UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, a minor, by and through his next friend and mother, ERICA ADAMS KASPER,

Plaintiff,

Case No.: 3:17-cv-00739-TJC-JBT

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.
_____/

DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY OF DEANNA ADKINS, M.D. AND DIANE EHRENSAFT, PH.D.
(*Daubert Motion*)

Defendant, **SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA** ("Defendant" or "School Board"), through its undersigned counsel and pursuant to Fed. R. Civ. P. 702, and M.D. Fla. Loc. R. 3.01, moves to exclude certain testimony of two of Plaintiff's proffered experts, Deanna Adkins, M.D. ("Adkins") and Diane Ehrensaft, Ph.D. ("Ehrensaft"). In support of the requested relief, Defendant states as follows:

1. Adkins, an endocrinologist from North Carolina, was identified by Plaintiff as an unretained expert witness to testify regarding the matters contained in her expert report, including her opinion that "[r]equiring individuals with gender dysphoria to use single-sex facilities that are inconsistent with their gender identity is not only harmful to their mental health and stigmatizing; when these individuals are excluded from restrooms that match their gender identity, rather than use restrooms of a different gender or gender neutral restrooms,

they often will avoid restroom use for long periods of time, resulting in urinary tract infections kidney problems, and other medical complications."[1] She also opines, "[b]eing denied access to restrooms that match their gender identity heightens transgender individuals' dysphoria, worsens depression and anxiety and can lead to self-harm."

2. Ehrensaft, a psychologist from California, was identified by Plaintiff as a retained expert witness to testify regarding the matters contained in her report, including her opinion that "the implementation of the school's bathroom policy in September 2015 has direct bearing on [Plaintiff's] levels of anxiety and mild depression" and "psychological remedy would most likely be evident if this bathroom policy was revoked and replaced by a policy of allowing all students to use the bathroom that aligns with their affirmed gender identity." She concludes her report with the opinion that "[i]t would not only make for a more comfortable school day for [Plaintiff], it would also bolster his confidence as he experienced himself as recognized and supported for the boy he is."

MEMORANDUM OF LAW

Rule 702 of the Federal Rules of Evidence provides the basic requirements for when a witness is qualified to provide testimony as an expert on a particular subject area. Pursuant to Rule 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

[1] The undersigned has not filed a copy of the expert affirmative and rebuttal reports of Ehrensaft and Adkins with this Motion. If the Court determines that copies of the reports are necessary for the adjudication of this Motion, the undersigned will file the reports of Ehrensaft and Adkins. Defendant is further filing the deposition transcripts of Ehrensaft and Adkins under seal in an abundance of caution since Defendant explored various medical issues regarding Plaintiff. If such documents need to be filed in the public domain, Defendant will certainly do so at the request of the Court. The deposition transcripts are being filed with this Motion under seal as **Exhibits 1** and **2**. See, Docs. 68, 68-1, and 72.

> (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (2) the testimony is based on sufficient facts or data;
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> (3) the testimony is the product of reliable principles and methods; and
>
> (4) the expert has reliably applied the principles and methods to the facts of the case.

The application of Federal Rule of Evidence 702 to determine the admissibility of expert witnesses was refined by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-93, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), where it instructed that district courts are to perform a "gatekeeping" role concerning the admission of expert scientific testimony. See also Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147-48, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

The experts proffered by the Plaintiff intend to offer testimony that they are simply not qualified to give which will necessarily lead to the presentation of incompetent, unreliable, and irrelevant testimony. Daubert instructs that the following factors are necessary for the Court to consider before expert testimony should be admitted:

> (1) the expert is qualified to testify competently regarding the matters he intends to address;
>
> (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and
>
> (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 1063, 125 S.Ct. 2516, 161 L.Ed.2d 1114 (2005).

The School Board anticipates that Adkins and Ehrensaft will offer testimony on several discrete areas on which they are unqualified to opine.[2] These include their opinions as to what the School Board's policy or practice should be in terms of whether bathrooms should be segregated based on biological sex or one's gender identity. Second, the School Board expects Adkins and Ehrensaft to testify regarding an alleged connection between the School District's policy on bathroom usage and Plaintiff's alleged emotional distress. Third and finally, despite Defendant's best effort to avoid it, Defendant expects Plaintiff to turn the legal issue in this case into a fact question by injecting a medical community dispute.[3]

(1) Adkins and Ehrensaft are Unqualified to Testify as Experts on Matters of School Policy Creation and Implementation

An expert may be qualified "by knowledge, skill, experience, training, or education." Furmanite Am., Inc. v. T.D. Williamson, 506 F.Supp.2d 1126, 1129 (M.D. Fla. 2007)(citing Fed. R. Evid. 702). Determining whether a witness is qualified to testify as an expert "requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony." Jack v. Glaxo Wellcome, Inc., 239 F.Supp.2d 1308, 1314–16 (N.D. Ga. 2002). After the district court undertakes a review of all of the

[2] The trial testimony of Adkins was perpetuated today by way of deposition in North Carolina, and as of the time of this writing, it is unknown what portions of Adkins testimony Plaintiff will seek to introduce into evidence. Thus, due to the timing of the deposition and the deadline to file this Motion, the undersigned utilized best efforts to anticipate the nature of Plaintiff's proffered expert testimony based on Plaintiff's discovery disclosures.

[3] The Court need look no further than the Motion/Application for Leave to Appear as Amicus Curiae filed by select medical organizations. Defendant objected to the filing of the Motion, but Plaintiff apparently consented. [Doc. 119; 119-1].

relevant issues and of an expert's qualifications, the determination regarding qualification to testify rests within the district court's discretion. J.G. v. Carnival Corp., No. 12-21089-CIV, 2013 WL 752697, at *3 (S.D. Fla. Feb. 27, 2013). The unrefuted evidence is clear that Adkins and Ehrensaft are unqualified to tender "expert" opinions on the adoption and implementation of public school policies.

Adkins conceded at deposition that she has never talked to any employees of the St. Johns County School Board; never spoken with any of Plaintiff's teachers or instructors; never talked to any parents of students or students in the St. Johns County School District; was never hired by schools to teach; never served as an administrator in a school district; never been licensed as a teacher, and; never been responsible for implementing policies in a public school. (Ex. 1 at 18:3-19:18).

Ehrensaft is a licensed psychologist. (Ex. 2 at 19:21-25). She has never taught in a school district as a school teacher; never been a public school administrator; never been licensed as a public school educator, and; never been responsible for implementing policies in a public school. (Ex. 2 at 67:17 – 68:6). While Ehrensaft reviewed some of Plaintiff's medical files, she failed to look at any of Plaintiff's educational records. (Ex. 2 at 36:4-18; 37:9-14). In reaching her opinions, Ehrensaft did not speak with a single employee of the St. Johns County School Board; Plaintiff's parents; any of Plaintiff's teachers; or any parents of students or students in the St. Johns County School District. (Ex. 2 at 48:20-49:10).

In sum, neither Adkins nor Ehrensaft are certified K-12 teachers, K-12 officials, or K-12 administrators. They have likewise never served in such a position. Neither has a degree in education or teaching nor have they published, taught, or researched in the fields of

education or education administration. While an expert can be qualified to testify to a particular subject area in a variety of ways, that expert must have at least some training, education, experience in the proffered field, or some other path to be able to speak with authority on a particular subject. See Frazier, 387 F.3d at 1260-61 (recognizing that "experts may be qualified in various ways" and that "[w]hile scientific training or education may provide possible means to qualify, experience in a field may offer another path to expert status"). Simply put, to the extent that Adkins and Ehrensaft are being offered to opine on educational policy creation and implementation, including the use of bathrooms by individuals in K-12 schools, they both lack the education, experience, and qualifications to do so.

(2) Adkins and Ehrensaft are Unable to Link the School Board Bathroom Policy to Purported Emotional Distress and Damages

Daubert requires courts to evaluate whether an expert's opinion has been reached on reliable inquiries. Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 282 F.R.D. 655, 666 (M.D. Fla. 2012), aff'd, 725 F.3d 1377 (Fed. Cir. 2013). A basic foundation for admissibility is that the "proposed expert testimony must be supported by appropriate validation - i.e., 'good grounds,' based on what is known." Frazier, 387 F.3d at 1261 (internal notations omitted) (quoting Daubert, 509 U.S. at 590).

Daubert listed four non-exhaustive factors a court may consider in determining whether expert testimony is reliable: "(1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known potential rate of error; and (4) whether the theory has attained general acceptance within the

scientific community." Allison v. McGhan Medical Corp.., 184 F.3d 1300, 1312 (11th Cir. 1999).

Fundamentally, the proffered experts attempt to link the School Board's bathroom policy or practice to any emotional distress harm or damages that Plaintiff allegedly experienced is based on unreliable, *ipse dixit*. Cogently, both experts freely admitted that there is no peer-reviewed research that supports any conclusion in this regard. Moreover, they did not read his complete medical records, they did not read his educational records and they did not consider all of the possible alterative causes of any alleged damages.

Specifically, Adkins testified she cannot cite to any peer-reviewed scientific literature in any field demonstrating the need for any kind of bathroom use in the treatment of transgendered individuals. (Ex. 1 at 63:6-14). She concedes that she has not seen a study that looks specifically at bathroom use as a form of treatment for transgender students. (Ex. 1 at 177:25-179:3). Further, she cannot cite to any peer-reviewed, published scientific journal articles that document a known error rate for her claim that admittance to school privacy facilities like locker rooms and restrooms of the opposite sex is a necessary component for the successful treatment of youth suffering from gender dysphoria. (Ex. 1 at 63:21 – 64:10).

Adkins is not a psychologist or a psychotherapist. (Ex. 1 at 197:12-19). She does not diagnose gender dysphoria. (Ex. 1 at 198:7-13). To prepare for her deposition, she reviewed her expert testimony, Plaintiff's record and some medical literature, and "that's about it." (Ex. 1 at 8:13-18). She treated Plaintiff three times and spent eight to ten hours talking with Plaintiff's lawyers. (Ex. 1 at 9:23-25; 26:8-12). She did not review inpatient records of Plaintiff after he engaged in a self-destructive act. (Ex. 1 at 34:5-35:7).

Similarly, in Ehrensaft's report, she did not cite to any treatment outcome studies in her bibliography that study the effect of the use of public restrooms and that offer an error rate for that treatment; likewise, she did not cite to any studies that specifically focus on bathroom use. (Ex. 2 at 128:21-129:10). In short, there are no studies in Ehrensaft's bibliography that are considered treatment outcome studies that specifically look at the use of public bathrooms and have a published error rate. (Ex. 2 at 129:17-130:9).

Ehrensaft's contact with Plaintiff was also extremely limited. She conducted only three, two-hour interviews of Plaintiff over the internet. (Ex. 2 at 41:3-23). She never even reviewed Plaintiff's deposition in this case. (Ex. 2 at 64:6-8). She did not perform an "assessment" and readily conceded during deposition that her report should not have used the word "assessment;" rather, she admitted should have used the word "observed." (Ex. 2 at 167:19-168:6). She could not perform psychotherapy during these internet interviews with Plaintiff because she is not licensed in Florida. (Ex. 2 at 47:8-48:5). Following the interviews, Ehrensaft did not diagnose Plaintiff or recommend any form of therapy. (Ex. 2 at 49:21-50:1; 50:8-11). She is neither a treating physician nor a therapist to Plaintiff. (Ex. 2 at 87:9-20).

Regarding her opinion on how the use of a bathroom is related to Plaintiff's alleged anxiety and depression, her methodology for arriving at that opinion is her clinical experience and interviewing "observations." (Ex. 2 at 254:15 – 255:10). Stated differently, her "opinions" are based solely on Plaintiff's self-report. Such a methodology is fatally flawed under Daubert, because she agrees that according to a certain body of research, her

clinical expertise and interviewing observations are no more reliable than a laypersons. (Ex. 2 at 255:12-22)

Ehrensaft even recognizes the unreliability of her proffered opinions conceding she is not capable of predicting what is going to happen in the future, and that as an expert witness, you are to avoid statements of cause and effect, unless you state them as an alternative hypothesis. (Ex. 2 at 149:22-151:13). Ehrensaft offered no alternative hypothesis.

While it is true that an expert can testify based on personal or professional experience, and that this can provide a foundation in reliability for an opinion, see, e.g., United States v. Jennings, 599 F.3d 1241, 1248 (11th Cir. 2010), "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." United States v. Augustin, 661 F.3d 1105, 1125 (11th Cir. 2011). This is something that neither expert can do reliably as to the subject area of the purported effects.

The foundation upon which Adkins offers opinions on Plaintiff's psychological condition is tremendously lacking and falls woefully short of meeting the Daubert admissibility standards as well. Adkins has never seen any of Plaintiff's educational records, and she did not review any of Plaintiff's therapy records. (Ex. 1 at 25:6-8; 24:24-25:1) Moreover, Adkins is licensed in North Carolina, not Florida, as a medical provider, and she does not diagnose, and did not diagnose in this case, gender dysphoria. (Ex. 1 at 15:6-8; p. 198:7-13). Adkins only treated Plaintiff for testosterone needs.

Indeed, neither can legally diagnose Plaintiff, because doing so would potentially be in violation of Florida law regarding the practice of psychology. See Section 490.003(7), Florida Statutes. This would include their "observations" as well, given that Section 490.003(4), Florida Statutes, includes making observations as part of the practice of psychology:

> (4) "Practice of psychology" means the **observations,** description, evaluation, interpretation, and modification of human behavior, by the use of scientific and applied psychological principles, methods, and procedures, for the purpose of describing, preventing, alleviating, or eliminating symptomatic, maladaptive, or undesired behavior and of enhancing interpersonal behavioral health and mental or psychological health.

(emphasis added)

Adkins' and Ehrensaft's inability to evaluate or diagnose Plaintiff means that neither can testify that Plaintiff's harm was caused by the School Board and its policies. Thus, with such extreme limitations on their ability to assess Plaintiff's psychological conditions, positing that the School Board harmed Plaintiff is merely *ipse dixit* and not sufficiently reliable to accept as expert evidence. Frazier, 387 F.3d at 1261; see also Fed.R.Evid. 702 advisory committee's note (2000 amendment) ("[t]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it'").

Furthermore, Adkins and Ehrensaft cannot reliably apply their personal and professional experience to testify to a conclusion that the School Board's policy and practice on bathroom usage caused Plaintiff harm, because they did not appropriately isolate all of the potential causes from the effect (Plaintiff's damages) in this case. This failure to isolate or control for potential causes of alleged harm renders any opinion that there is a causal link,

unreliable. See Hendrix ex rel. G.P. v. Evenflo Co., 609 F.3d 1183, 1197–98 (11th Cir. 2010)(affirming district court decision that proposed expert testimony was insufficiently reliable because it failed to appropriately rule out all potential possible causes). [4]

Perhaps in recognition of this failure to perform any medical or scientific methods of controlling for variables that might have led to alleged harm, such as rule in rule out techniques or differential diagnosis, Ehrensaft testified at deposition that she was not attempting to assert causal relationships between the School Board's actions and the Plaintiff's alleged harm, but merely that she was sequencing or chronicling events. (Ex. 2 at 149:11-157:17). Ehrensaft's written expert report is misleading on this point, but in any event, it cannot be gainsaid that "an expert's failure to explain the basis for an important inference mandates exclusion of his ... opinion." Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1344 (11th Cir. 2003). That is what is at issue here on this particular area of potential testimony; that is, a dearth of support for any leaps or inferences that Plaintiff's ask this court to make on the basis of expert testimony that is by nature unreliable because such leap needs to be made. Rider v. Sandoz Pharm. Corp., 295 F.3d 1194, 1202 (11th Cir. 2002) (holding that experts testimony must not require a court to make an unsupported leap of faith in a causal chain and that courts should not admit speculation conjecture or unsupported inferences).

In sum, the proposed expert testimony of Ehrensaft and Adkins is inadmissible under Daubert, because they failed to review critical information relevant to Plaintiff's emotional

[4] Ehrensaft claims that the behaviors of the Plaintiff are not due to internal mental illness or problems, but are caused by the environment. (Ex. 2 at 161:12-18). She did not, however, inform the Court that she cannot make these cause and effect statements. (Ex. 2 at 162: 1-8).

state and alleged damages, they failed to cite to any peer-reviewed, scientific studies supporting their opinion that failing to allow a transgender student to use the bathroom of their choice is necessary treatment, they are unable to cite to any reliable basis for any asserted inference that the School Board caused the Plaintiff harm, and they are unable under Florida law to assess, evaluate, or diagnose Plaintiff. In re Trasylol Prod. Liab. Litig., No. 08-MD-01928, 2013 WL 1080552, at *8 (S.D. Fla. Mar. 14, 2013)(finding expert testimony unreliable where expert failed to review all relevant materials and consider different potential causes for effects). Adkins and Ehrensaft are simply being utilized as a vessel to re-phrase Plaintiff's self reports in this case.

(3) Expert Testimony on how Transgender Individuals should be Treated or how Sex should be Defined does Not Assist this Court in Understanding the Evidence in this Case or Determining a Fact at Issue

The majority of the areas of the proposed testimony in Adkins' and Ehrensaft's expert witness reports simply provide no assistance to this Court in understanding the evidence or facts at issue, meriting their exclusion under Rule 702. See also McKee v. United States, No. 1:11-CV-2526-RGV, 2014 WL 11460475, at *5 (N.D. Ga. Jan. 15, 2014), aff'd, 597 F. App'x 625 (11th Cir. 2015) ("In applying Rule 702, the Court must ensure that the proposed expert testimony is relevant to the task at hand, ... ie, that it logically advances a material aspect of the proposing party's case.").

Indeed, a large portion of both expert reports and the testimony at depositions concern the proper way to treat a transgender individual and how a transgender individual should be addressed and treated in the psychosocial context. These types of opinions are completely unrelated to the issues before this Court which are purely legal in nature. How transgender

individuals should be treated in the psychosocial context, the best ways to psychologically affirm transgender youth, and the efficacy of different treatments for transgender youths is of no probative value to the ultimate and important determinations that this Court must make.[5]

The legal issues before this Court include which level of constitutional scrutiny to apply to Plaintiff's claim, the classification at issue under the Equal Protection Clause, and the nature of the governmental interest in making that classification. In the context of Plaintiff's Title IX claim, the legal issue is whether "gender identity" is synonymous with "sex" under Title IX. This requires an analysis of the plain, ordinary meaning of "sex," applicable case law, and the position of the Departments of Education and Justice. How Plaintiff's experts define "sex" and their opinion as to how "sex" should be defined in the medical community is simply irrelevant and will not assist this Court in determining any issue in this case.

CONCLUSION

WHEREFORE, the School Board requests that this Court enter an Order excluding Ehrensaft and Adkins from testifying about the appropriate policy or practice that the School District should adopt and implement on bathroom usage, whether the School Board's actions have caused Plaintiff harm or emotional distress, the nature and extent of Plaintiff's alleged psychological condition(s), the manner in which Plaintiff and transgender individuals, or individuals with gender dysphoria, should be treated, and the definition of "sex" in the medical community.

[5] It should be noted that the nature of these opinions is developing with disagreement amongst reasoned medical and psychological professionals regarding the appropriateness of therapeutic treatment of individuals with gender dysphoria or who identify as transgender.

CERTIFICATE OF COUNSEL CONFERENCE PURSUANT TO LOCAL RULE 3.01(g)

Pursuant to 3.01(g) of the Local Rules of the Middle District of Florida, the undersigned certifies that he has conferred with the attorneys representing the Plaintiff regarding the relief requested in the motion. Counsel for Plaintiff does not consent to the relief requested.

Dated this 6th day of December, 2017.

Respectfully submitted,

/s/ Terry J. Harmon
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 6th day of December, 2017, a true and correct copy of the foregoing was electronically filed in the U.S. District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Terry J. Harmon
TERRY J. HARMON

DEPOSITION TRANSCRIPT OF DEANNA ADKINS, M.D.

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TO BE FILED UNDER SEAL

DEPOSITION TRANSCRIPT OF DIANE EHRENSAFT, PH.D.

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TO BE FILED UNDER SEAL