parties in the case. *Id.* ¶¶ 7, 71, 116. Unlike the municipalities in *Helgeland*, the Intervening Student Clubs’ interests in the present action are “direct and immediate,” and the Intervening Student Clubs possess the “special, personal, or unique interest” found lacking in *Helgeland*. *See id.* ¶¶ 7, 71, 116. (*See also* Pierotti Aff. ¶¶ 7-16; Miesbauer Aff. ¶¶ 6-13; Post Aff. ¶¶ 6-13.)

In short, the Intervening Student Clubs, their participants, and the students they protect and advocate for who have not disclosed their gender identity to their parents or guardians are the intended beneficiaries of the District’s Guidance currently at issue and thus have a personal interest in the outcome. *See id.* ¶ 116; *see also Armada*, 183 Wis. 2d at 474 (referencing statutes protecting privacy interests of proposed intervenor as grounds for granting intervention); *see also, e.g., California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (granting intervention to persons who were “intended beneficiaries” of federal statute that was being challenged as unconstitutional).

It is also important for the Court to hear from those directly impacted by the District’s Guidance. Without their participation in this lawsuit, there will be no way to hear of the actual direct impact the District’s Guidance has on transgender, non-binary, and other gender-expansive

students and the harm that would come if it was removed. The Intervening Student Clubs' officers' affidavits submitted in support of this motion to intervene illustrate some of the protections that could be lost as a result of this action. (*See* Pierotti Aff. ¶¶ 10-16; Miesbauer Aff. ¶¶ 8-13; Post Aff. ¶¶ 8-13.)

The distinct and significant personal interests of the Intervening Student Clubs include maintaining a welcoming and safe environment for their participants and all students who identify as transgender, non-binary, and other gender-expansive. (*See* Pierotti Aff. ¶¶ 7, 10-12, 16; Miesbauer Aff. ¶¶ 6, 8-10, 13; Post Aff. ¶¶ 6, 8-10, 13.) The Clubs also have an interest in protecting the privacy and safety of those students who have not disclosed their gender identity to their parents or guardians and who may experience a less welcoming or more hostile environment, such as rejection, or verbal or physical abuse, by one or both of their parents or guardians at home. (*See* Pierotti Aff. ¶¶ 13-15; Miesbauer Aff. ¶¶ 11-12; Post Aff. ¶¶ 11-12.) These interests easily satisfy the interest requirement in the intervention as-of-right standard.

**C. The Intervening Student Clubs Would Be Unable To Protect Their Interests If Not Allowed To Intervene**

The third prong of the test is that the disposition of the action may impair or impede the interests of the intervening party. Unless they are permitted to intervene, the Intervening Student Clubs would not be able to protect their interests using the tools available to parties, such as discovery, motion practice, and trial. For example, they could not present evidence on factual issues that may need to be resolved before reaching a conclusion on the constitutionality of the District's Guidance, they could not challenge the evidentiary support for Plaintiffs' assertions of injury, they could not offer evidence of actual injury that would be suffered by students if the District's Guidance is removed or limited, and they could not participate in the trial and appellate

processes through which the disputes over the constitutional impact(s) of the District's Guidance are resolved.

The Intervening Student Clubs can offer evidence from a personal perspective about the important protections the District's Guidance provides. The Intervening Student Clubs are also well-positioned to offer evidence about the actual harms their participants and other transgender, non-binary, and gender-expansive students would suffer if the District's Guidance is removed or limited. Without intervention, the Intervening Student Clubs would be unable to protect the vital interests described in Section B above. The Intervening Student Clubs' distinct and significant personal interests differ from the current parties' interests and could be significantly impacted with the result of this lawsuit. Accordingly, disposition of this action without the Intervening Student Clubs may impair or impede the Intervening Student Clubs' ability to protect their interest in maintaining the protections of the Guidance for themselves and their members, which are put in jeopardy by this dispute.

**D. The Intervening Student Clubs' Interests Are Not Adequately Represented By The Current Parties**

Finally, the Intervening Student Clubs' interests are not adequately represented by the existing parties, because the Intervening Student Clubs' interests in upholding the District's Guidance are personal and the potential serious harm the students face if the District's Guidance is removed is much different than the harm the District will experience. (*See* Pierotti Aff. ¶¶ 12-16; Miesbauer Aff. ¶¶ 10-13; Post Aff. ¶¶ 10-13.) Currently, no students, the only intended beneficiaries of the challenged guidance, are parties to this action.

The showing required to establish a lack of adequate representation is minimal. *See Armada*, 183 Wis. 2d at 476 (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)); *see also M & I Marshall & Ilsley Bank v. Urquhart Cos.*, 2005 WI App 225, ¶ 18,

287 Wis. 2d 623, 706 N.W.2d 335; *Wolff*, 229 Wis. 2d at 747. When there is a serious possibility that the representation of the proposed intervenor *may be* inadequate, “all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf.” See 1 Jean W. Di Motto, *Wisconsin Civil Procedure Before Trial* § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

Even though intervenors need only make a “minimal showing” of the inadequacy of representation, there is a presumption that the representation will be adequate when the government is arguing for the result being sought by the putative intervenors. See *Helgeland*, 2008 WI 9, ¶ 91. However, that presumption is overcome by the interests of the Intervening Student Clubs here.

First, the distinct personal interests of the Intervening Student Clubs, their participants, and the other transgender, non-binary, and gender-expansive students they protect and advocate for as direct beneficiaries of the District’s Guidance shows that the District’s representation alone may be inadequate. The District should not be presumed to simultaneously and adequately represent both the District at large as well as the individual interests of the Intervening Student Clubs. The Intervening Student Clubs have “special, personal [and] unique interest[s],” *id.* ¶ 116, as compared to the District, and their personal interests are likewise “more powerful than” the District’s. *Id.* ¶ 117; see also *id.* ¶ 204 (“Diversity of interest can be the conclusive factor when evaluating the adequacy of representation.”) (Prosser, J., dissenting)<sup>2</sup>; *Armada*, 183 Wis. 2d at 476 (a governmental entity cannot be expected to defend an action with the same vehemence of the individual person whose personal interests are at stake); *Utah Ass’n of*

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<sup>2</sup> The Intervening Student Clubs are private beneficiaries of the District’s Guidelines seeking to intervene in a case defended by the District. In contrast, the municipalities in *Helgeland* sought to assert yet another *governmental* perspective on why the employment benefits restrictions at issue in that case should be upheld.

*Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (quoting *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977)) (applying Federal Rule of Civil Procedure 24(a)) (“We have here . . . the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation.”).<sup>3</sup>

The interests of the Intervening Student Clubs are unique to a subset of students enrolled in the District, rather than the District as a whole, and the presumption that government representation is adequate is overcome. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994, 1000-01 (8th Cir. 1993) (“Because the counties and the landowners seek to protect local and individual interests not shared by the general citizenry of Minnesota, no presumption of adequate representation arises.”); *Clark v. Putnam Cty*, 168 F.3d 458, 461-62 (11th Cir. 1999) (black voters allowed to intervene in challenge to court-ordered voting plan defended by county commissioners, since commissioners represented all county citizens, including persons whose interests were adverse to proposed intervenors). The Intervening Student Clubs and their participants have unique and personal interests in this case, distinct from those of the District and even from most other students enrolled in the District who do not identify as transgender, non-binary, or gender-expansive. The rights and protections the Intervening Student Clubs and their participants may lose will affect and potentially harm some of the most valuable interests in their lives, including privacy and nondiscrimination. (*See*

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<sup>3</sup> “Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1).” *Helgeland*, 2008 WI 9, ¶ 37.

Pierotti Aff. ¶¶ 10-16; Miesbauer Aff. ¶¶ 8-13; Post Aff. ¶¶ 8-13.) The presumption of adequate representation by the District, therefore, is inappropriate and inapplicable in this action.

Similarly, the presumption of adequate representation when a movant and an existing party have the same ultimate objective does not apply in this case. *See Helgeland*, 2008 WI 9, ¶ 90. The factors that the Court must examine are the difference in the parties' respective incentives to defend the case and what each party has "at stake" depending on the outcome. *Wolff*, 229 Wis. 2d. at 748-50. The Intervening Student Clubs both include participants who actually benefit from keeping their gender identity private from one or both of their parents and guardians and advocate for and protect non-club participants who are similarly benefiting from the confidentiality protections of the District's Guidance. (*See* Pierotti Aff. ¶¶ 7, 11, 13-15; Miesbauer Aff. ¶¶ 6, 9, 11-12; Post Aff. ¶¶ 6, 9, 11-12.) Thus, the Intervening Student Clubs should not have to sit on the sidelines while the validity of students' rights and safety is being challenged.

Students have the most to lose in terms of rights and protections, and they should, therefore, be able to protect those rights directly as a party to this action through the Intervening Student Clubs. Like the proposed intervenor town in *Wolff*, the Intervening Student Clubs "may be in a position to defend the [District's Guidance] more vigorously" than the District itself. *Id.* at 749. Put another way, the District's incentives to defend its Guidance are different and potentially weaker than those of the Intervening Student Clubs given the personal harm that the Intervening Student Clubs would experience if the District's Guidance is removed. Likewise, the Intervening Student Clubs may be "in a better position . . . to provide a full ventilation of the legal and factual context' of the dispute." *Id.* at 748 (quoting *Nuesse v. Camp*, 385 F. 2d 694, 704 (D.C. Cir. 1967)).



The Intervening Student Clubs, therefore, have made the minimal showing necessary to establish a lack of adequate representation.

**E. “Blending and Balancing” The Intervention Requirements Confirms The Right Of The Proposed Intervening Student Clubs to Intervene**

The Intervening Student Clubs meet the four criteria necessary to claim a right of intervention. *See* Wis. Stat. § 803.09(1); *Helgeland*, 2008 WI 9. The Intervening Student Clubs’ showing is particularly strong given the fact that “the criteria need not be analyzed in isolation from one another, and a movant’s strong showing with respect to one requirement may contribute to the movant’s ability to meet other requirements as well.” *Helgeland*, 2008 WI 9, ¶ 39 (footnote omitted). That is, “there is interplay between the requirements; the requirements must be blended and balanced . . . .” *Id.* In the current situation, that interplay amplifies the need for intervention. For example, the difference between the Intervening Student Clubs’ personal interests in protecting its participants and its efforts to also protect other non-club participant transgender, non-binary, and other gender-expansive students, as compared to the District’s choice to defend its Guidance, demonstrates not only that the Intervening Student Clubs meet the interest requirement, but also goes to the adequacy of representation prong. (*See* Pierotti Aff. ¶¶ 10-16; Miesbauer Aff. ¶¶ 8-13; Post Aff. ¶¶ 8-13.) Also, because the Intervening Student Clubs’ interests are directly at issue in this case, they are able to meet the interest and impairment prongs of the intervention test. (*See id.*) When considering such interplay, the showing of the Intervening Student Clubs is even stronger.

Therefore, pursuant to Wis. Stat. § 803.09(1), the Intervening Student Clubs are entitled as a matter of right to intervene in order to adequately protect their unique and significant interests in preserving the District’s Guidance.

**II. IN THE ALTERNATIVE, THE COURT SHOULD EXERCISE ITS DISCRETION UNDER WIS. STAT. § 803.09(2) TO PERMIT THE INTERVENING STUDENT CLUBS TO INTERVENE**

In addition to intervention as a matter of right, upon timely motion a court may exercise its discretion to permit a party to intervene when the movant's claim or defense and the main action have a question of law and fact in common and intervention will not delay or prejudice the adjudication of the rights of the original parties. *See* Wis. Stat. § 803.09(2); *Helgeland*, 2008 WI 9, ¶¶ 119-20. As discussed under intervention as of right in Section I.A. above, this intervention motion is timely. The Intervening Student Clubs meet the additional criteria for permissive intervention, as well.

The primary claim in this lawsuit is that the District's Guidance violates the constitutional rights of the plaintiff-parents to stop their children from identifying by a different gender identity at school than their sex assigned at birth. The Plaintiffs claim that the District should not be allowed to maintain the confidentiality of their children's decision to identify by a different gender identity if at some point their children were to identify as transgender, non-binary, or gender-expansive or experience gender dysphoria. Here, the Intervening Student Clubs seek to intervene so that they are in a position to respond to Plaintiffs' legal and factual allegations. Common questions of law and fact at issue in the main action that will be addressed by the Intervening Student Clubs include the protections the District's Guidance affords their participants and other transgender, non-binary, and other gender-expansive students in their schools, the potential harm that would result if the District's Guidance is removed, and whether those benefits, and the harm of their removal, support the Guidance under the proper constitutional standard.

If allowed to intervene, the Intervening Student Clubs will “significantly contribute to [the] full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.” *Spangler v. Pasadena Bd. of Educ.*, 552 F. 2d 1326, 1329 (9th Cir. 1977); *see also Daggett v. Comm’n on Gov’t Ethics & Election Practices*, 172 F. 3d 104, 113 (1st Cir. 1999) (In exercising its discretion, a court may consider a variety of factors, including whether the intervenor’s participation would “be helpful in fully developing the case.”). Much of this critical information cannot be provided by the current parties. Simply put, it is in the interest of justice to allow the Intervening Student Clubs to intervene.

### **CONCLUSION**

For the reasons stated above, the Intervening Student Clubs should be allowed to intervene as a matter of right pursuant to Wis. Stat. § 803.09(1). Alternatively, permissive intervention should be granted pursuant to Wis. Stat. § 803.09(2).

Dated this 4th day of May, 2020.

Respectfully submitted,

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