APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP2205 Cir. Ct. No. 2016JV38

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN THE INTEREST OF C. G., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

C. G.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.[1]

[1] This appeal was converted from a one-judge appeal to a three-judge appeal by the May 11, 2020 order of the Chief Judge of the Court of Appeals. *See* WIS. STAT. § 752.31(3); WIS. STAT. RULE 809.41(3) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

¶1 SEIDL, J. C.G. ("Ella") appeals an order denying her postdispositional motion to stay her juvenile sex offender registration under WIS. STAT. § 301.45. WISCONSIN STAT. § 301.45(2)(a) mandates that the Department of Corrections (DOC) maintain a registry of all persons required to register as sex offenders. For each offender, the registry must include "[t]he person's name, including any aliases used by the person." Sec. 301.45(2)(a)1. WISCONSIN STAT. § 301.47(2)(a)-(b), in turn, provides that a registered sex offender may not "[c]hange his or her name" or "[i]dentify himself or herself by a name unless the name is one by which the person is identified with the [DOC]."

¶2 Ella contends the circuit court erroneously exercised its discretion by denying the stay. In addition, Ella contends that, as applied to her, requiring her to register as a sex offender violates her First Amendment rights because the statute's prohibition against legally changing her name restricts her right to self-expression as being a female. She further contends that because the prohibition is a content based restriction, we must apply strict scrutiny. By applying strict scrutiny, Ella asserts that her right to self-expression outweighs any government interest in limiting her use of another legal name. Finally, Ella contends that requiring her to register as a sex offender constitutes cruel and unusual punishment, thereby violating her Eighth Amendment rights.

¶3 We conclude that the circuit court did not erroneously exercise its discretion when it denied Ella's motion to stay the sex offender registration requirement. The sex offender registry statute's prohibition against Ella changing her legal name does not restrict her right to self-expression and, thus, does not implicate the First Amendment. Even if we were to determine that the First Amendment is implicated, we conclude the statute is content neutral, requiring the application of intermediate scrutiny. Applying that level of scrutiny, we conclude

the registry restriction on Ella's changing her name is constitutional as it furthers an important government interest in an incidentally restrictive manner. We further determine that we are bound by our supreme court's decision in ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, that no Eighth Amendment violation occurs based upon the registry's prohibition against name changes. We therefore affirm.

BACKGROUND

¶4 On May 10, 2016, the Shawano Police Department received a complaint that a fifteen-year-old male with disabilities, Alan, had been held down by Ella and Mandy[2] while at Mandy's house, so that Ella could perform oral sex on him. At the time of her appeal, Ella was nineteen years old, but she was fifteen at the time of the incident. Ella sat on Alan's legs while Mandy held down his arms. Alan was five feet, ten inches tall and weighed 110 pounds. A face sheet from the DOC stated that Ella was six feet, five inches tall and weighed 345 pounds. Alan is on the autism spectrum and is blind in his left eye. When Alan tried to yell for help from Mandy's parents, Mandy placed one of her hands over Alan's mouth. When Ella stopped the assault, Alan pulled up his underwear and pants and then left Mandy's house. Alan did not report the incident to anyone because he was embarrassed and Ella and Mandy had told him not to say anything. Alan's parents later learned of the incident after they searched his cell phone and

[2] This opinion refers to the three juveniles as Ella, Alan, and Mandy. Pursuant to WIS. STAT. RULE 809.81(8), we use pseudonyms when referring to the juveniles in this confidential matter. Ella, a transgender female, prefers that we reference her using feminine pronouns, and we follow her preference.

discovered Facebook messages indicating that Alan had been held down while a person performed oral sex on him.

¶5 After a police investigation, the State filed a delinquency petition against Ella, alleging one count of sexual assault of a child under sixteen years of age, as a party to a crime, contrary to WIS. STAT. § 948.02(2), and one count of disorderly conduct, as a party to a crime, contrary to WIS. STAT. § 947.01(1). Ella pled no contest to the sexual assault count of the petition, and the disorderly conduct count was dismissed and read in. Ella was adjudicated delinquent, and the circuit court entered a dispositional order placing her at Lincoln Hills School for six to ten months. The court's dispositional order described Ella's act as a "forceful delinquent act to a child" and stated that "[Ella] needs to have intensive treatment to help h[er] develop a better thought process to where [s]he can improve h[er] decision making skills and reduce h[er] impulsive behaviors."

¶6 Ella's attorney moved to stay the sex offender registry requirement under WIS. STAT. § 301.45. Following a hearing on Ella's motion, the circuit court denied the requested stay. The court found that: (1) there was a ten-month age difference between Alan and Ella; (2) Alan and Ella's relationship was that of friendship, not romance; (3) there was no indication that Alan suffered physical bodily harm; (4) Alan was on the autism spectrum and was evaluated to be functioning at a sixth-grade level as a freshman in high school; (5) it was a forcible situation; (6) the act was terrifying; and (7) Ella was at a "high risk" to reoffend.[3] The latter finding was made despite Ella presenting expert testimony

[3] At Ella's initial motion hearing to stay the sex offender reporting requirements, the court found Ella to be at a "high risk" to reoffend. However, in the circuit court's written decision on Ella's postdispositional motion to stay the sex offender registration requirements based on new information, the court found that there was a risk to reoffend, albeit a low risk.

by a psychotherapist, Dr. Mark Reich, opining that Ella would be in a "low risk category of reoffense."

¶7 Ella subsequently filed a motion to change placement claiming that Lincoln Hills was an unsafe placement for her and that she exhibited good behavior and progress in treatment. Ella stated that another youth had punched her in the head. Lincoln Hills' staff suggested that Ella was partly to blame for that incident because she told other youths that they were cute, which "could get other youth kind of worked up a little bit." Additionally, a room search revealed that Ella had written a number of letters inappropriately referencing teachers. Ella nonetheless successfully completed Lincoln Hills' juvenile cognitive intervention program. The circuit court denied Ella's motion for a change of placement, finding that her placement at Lincoln Hills remained appropriate.

¶8 Ella was also the victim of a second unprovoked assault by another youth at Lincoln Hills causing a significant head wound requiring hospital treatment. Following this assault, the DOC transferred Ella from Lincoln Hills to the Mendota Juvenile Treatment Center (MJTC) in order to better serve Ella's mental health needs and for her safety. Ella was sent to MJTC, in part, because she was transitioning as a transgender youth from a male to a female identity, and she was a target for aggression from other youths at Lincoln Hills.

¶9 Ella adjusted well at MJTC, although she was sanctioned twice for making disrespectful comments to staff during her first week. She obtained near perfect scores in the behavioral program and maintained the highest privilege level throughout most of her stay. To determine if a special purpose evaluation was warranted, Dr. Michael Caldwell, an MJTC psychologist, conducted a WIS. STAT.

ch. 980 evaluation, which revealed Ella to be in a relatively low-risk category for reoffense.

¶10 Ella's dispositional order terminated, and she filed a postdispositional motion seeking to stay her sex offender registration, and to have the circuit court declare Wisconsin's juvenile sex offender registry provisions unconstitutional. Ella also filed a supplemental postdispositional motion, attaching a psychosexual evaluation completed by Dr. Nick Yackovich, Jr., a psychologist who specializes in sex offender treatment. Yackovich conducted a risk assessment, opining thereafter that Ella's predicate offense likely was the result of "immature decision-making and poor boundary setting, but does not evidence criminogenic factors or a deviant sexual interest." He also opined that the public would not be protected by Ella's registration as a sex offender and that there was a possibility that registration would harm Ella. The circuit court issued a written decision denying Ella's motions. This appeal follows.

DISCUSSION

I. Stay of Sex Offender Registration

¶11 Ella first argues that the circuit court erroneously exercised its discretion by refusing to stay the disposition requiring her to register as a sex offender. *See* ***State v. Cesar G.***, 2004 WI 61, ¶40, 272 Wis. 2d 22, 682 N.W.2d 1 (holding that "the sex offender registration requirement established in WIS. STAT. § 938.34(15m) is a disposition" and that a circuit court has the authority to stay that disposition). We review a circuit court's order denying such a stay for an erroneous exercise of discretion. ***Id.***, ¶42. A discretionary decision "will stand unless it can be said that no reasonable judge, acting on the same facts and

underlying law, could reach the same conclusion." ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

¶12 A reviewing court may not substitute its discretion for that of the circuit court. ***State v. Rhodes***, 2011 WI 73, ¶26, 336 Wis. 2d 64, 799 N.W.2d 850. When the circuit court sets forth inadequate reasons for its decision, however, we will independently review the record to determine whether the court properly exercised its discretion and whether the facts provide support for its decision. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493.

¶13 In considering whether to stay the sex offender registration requirement for a delinquent juvenile, a circuit court should consider the factors enumerated in WIS. STAT. §§ 938.34(15m)(c) and 301.45(1m)(e). *See* ***Cesar G.***, 272 Wis. 2d 22, ¶52. Those factors include: (1) the seriousness of the offense; (2) the ages of the juvenile and the victim at the time of the violation; (3) the relationship between the juvenile and the victim; (4) whether the violation resulted in bodily harm; (5) whether the victim suffered from a mental illness or deficiency that rendered him or her incapable of understanding or evaluating the consequences of his or her actions; (6) the probability that the juvenile will commit other violations in the future; and (7) any other factors the court determines may be relevant. ***Id.***, ¶50. Importantly, the court has discretion as to which factors to consider and how to weigh them. *See* ***State v. Jeremy P.***, 2005 WI App 13, ¶10, 278 Wis. 2d 366, 692 N.W.2d 311 (2004); *see also* §§ 301.45(1m)(e), 938.34(15m)(c). The juvenile bears the burden to prove by clear and convincing evidence that, when considering the factors, a stay should be granted in his or her case. ***Cesar G.***, 272 Wis. 2d 22, ¶51.

¶14 Ella first contends the circuit court erred as a matter of law when it concluded that she had to prove that she posed "no risk," rather than a low risk, to reoffend. She argues the "no risk" standard is not the law and is impossible to prove.

¶15 Ella also contends the circuit court erred in finding that she would not face any added harm from the sex offender registration, arguing that this view constitutes a fundamental misunderstanding about the LGBTQ[4] population. She asserts that requiring her to use her male name when she identifies as female "outs her."[5]

¶16 Ella further asserts that the circuit court placed too much emphasis on the seriousness of the offense, and it failed to weigh the other ***Cesar G.*** factors as applied to her individually. In addition, Ella contends the court relied on incorrect facts by stating that she had been inconsistent in reporting information to her treatment providers. Specifically, Ella contends the court noted that she reported to Dr. Reich that she had never been involved in "this kind" of behavior before, but Ella failed to note that she later told an individual at Lincoln Hills that she had been sexually active with a boyfriend. She also claims the court relied on incorrect facts by noting she had a "history of being abusive toward[] teachers, at

[4] "LGBTQ" stands for lesbian, gay, bisexual, transgender, and queer. Gay & Lesbian Alliance Against Defamation, *GLAAD Media Reference Guide* (10th ed. Oct. 2016).

[5] Ella contends that having a legal name that does not match the gender presented indicates to the public that she is transgender rather than cisgender. She refers to this as "outing," which is the act of publicly revealing another person's sexual orientation or gender identity without that person's consent. Gay & Lesbian Alliance Against Defamation, *GLAAD Media Reference Guide* (10th ed. Oct. 2016).

least verbally and perhaps otherwise," and that it ignored the expert risk assessment information.

¶17 With regard to Ella's risk to reoffend, while Ella argues the circuit court imposed an erroneous and impossible "no risk" standard instead of weighing "the probability that the juvenile will reoffend, not the mere possibility of re-offense," we cannot discern that the court actually employed such a legal standard. The court found that:

> A risk remains to reoffend; reduced, but nonetheless a risk. That level of risk and the benefits to the protection of the community by complying with the [sex offender registry] need[] to be balanced against the harm felt by the individual as a consequence of registering.
>
> ....
>
> The risk to reoffend exists in this case, albeit ... low. However, if such reoffen[s]e happens, the harm felt to the victims is very high.

It is clear from the above findings that the court did not use a "no risk" standard—i.e., the court did not determine Ella must prove she poses no risk of reoffending. Instead, the court considered that her risk, albeit low, was significant enough to warrant the need for further community protection through the sex offender registry. This was a proper exercise of the court's discretion.

¶18 Ella further argues the circuit court erroneously exercised its discretion by failing to consider the following evidence regarding her low risk of reoffense: (1) Ella successfully completed Lincoln Hills' two-part juvenile cognitive intervention program; (2) she was bullied because of her sexuality and was physically assaulted on two separate occasions; (3) Ella's case manager testified that she completed "[her] apology letter to h[er] victim and was making

'very good progress' toward[] her schooling"; (4) she successfully completed sex offender treatment at MJTC; and (5) MJTC psychologist Michael Caldwell conducted a WIS. STAT. ch. 980 evaluation and found Ella to be a low risk to reoffend.

¶19 The circuit court, however, did consider this evidence. For example, the court considered Dr. Caldwell's findings and Ella's completion of sex offender treatment as supporting her claim that she was a low risk to reoffend. The court nonetheless found that Ella did act inappropriately while at Lincoln Hills when she "attempted to kiss another student without that student's permission," and that this act evidenced her impulsiveness and created a concern that Ella would act out sexually in the future. The court agreed that there was a reduced risk of reoffense, but the court observed that the harm felt by the victims is very high if reoffense happens. The court properly noted that the "goal of juvenile rehabilitation needs to be balanced with the purposes of personal accountability and of public protection."

¶20 Ella additionally argues the circuit court erroneously "ignored" Dr. Reich's testimony and Dr. Caldwell's evaluation, both of which placed Ella in a relatively low-risk category for reoffense. However, as indicated by the court's findings set forth above, it is evident the court did not ignore but, in fact adopted, that testimony. In addition, to the extent it could be discerned that the court's risk conclusion was any different from that of the experts, a court acting as fact finder is not required to accept an expert's ultimate conclusion. *See* ***Sullivan v. Bautz,*** 2006 WI App 238, ¶18, 297 Wis. 2d 430, 724 N.W.2d 908.

¶21 The circuit court properly considered the seriousness of Ella's offense and its impact upon the victim when denying the request to stay the sex

offender registry requirement despite Ella's relatively low risk of reoffense. Although Alan did not suffer bodily harm, the assault was indeed very serious. The court noted that Alan was held down against his will and was prevented from yelling for help. The court further noted that Alan suffered from autism, was progressing slower than his peers in school, had emotional and learning problems in school, and was blind in one eye. Although Ella and Alan were ten months apart in age, Alan was in therapy all his life, and his situation became worse after the assault. Indeed, Alan's mother testified that the assault has affected the whole family. As to the seriousness of the offense, the court reasonably found that Ella's sexual assault of Alan was violent in nature.

¶22 Ella's sexual assault was also nonconsensual and arguably premeditated. Prior to the sexual assault occurring, Alan expressed to Ella and Mandy that he was not interested in this type of behavior. Facebook messages reveal that Ella asked Alan if he had ever received "head" before. Alan repeatedly told Ella that he did not want "head" from Ella. Additionally, Alan told Mandy that he did not want to get "head" from a "guy." Although Ella notes that she, Alan, and Mandy were friends, the messages support the circuit court's findings that "[Alan] didn't want to have this type of relationship." Alan was also a vulnerable victim. He is blind in his left eye, a high school freshman functioning at a sixth-grade level, and suffers from attention deficit disorder and autism spectrum disorder. As stated above, Alan was much smaller than Ella. All of these facts strongly support the court's finding regarding the seriousness of the offense.

¶23 In Ella's supplemental reply brief, she attempts to minimize the seriousness of her offense and the impact on Alan by asserting that: (1) the offense was a very short incident between three individuals in the same friend

group; (2) there was no violence or threat of violence; (3) it was Ella who stopped the encounter; (4) Alan did not report the incident; (5) Alan's parents did not note any changes in his behavior or attitude; (6) although Alan has autism with cognitive delays, he is still in mainstream schools with the ability to make friends; (7) Ella's physical description by the DOC was outdated; and (8) blindness is not a mental deficiency that rendered Alan incapable of understanding the consequences of his actions. Ella's arguments in this regard fail because we search the record for evidence that supports findings the circuit court made, not for findings it could have made but did not. *See* ***Noble v. Noble***, 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166. Here, the record amply supports the court's findings concerning the seriousness of the offense and its impact on Alan.

¶24 The circuit court also properly exercised its discretion in denying the stay by balancing the public's interest in having Ella register as a sex offender against the harm to Ella posed by such registration. The court found that although Ella may be stigmatized by having to register as a sex offender, such stigma is undoubtedly experienced by anyone who has to register as a sex offender. And while Ella argues she will be harmed by remaining on the sex offender registry, she has presented no evidence of actual harm to date in support of that claim. The court considered that the purposes underlying the registration requirement are to protect the public and to assist law enforcement. The record supports the court's determination that the public's interest in law enforcement's effective use of the registry outweighs any harm to Ella caused by the registration requirement.

¶25 In all, the record contains ample evidence supporting the circuit court's discretionary decision to deny Ella's motion to stay the sex offender registration requirement. Based on the evidence presented, the court could reasonably determine that Ella failed to show by clear and convincing evidence

that a stay should be granted. We discern no discretionary error by the court as to its consideration and weighing of the evidence presented. *See* ***Jeremy P.***, 278 Wis. 2d 366, ¶10.

II. First Amendment Challenge

¶26 Ella argues that the name-change ban in WIS. STAT. § 301.47(2)(a)-(b) renders the sex offender registry statute unconstitutional, as applied to her, under the First Amendment[6] to the United States Constitution. An as-applied constitutional challenge "is a claim that a statute is unconstitutional as it relates to the facts of a particular case or to a particular party." ***State v. Pocian***, 2012 WI App 58, ¶6, 341 Wis. 2d 380, 814 N.W.2d 894. Whether a statute is unconstitutional as applied is a question of law that we review de novo. ***Dane Cnty. DHS v. J.R.***, 2020 WI App 5, ¶51, 390 Wis. 2d 326, 938 N.W.2d 614 (2019).

¶27 In order to determine whether the name-change ban in WIS. STAT. § 301.47 violates Ella's First Amendment rights, we must first determine whether the name-change ban regulates speech or expressive conduct. *See* ***State v. Baron***, 2009 WI 58, ¶14, 318 Wis. 2d 60, 769 N.W.2d 34. If neither speech nor expressive conduct is being regulated, we need not utilize a First Amendment analysis because the statute does not implicate the First Amendment. ***Id.*** "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be

[6] Section 1 of the Fourteenth Amendment to the United States Constitution incorporated the First Amendment, so that it applies to state government. *See* ***DiMa Corp. v. Town of Hallie***, 185 F.3d 823, 826 (7th Cir. 1999).

to create a rule that all conduct is presumptively expressive." ***Clark v. Community for Creative Non-Violence***, 468 U.S. 288, 293 n.5 (1984). If we determine that speech or expressive conduct is being regulated, then we must decide whether the statute's regulation is content based or content neutral. *See* ***Baron***, 318 Wis. 2d 60, ¶14. As we further discuss below, a content based statute must survive strict scrutiny, whereas a content neutral statute must only survive intermediate scrutiny. ***Id.***

¶28 Ella argues that the name-change ban in the sex offender registry statute regulates her right to express female identity and is therefore an unconstitutional burden on her free speech. Ella contends that having a name consistent with her gender identity gives her "dignity and autonomy that otherwise does not exist with her birth name." She further contends that her ability to informally identify with a female-sounding name—as long as she notifies the registry that she uses such a name—is insufficient to protect her right to formally identify in that manner with a name other than her current legal name. This inability, according to Ella, prohibits her from truly identifying as a woman, and it also forces her to "out herself as a male anytime she is required to present her legal name."

¶29 In response, the State argues the statutory provision does not prohibit Ella from using her preferred name to express her gender identity.[7] The State

[7] The State also argues that Ella's claim that WIS. STAT. § 301.47(2) violates her First Amendment right to free speech is not yet ripe because the "claim is based on the possibility that she might someday unsuccessfully try to change her name." A claim is not ripe if it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all." ***Thomas v. Union Carbide Agric. Prods. Co.***, 473 U.S. 568, 580-81 (1985). However, Ella is currently required to register as a sex offender under WIS. STAT. § 301.45. Because she is required to register as a sex offender, she may not legally change her name at this time without punishment and we therefore reject the State's ripeness argument.

asserts that Ella can use whatever name she chooses, as long as that name or alias is included in the sex offender registry. The State further contends that while WIS. STAT. § 301.47 prohibits Ella from legally changing her name, it recognizes her right to identify herself by her preferred name—again, subject only to her including that name in the sex offender registry.

¶30 We agree with the State's argument. Ella's wish to express herself with her desired name does not mean that the ban on legally changing her name implicates the First Amendment. This court rejected a similar argument in ***Williams v. Racine County Circuit Court***, 197 Wis. 2d 841, 541 N.W.2d 514 (Ct. App. 1995). There, the circuit court denied a prisoner's petition to change his name pursuant to WIS. STAT. § 786.36. ***Williams***, 197 Wis. 2d at 846. On appeal, the prisoner argued that denying his requested name change violated his protected right to religious freedom and his First Amendment rights. ***Id.*** We rejected that argument, reasoning that the prisoner had "no positive right to a name change." ***Id.***

¶31 Additionally, a federal district court has recently held that a transgender plaintiff failed to meet her burden of showing that Wisconsin's name-change ban for registered sex offenders implicated her right to free speech. *See* ***Krebs v. Graveley***, No. 19-cv-634-jps, 2020 WL 1479189, at *2 (E.D. Wis. Mar. 26, 2020), *appeal filed.* "Without this foundation," the court noted, the plaintiff could not "present a viable First Amendment claim at all, irrespective of the level of scrutiny to be applied." ***Id.*** The court declined to apply even "rational basis review" because "[w]ithout her freedom of speech being implicated in the matter," the plaintiff "present[ed] no claim at all." ***Id.*** We agree with, and adopt, the foregoing analysis.

¶32 Ella has therefore failed to meet her burden to prove that her First Amendment rights are implicated by the sex offender registry statute, and she has failed to rebut the presumption of constitutionality. Ella has the right to use whatever name she chooses, provided she includes it in the sex offender registry. *See* WIS. STAT. § 301.47(2)(b). Her freedom of expression is therefore not implicated. Neither the fact that she may feel uncomfortable when having to use her legal name, nor that she feels "outed" when she does use her legal name, renders the statute unconstitutional as applied to her. Ella is capable of expressing herself and identifying herself consistent with her gender identity. Because the name-change ban in WIS. STAT. § 301.47 does not restrict Ella's ability to express herself, we need not utilize a First Amendment analysis because the statute does not implicate the First Amendment. *See* ***Baron***, 318 Wis. 2d 60, ¶14.

¶33 Nonetheless, if we engage in a First Amendment analysis, we conclude that the name-change ban in WIS. STAT. § 301.47(2) is content neutral, and, thus, it does not trigger a strict-scrutiny analysis. Ella contends strict scrutiny applies because the registry imposes a content based restriction on her, such that the State must show, beyond a reasonable doubt, that the statute is narrowly tailored to serve a compelling state interest. *See* ***R.A.V. v. St. Paul***, 505 U.S. 377, 395 (1992). Ella asserts that the "violation of her right to express her true identity is content based because it restricts her ability to express her transgender identity while not doing the same for registrants who are cisgender." She claims the "communication at issue is content based because it conveys gender identity, and the registry prevents transgender individuals from communicating" their preferred gender identity "while not prohibiting cisgender people from doing so."

¶34 Content based laws—i.e., those that target speech based on its communicative content—are presumptively unconstitutional and may be justified

only if the government proves that they are narrowly tailored to serve compelling state interests. ***Reed v. Town of Gilbert, Ariz.***, 576 U.S. 155, 163 (2015) (citations omitted). Government regulation of speech is content based if a law applies to particular speech because of the topic discussed, or the idea or message expressed. ***Id.***

¶35 Ella's argument that the name-change ban is content based misses the mark. The name-change ban does not target speech based on its communicative content. Specifically, it does not apply to particular speech because of the topic discussed, or the idea or message being conveyed. *See* ***id.*** On its face, the name-change ban only requires an individual to register using his or her existing legal name and any other name the individual wishes to use, and it prohibits an individual from changing his or her legal name. *See* WIS. STAT. § 301.47(2)(a)-(b). The statute is content neutral because it does not determine such matters as what name a person must use—or what must be contained in a name—and does not treat anyone differently based on their name. The statute might be content based if, for example, it required a male to have a traditionally male-sounding name (e.g., William, John) and prohibited males from legally using "mixed-gender" names (e.g., Payton, Connie) or traditionally female-sounding names (e.g., Suzy, Mary). But, of course, the statute does not do so. The statute merely prohibits an individual from changing his or her current legal name, regardless of the message it conveys. Even if the name-change ban might disproportionately affect transgender persons, the statute is still content neutral. "[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." ***McCullen v. Coakley***, 573 U.S. 464, 480 (2014).

¶36 As a content neutral statute, the name-change ban would at most be subject to intermediate scrutiny. *See* ***Baron***, 318 Wis. 2d 60, ¶14. A content neutral restriction on speech is lawful under intermediate scrutiny if: (1) it furthers an important or substantial government interest; (2) the governmental interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. ***Turner Broad. Sys., Inc. v. F.C.C.***, 512 U.S. 622, 662 (1994). The regulation does not need to be the least speech-restrictive means of advancing the government's interest in order to satisfy this standard. ***Id.*** A regulation is sufficiently narrow if the governmental interest "would be achieved less effectively absent the regulation." ***Id.*** (citation omitted).

¶37 Wisconsin's statutory name-change ban for sex offender registrants easily passes intermediate scrutiny. Under the first prong of the ***Turner*** test, the name-change ban furthers an important or substantial government interest—specifically, to "protect the public and assist law enforcement." ***Bollig***, 232 Wis. 2d 561, ¶21. Allowing changes to a registrant's legal name would frustrate the ability of the public and law enforcement to quickly identify sex offenders and their locations.

¶38 Under the second prong of the ***Turner*** test, the governmental interest is unrelated to the suppression of free expression. As explained above, the name-change ban is content neutral and is justified without reference to the allegedly regulated "speech."

¶39 As to the third prong of the ***Turner*** test, the name-change ban is sufficiently tailored to achieve the State's important interest in efficiently tracking registered sex offenders. As noted above, the statute specifically enables Ella to

express herself by using her desired name; she simply may not change her legal name. The name-change ban is sufficiently narrow in scope because it does "not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" ***Turner***, 512 U.S. at 662 (citation omitted).

¶40 In summary, the name-change ban in WIS. STAT. § 301.47 does not implicate the First Amendment because the statute does not prohibit Ella from using whatever name she chooses. And, even if we were to conclude the ban implicated the First Amendment, strict scrutiny does not apply because the ban is content neutral. The ban satisfies intermediate scrutiny because it is sufficiently tailored to the State's important interest in protecting the public and aiding law enforcement.

III. Eighth Amendment Challenge

¶41 Ella also raises an as-applied challenge to the sex offender registry under the Eighth Amendment[8] to the United States Constitution, which prohibits states from imposing "cruel and unusual punishments." *See* U.S. CONST. amend. VIII. The Wisconsin Constitution contains a similar provision, which is interpreted identically to the federal provision. ***State v. Ninham***, 2011 WI 33, ¶45, 333 Wis. 2d 335, 797 N.W.2d 451.

¶42 Ella's argument regarding the Eighth Amendment fails because our supreme court has held that Wisconsin's sex offender registration requirement does not constitute punishment at all. *See* ***Bollig***, 232 Wis. 2d 561, ¶27. In ***Bollig***,

[8] The Eighth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment. *See* ***Robinson v. California***, 370 U.S. 660, 666-67 (1962).

the court held that "Wisconsin's registration statute does not evince the intent to punish sex offenders, but rather it reflects the intent to protect the public and assist law enforcement." ***Id.***, ¶21. ***Bollig*** is binding and requires that we conclude the sex offender registry is not cruel or unusual punishment. We therefore reject Ella's claim in that regard.

¶43 While Ella concedes that, under ***Bollig***, the purpose of the sex offender registry is civil and nonpunitive, she nevertheless argues that its effect is punitive as applied to her, given her transgender identity. To determine if a statute is punitive, we apply the "'intent-effects' test." ***State v. Williams***, 2018 WI 59, ¶21, 381 Wis. 2d 661, 912 N.W.2d 373. If there is a finding that the intent was to impose punishment, the law is considered punitive and the inquiry stops there. ***City of S. Milwaukee v. Kester***, 2013 WI App 50, ¶22, 347 Wis. 2d 334, 830 N.W.2d 710. If the intent was to impose a civil and nonpunitive regulatory scheme, the court must next determine whether the effects of the sanctions imposed by the law are so punitive as to render them criminal. ***Id.***

¶44 Our supreme court found in ***Bollig*** that the intent of the sex offender registry statute is not to impose punishment but, rather, to create a civil regulatory scheme to protect the public and assist law enforcement. Moreover, the effects of the statute, as a whole, are not so punitive as to render it criminal in nature. In asserting an as-applied challenge, Ella is attempting to relitigate the issue of whether mandatory sex offender registration is punitive due to its effects as applied to her. Ella cannot circumvent ***Bollig***'s holding simply by bringing an as-applied challenge. *See* ***Seling v. Young***, 531 U.S. 250, 263-65 (2001).

¶45 In ***Young***, an inmate brought an as-applied challenge to Washington State's Community Protection Act of 1990, asserting the Act was punitive as

applied to him in violation of the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution. ***Id.*** at 253-54. The Washington Supreme Court, however, had already concluded that the Act was civil in nature, rather than punitive. ***Id.*** at 253. The United States Supreme Court held that Young could not "obtain release through an 'as-applied' challenge to the Washington Act on double jeopardy and *ex post facto* grounds." ***Id.*** at 263. The Court reasoned "that [allowing] an 'as-applied' analysis would prove unworkable. Such an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and *Ex Post Facto* Clauses." ***Id.*** The Court further reasoned that "[p]ermitting [Young's] as-applied challenge would invite an end run around the Washington Supreme Court's decision that the Act is civil in circumstances where a direct attack on that decision is not before this Court." ***Id.*** at 263-64.

¶46 Similarly, in the present case, we cannot now allow Ella to relitigate the issue as to whether the effects of the sex offender registry statute are so punitive as to be a criminal penalty in her case. To do so would contravene ***Bollig***, as we would have to reconsider the same factors our supreme court did in that case and arrive at a different conclusion. We would be reweighing whether the protection of the public and assistance to law enforcement are not as important as a transgender individual's right to expression. We further note that the impact of the latter consideration does not rise to the level a criminal sanction, particularly where, under the statute, Ella can still express her identity without legally changing her name.

¶47 In summary, ***Bollig*** prevents Ella's as-applied challenge. The Wisconsin sex offender registration requirement is not punitive. Ella may not

circumvent ***Bollig*** by bringing an as-applied challenge. *See* ***Young***, 531 U.S. at 263-65.

CONCLUSION

¶48 We reject Ella's argument that the circuit court erroneously exercised its discretion when it denied Ella's postdispositional motion to stay the requirement that she register as a sex offender. We further conclude that the statutory name-change ban does not implicate the First Amendment right to free speech, and even if it does, it is content neutral and does not trigger strict scrutiny. The ban survives intermediate scrutiny. Finally, precedent from our supreme court prevents Ella's Eighth Amendment as-applied challenge. Accordingly, we affirm.

By the Court.—Orders affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT SHAWANO COUNTY

In the Interest of C J G

Date of Birth: 05-24-2000

Dispositional Order - Delinquent

AMENDED

Case No. 2016JV000038

FILED
MAY 19 2017
REG. IN PROBATE
SHAWANO & MENOMINEE COUNTIES

A petition was filed with the court.
This dispositional hearing was held on March 16, 2017, which is the effective date of this order.

THE COURT FINDS:

1. The juvenile is delinquent because:

Ct	Description	Wisconsin Statutes	Plea	Date of Offense
1	2nd Degree Sexual Assault of Child [939.05 - PTAC, as a Party to a Crime]	948.02(2)	No Contest	01-01-2016

2. The juvenile committed an act that
- [X] A. would be punishable by a sentence of six (6) months or more if committed by an adult, the juvenile is a danger to the public and in need of restrictive custodial treatment, and placement in the serious juvenile offender program is not appropriate.
- [ ] B. would be a misdemeanor if committed by an adult and the juvenile has not successfully completed a Teen Court program in the two (2) years before the date of the violation.
- [ ] C. would be subject to a penalty enhancement, if committed by an adult.
- [ ] D. made the juvenile eligible for placement in the serious juvenile offender program.

[X] 3. The juvenile is placed out of the home.

A. Placement in the home at this time [X] is [ ] is not contrary to the welfare of the juvenile and the community. C engaged in a forceful delinquent act to a child. He jeopardized and victimized this child. C needs to have intensive treatment to help him develop a better thought process to where he can improve his decision making skills and reduce his impulsive behaviors.

B. Reasonable efforts to prevent removal were: *[Complete one of the following]*
- [X] made by the department or agency responsible for providing services.
  The Department of Human Services has made reasonable efforts to avoid the placement by beginning the juvenile court process to hold C accountable for his actions, protect the community and starting to rehabilitate C C participated sporadically in counseling services through Catalpa Health. As of 09/26/2016, C participated in five sessions over a nine month period. Due to the nature and forceful delinquent act, C needs to be temporarily placed at Lincoln Hills where he can receive intensive services to help him improve his thinking and decision making skills.
- [ ] made by the department or agency responsible for providing services, although an emergency situation resulted in immediate removal of the juvenile from the home.
- [ ] required, but the department or agency responsible for providing services failed to make reasonable efforts.

C. Reasonable efforts to place the juvenile in a placement that enables the sibling group to remain together were
- [ ] made.
- [X] not required because the juvenile does not have siblings in out-of-home care.
- [ ] not required because it would be contrary to the safety or well being of the juvenile or any of the siblings.

D. Permanency plan was
- [X] not filed.
- [ ] filed and reasonable efforts to achieve the permanency goal of the permanency plan, including through an out-of-state placement if appropriate, were *[Complete one of the following only if a permanency plan was filed]*
  - [ ] made by the department or agency responsible for providing services.
  - [ ] not made by the department or agency responsible for providing services.

[ ] E. The [ ] mother [ ] father was present and was asked to provide the names and other identifying information of three adult relatives of the juvenile or other adult individuals whose home the parent requests the court to consider as placements for the juvenile, unless that information was previously provided.

4. As to the department or agency recommendation:
   - [X] A. The placement location recommended by the department or agency is adopted.
   - OR
   - [ ] B. After giving bona fide consideration to the recommendations of the department or agency and all parties, the placement location recommended is not adopted.

- [ ] 5. The rehabilitation and treatment/care of the juvenile cannot be accomplished by means of voluntary consent of the parent(s)/guardian, and a transfer of legal custody is necessary.

- [ ] 6. Restitution.
  - [ ] A. The juvenile alone is financially able to pay restitution of $ _____ and/or a forfeiture of $ _____.
  - [ ] B. The juvenile is physically able to perform services for the victim [Under age 14, 40 hour limit] and the victim agrees to accept such services.
  - [ ] C. The custodial parent(s) is financially able to pay reasonable restitution of $ _____ and/or a forfeiture of $ _____.

- [ ] 7. Other: _____

THE COURT ORDERS:

1. The juvenile is placed under court jurisdiction.

2. Placement

☐ In-home at _____

Expiration date of this order *[Not to exceed 1 year]* _____.

☒ Out-of-home at

Program	Begin Date	Length	Agency/Program	Comments
Placement		30DA	Dept of Human Services Secure detention	Imposed and stayed (parents are responsible for reimbursement of secure detention and transportation cost to the Shawano County Sheriff's Department
Placement			Dept of Human Services County child care institution	C. B is committed to the Wisconsin Department of Corrections for a period of 6 to 10 months or until 01-16-2018 at Lincoln Hills School. C will participate in the sex offender treatment program, or another program to be determined after reception. Upon completion of the program, youth is placed under the supervision of Shawano County for after care.

and into the placement and care responsibility of the department in the county where this order is issued, which has primary responsibility for providing services.

A. Expiration date of this order shall be the later of

- ☐ One year from the date of this order;
- ☐ The date the juvenile reaches his or her 18th birthday;
- ☐ The date the juvenile is granted a high school or high school equivalency diploma or the date the juvenile reaches his or her 19th birthday, whichever occurs first, if the juvenile is enrolled fulltime in a secondary school or vocational or technical equivalent and reasonably expected to complete the program prior to age 19;
- ☐ The date the juvenile is granted a high school or high school equivalency diploma or the date the juvenile reaches his or her 21st birthday, whichever occurs first, if ALL of the following apply:
  - The juvenile is a fulltime student in secondary school or vocational or technical equivalent.
  - An individualized education program is in effect for the juvenile.
  - The juvenile or guardian, on behalf of the juvenile, agrees to this order.
  - The juvenile is 17 years of age or older when this order is entered.

OR

☐ Expiration date of this order March 16, 2018.

☒ B. Juvenile Corrections.

Expiration date of this order [Not to exceed 2 years] January 16, 2018.

☐ C. Serious juvenile offender program.

Expiration date of this order [Not to exceed 5 years] _____.

☐ D. Type 2 residential care center for children and youth.

Expiration date of this order [Not to exceed 2 years] _____.

☐ 3. This is an out-of-home placement. The juvenile has one or more siblings in out-of-home care and the juvenile is not placed with all those siblings. The department or agency

- ☐ shall make reasonable efforts to provide frequent visitation or other ongoing interaction between the juvenile and any siblings.
- ☐ is not required to provide for frequent visitation or other ongoing interaction because it would be contrary to the safety or well being of the juvenile or any siblings.

☐ 4. This is an out-of-home placement and the department or agency shall conduct a diligent search in order to locate and provide notice as required by §938.355(2)(cm), Wis. Stats., to all adult relatives of the juvenile, including the three adult relatives provided by the parents under §938.335(6), Wis. Stats., no later than 30 days from the date of the juvenile's removal from the home, unless the search was previously conducted and notice provided.

☐ 5. This is an out-of-home placement. If a permanency plan has been prepared, filed and is consistent with this order, this order contains the plan. Otherwise, a permanency plan consistent with the court's order shall be filed no later than 60 days from the date of the juvenile's removal from the home and shall be made part of this order. If the recommended placement is to a juvenile correctional facility or secured residential care center and the court does not order that placement, then the permanency plan is due 60 days from the date of disposition.

☐ 6. Total Restitution is $ _____, and
☐ $ _____, *[Under age 14, $250 limit]* to be paid ☐ **See restitution supplement**

☐ Make repairs or provide services agreeable to the victim (under age 14, 40 hour limit)

☐ The juvenile is in an out-of-home placement and receiving income; the juvenile shall pay _____% of that income for restitution.

☐ 7. Forfeiture of $ _____, to be paid _____

☐ 8. Supervised work program/community service. _____ hours _____

☒ 9. Mandatory victim/witness fee of $20 per case, to be paid

Provision	Amount	Total Days to Pay	Due Date	Concurrent with/Consecutive to/Comments
Juv Victim/Witness No CLD	20.00	60	05-15-2017	

☐ 10. Legal custody transferred to
☐ County Department of Human/Social Services.
☐ Other: _____

☒ 11. Conditions of supervision and/or return: ☐ **See attached.**

Program	Begin Date	Length	Agency/Program	Comments
Supervision	03-16-2017	12MO	Dept of Human Services	Formal supervision - 12 months Parental participation in supervision

Time Provisions

Program	Begin Date	Length	Agency/Program	Comments
Home detention		30DA	Dept of Human Services	Imposed and stayed with electronic monitoring (parents are responsible for reimbursement of electronic monitoring system cost within 60 days of billing)

Miscellaneous Provisions

Provision	Agency/Program	Explanation of Provision
Costs		Payable to Register in Probate, 311 N. Main St., Shawano, WI 54166 Failure to pay will result in a 2 year suspension of operating privileges.
Alcohol and other drug Testing	Dept of Human Services	Urinalysis upon request of social worker Juvenile will not own, possess or use alcohol, drugs or drug paraphernalia
Counseling	Dept of Human Services	Individual perpetrator/victimization counseling by a certified and licensed therapist Family counseling as deemed appropriate by social worker Intensive In-Home Team involvement if deemed appropriate by Social Worker Psychosexual evaluation and follow through with recommendations as deemed appropriate by social worker Mental health counseling as deemed appropriate by social worker or community counseling agency

Miscellaneous Provisions

Provision	Agency/Program	Explanation of Provision
Other	Dept of Human Services	Must Follow All Juvenile Court Supervision Conditions (see Addendum) Apology letter to: A.P. (to be completed within 60 days of disposition and or as deemed appropriate by counselor. Must be handwritten) Social History form by parents *Autobiography by juvenile* C will not solicit exposure of others or self C will not touch others either directly or indirectly in their genitalia C will not have others touch him in a sexual manner C will not have sexual intercourse with anyone C will be supervised by an adult if having any contact with a child under the age of 10 Parent and child will sign all necessary releases pertinent to treatment related response with the Department of Human Services and all treatment providers Will not possess or have access to any sexually explicit materials (i.e. Pornographic videos, magazines, internet material or toys) Carey Guides to address criminogenic needs Compass assessment to be completed with assigned social worker
Program	Dept of Human Services Other	Lincoln Hills Juvenile Cognitive Intervention Program and/or the CORE phases A & B for sex offender treatment or other programming approved by Shawano County Human Services. When C completes his programming at Lincoln Hills and is discharged, Shawano County Human Services will monitor for his after care needs. Day Treatment if deemed appropriate by Social Worker (cost of day treatment and transportation is at the cost of the parents or otherwise arranged by the parent)
Restrictions	Dept of Human Services Other	No contact with: A.P., his family, home or property. No contact means no face to face, written, 3rd party, electronic, social media or phone (including texting). Incidental contact may occur in the school setting No contact with: M.D., his family, home or property. No contact means no face to face, written, 3rd party, electronic, social media or phone (including texting). Incidental contact may occur in the school setting Firearms (Felony as an Adult; and Therefore, No Possession of Firearms) Sex offender registry: 15 years from the date of disposition. Paperwork to be completed at Lincoln Hills or with assigned case worker and/or Sheriff's Department

12. If the juvenile is placed outside of the home, the parent(s) shall provide a statement of income, assets, debts, and living expenses of the household, to the county department or agency.
   - [X] A. The parent(s)/guardian shall contribute toward the expenses of custody/services in the amount of
     - [ ] $ _____.
     - [X] to be determined by [Agency] Shawano County Sheriff's Department & Shawano Human Services
   - [ ] B. The amount of support to be paid by the parent(s), guardian or trustee for the out-of-home placement is
     - [ ] $ _____ or _____ % of gross income payable by wage assessment.
     - [ ] to be set by the child support agency.

     The support obligation begins on the date of placement.

[ ] 13. Driver's license. [ ] Suspension [ ] Restriction [ ] Revocation

14. Specific services to be provided to juvenile and family: [ ] **See attached.**
Counseling services, case management services, educational services and referral services

[X] 15. DNA testing. DNA to be completed within 60 days of disposition. To be completed by the Shawano County Sheriff's Department or Lincoln Hills. Contact social worker for testing dates

[X] 16. Sex offender registration.
C G is placed on the sex offender registry for a period of 15 years from the date of disposition. This registration will be completed at Lincoln Hills or with assigned social worker/case manager and/or sheriff's department

17. If the juvenile is placed out of the home, the parent(s) who appeared in court have been orally advised of the applicable grounds for termination of parental rights (TPR) and the conditions that are necessary for the juvenile to be returned to the home or restoration of visitation rights. Written TPR warnings are attached. Conditions for return/visitation are part of this order or attached.

☐ 18. Other. _____

☒ The juvenile was advised of possible sanctions for violations of the conditions of this order.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

BY THE COURT:

Distribution:

1. Original - Court
2. Juvenile
3. Juvenile's Parent(s)/Guardian/Legal Custodian/Trustee
4. Juvenile's Attorney(s)
5. District Attorney/Corporation Counsel
6. School
7. Social Worker
8. Other: _____

_____
Circuit Court Judge

May 19, 2017
Date

NOTICE: If requested by a parent/guardian/legal custodian or the juvenile (14 years of age or over), the agency providing care or services for the juvenile or that has legal custody of the juvenile must disclose to, or make available for inspection, the contents of any records kept or information received by the agency about the juvenile unless the agency determines that imminent danger would result.

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

For Official Use

IN THE INTEREST OF

_____
Name

_____
Date of Birth

Acknowledgment of Dispositional Conditions and Sanctions (Delinquency/JIPS)

Case No. _____

1. I am the juvenile. The court has imposed a dispositional order in this case.

2. I ☐ have read ☐ have had read to me the conditions of that dispositional order.

3. I understand the conditions of the order I must obey.

4. I understand that if I violate the order, the court could order one or more of the following sanctions:
   - Place me in a juvenile detention facility or the juvenile portion of a county jail for up to ten days with educational services. *(delinquency only)*
   - Place me in nonsecure custody for up to ten days with educational services.
   - Suspend or limit the use of my operating privilege (driver's license) or any Department of Natural Resources approval for a period of up to three years.
   - Detain me in my home or current residence for up to 30 days under rules of supervision, including electronic monitoring.
   - Perform up to 25 hours without pay in a supervised work program or other community service.

5. I understand that if my caseworker is investigating whether I violated the order, my caseworker may, without a hearing, place me for up to 72 hours in:
   - A juvenile detention facility. *(delinquency only)*
   - The juvenile portion of a county jail. *(delinquency only)*
   - Nonsecure custody.

6. I understand that if I violate the order or my after care status, my caseworker may, without a hearing, place me for up to 72 hours in:
   - A juvenile detention facility. *(delinquency only)*
   - The juvenile portion of a county jail. *(delinquency only)*
   - Nonsecure custody.

_____ Signature of Caseworker	_____ Signature of Juvenile
_____ *Name Printed or Typed*	_____ *Name Printed or Typed*
_____ Date	_____ Date

Distribution:
1. Original - Juvenile Clerk
2. Caseworker
3. Juvenile/Juvenile's attorney
4. Juvenile's parents

JD-1749, 08/06 Acknowledgment of Dispositional Conditions and Sanctions (Delinquency/JIPS) §938.355(6) & (6d), Wisconsin Statutes
This form shall not be modified. It may be supplemented with additional material.
Page 1 of 1

STATE OF WISCONSIN CIRCUIT COURT SHAWANO COUNTY

CONDITIONS OF JUVENILE COURT SUPERVISION – ADDENDUM

In the Interest of: C J. G Case No: 16JV38

YOU SHALL COMPLY WITH THE FOLLOWING:

- Obey all laws.
- Report all police contacts to your Disposition Worker within 24 hours
- Keep all appointments with your Disposition Worker.
- Inform your Disposition Worker of any change in residence or employment, providing this notice in writing (within 24 hours).
- Attend school and classes as scheduled (Daily School attendance, no unexcused absences, obey school rules).
- You must have your parent's (Disposition Worker's) approval for activities away from your home. You must keep your parent(s) informed as to your activities and companions.
- Be truthful to your Disposition Worker in all matters, including whereabouts, activities and companions, upon request.
- No use of alcohol or illegal substances and no misuse of prescribed or over-the-counter medications.
- Will follow city and county curfew or as deemed appropriate by parent and/or social worker (weekdays_____/weekends_____)
- Will follow rules at home
- Will do chores as directed by parent
- Will talk to Parents/Guardians, social workers, law enforcement and teachers with respect (no name calling, will not threaten or use obscenities towards anyone)
- Will Not Verbally or Physically Threaten Others
- Will Not Be Verbally or Physically Aggressive Towards Others
- Will not runaway from home (must ask for permission from parents/guardians to leave the home)

PARENTS WILL:

- Support the above conditions and the DPA/Consent Decree/Order of the Court and disposition services.
- Keep all appointments with the Disposition Worker.
- Report violations of the law and of the above conditions to the Disposition Worker within the next business day or as determined with the Disposition Worker.
- Set appropriate rules and consequences for your child, keeping the Disposition Worker informed of these rules.
- Support your child's education by providing information, attending school meetings, and keeping knowledgeable about your child's performance, requesting assistance through school or the Disposition Worker as needed.
- Inform Disposition Worker of any weapons kept on your property. Maintain weapons safely and store weapons in a locked cabinet or closet, inaccessible to your child. Store ammunition separately, also in a locked cabinet or closet. Trigger locks alone do not meet this requirement, but may be a supplemental safety measure. Supervise your child when he/she is handling any weapon.
- Parents are expected to be a positive role model for their child and must cooperate with the Department of Human Services
- Failure to cooperate with the Department of Human Services and failure to comply with the parental expectations of juvenile court supervision, the parents may be held in contempt of court

_____/_____ _____/_____

Supervising Social Worker Date Youth Date

_____/_____ _____/_____

Parent Date Parent Date

L:c&f/cond juv ct supv/1-2015

How to Write an Apology Letter to a Victim

If the following are not addressed, your letter will be given back to be rewritten. The letter MUST be handwritten:

1. Begin by dating the letter. On the upper left corner of the paper.

2. Properly address the letter, below the date. If the action for which you are writing the letter was directed at a specific individual only, it should be addressed to that person, i.e. Mr. Bill Smith. If the act impacted an entire household, then it should addressed to the entire household, i.e. Mr. Bill Smith and Family.

3. Describe what you did in specific terms. For example: I punched you in the arm, I broke into your house, I stole your coin collection or I spray painted your car. Avoid saying things like "I pulled a prank on you". Be specific about what you have done. This should help you take ownership for what you have done.

4. Take a few minutes and imagine if you were on the receiving end of the behavior. Imagine how you would feel if you got punched, had your home broken into, or your property stolen and damaged. Now write a few sentences explaining how your behavior impacted the victim. Your letter should show an appropriate degree of remorse.

5. Describe what behaviors or actions you will take to occupy your time, talent, and energy in a more productive manner in the future. The purpose of this step is to let the victim know that you understand you need to make changes with your behavior and identify how this will happen.

6. You should plan on spending some time, perhaps several hours working on this letter. To crank out some meaningless garbage in 10 or 15 minutes is not the goal. The total length of the letter should be several paragraphs. The letter will be handwritten, use appropriate grammar and spell check the letter. Your parent(s) should also review your work.

7. Upon completion, place the finished letter in an unsealed envelope, and give it to your social worker for final approval and mailing to the victim. Your social worker will make a copy to be placed in your file to verify it has been completed and note when it was mailed.

STATE OF WISCONSIN, CIRCUIT COURT, SHAWANO COUNTY

For Official Use

Notice Concerning Grounds To Terminate Parental Rights

Case No. _____

Your parental rights can be terminated against your will under certain circumstances. A list of potential grounds to terminate your parental rights is given below. Those that are check-marked may be most applicable to you, although you should be aware that if any of the others also exist now or in the future, your parental rights can be taken from you.

☐ **Abandonment.** *Any of the following must be proven by evidence that:*
- ☐ You have left your child without provision for care or support:
  - ☐ and neither parent has been found for 60 days.
  - ☐ in a place or manner that exposes your child to substantial risk of great bodily harm or death.
- ☐ You have failed to visit or communicate with your child for:
  - ☐ three months or longer after your child has been placed, or continued in a placement, outside your home by a court order.
  - ☐ six months or longer after leaving your child with any person, and you know or could discover the whereabouts of your child.
- ☐ A court of competent jurisdiction previously has found that when your child was under one year of age:
  - ☐ your child was abandoned, pursuant to §48.13(2), Wis. Stats., or a comparable state or federal law.
  - ☐ you intentionally abandoned the child in a place where the child may suffer because of neglect, in violation of §948.20, Wis. Stats., or a comparable state or federal law.

☐ **Continuing Need of Protection or Services.** *As proven by evidence that:*
- ☐ A court placed, or continued in a placement, your child outside your home after a judgment that your child is in need of protection or services under §§48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365, Wis. Stats., and:
  - The agency responsible for the care of your child has made a reasonable effort to provide the services ordered by the court;
  - Your child has been outside your home for a cumulative total period of six months or longer under a court order;
  - You have failed to meet the conditions established for the safe return of your child to your home; and,
  - There is a substantial likelihood that you will not meet these conditions within the 9-month period following the fact-finding hearing under §48.424, Wis. Stats.
- ☐ A court has adjudicated your child in need of protection or services on three or more occasions, under §48.13(3), (3m), (10) or (10m), Wis. Stats. and:
  - In connection with these adjudications, the court has placed your child outside your home pursuant to a court order containing this notice, and,
  - You caused the conditions that led to each of the out-of-home placements.

☐ **Continuing Need of Protection or Services (Unborn child).** *As proven by evidence that:*
- A court placed you [as an expectant mother], or continued you in a placement, outside your home after a judgment that your unborn child is in need of protection and services under §§48.345 and 48.347, Wis. Stats.
- The agency responsible for the care of you and your unborn child has made a reasonable effort to provide the services ordered by the court;
- Your child stayed outside your home for a cumulative total period of six months or longer under a court order; [Not including time spent outside the home as an unborn child]
- You have failed to meet the conditions established for the safe return of your child to your home; and,
- There is a substantial likelihood that you will not meet these conditions within the 9-month period following the fact-finding hearing under §48.424, Wis. Stats.

☐ **Failure to Assume Parental Responsibility.** *As proven by evidence that:*
- You are or may be a parent of a child.
- You have not had a substantial parental relationship with the child.

☐ **Continuing Parental Disability.** *As proven by evidence that:*
- You are presently an inpatient at a hospital as defined in §50.33(2)(a),(b) or (c), Wis. Stats., a licensed treatment facility as defined in §51.01(2), Wis. Stats., or state treatment facility as defined in §51.01(15), Wis. Stats., on

account of mental illness as defined in §51.01(13)(a) or (b),Wis. Stats., or developmental disability as defined in §55.01(2) or (5), Wis. Stats.
- You have been an inpatient for at least two of the last five years before a petition to terminate parental rights is filed.
- Your condition is likely to continue indefinitely.
- Your child is not being provided with adequate care by a parent, guardian, or relative who has legal custody of your child.

☐ **Continuing Denial of Periods of Physical Placement or Visitation.** *As proven by evidence that:*
- You have been denied periods of physical placement by a court order in an action affecting the family, or have been denied visitation by an order under §§48.345, 48.363, 48.365, 938.345, 938.363, or 938.365, Wis.Stats.
- At least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit you periods of physical placement or visitation.

☐ **Child Abuse.** *As proven by evidence that:*
You show a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition; and that:
- ☐ You have caused death or injury to a child or children resulting in a felony conviction.
- ☐ A child has previously been removed from your home by the court under §48.345, Wis. Stats., after an adjudication that the child is in need of protection or services under §48.13(3) or (3m), Wis. Stats.

☐ **Relinquishment.** *As proven by evidence that:*
- ☐ A court of competent jurisdiction has found pursuant to §48.13(2m), Wis. Stats., that you have relinquished custody of your child under §48.195(1), Wis. Stats., when the child was 72 hours old or younger.

☐ **Incestuous Parenthood.** *As proven by evidence that:*
You are related, either by blood or adoption, to your child's other parent in a degree of kinship closer than 2nd cousin.

☐ **Homicide or Solicitation to Commit Homicide of Parent.** *As proven by evidence that:*
You have been convicted of the intentional or reckless homicide of the other parent, or solicitation to commit intentional or reckless homicide of the other parent, in violation of §§940.01, 940.02 or 940.05, 939.30, Wis. Stats., or a comparable state or federal law.

☐ **Parenthood as a Result of Sexual Assault.** *As proven by evidence that:*
- You are or may be the father of a child.
- The child was conceived as the result of a sexual assault in violation of §§940.225(1),(2) or (3), 948.02(1) or (2), or 948.025 or 948.085, Wis. Stats., which you committed against the child's mother during a possible time of conception.

☐ **Commission of a Felony Against a Child.** *As proven by evidence that:*
- ☐ You have been convicted of a serious felony as defined in §48.415(9m)(b), Wis. Stats., against one of your children.
- ☐ You have committed child trafficking in violation of §948.051 or a comparable state or federal law involving any child.

☐ **Prior Involuntary Termination of Parental Rights to Another Child.** *As proven by evidence that:*
- Your child has been adjudicated to be in need of protection or services under §48.13(2),(3) or (10), Wis. Stats. or your child was born after a petition for termination of parental rights under §48.415(10), Wis. Stats., was filed in which a sibling of your child is the subject.
- In the three years prior to the child being adjudicated in need of protective services as specified in §48.415(10)(a), or in the case of a child born after the filing of a petition regarding a sibling as specified in §48.415(10(a), within three years prior to the date of the birth of the child, a court has ordered the termination of your parental rights with respect to another of your children on one or more grounds specified in §48.415, Wis. Stats.

The court has orally informed me of the applicable grounds for termination of parental rights, and I have received a copy of this notice.

Signature of Parent/Expectant Mother	Signature of Parent	Date

FILED
10-29-2018
Shawano County
Register in Probate
2016JV000038

BY THE COURT:

DATE SIGNED: October 29, 2018

Electronically signed by William F. Kussel, Jr.
Circuit Court Judge

STATE OF WISCONSIN	CIRCUIT COURT	SHAWANO COUNTY, BR II

In the interest of C.J.G., a person under the age of 18:
STATE OF WISCONSIN
Petitioner,
vs
C J. G
Respondent.

DECISION

Case No. 16-JV-38

DECISION

This matter comes before the court via a post-disposition motion filed by respondent C J. G by Attorneys Colleen Marion and Kelsey Loshaw[1] pursuant to Wis. Stats. §§ 809.30(2)(h), 938.363(1)(a) and 938.34(16) to stay sex offender registration requirements. The stated basis of the stay is that there exists new information that affects the suitability of the disposition (with regards to having the respondent register as a sex offender). Additionally, the respondent challenges the constitutionality of the statute (301.45) both on its face and applied to the respondent. Respondent request that if the court grants the stay on the basis of new information; i.e., the primary argument, then the court should not review the constitutional arguments. The respondent cites *State v. Blalock,* 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989), for the general rule that cases should be decided on the narrowest possible ground;

[1] The court will hereafter reference arguments or positions coming from "respondent".

the court hearing no argument to the contrary and agreeing with respondent; therefore, the court will follow that level or review in this case.

RESPONDENT'S MOTION TO STAY SOR BASED ON NEW INFORMATION

This court will take up the first and primary motion and argument advanced by the respondent; to wit, that new information available to the court and the parties makes the suitability of the of the current disposition inappropriate; i.e., there is no longer a need for the respondent to register as a sex offender. The respondent argues that subsequent to the dispositional hearing and the May 17 2017, hearing to determine if the respondent should register as a sexual offender, the following new information exists: (1) the respondent successfully completed Lincoln Hills two-part juvenile cognitive intervention program (JCIP), (2) the respondent was bullied because of her sexuality and was physically assaulted on two separated occasions, (3) that his case manager testified that he completed his apology letter to her victim and was making "very good progress" towards her schooling, (4) the respondent successfully completed sex offender treatment as MJTC; and, (5) that MJTC psychologist Michael Caldwell conducted a 980 evaluation and found her to be of low risk to reoffend. The respondent argues that there is a low risk of reoffending and that should be balanced against a high risk of harm. The respondent argues, among other things, that a high risk of harm exists because, (1) many municipalities and counties in the state of Wisconsin have enacted ordinances restricting where an offender may reside and that could affect her ability to attend cosmetology school in Green Bay, (3) that registering as a sex offender could stigmatize her; and, (4) that being on a SOR would prevent her from changing her name to consistent with her presented gender.

In the matter before this court, the respondent was adjudicated delinquent on the basis of a second degree sexual assault of child. Pursuant to Wis. Stat. § 938.34(15m)(bm) sex offender registration (SOR) is mandatory unless all the factor under Wis. Stat. § 301.45(1m)(a) are met. § 301.45(1m)(e) sets for the factors that the court may consider in determining whether the person who filed the motion to have the juvenile excluded from the SOR has clearly and convincingly shown that the juvenile has satisfied the criteria in para. a.

At the May 17 2017, hearing to determine if the respondent should be excluded from the SOR requirement, the court applied the factors under 301.45(1m)(a) and criteria enumerated under 301.45(1m)(e), as well as factors set forth in *State v. Cesar*, 272 Wis.2d 682 and placed the respondent on the SOR for a period of 15 years.[2] The Court in *Cesar,* stated that court should consider the seriousness of the offense and all of the factors set forth in the statute when determining if the court should exclude the juvenile from the SOR requirements. In the case at hand the juvenile was convicted of a second degree sexual assault on a child. The serious and forceful nature of this attack should not and cannot be glossed over. The child was physically held down, against his will, with the assistance of an accomplice while the respondent sat on the child's legs and pulled his pants and underwear down. The respondent then put the victim's penis in his mouth against the child victim's will. The victim was prevented from calling for help when the accomplice placed her hand over the victim's mouth to prevent him from crying out for help. Prior to the assault the victim suffered from disabilities; he suffered from Autism, he was behind his peers (as testified by his Mother), had

[2] It is not necessary to reiterate in detail all the findings made at the May 17, 2017, hearing as the respondent is not arguing that the court applied the incorrect law or did not consider the factor or criteria correctly; respondent filed a motion to reconsider; however that motion was withdrawn. The basis of respondent's motion to stay is based upon new information as well as constitutional challenges to the statute.

emotional problems, and had learning problems in school[3], and was blind in one eye. While the age difference between the respondent were only 10 months apart, the victim's Mother testified that her son (victim) was behind his peers. The Mother testified that her son was doing poorly in school and was in therapy all of his life, and that after the attack, things got worst. She testified that her son is very embarrassed about the attack and that it has effected the whole family and tries not to talk about it because she breaks down.

As discussed in *Cesar,* the goal of juvenile rehabilitation needs to be balanced with the purposes of personal accountability and of public protection. Respondent's citation or new information needs to be weighed. Respondent cites Dr. Michael Caldwell's, findings and the completion of sex offender treatment as evidence that the respondent is of low risk to reoffend. Additionally, respondent argues that there would be harm to the victim by complying with the SOR, in terms of stigma, restrictions on where she could reside, and inability to change her name to a name consistent with how she projects her gender. The State does not present cite any evidence to counter the respondent's evidence that the respondent is of low risk to reoffends. Instead, the State argues that low risk does not mean no risk. The State cites the unpublished Shawano County case of *In re Albert A.*, 351 Wis.2d 684, (2013). In that unpublished case the court of appeals, the juvenile appealed a Shawano county judge's decision not to exempt the juvenile form complying with SOR requirements even though the psychosexual evaluator ranked the child as "low risk" to reoffend. The court of appeals in upholding the decision of the circuit court judge state the following:

[3] The Mother testified that at the time or the attack her son was a freshman in high school but was performing at a sixth grade level.

> Given this record, we conclude the circuit court properly considered the *Cesar G.* factors, and simply gave more weight to factors that would require Albert to register. That choice was completely within the circuit court's discretion. Because the record "reflect[s] the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case," we affirm the circuit court's discretionary decision denying a stay of the sex offender registration requirement. See *Cesar G.*, 272 Wis. 2d 22, ¶42 (citation omitted).

In this case, Dr. Caldwell's examination and findings that the respondent's risk to reoffend is "low", that that respondent has completed sexual offender treatment and has otherwise done well, is evidence that the respondent is at a reduced risk to reoffend. However, the juvenile did act inappropriately when she was a Lincoln Hills when she attempted to kiss another student without that student's permission. The respondent brief states that "There was mention of a prison rape elimination act (PREA) investigation based on the attempted kiss." [respondent brief page 6]. Respondent cited 28 C.F.R § 115.6 as authority that PREA does not regulate kissing, but does regulated repeated disparaging remarks about a person's gender, body, or dress. Whether or not such behavior is illegal, prohibited or not; it demonstrates failure to abide by certain sexual boundaries that individuals need to follow. Additionally, this behavior needs to be put in context with the fact that the juvenile was at Lincoln Hills for a delinquency resulting from underlying act of 2nd degree sexual assault of a minor child. While the court understands that she acknowledged that she should have asked for permission and missed some cues, it is no guarantee that the respondent will not sexually act out in an illegal manner in the future. This act is not evidence of a reduced risk to reoffend, but rather evidence of an increased risk to reoffend.

A risk remains to reoffend; reduced, but nonetheless a risk. That level of risk and the benefits to the protection of the community by complying with the SOR needs to be balanced against the harm felt by the individual as a consequence of registering.

The respondent argues that complying with the SOR has a tendency to stigmatize the registrant and that this would be especially harmful to the respondent because of his LGBTQ status. Respondent argues that registration would require her to "out herself" by being required to keep her "stereotypically male name." This court does understand that complying with the SOR can be embarrassing and stigmatize the registrant; this is true regardless of the age, sex, gender, or gender projection that an individual has. However, the respondent's SOR status would not be made public on-line as is the case with adult registrants. The court does acknowledge that the name could be released by the sheriff or chief of police if they determine there is a legally appropriate reason to do so; however, if the respondent maintains good behavior and shows no threat, then there should be little need for law enforcement to release this information. The court understands and empathizes that the respondent could be stigmatized by being made to comply with the SOR; however, that is a consequence of the juveniles serious and willful sexual misconduct. While the respondent may suffer some emotional discourse because of the SOR, her victim also suffered emotion distress as a consequence of her actions and behavior.

The respondent argues that her freedom to live where she wants would be negatively restricted because many municipalities and counties are setting restrictions as to where a SOR

can reside. The court acknowledges that this may be a consequence; however, respondent has not shown clearly that this would amount to any more than an inconvenience[4].

The risk to reoffend exists in this case, albeit is low. However, if such reoffence happens the harm felt to the victims is very high. The risk of harm to the respondent by the SOR exists; however, the effect of that harm, while embarrassing and inconvenient, is not of the degree compared to the harm felt by a victim of an sexual assault. The court relies on its findings it made at the May 17, 2017, hearing and as modified and supplemented by the new information provided by the respondent. The court applying the factors in § 301.45(1m)(a) and criteria enumerated under 301.45(1m)(e), including, the seriousness of the sexual assault, finds that the respondent has failed to show by clear and convincing evidence that the respondent should be excluded from registering as a sex offender. Accordingly, the court DENIES the respondent's motion to stay the sex offender registration.

RESPONDENT'S MOTION TO FIND STATUTE UNCONSTITUTIONAL FACIALLY AND AS APPLIED.

Respondent argues that the Wisconsin SOR provisions are unconstitutional facially and as applied to the respondent. Respondent argues the following:

1. The Wisconsin SOR provisions violate Substantive Due Process by:
    a. Infringing on the juveniles reputation
    b. Infringing on the right to travel /freedom of movement
    c. Infringement on the right to speech/expression
    d. Informational privacy
2. Wisconsin mandated SOR violates procedural Due Process
3. Wisconsin's juvenile SOR provisions violated the 8th Amendment

[4] Respondent argues that it could affect her desire to attend cosmetology school in Green Bay which has some restrictions where registrants can reside; however, it has not been shown that this would prevent attending cosmetology school, albeit more complicated.

4. *Wisconsin's juvenile SOR provisions violate Equal Protection*

Current case law provides that Wisconsin state statutes are presumed to be constitutional unless the party challenging the statutes can show that the statutes are unconstitutional beyond a reasonable doubt. Generally, statutes that regulate fundamental constitutional rights are reviewed by the court by strict scrutiny; however, other statutes are reviewed by the lower standard of rational basis. The Wisconsin Court of Appeals reviewed a challenge to application of the Wisconsin SOR provisions to a juvenile and applied the rational basis level or review. See. *State v. Joseph E.G.* 2001 WI App 29.

The *Joseph* court reviewed an appeal by a juvenile contending that he should not be made to register as a sex offender pursuant to WIS STAT §301.45(1m) because it violated his right to equal protection and substantive due process. The court rejected the juvenile's argument and affirmed the circuit court on the basis that the State Legislature had a rational basis for not allowing juveniles convicted of false imprisonment to be excluded from registrations. The court finding that the classification that the juvenile complained of is not a suspect classification or even a quasi-suspect classification, the challenge would be reviewed by the rational basis standard. The court states:

> When considering an equal protection challenge that does not involve a suspect or quasi-suspect classification, "the fundamental determination to be made ... is whether there is an arbitrary discrimination in the statute ..., and thus whether there is a rational basis which justifies a difference in rights. Joseph bases his challenge on the Fourteenth Amendment of the United States Constitution and art. I, § 1 of the Wisconsin Constitution. No. 99-3248 6 afforded." *Ruesch*, 214 Wis. 2d at 564, 571 N.W.2d at 905 (quoting *State v. Akins*, 198 Wis. 2d 495, 503, 544 N.W.2d 392, 395 (1996)). A statute violates equal protection if it creates an irrational or arbitrary classification. Id. However, a statute that creates a classification that is rationally related to a valid legislative objective does not violate equal protection guarantees. Id. *Joseph at 5-6*

The *Joseph* court went on to state that the "purposes underlying the registration requirement of WIS. STAT. § 301.45 are to protect the public and assist law enforcement officials." at 6 Furthermore the court found that the Legislature crafted a narrow exception to the mandatory registrations for sex between two minors, but for the age of the younger child no law would have been broken. at 7. The court commenting that the individuals would have been in effect "equally consenting participants...where the offender was not a predatory seeker of sexual contact." at 7. The Court went on to state that if it is determined that the "factually consensual contact has occurred, the offender presents no danger to the public..." the court may excuse registration if the court is satisfied that the purposes of § 301.45 are not undermined. at 7 However, the court went on to state that if the court were concerned that the action were not truly consensual "or if the offender appears to be predatory" the court count then deny the juveniles request to be excused from registration.

The *Joseph* court rejected the challenge of the juveniles Substantive Due Process claim. The court stated that "Substantive due process protects one from state conduct 'that shocks the conscience...or interferes with rights implicit to the concept of ordered liberty.' [quoting *United States v. Salermo, 481 U.S. 739 (1987)]*...[and] requires that the means chosen by the legislature to effect the valid legislative objective bear a rational relationship to the purposes sought to be achieved." at 8-9 The court found a rational relationship between the protection of the public and the requirement of SOR registration regarding the juvenile.

The Wisconsin Supreme Court upheld the constitutionality of Wisconsin's juvenile SOR statutes over a substantive due process and equal protection challenge. The court applied a rational basis level of review to conclude that the statute was constitutional as applied to the juvenile. The court finding that their proper role was "one of judicial restraint and deference," and found that "legislature determined that offenders who are convicted of certain statutes must register as sex offenders...[and there were a numerous conceivable, rational reasons why the legislature could have so chosen to include registration [for the juvenile]..." at 106. The Court ruled that § 301.45 is reasonably related to a legitimate state purpose and that the juvenile had failed to show it was unconstitutional as applied to him beyond a reasonable doubt.

The purpose of the registration requirements of § 301.45 are to protect the public and to assist law enforcement officials. *Smith* Respondent argues that the registration requirements "do not bear a rational relationship to those goals." (Respondent's Motion at 19). The court's role is to apply restraint and deference and to apply its judicial functions "with great restraint, always resting on constitutional principles, not judicial will..." *Flynn v.DOA,* 216 Wis.2d 529, 521 (1998). The legislature in enacting 301.45 found a rational relationship between registration and public protection and the assistance of law enforcement. That is not an irrational belief. Registration, by its very nature, helps keep track of where sex offenders reside; that would reasonably assist law enforcement to monitor offenders and help prevent further violations. While the respondent argues that there is no evidence that juvenile sex offenders pose a significant risk of reoffending; the fact is that they still pose *a* risk. That

is because low risk does not mean *no* risk. Respondent argues that there is no evidence that registration improves public safety. However, registration works not only by assisting law enforcement, but it also logically can help prevent further offenses by making it more difficult for an offender to reoffend; that is, they may be prevented from residing close to potential victims, and they may not be able to commit such crimes with the same anonymity as a non-registrant. The respondent has the burden of proof that the juvenile SOR statutes are not reasonably related to the legitimate legislative purpose of those statutes and are unconstitutional by the standard "beyond a reasonable doubt." This court finds that the respondent has not met that burden.

The respondent argues that § 304.45 is unconstitutional as applied to the respondent. The respondent's argument concerns the respondent's LGBTQ status. The respondent is transgender and identifies as a female. The respondent's argument is essentially that due to this gender identity and/or expression the SOR requirements would interfere with her right to travel, would interfere with her freedom of speech/expression. Respondent argues that as an registrant she would be subject to possible disclosure by a sheriff or chief of police which would cause stigma because of having her gender identity disclosed. While it is true that the juveniles name could be disclosed by a sheriff or chief of police under certain circumstances, the name of the juvenile would not be posted on-line as would be in the case with an adult offender. Embarrassment and stigma as a result of registration are not something limited to the respondent – it is reasonable to believe that registration would be embarrassing to any juvenile offender, regardless of their LGBTQ or non-LGBTQ status. It is reasonable to

find that embarrassment to the respondent could be greater because of her LGBTQ status; however, at an August 22, 2017 change of placement hearing, Lincoln Hills Social Worker, Stacey Bloch testified that the respondent "tends not to hide [her] sexuality at all [S]he makes it very well known that [s]he would like to dress up like a girl... (Tr. 8/22/17 at 18). Additionally, the respondent tried to kiss another youth at Lincoln Hills without permission. The court draws an inference that the respondent has not taken much action to hide her LGBTQ status, nor has the respondent provided any credible evidence for the court to so infer there was an effort to hide her LGBTQ status. Therefore, it is difficult for the court to conclude that the respondent would suffer a greater embarrassment or stigma from registration as compared to a non-LGBTQ registrant.

The respondent argues that being a registrant would restrict her freedom of travel or where she could reside. The respondent argues that municipalities and counties pass ordinance and regulations restricting where an individual could residence. The constitutionality of those ordinance and regulations are beyond the scope of review of this court; additionally, it has not been argued that the respondent was denied residence under one of those rule or ordinances; therefore, this effect on the respondent's travel is speculative. Respondent argues that she would want to attend cosmetology school in Green Bay, Wisconsin and she would be subject to residency restrictions there. Such consequences are no different than any other juvenile registrant would be subject to; the respondent has not shown beyond a reasonable double that this statute as applied would be unconstitutional as applied.

Respondent argues that registration would unconstitutionally, affect her right to speech/expression because she could not change her name from her current name to a female sounding name pursuant to the registration requirements. She argues that besides interfering with her right to adopt a name she is more comfortable with, it would also require her to "out herself." The name change restriction is reasonably related to the purpose of the statute; registration by its very nature needs to keep accurate records of its registrants. The prohibition against name change applies to all registrants regardless of the LGBTQ status. The court understands that it could be emotionally difficult for an LGBTQ person to have to reveal their LGBTQ status; however, as discussed above, it does not appear that the respondent has taken any action to hide her LGBTQ status. The court finds that the respondent has not met her burden of proof to show that WIS. STAT § 301.45 is unconstitutional as applied to the respondent.

Respondent argues that the juvenile registration requirements violates the 8th Amendment of the United States Constitution as it is an unconstitutional punishment, on its face and as applied. The 8th Amendment prevents cruel and unusual punishment. The respondent cites *State v. Doe*, 538 U.S. 84 (2003), which sets forth the two-part test to determine if statutory scheme is punitive. Under *Smith*, the court must first determine if the legislative intent was punitive, and if no; then determine if the statutory scheme is so punitive in purpose or intent to negate the governmental intention to deem it civil. The court finds that the intent of the juvenile registration statute is non-punitive.

Wisconsin case law has determined that the Wisconsin sex registration requirements do not constitute cruel and unusual punishment. *State v. Bollig*, 2000 WI 6, 232, 232 Wis.2d 561, found that the Wisconsin sex registration statues do not constitute a punishment. *Jeremy P*, 2005 WI APP 13, 278 Wis.2d 366 and *State v. Hezzie R.*, 219 Wis.2d 848 (1998), both state that requiring juveniles to register as a sex offender do not constitute a punishment.

Respondent argues that the later cases of *Roper, Graham, Miller,* and *Montgomery*, represent a "sea of change in the law pertaining to children and sentencing determinations, and undermine *Jeremy P's* holding that SOR is not punishment." (respondent motion at 32). This court; however, finds that the Wisconsin cases are still on point and controlling at this time. Likewise, the court finds that the respondent has failed to meet their burden of proof to show the statute is a cruel and usual punishment to the respondent because of her LGBTQ status; while the court can understand that some of the consequences of registering *may* affect an LGBTQ to somewhat greater degree, it is not clear that it would be to such a degree to characterize it as a punishment.

Finally, the respondent argues that the juvenile registration requirement pursuant to 301.45, violates the respondent's procedural due process rights and the equal protection rights.

With regards to the procedural due process argument, both the respondent and State cite *Aicher ex rel LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, 237

Wis.2d 99 as authority for the application of the two-step test when reviewing procedural due process claims. First, the court is to look at whether the person has shown that a constitutionally protected liberty or property interest is at stake; and, Second, whether the procedures associated with that deprivation were adequate.

The respondent does not indicate what constitutionally protected liberty or property interest was at issue in her motion. The respondent has not shown that requiring a juvenile offender register as a sexual offender is a protected liberty issue. Assuming for the sake of argument that the liberty issue at stake, relates to infringement of privacy, rights of travel, or right of expression affected by registration, then the court would go to the second level of analysis; i.e., whether there were sufficient procedures attendant with the deprivation of those interests. Both the respondent and state cite *Matthews v. Eldridge,* 424 U.S. 319 (1979), as authority for use of a three-part balancing test to determine the adequacy of the procedures attendant to the protected interests. The test consists of the following: (1) whether a private interest will be affected by the official action, (2) the risk of erroneous deprivation of the interest by the procedures used; and (3) the government's interest, including the procedures used, the administrative burdens, and the fiscal concerns.

In the case at hand, the respondent was statutorily given the right to have a hearing to show that she should be exempted from the SOR. The hearing was on record in a courtroom, presided by a judge and attended by a prosecutor and defense counsel. The rules of evidence and procedures were followed and the respondent was provided

the right to call witnesses and cross-examine witnesses, offer evidence, and object to the introduction of evidence pursuant to the Wisconsin Rule of Evidence and other attendant Wisconsin statutes and procedures. While no determination made by a court can be 100% accurate, chances of erroneous depravation of rights are small. The statute does not provide for a hearing before a jury on the determination; however, even if such a right were provided, it is not clear that a jury would provide any greater guarantee against erroneous deprivation. The court finds that the respondent has not met her burden of proof as to showing that procedural due process rights are violated by the Wisconsin statutory provisions.

The respondent argues that the Wisconsin SOR provisions violated her equal protection rights. Respondent argues that the SOR violates her equal protection rights because she is treated differently because of her gender identity. Respondent argues that not allowing her to change her name to more in line with her gender identity discriminates against transgender individuals to use a name not in line with their gender identity. Essentially, equal protection requires that individuals who are similarly situated should be treated similarly. The Wisconsin SOR statutes treat all juveniles required to register the same, regardless of their sexual orientation, gender identity, or other LGBTQ characteristics. The name change prohibition applies to all registrants regardless of their LGBTQ status; that prohibition is rationally related to the purpose of the statute; i.e. public protection and to assist law enforcement. If an exception were made to allow individuals who claimed LGBTQ status to change their name, that exception could also be challenged as violating equal protection requirements. The

court finds that the respondent has failed to meet her burden to show that Wisconsin's juvenile SOR provision violate equal protection rights facially or as applied.

CONCLUSION

In conclusion, for reasons stated above, the court DENIES the respondent's post dispositional motion to stay the sex offender registration, and DENIES respondent's motion to declare section 301.45 juvenile registration provisions facially unconstitutional and unconstitutional as applied.

Dated this 29 Day of October, 2018

By the Court

Wm. F. Kussel
Circuit Court Judge
Shawano County Circuit Court, BR II

KeyCite Yellow Flag - Negative Treatment
Distinguished by Zalewska v. County of Sullivan, New York, 2nd Cir. (N.Y.), January 10, 2003

2000 WL 33162199
Only the Westlaw citation is currently available.
Superior Court of Massachusetts.

Pat DOE, [*] [1]

v.

John YUNITS, et al. [2]

No. 001060A.

Oct. 11, 2000.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

GILES.

*1 Plaintiff Pat Doe [3] ("plaintiff"), a fifteen-year-old student, has brought this action by her next friend, Jane Doe, requesting that this court prohibit defendants from excluding the plaintiff from South Junior High School ("South Junior High"), Brockton, Massachusetts, on the basis of the plaintiff's sex, disability, or gender identity and expression. Plaintiff has been diagnosed with gender identity disorder, which means that, although plaintiff was born biologically male, she has a female gender identity. [4] Plaintiff seeks to attend school wearing clothes and fashion accouterments that are consistent with her gender identity. Defendants have informed plaintiff that she could not enroll in school this academic year if she wore girls' clothes or accessories. After a hearing, and for the reasons stated below, plaintiff's motion for preliminary injunction is *ALLOWED*.

BACKGROUND

Plaintiff began attending South Junior High, a Brockton public school, in September 1998, as a 7th grader. In early 1999, plaintiff first began to express her female gender identity by wearing girls' make-up, shirts, and fashion accessories to school. South Junior High has a dress code which prohibits, among other things, "clothing which could be disruptive or distractive to the educational process or which could affect the safety of students." In early 1999, the principal, Kenneth Cardone ("Cardone"), would often send the plaintiff home to change if she arrived at school wearing girls' apparel. On some occasions, plaintiff would change and return to school; other times, she would remain home, too upset to return. In June 1999, after being referred to a therapist by the South Junior High, plaintiff was diagnosed with gender identity disorder. Plaintiff's treating therapist, Judith Havens ("Havens"), determined that it was medically and clinically necessary for plaintiff to wear clothing consistent with the female gender and that failure to do so could cause harm to plaintiff's mental health.

Plaintiff returned to school in September 1999, as an 8th grader, and was instructed by Cardone to come to his office every day so that he could approve the plaintiff's appearance. Some days the plaintiff would be sent home to change, sometimes returning to school dressed differently and sometimes remaining home. During the 1999-2000 school year, plaintiff stopped attending school, citing the hostile environment created by Cardone. Because of plaintiff's many absences during the 1999-2000 school year, plaintiff was required to repeat the 8th grade this year.

Over the course of the 1998-1999 and 1999-2000 school years, plaintiff sometimes arrived at school wearing such items as skirts and dresses, wigs, high-heeled shoes, and padded bras with tight shirts. The school faculty and administration became concerned because the plaintiff was experiencing trouble with some of her classmates. Defendants cite one occasion when the school adjustment counselor had to restrain a male student because he was threatening to punch the plaintiff for allegedly spreading rumors that the two had engaged in oral sex. Defendants also point to an instance when a school official had to break up a confrontation between the plaintiff and a male student to whom plaintiff persistently blew kisses. At another time, plaintiff grabbed the buttock of a male student in the school cafeteria. Plaintiff also has been known to primp, pose, apply make up, and flirt with other students in class. Defendants also advance that the plaintiff sometimes called attention to herself by yelling and dancing in the halls. Plaintiff has been suspended at least three times for using the ladies' restroom after being warned not to.

*2 On Friday, September 1, 2000, Cardone and Dr. Kenneth Sennett ("Sennett"), Senior Director for Pupil Personnel Services, met with the plaintiff relative to repeating the

8th grade. At that meeting, Cardone and Sennett informed the plaintiff that she would not be allowed to attend South Junior High if she were to wear any outfits disruptive to the educational process, specifically padded bras, skirts or dresses, or wigs. On September 21, 2000, plaintiff's grandmother tried to enroll plaintiff in school and was told by Cardone and Sennett that plaintiff would not be permitted to enroll if she wore any girls' clothing or accessories. Defendants allege that they have not barred the plaintiff from school but have merely provided limits on the type of dress the plaintiff may wear. Defendants claim it is the plaintiff's own choice not to attend school because of the guidelines they have placed on her attire. Plaintiff is not currently attending school, but the school has provided a home tutor for her to allow her to keep pace with her classmates.

On September 26, 2000, the plaintiff filed a complaint in this court claiming a denial of her right to freedom of expression in the public schools in violation of G.L.c. 71, § 82; a denial of her right to personal dress and appearance in violation of G.L. c. 76, § 83; a denial of her right to attend school in violation of G.L. c. 76, § 5; a denial of her right to be free from sex discrimination guaranteed by Articles I and XIV of the Declaration of Rights of the Massachusetts Constitution; a denial of her right to be free from disability discrimination guaranteed by Article CXIV of the said Declaration of Rights; a denial of her due process rights as guaranteed by G.L. c. 71, § 37 and G.L. c. 76, § 17; a denial of her liberty interest in her appearance as guaranteed by the Massachusetts Declaration of Rights, Art. I and X; and a violation of her right to free expression as guaranteed by the said Declaration of Rights, Art. I and X.

DISCUSSION

I. Introduction

In evaluating a request for a preliminary injunction, the court must examine "in combination the moving party's claim of injury and chance of success on the merits." *Packing Industries Group, Inc. v. Cheney,* 380 Mass. 609, 617 (1980). "If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party ... Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *GTE Products Corp. v. Stewart,* 414 Mass. 721, 722-23 (1993), quoting *Packaging Industries Group, Inc. v. Cheney, supra* (footnote omitted). In addition, where the injunction is sought against a public entity, as it is here, the court must consider the risk of injury to the public interest which would flow from the grant of the injunction. *Brookline v. Goldstein,* 388 Mass. 443, 447 (1983); *Biotti v. Board of Selectmen of Manchester,* 25 Mass.App.Ct. 637, 639 (1988).

II. The Likelihood of Plaintiff's Success on the Merits

*3 Plaintiff's complaint asserts eight causes of action based on the Massachusetts Declaration of Rights and the General Laws. They are individually addressed below to evaluate the likelihood of success on the merits.

A. Freedom of Expression, Massachusetts Declaration of Rights, Art. II and X

The Massachusetts Declaration of Rights, Article XVI (as amended by Article 77) provides, "[t]he right of free speech shall not be abridged." The analysis of this article is guided by federal free speech analysis. See *Hosford v. School Committee of Sandwich,* 421 Mass. 708, 712 n. 5 (1996); *Opinion of the Justices to the House of Representatives,* 387 Mass. 1201, 1202 (1982); *Colo. v. Treasurer and Receiver General,* 378 Mass. 550, 558 (1979). According to federal analysis, this court must first determine whether the plaintiff's symbolic acts constitute expressive speech which is protected, in this case, by Article VXI of the Massachusetts Declaration of Rights. See *Texas v. Johnson, supra,* citing *Spence v. Washington, supra.* If the speech is expressive, the court must next determine if the defendants' conduct was impermissible because it was meant to suppress that speech. See *Texas v. Johnson,* 491 U.S. 397, 403 (1989), citing *United States v. O'Brien,* 391 U.S. 367, 377 (1968); see also *Spence v. Washington,* 418 U.S. 405, 414 n. 8 (1974). If the defendants' conduct is not related to the suppression of speech, furthers an important or substantial governmental interest, and is within the constitutional powers of the government, and if the incidental restriction on speech is no greater than necessary, the government's conduct is permissible. See *United States v. O'Brien, supra.* In addition, because this case involves public school students, suppression of speech that "materially and substantially interferes with the work of the school" is permissible. See *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 739 (1969).

1. The Plaintiff's Conduct is Expressive Speech Which is Understood by Those Perceiving It

Symbolic acts constitute expression if the actor's intent to convey a particularized message is likely to be understood by those perceiving the message. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (finding that an upside-down flag with a peace symbol attached was protected speech because it was a purposeful message people could understand); see also *Chalifoux v. New Caney Independent School Dist.*, 976 F.Sup. 659 (S.D.Tex.1997) (students wearing rosary beads as a sign of their religious belief was likely to be understood by others and therefore protected).

Plaintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity. Contrast *Olesen v. Board of Education of School District No. 228*, 676 F.Sup. 820 (N.D.Ill.1987) (school's anti-gang policy of prohibiting males from wearing earrings, passed for safety reasons, was upheld because plaintiff's desire to wear an earring as an expression of his individuality and attractiveness to girls was a message not within the scope of the First Amendment).

*4 This court must next determine if the plaintiff's message was understood by those perceiving it, i.e., the school faculty and plaintiff's fellow students. See *Bivens v. Albuquerque Public Schools*, 899 F.Sup. 556 (D.N.M.1995) (student failed to provide evidence that his wearing of sagging pants to express his identity as a black youth was understood by others and, therefore, such attire was not speech). In the case at bar, defendants contend that junior high school students are too young to understand plaintiff's expression of her female gender identity through dress and that "not every defiant act by a high school student is constitutionally protected speech." *Id.* at 558. However, unlike *Bivens*, here there is strong evidence that plaintiff's message is well understood by faculty and students. The school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly has been received. Moreover, plaintiff is likely to establish, through testimony, that her fellow students are well aware of the fact that she is a biological male more comfortable wearing traditionally "female"-type clothing because of her identification with that gender.

2. The Defendants' Conduct Was a Suppression of the Plaintiff's Speech

Plaintiff also will probably prevail on the merits of the second prong of the *Texas v. Johnson* test, that is, the defendants' conduct was meant to suppress plaintiff's speech. Defendants in this case have prohibited the plaintiff from wearing items of clothing that are traditionally labeled girls' clothing, such as dresses and skirts, padded bras, and wigs. This constitutes direct suppression of speech because biological females who wear items such as tight skirts to school are unlikely to be disciplined by school officials, as admitted by defendants' counsel at oral argument. See *Texas v. Johnson*, 491 U.S. 397, 408-16 (1989). Therefore, the test set out in *United States v. O'Brien*, which permits restrictions on speech where the government motivation is not directly related to the content of the speech, cannot apply here. Further, defendants' argument that the school's policy is a content-neutral regulation of speech is without merit because, as has been discussed, the school is prohibiting the plaintiff from wearing clothes a biological female would be allowed to wear. Therefore, the plaintiff has a likelihood of fulfilling the *Texas v. Johnson* test that her speech conveyed a particularized message understood by others and that the defendants' conduct was meant to suppress that speech.

3. Plaintiff's Conduct is not Disruptive

This court also must consider if the plaintiff's speech "materially and substantially interferes with the work of the school." *Tinker v. Des Moines Community School Dist.*, *supra*. Defendants argue that they are merely preventing disruptive conduct on the part of the plaintiff by restricting her attire at school. Their argument is unpersuasive. Given the state of the record thus far, the plaintiff has demonstrated a likelihood of proving that defendants, rather than attempting to restrict plaintiff's wearing of distracting items of clothing, are seeking to ban her from donning apparel that can be labeled "girls' clothes" and to encourage more conventional, male-oriented attire. Defendants argue that any other student who came to school dressed in distracting clothing would be disciplined as the plaintiff was. However, defendants overlook the fact that, if a female student came to school in a frilly dress or blouse, make-up, or padded bra, she would

go, and presumably has gone, unnoticed by school officials. Defendants do not find plaintiff's clothing distracting *per se,* but, essentially, distracting simply because plaintiff is a biological male.

*5 In addition to the expression of her female gender identity through dress, however, plaintiff has engaged in behavior in class and towards other students that can be seen as detrimental to the learning process. This deportment, however, is separate from plaintiff's dress. Defendants vaguely cite instances when the principal became aware of threats by students to beat up the "boy who dressed like a girl" to support the notion that plaintiff's dress alone is disruptive. To rule in defendants' favor in this regard, however, would grant those contentious students a "heckler's veto." See *Fricke v. Lynch,* 491 F.Sup. 381, 387 (D .R.I.1980). The majority of defendants' evidence of plaintiff's disruption is based on plaintiff's actions as distinct from her mode of dress. Some of these acts may be a further expression of gender identity, such as applying make-up in class; but many are instances of misconduct for which any student would be punished. Regardless of plaintiff's gender identity, any student should be punished for engaging in harassing behavior towards classmates. Plaintiff is not immune from such punishment but, by the same token, should not be punished on the basis of dress alone.

Plaintiff has framed this issue narrowly as a question of whether or not it is appropriate for defendants to restrict the manner in which she can dress. Defendants, on the other hand, appear unable to distinguish between instances of conduct connected to plaintiff's expression of her female gender identity, such as the wearing of a wig or padded bra, and separate from it, such as grabbing a male student's buttocks or blowing kisses to a male student. The line between expression and flagrant behavior can blur, thereby rendering this case difficult for the court. It seems, however, that expression of gender identity through dress can be divorced from conduct in school that warrants punishment, regardless of the gender or gender identity of the offender. Therefore, a school should not be allowed to bar or discipline a student because of gender-identified dress but should be permitted to ban clothing that would be inappropriate if worn by any student, such as a theatrical costume, and to punish conduct that would be deemed offensive if committed by any student, such as harassing, threatening, or obscene behavior. See *Bethel v. Fraser,* 478 U.S. 675 (1986).

B. G.L. c. 71, § 82

Defendants argue that G.L. c. 71, § 82 is inapplicable because the statute only applies to secondary school; and South Junior High has been designated a primary school. Therefore, plaintiff will probably fail in this claim if defendants can substantiate their assertion. Nevertheless, the Supreme Court's constitutional analysis in *Tinker,* which was codified by G.L. c. 71, § 82, see *Pyle v. School Committee of South Hadley,* 423 Mass. 283, 286 (1996), remains applicable in this case and implicates the same principles. As discussed, plaintiff has demonstrated a likelihood of success on the merits in her common law freedom of expression claim.

C. Liberty Interest in Appearance Massachusetts Declaration of Rights Article I and X

*6 Plaintiff is also likely to prevail in this claim. A liberty interest under the First Amendment has been recognized to protect a male student's right to wear his hair as he wishes. See *Richards v. Thurston,* 424 F.2d 1281 (1st Cir.1970), cited with approval *Bd. of Selectmen of Framingharn v. Civil Service Commission,* 366 Mass. 547, 556 (1974). The question in liberty interest cases is whether the government's interest in restricting liberty is strong enough to overcome that liberty interest. Given that plaintiff has a likelihood of success in proving that her attire is not distracting, as discussed above, she is likely to prove that defendants' interests do not overcome the recognized liberty interest in appearance.

D. Sex Discrimination G.L. c. 76, § 5 and Article I and XIV of the Massachusetts Declaration of Rights

G.L. c. 76, § 5 states that "Every person shall have the right to attend the public schools of the town where he actually resides ... No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and course of study of such public school on account of race, color, sex, religion, national origin or sexual orientation." G.L. c. 76, § 5 (2000). Federal cases have recognized the impropriety of discriminating against a person for failure to conform with the norms of their biological gender. See *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250 (1989) (sex stereotyping occurred when members of an accounting firm denied female associate promotion because she failed to walk, talk, and

dress femininely); *Rosa v. Park West Bank,* 214 F.3d 213 (1st Cir .2000) (claim of sex discrimination may be sustained when cross-dressing man was denied a loan application until he went home to change clothes). This court finds plaintiff's reliance on such cases persuasive and the cases cited by defendants distinguishable, as discussed below.

Plaintiff contends that defendants' action constitute sex discrimination because defendants prevented plaintiff from attending school in clothing associated with the female gender solely because plaintiff is male. Defendants counter that, since a female student would be disciplined for wearing distracting items of men's clothing, such as a fake beard, the dress code is gender-neutral. Defendants' argument does not frame the issue properly. Since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear. If the answer to that question is no, plaintiff is being discriminated against on the basis of her sex, which is biologically male.[5] Therefore, defendants' reliance on cases holding that discrimination on the basis of sexual orientation, transsexualism, and transvestism are not controlling in this case because plaintiff is being discriminated against because of her gender. See *Ulane v. Eastern Airlines,* 742 F.2d 1081 (7th Cir.1984).[6] Furthermore, such cases have been criticized and distinguished under both Title VII and the First and Fourteenth Amendments. See *Quinn v. Nassau County Police Dept.,* 53 F.Sup.2d 347 (E.D.N.Y.1999); *Blozis v. Mike Raisor Ford, Inc.,* 896 F.Sup. 805 (N.D.Ind.1995); *Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir.2000).

*7 In support of their argument, defendants cite cases in which gender-specific school dress codes have been upheld in the face of challenges based on gender discrimination and equal protection because the codes serve important governmental interests, such as fostering conformity with community standards. See *Jones v. W.T. Henning Elementary School,* 721 So.2d 530 (La.App.3rd Cir1998); *Hines v. Caston School Corp.,* 651 N.E.2d 330, 335 (Ind.App.1995); *Harper v. Edgewood Board of Education.* 655 F.Sup. 1353 (S.D.Ohio 1987). Such cases are not binding on this court. This court cannot allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort. "Our constitution ... neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 539 (1896) (dissenting opinion of Harlan, J.). Thus, plaintiff in this case is likely to establish that the dress code of South Junior High, even though it is gender-neutral, is being applied to her in a gender discriminatory manner.

E. Disability Discrimination Article CXIV of the Massachusetts Declaration of Rights

Plaintiff does not have a likelihood of success in proving that the defendants' conduct constituted disability discrimination. Analysis of federal discrimination law is instructive in construing state disability discrimination law. See *Cox v. New England Tel. & Tel. Co.,* 414 Mass. 375 (1993). The federal Americans with Disabilities Act expressly excludes "transvestism, transsexualism ... [and] gender identity disorders not resulting from physical impairments ..." 42 U.S.C. 12211(b) (2000). While noting that the courts of this state can, and often do, provide more protection than its federal counterpart, there is no authority to support the notion that Gender Identity Disorder is a protected disability under the Massachusetts Declaration of Rights of laws of this state.

F. Due Process G.L. c. 76, § 17

Plaintiff does not have a likelihood of success on the merits of this claim because, as defendants correctly point out, the plaintiff has not been expelled from school. Therefore, no process was due the plaintiff.

G. G.L. c. 71, § 83

Defendants again are correct in asserting that this section, which protects a student's right to personal dress, is a local option statute which applies only to jurisdictions that have chosen to adopt it. G.L. c. 71, § 86. Therefore, the plaintiff has not demonstrated a likelihood of success on the merits of this claim.

II. Irreparable Harm

The party seeking an injunction bears the burden of establishing irreparable harm, i.e., that it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits. *GTE Products Corp. v. Stewart, supra* at 726. Plaintiff in this case has met the burden of establishing irreparable harm. The plaintiff is currently being home schooled because the defendants will not allow her to attend school in girls' attire. Therefore, plaintiff is being denied the benefits of attending school with her peers, learning in an interactive environment, and developing socially. See *McLaughlin v. Boston School Committee,* 938 F.Sup. 1001,

1011-12 (D.Mass.1994). Such harm is further exacerbated by the fact that the plaintiff has been the subject of much controversy over the past two years and now is noticeably absent from school. Defendants argue that any harm to the plaintiff is self-induced because plaintiff has chosen not to attend school under the conditions the defendants have put on her attire. This contention is without merit. Defendants are essentially prohibiting the plaintiff from expressing her gender identity and, thus, her quintessence, at school. Their actions have forced plaintiff to submit to home schooling. However, "in the field of public education the doctrine of 'separate but equal' has no place." *Brown v. Board of Education of Topeka,* 347 U.S. 483, 495 (1954).

III. The Balance of the Equities

***8** The balance of the equities tips in favor of plaintiff in his case. The plaintiff attended South Junior High School for two academic years; and the school and its students, with the exception of new students entering this year, are accustomed to interacting with plaintiff and, thus, are capable of doing so again. Because the school is empowered to discipline plaintiff for conduct for which any other student would be disciplined, the harm to the school in readmitting plaintiff is minimal. On the other hand, if plaintiff is barred from school, the potential harm to plaintiff's sense of self-worth and social development is irreparable. Defendants cite cases that stand for the proposition that a school's interest in disciplining students by barring them from school outweigh the harm to the student. See *Katchak v. Glasgow Independent School District,* 690 F.Sup. 580, 583 (W.D.Ky.1988). In this case, however, the school is not disciplining the plaintiff for certain conduct. The school is barring her from school on account of the expression of her very identity. Defendants maintain that plaintiff is free to enroll in school as long as she complies with the stated dress code. This is not entirely true because the defendants have placed specific restrictions on plaintiff's dress that may not be placed on other female students. This court does take note of the fact that defendants made efforts to accommodate the plaintiff's desire to dress in girl's clothes for over a year. However, their proscription of the items of clothing that can be worn by plaintiff is likely to be impermissible. Therefore, the harm to plaintiff by the actions of the defendants outweigh the harm to the defendants in granting this injunction.

IV. The Harm to the Public Interest

Defendants have not made a showing that the granting of this injunction will harm the public interest. Although defendants contend that plaintiff's dress is disruptive to the learning process, the workings of the school will not be disrupted if they are permitted to discipline plaintiff according to normal procedures for truly disruptive attire and inappropriate behavior. Furthermore, this court trusts that exposing children to diversity at an early age serves the important social goals of increasing their ability to tolerate such differences and teaching them respect for everyone's unique personal experience in that "Brave New World" out there.

ORDER

For all the foregoing reasons, plaintiff's motion for preliminary injunction is *ALLOWED;* and it is hereby *ORDERED THAT:*

1. Defendants are preliminarily enjoined from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined.

2. Defendants are further preliminarily enjoined from disciplining plaintiff for any reason for which other students would not be disciplined.

3. If defendants do seek to discipline plaintiff in conformance with this order, they must do so according to the school's standing policies and procedures.

All Citations

Not Reported in N.E.2d, 2000 WL 33162199

Footnotes

* Editor's Note: A petition for interlocutory relief from the preliminary injunction entered in this opinion was denied by the Appeals Court sub nom *Doe v. Brockton School Committee,* No.2000-J-638 (November 30, 2000) (Jacobs, J.).

1 By her next friend, Jane Doe, plaintiff's grandmother and guardian.

2 Maurice Hancock, Wayne Carter, George Allen, Mary Gill, Dennis Eaniri, Kevin Nolan, Ronald Dobrowski. School Committee Members; Joseph Bage, Superintendent; Kenneth Cardone, Principal of South Junior High School; Dr. Kenneth Sennett, Senior Director for Pupil Services, in their individual and official capacities; and Brockton Public Schools.

3 A pseudonym.

4 This court will use female pronouns to refer to plaintiff: a practice which is consistent with the plaintiff's gender identity and which is common among mental health and other professionals who work with transgender clients.

5 This case is distinguishable from *Harper v. Edgewood Bd. of Education,* 655 F.Sup. 1353 (S.D.Ohio 1987). In *Harper,* the court granted summary judgment in favor of the defendants, who prevented two students dressed in clothing of the opposite gender from attending the prom against a claim that the plaintiffs' First Amendment rights were violated. The court found the school's action permissible because it fostered community values and maintained discipline. Plaintiff in this case, however, is not merely engaging in rebellious acts to demonstrate a willingness to violate community norms; plaintiff is expressing her personal identity, which cannot be suppressed by the school merely because it departs from community standards.

6 *LaFleur v. Bird-Johnson Co.,* 1994 W.L. 878831 (Mass.Super. Nov. 3, 1994) [3 Mass.L.Rptr. 196], is also distinguishable. *LaFleur* was decided after *Price Waterhouse v. Hopkins* but recognized the Supreme Judicial Court's holding in *Macauley v. MCAD,* 379 Mass. 279 (1979), that transsexual discrimination is not within the scope of this state's sexual discrimination law. However, the case at hand differs from *LaFleur,* where the plaintiff claimed she was discriminated against in the employment context because she was a transvestite, because the instant plaintiff is likely to establish that defendants have discriminated against her on the basis of sex by applying the dress code against her in a manner in which it would not be applied to female students.

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