BY THE COURT:

DATE SIGNED: October 2, 2023

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)* The matter is before the Court on cross Motions for Summary Judgment.

FINDINGS OF FACT

1. T.F. and B.F. had a daughter ("A.F.") that attended Kettle Moraine Middle School ("KMMS") in the Kettle Moraine School District. (T.F. Affidavit, Dkt. 79, ¶1).

2. A.F. began questioning her gender identity and T.F. and B.F. moved her to a mental health center and that center focused on "affirming" this new gender identity. (*Id.*, at ¶2-3).

3. A.F. then returned to the school with some parental support for the identity, but T.F. and B.F. ultimately changed course and went to the school informing them they wished to refer to A.F. by her legal name and female pronouns. (*Id*., at ¶7-11).

4. The District replied by saying they will follow the guidance of A.F. in what pronouns to use, even over parental objections. (*Id.*, at ¶13).

5. In response T.F. and B.F. withdrew A.F. from the District and shortly thereafter A.F. concluded that she did not want to transition genders. (*Id.*, at ¶15-20).

6. S.W. and P.W. are parents who have two children within the district and are concerned that the District would handle this process in the same way for their children as well if their children were to seek a gender transition. (S.W. Affidavit, Dkt. 80).

7. Social transitioning is separate from medical transitioning and consists of individuals who adopt their transgender identity in ways such as hairstyle/clothing, use of opposite-sex facilities, and adopting name and pronoun changes. (Expert Affidavit of Dr. Erica Anderson, Dkt. 77, ¶8).

8. Gender dysphoria is where one feels that their natal sex does not match their perceived gender identity and this gender incongruence usually causes clinically significant distress or impairment. (*Id*., at ¶9).

9. The World Professional Association for Transgender Health (WPATH) publishes Standards of Care (SOC) that provide guidelines for transgender care with WPATH SOC7 remaining the most current document until September 6, 2022 when WPATH SOC8 was released. (*Id.*, at ¶10).

10. There has been an increasing rise in gender dysphoria in children who have not experienced this before and can even come as a surprise to parents and others when it eventually manifests. (*Id.*, at ¶12); (Expert Affidavit of Dr. Stephen Levine, Dkt. 78, ¶196) ("For many parents, a trans identity may appear to arise "out of the blue" around puberty.").

11. Among those who express gender dysphoria there are individuals who eventually conclude that they no longer wish to transition. (Anderson Aff., Dkt. 77 at ¶19-20).

12. Social transitioning of one's gender is a decision that should usually be preceded by a mental health professional ("MHP") conducting a psychological assessment in order to see the benefits and challenges of such a transition. (*Id.*, at ¶55).

13. Social transitioning represents "one of the most difficult psychological changes a person can experience." (*Id.*, at ¶41).

14. According to Dr. Levine, it is appropriate for parents to say no to a social transition because it is their job to help children avoid making bad decisions. (*Id.*, at ¶57).

15. Social transitioning is a "powerful psychotherapeutic intervention" that likely reduces the number of children desisting from their transgender identity and can lead them to using puberty blockers and cross-sex hormones, which carry known risks. Thus, informed consent from the parents must be obtained before socially transitioning a child. (Levine Aff., Dkt. 78, ¶202).

16. Social transitioning without full support of one's parents can result in the child living a double life which can be "psychologically harmful." (*Id.*, at ¶200-201).

17. There is also no evidence to suggest that socially and/or medically transitioning reduces risk of suicide among individuals experiencing gender dysphoria. (*Id.*, at ¶142).

18. Trained psychotherapists should not drive a wedge between a parent and their child as social transition can only occur with "the support and acceptance of parents/caregivers." (Anderson Aff., Dkt. 77, ¶74-75).

19. Further, "[c]ircumventing, bypassing, or excluding parents from decisions about a social transition undermines the main support structure for a child or adolescent who desperately needs support." (*Id.*, at ¶76).

20. A school facilitated transition without parental consent/buy-in infringes on parents' ability to take a more cautious approach to their child as well as a treatment approach that does not involve immediate transitioning. (*Id.*, at ¶71-72).

21. The District acknowledges that they affirmed A.F.'s social transition because of advice from A.F.'s therapist and worry over a potential Title IX violation. (Michael Comiskey Affidavit. Dkt. 67, ¶12-13).

22. Multiple individuals from the District provided input on whether or not to allow A.F. to socially transition including (1) Mike Comiskey, the principal of KMMS; (2) Allison Beyerl, the school psychologist; (3) Charles Wiza, the director of student services; (4) Pat Deklotz, the superintendent; and (5) Gary Vose, the board of education president. (Kettle Moraine Response to Interrogatories, Ex. 1, Dkt. 73, p.4, ¶1-2).

23. Pat Deklotz was the individual ultimately responsible for deciding to affirm A.F.'s preferred gender identity over the objection of her parents. (*Id.*, at p.5, ¶5).

DISCUSSION

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶31, 363 Wis. 2d 699, 866 N.W.2d 679. The only facts that are of relevant in this consideration are "material facts" which are facts "that [are] 'of consequence to the merits of the litigation.'" *Haase-Hardie v. Wis. Dep't of Natural Res.*, 2014 WI App 103, ¶13, 357 Wis. 2d 442, 855 N.W.2d 443 (quoting *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294)). Those material facts cannot have a "genuine issue" between the parties and such issue "is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Strasser v. Transtech Mobile Fleet Serv.*, 236 Wis. 2d 435, ¶32, 613 N.W.2d 142 (2000) (citing *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991)). If a jury could go either way, then summary judgment would not be appropriate because the purpose of summary judgment is to "eliminate unnecessary trials." *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 562, 297 N.W.2d 500 (1980). Just because the question of law may be novel or particularly difficult does not make summary judgment any less appropriate of a remedy provided that the requirements, i.e., no dispute of material facts, are still met. *See id.*, 98 Wis. 2d at 569.

In summary judgment "[s]upporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Wis. Stat. § 802.08(3) (2007). An adverse party may respond with their own affidavits in order to show that there is an issue of material fact, "[i]f the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." *Id*. This is because "evidentiary

facts set forth in the affidavits or other proof are taken as true by a court if not contradicted by opposing affidavits or other proof." *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997) (citing *Leszczynski v. Surges*, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966)).

Plaintiffs contend they are entitled to summary judgment because the record reflects that there are undisputed facts that the District has put forth a policy that violates parental rights as well as the District specifically violating B.F. and T.F.'s rights as parents relating to how the District utilized this policy in effect towards their daughter. (Dkt. 74, pp. 34-35).

Defendants on the other hand contend that they are entitled to summary judgment due to the fact that plaintiffs B.F. and T.F. have not identified a fundamental right that the District may have violated. (Dkt. 69, p. 2). As to plaintiffs P.W. and S.W., defendants say summary judgment is appropriate because plaintiffs have failed to identify a policy at issue nor have they been negatively impacted by the District so there is no justiciable controversy. (Dkt. 69, p. 3).

I. What Standard Should Be Applied, Further What Right Has Been Identified?

The first question that must be addressed is what standard this Court should apply in determining who summary judgment should be resolved in favor of. Two interconnected pieces that this Court must determine is what right is at stake and in turn what level of protection is required for that right. As "a court's task in a challenge based on substantive due process 'involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." *Blake v. Jossart*, 2016 WI 57, ¶47, 370 Wis. 2d 1, 884 N.W.2d 484 (quoting *State v. Wood*, 2010 WI 17, ¶18, 323 Wis. 2d 321, 780 N.W.2d 63) (alteration in original). Substantive due process is a right separate from procedural due process, which focuses on ensuring fair procedures are in place, and instead

substantive due process "protects individuals from 'certain arbitrary, wrongful actions regardless of the fairness of procedures used to implement them.'" *Black v. City of Milwaukee*, 2016 WI 47, ¶43, 369 N.W.2d 272, 882 N.W.2d 333 (quoting *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997)).

a. The Right at Issue is not the Right to Control Education of One's Child but the Right to Make Medical and Healthcare Decisions for a Child.

Defendants have suggested that plaintiffs have not identified a carefully defined fundamental right that defendants may have violated. (Dkt. 69, p. 12). In support of this they reference the Supreme Court which has said that cases involving substantive due process require a "'careful description' of the asserted fundamental liberty interest." *Wash. v. Glucksberg*, 521 U.S. 701, 721 (1997) (internal citations omitted). Defendants say that this Court cannot consider the broad generalized right to raise one's children and instead must identify what specific right is at issue. (Dkt. 69, p. 13). Defendants heavily focus on claiming the plaintiffs have asserted a right to direct their children's education. (*Id.*). In part they refer to plaintiff's Summons & Complaint (Dkt. 2), which refers to the right of parents to direct the education of their children. (Dkt. 69, p. 12). However, this is just one of the rights that plaintiffs make reference to in their Complaint. (*See* Dkt. 2, ¶¶52-60, pp. 13-15). Defendants say plaintiffs cannot make "sweeping references to constitutional doctrines." (*Id.*); *Larson v. Burmaster*, 2006 WI App 142, ¶39, 295 Wis. 2d 333, 720 N.W.2d 134. However, that case does not say that such broad references are inherently impermissible, rather there the plaintiffs "[did] not apply [those] concepts to their case in the form of a reasoned argument." *Larson*, 2006 WI App 142 at ¶39. Defendants then cite a plethora of federal case law laying down their argument on why the right to control education is a limited one. (*See* Dkt. 69 pp.13-17).

One of these cases, *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), explained that parents do have a recognized liberty interest in the "custody, care, and nurture of their children" and that right resides firstly with the parents, however "[it] does not reside their exclusively, nor is it 'beyond regulation [by the state] in the public interest.'" *Id*., 949 F.3d at 1231 (internal citations omitted) (alterations in original). This case focused on whether there was a fundamental right to determine if a parent could have to the right to limit the risk their children would be exposed to nude members of the opposite sex in places like locker rooms. *Id*. That is not what is at issue in this case. This case involves a question of whether or not there is a right associated with getting the District to comply with the parents request to not use A.F.'s preferred pronouns and male name while she is at school.

Defendants also refer to parents limited rights on whether or not they can control how the school teaches their child from the First, Second, and Sixth Circuits with *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003), and *Blau v. Fort Thomas Pub. Sch. Dis.*, 401 F.3d 381 (6th Cir. 2005), respectively. (Dkt. 69, pp. 16-17). All these cases focus on the recognized right that parents can control where their kids go to school, but parents cannot control the particularized content that their kids learn. (*See id*.). Further, Defendants second heading from their argument section within their Reply Brief to their Motion for Summary Judgment reads: PLAINTIFFS DO NOT HAVE A FUNDAMENTAL RIGHT TO CONTROL HOW A SCHOOL EDUCATES THEIR CHILD. (Dkt. 90, p. 6). When presenting oral argument before this Court, Defendants said that this is not a fundamental rights issue and "this isn't a medical issue. It is not a medical issue. It's a constitutional issue." (Dkt. 91, pp. 23:20-24:5).

Plaintiffs rebut this point raised by defendants by saying they "do not seek to 'control every aspect of a child's education' or 'direct how a public school teaches their child.'" (Dkt. 87, p. 4). Plaintiffs rightly point out that the case law the Defendants rely on deal with "a school district making a significant and controversial health-related decision for a particular child over the parents' objection." (Dkt. 87, p. 5). They also reference one of the cases cited by Defendants that mentions the distinction that having a child take an anonymous survey does not carry with it the same weight as other protected familial rights such as visitation or sending a kid to a private school over a public one. *C. N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3rd Cir. 2005). In their oral argument they reinforced this point of not suggesting there is a right to control education by saying "[w]e don't disagree. That is not and has never been our argument in this case." (Dkt. 91, p. 5:20-21).

This case is not about parents controlling how a school specifically educates its students. This is also not a case about the broader societal debate or implications of transgenderism in our youth or the political movement that supports it.

One of the main rights plaintiffs have suggested this case implicates is the parental decision-making authority, such as making healthcare decisions, which they argue is a fundamental liberty interest that requires passing of strict scrutiny. (Dkt. 74, p. 20 and 26). Defendants seemingly ignore this argument from the Plaintiffs, instead focusing on arguing against a position that the Plaintiffs never took up - which is the right to control how a school educates one's child. Though they do address the parental rights position they say that "no court has expanded the scope of [parental right's] so broadly as to include a right of parents to control what nickname and pronoun school personnel use during the day." (Dkt. 88, p. 12).

Under *Michels v. Lyons*, 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486, parents have fundamental liberty interest in the decisions regarding "care, custody, and control of their children." *Id.*, at ¶24. The state only has an interest when the child's physical and mental health or welfare is in jeopardy. *Id*. However, the state's interest if violating a parent's right, must still be narrowly tailored. *Id*., at ¶21 (explaining that infringements on the right of parental autonomy are subject to strict scrutiny and this must be narrowly tailored).

Further, "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). A child is not granted the same autonomous rights as adults because "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Id*.

Plaintiffs have introduced uncontested expert affidavits explaining that this is a medical issue as they offer insight into transgenderism and how both medical and social conditioning can impact a child's mental health. (Dkt. 74, pp. 3-13). Of particular importance to note is that both doctors agree that living a "double life" where a child's gender roles are different at home and school, is "inherently psychologically unhealthy" and can undermine existing support structures for that child. (Dkt. 74, p. 12); *see also* (Dkt. 78, ¶¶ 200-201); (Dkt. 77, ¶¶ 74-76). Both doctors do note that all professional organizations that have handled these types of scenarios suggest a child receives professional evaluation, but none have said that a school district should continue the process of treating or addressing that child's alternative gender identity without "parental consent and buy-in." (Dkt. 74 p. 12); *see also* (Dkt. 77, ¶¶54-57, 77); (Dkt. 78, ¶¶185-187, 200).

This is undisputedly a medical and healthcare issue – the Defendants put forth no evidence to the contrary. As such, the School District went against the parents' wishes on how to medically treat their child. This directly implicates an infringement against the parental autonomy right to direct the care for their child. *Michels*, 2019 WI 57 at ¶24.

b. As the Liberty Issue at Stake is the Right to Decide Medical Decisions for One's Child, the District Must Survive the Strict Scrutiny Approach.

Defendants first contend that the test that should be applied to their actions is the test of shocking the conscience. (Dkt. 69, p. 10). Their argument is that a violation of substantive due process resulting from executive action requires a "shocks-the-conscience" standard. *Black v. City of Milwaukee*, 2016 WI 47, ¶43, 369 N.W.2d 272, 882 N.W.2d 333; *see also Gorokhovsky v. City of Chi.*, 813 F. App'x 221, 223 (7th Cir. 2020). This is a high standard to show, requiring that it offend "even hardened sensibilities" or the "decencies of civilized conduct." *Black*, 2016 WI 47 at ¶44.

They argue this is a different standard than if a legislature had taken action that violates substantive due process where that would only require passing a standard of rational basis or strict scrutiny, depending on the liberty infringed upon. *State v. Alger*, 2015 WI 3, ¶39, 360 Wis. 2d 193, 858 N.W.2d 346 (explaining that if no fundamental right or suspect class is implicated rational basis applies whereas if those were implicated strict scrutiny would apply).

Defendants contend that even if this Court where to apply the legislative standard to this issue it would only need to pass the lesser rational basis review. (Dkt. 88, pp. 9-10). Continuing further down that path they also suggest that if this Court where to find strict scrutiny would apply, their actions would pass that as well because defendants narrowly tailored their actions to fit a compelling state interest. (*Id.*, at p. 15).

Plaintiffs have rebutted the claim that the "shocks-the-conscience" test is the appropriate one by pointing out that the Seventh Circuit has acknowledged that the shocks-the-conscience analysis is not applicable to every substantive due process claim. *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999). Even the Supreme Court has noted that the "shocks-the-conscience" test can be applied *alongside* the fundamental liberty test, i.e., strict scrutiny. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (plaintiff failed both shocks-the-conscience test and strict scrutiny so there not a violation of the Fourteenth Amendment). They allege that some of the other federal circuits have misapplied the shocks-the-conscience test due to a misreading of the case *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (Dkt. 89, pp. 3-4). When reading *Lewis*, the Supreme Court in citing to support the use of this test notes a previous case, *United States v. Salerno*, 481 U.S. 739 (1987), where they include a parenthetical quoting the case. *Lewis*, 523 U.S. at 847. The relevant portion from *Salerno* quoted in *Lewis* is "'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' … *or* interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746 (internal citations omitted) (emphasis added). The shocks-the-conscience test is just one of the avenues to attack egregious government conduct, but there are also still the protections in place for conduct that interferes with fundamental rights. *See id*.

Plaintiffs have put forth two expert affidavits, one from a clinical psychiatrist and another a transgender clinical psychologist, which this Court finds persuasive. (Dkt. 74, p. 4, n. 1-2). Defendants have put forth nothing in rebuttal to plaintiff's expert affidavits. These affidavits unquestionably show this is a question of making a medical and/or healthcare decision for a child and one that the District has interfered with. This means there is a fundamental liberty

interest at stake that the government is interfering with and thus the District's actions must pass strict scrutiny.

The School District could not administer medicine to a student without parental consent. The School District could not require or allow a student to participate in a sport without parental consent. Likewise, the School District can not change the pronoun of a student without parental consent without impinging on a fundamental liberty interest of the parents.

c. Additionally, This Case Does Not Implicate Title IX and Defendants Reliance on Such is Unwarranted.

Another area of dispute is whether or not Title IX applies to this situation. Defendants have said that they wanted to continue to refer to A.F. by her requested male name and pronouns out of a worry that they may be in violation of Title IX had they not done so. (Dkt. 69, p. 7). They further say directly that "[t]he federal government has also taken the position that failing to respect a student's chosen pronoun can violate Title IX." (Dkt. 69, p. 22). To support this proposition the District refers to a Dear Colleague letter regarding Transgender Students[1]. (*Id.*).

However, this letter has since been rescinded and is no longer in effect, partially due to the fact that a federal district court in *Texas v. United States*, 201 F. Supp. 3d 810, 831 (N.D. Tex. 2016) enjoined this letter and said it violated the law. Even further, within the Seventh Circuit, these letters are not law and are persuasive at best. *See Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019) ("That said, the letter, standing alone, is obviously not enough to get [plaintiff] over the plausibility line."); *see also Cephus v. Blank*, 2022 U.S. Dist. Lexis 224964 at *19 (WD. WI. 2022) (explaining that the Seventh Circuit has precedent saying Dear Colleague letters are relevant to see if a Title IX claim is plausible). The Dear Colleague letter defendants

[1] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

rely on has no impact on whether or not Title IX would be implicated in a factual pattern such as this one. In fact, the Seventh Circuit weighed in recently in a case that reinforces the Plaintiffs position that Title IX would not apply here. (*See* Dkt. 87, pp. 13-15).

In *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861 (7th Cir. 2023) a teacher requested a Title VII exemption to referring to transgender students by the names that best suited their gender identities and instead requested to refer to all students solely by their surnames. *Id.*, 64 F.4th at 864. The Seventh Circuit ultimately concluded that this exception could not be found by a reasonable jury to impose only a *de minimis* harm to the "school's conduct of its business." *Id.* Therefore they granted summary judgment in favor of the school district. *Id.* In doing so they did note a defense raised by the school district, which they found to be unavailing, regarding the district's reliance on previous Seventh Circuit caselaw, *Whitaker v Kenosha Unified SD*, 858 F.3d 1034, 1050 (7th Cir 2017). *Id.*, 64 F.4th at 916. The Court noted that "[e]ven if we were to accept that the School District considered *Whitaker*, at best that case creates only a speculative risk of Title IX liability based on Kluge's actions," which suggests that *Whitaker* does not wholeheartedly confirm if Title IX applies to this issue. *Id.* The Court again references this proposition later when referring to how existing cases, such as *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), could be read into Title IX but the Court concluded that, "[s]uch legal assumptions, without the benefit of Supreme Court or Seventh Circuit authorities establishing Title IX liability for transgender discrimination, present merely speculative risk of Title IX liability for the School District." *Id.*

In short, Title IX is not applicable. While the Seventh Circuit's position is only a persuasive authority to this Court, neither the Supreme Court of the United States nor any other Wisconsin authority has addressed this issue. This Court finds the determination of the Seventh

Circuit that the issue of transgenderism has not been applied to Title IX to be a persuasive one at this time.

d. The Actions of the District Do Not Pass the Test of Strict Scrutiny.

Strict scrutiny requires that a "statute must be narrowly tailored to advance a compelling state interest" and it "is an exacting standard, and it is the rare case in which a law survives it." *State v. Roundtree*, 2021 WI 1, ¶27, 395 Wis. 2d 94, 952 N.W.2d 765 (internal citations omitted); *Glucksberg*, 521 U.S. at 721.

Defendant's argue that their actions would survive this because they were narrowly tailored to support a "vulnerable population of students" while also "complying with state and federal laws and guidance for the treatment of transgender and gender non-conforming students." (Dkt. 88, p. 16). They rely on a federal district court case from Maryland to support this where the court there found that the school district did not need to tell parents if their kids went with different names/pronouns. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 2022 U.S. Dist. LEXIS 149021 (D. Md. Aug. 18, 2022).

However, there the court found the fundamental right to be whether parents had a right "to be promptly informed of their child's gender identity." *John & Jane Parents 1*, at *20. The court also focused on the fact that parents do not have a right to direct their child's education. *Id*., at *25. That court viewed the case as closer to one's where curriculum was challenged. *Id.*, at 33.

The Maryland court did not consider the medical implications of such actions in the same way as they are presented before this Court. Further, federal district courts are only persuasive to this Court, and this is coming from one that is not even within this Court's federal circuit.

Kettle Moraine's reliance on attempting to comply with state and federal laws as well as guidance is also unavailing because there is no definitive guidance on this issue from relevant jurisdictions and the federal guidance pertaining to Title IX is, at best, an unsettled question.

Plaintiffs suggest that the District's actions are not narrowly tailored because there are not the necessary procedural protections in place that are necessary to override a parent's choice of how to medically treat their child. This is required as seen in *Michels* were the parent's decision was only overridden after introducing "clear and convincing" evidence. *Id.*, 2019 WI 57 at ¶37. Perhaps the District could introduce clear and convincing evidence in order to supplant a parent's medical judgment, but they certainly cannot do so on a whim in the manner that they did, and they have put forth no evidence – let alone clear and convincing evidence in this case. As Plaintiffs correctly point out, even in cases where Wisconsin's Child Protective Services are involved there is still a right to proper procedural fairness before a parent is deprived of their child within Wis. Stat. §§ 48.13; 48.27; 48.30. (Dkt. 74, p. 34).

II. There Is an Unwritten Policy in Place by the District and as Such P.W. and S.W. Have Standing.

Finally, Defendants seek to avoid the serious issues in this case by claiming that Kettle Moraine does not have a policy on how to handle transgender issues such as are raised in this case. To be clear, many school districts have grappled with this controversial issue in the way that parents and voters expect – promulgate a policy, provide for public input, and then adopt or reject the policy through a vote of the people's representatives on the school board. Unfortunately, in this case, Kettle Moraine chose a different path.

While the actions the School District has already taken violated the rights of the B.F. and T.F., if there is no set policy in place, can the second set of plaintiffs, P.W. and S.W., claim a sufficient enough injury to sustain this case? This Court answers yes.

The requirements for what count as justiciable controversies are statutory in nature. *See Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶35, 244 Wis. 2d 333, 627 N.W.2d 866; *see also* Wis. Stat. §§ 806.04 and 813.01.

Defendants also discuss the alleged hypothetical nature of the potential injury to P.W. and S.W. It is true that in Wisconsin a plaintiff does to show that there is a requirement that an injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Fox. v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 525, 334 N.W.2d 532, 537 (1983) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). In *Fox,* the plaintiff did not have standing because his claims rested on a series of "increasingly unlikely events actually occur[ing]." 112 Wis. 2d at 529.

Looking at the events in *Fox* shows a much more abstract fact pattern and reasoning to reach an injury than what the Plaintiffs suggests could take place here. In *Fox*, the district attorney sought to stop a prison being built in Portage, Wisconsin out of the fear that it may detrimentally affect prisoners' mental health, which may cause a higher rate of recidivism, which may increase crime and welfare costs in Milwaukee, Wisconsin, which may make his job harder and injure him as a district attorney. *Fox*, 112 Wis. 2d at 529.

That fact pattern is a much broader and hypothetical one than that of P.W. and S.W.'s children developing questions about their gender identity and asking the School District to refer to them by new pronouns and the School District obliging them against the request of the parents, or even simply never informing the parents.

The Plaintiffs expert affidavits are undisputed for purposes of summary judgment. *See* Wis. Stat. § 802.08(3); *Clauder*, 209 Wis. at 684. These experts speak to how fast this type of change in a child can come about to the point where it may be "out of the blue" or "come as a surprise to others" such as parents, family members, or friends. (Dkt. 78, p. 71, ¶196); (Dkt. 77, p. 6, ¶11). Indeed, even in this present case it is undisputed that A.F. began experiencing this change in her belief regarding her gender identity in December of 2020 without prior indication, shocking both of her parents. (Dkt. 79, p. 1, ¶¶2-3). P.W. and S.W. do have an imminent threat because if their children decide tomorrow to change their gender identity the School District may go along with that at the potential detriment of the child's health because that does not necessarily mean the parent's will also agree with the child's decision to switch pronouns and such split affirmations are psychologically unhealthy to a child. (Dkt. 78, ¶¶ 200-201); (Dkt. 77, ¶¶ 74-76).

Plaintiffs rely on *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) to support the proposition that a single decision can in effect create a policy. (Dkt. 89, p. 8). There, the Supreme Court handled questions regarding municipalities that "even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur*, 475 U.S. at 480 (citing *Owen v. City of Independence*, 445 U.S. 622 (1980)). The Court further wrote that single officials with final policymaking authority can create a policy and if an official has such authority is a question of state law. *Id.*, 475 U.S. at 483. School districts are "an arm of the city government" and thus subject to restrictions that municipalities are as they are "not a separate governmental unit." *State ex rel. West Allis v. Dieringer*, 275 Wis. 2d 208, 222, 81 N.W.2d 533, 541 (1957); *see also Greenfield v. West Milwaukee*, 272 Wis. 215, 75 N.W.2d 424 (1956)

(explaining that a statute splitting assets and liabilities amongst municipalities included school districts in the definition of municipality).

Here, Pat Deklotz, the superintendent or School's District administrator, *Wis. Stat. §* 115.001(8), acted on this issue after discussing it with the school board. (Dkt. 73, pp. 3-4, ¶¶1-2). District administrators have rule-making authority if they act with the consent of the school board. *Wis. Stat. §* 120.13(1)(b)1.

Rather than doing what the voters have elected them to do, the Kettle Moraine School Board abrogated their responsibility to either pass judgment on a policy regarding these serious issues or to affirm the actions of their employee, the superintendent. Instead, the School District has hidden behind claims of no parental right or unfounded Title IX issues rather than give parent's in their district what they deserve – clear guidance on how the district intends to handle these controversial issues. By failing to act, the District has implemented a policy, by the actions of their employee, which implicates the rights of P.W. and S.W. in the decision-making authority of their children. The injury that they may suffer is not far too attenuated so as to make the injury "hypothetical." As mentioned by the expert affidavits, and as seen through A.F., this is an issue that can arise seemingly out of nowhere and the School District has already shown by their actions that their policy is a willingness to go against parental wishes when handling the medical treatment of gender dysphoria in minors through affirming them by social transition.

CONCLUSION

This Court has before it what modern society deems a controversial issue – transgenderism involving minors within our schools. Clearly, the law on this issue is still developing across the country and remaining largely unsettled. However, this particular case is not about that broad controversial issue. This particular case is simply whether a school district can supplant a parent's right to control the healthcare and medical decisions for their children.

The well established case law in that regard is clear – Kettle Moraine can not. The School District abrogated the parental rights of B.F. and T.F. on how to medically treat A.F. when the district decided to socially affirm A.F. at school despite B.F. and T.F. requesting it does not. Through its policy of disregarding parental wishes on a medical or health related decision and with how fast questioning ones gender can arise, P.W. and S.W. are at real risk of being harmed by the current School District policy.

The current policy of handling these issues on a case-by-case basis without either notifying the parents or by disregarding the parents wishes is not permissible and violates fundamental parental rights.

IT IS HEREBY ORDERED,

1) Defendant's Motion for Summary Judgment is DENIED.
2) Plaintiff's Motion for Summary Judgment is GRANTED.
3) Kettle Moraine School District's policy to enable and affirm a minor student's transition to a different gender identity at school without parental consent violates parents' constitutional right to determine the appropriate medical and healthcare for their children.
4) Kettle Moraine School District's policy violated T.F. and B.F. constitutional rights as parents to determine the appropriate medical and healthcare for their children.
5) Kettle Moraine School District is enjoined from allowing or requiring staff to refer to students using a name or pronouns at odds with the student's biological sex, while at school, without express parental consent.