

**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,

v.

THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,

Defendant.

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

**MOTION FOR LEAVE TO ALLOW PLAINTIFF'S EXPERT WITNESS DR.
DIANE EHRENSAFT TO TESTIFY OUT-OF-TURN ON DECEMBER 13, 2017**

Plaintiff, Drew Adams, a minor, by and through his next friend and mother, Erica Adams Kasper ("Plaintiff"), by and through their undersigned counsel, respectfully moves this Court for leave to allow Plaintiff's proposed expert witness, Dr. Diane Ehrensaft, Ph.D., to testify out of turn on December 13, 2017.

FACTUAL BACKGROUND

Plaintiff has retained Dr. Diane Ehrensaft, Ph.D. as an expert witness. A noted developmental and clinical psychologist with expertise on transgender youth, gender identity, and gender dysphoria, Dr. Ehrensaft has provided expert testimony in cases presenting similar issues to the instant case. *See Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 275 (W.D. Pa. 2017) (noting the expert testimony of "Dr. Diane Ehrensaft, a developmental and clinical psychologist who has declared that she has considerable educational and professional

experience in the area of gender identity matters”); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 855 (S.D. Ohio 2016) (noting the expert testimony of “Diane Ehrensaft, a developmental and clinical psychologist who specializes in working with children and adolescents with gender dysphoria”). In accordance with the Court’s Case Management and Scheduling Order (Dkt. 59), Plaintiff provided Defendant with a copy of Dr. Ehrensaft’s expert report on October 2, 2017, and her rebuttal report on November 3, 2017. In addition, Dr. Ehrensaft also submitted an expert declaration to this Court on July 19, 2017 in support of Plaintiff’s request for a preliminary injunction. *See* Dkt. 22-3. Counsel for Defendant deposed Dr. Ehrensaft on November 17, 2017.

On November 18, 2017, Dr. Ehrensaft informed Plaintiff’s counsel that she would no longer be available to testify on December 11 or 12, 2017, as originally planned, due to the unexpected scheduling of her son’s surgery, set to take place on December 11, 2017 in New York. Due to the nature of the surgery, Dr. Ehrensaft must accompany her son for at least 24 hours following his surgery. While Dr. Ehrensaft is unavailable for the dates of December 11 and 12, she can make herself available to testify on December 13, 2017 in person, which, given the currently slated three days for this non-jury trial, Plaintiff assumes will fall during Defendant’s case.

Following confirmation of Dr. Ehrensaft’s availability and keeping in mind that this case involves a non-jury trial, Plaintiff’s counsel conferred with Defendant’s counsel regarding its willingness to allow Dr. Ehrensaft to testify on December 13, 2017. Defendant’s counsel objected to allowing Dr. Ehrensaft to testify out-of-turn on December 13, 2017. Accordingly,

Plaintiff now seeks relief from this Court and respectfully moves the Court for leave to allow Dr. Ehrensaft to testify on December 13, 2017.

MEMORANDUM OF LAW

“A trial court has broad discretion to exercise control over the order of presentation at trial.” *Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1181 (11th Cir. 2002) (citing *Geders v. United States*, 425 U.S. 80, 86–87 (1976)). *See also Morales Feliciano v. Rullan*, 378 F.3d 42, 57 (1st Cir. 2004) (“It is axiomatic that district courts enjoy wide latitude in matters concerning the ordering of proof and the presentation of evidence.”); *In re Winn-Dixie Stores, Inc.*, 418 B.R. 475, 476–77 (Bankr. M.D. Fla. 2009) (“Under Rule 611(a), courts have broad discretion in controlling the order of presentation of evidence.”). As such, Federal Rule of Evidence 611(a) provides that,

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

Fed. R. Evid. 611. A “court’s witness order requirement alone . . . is not reversible error absent some showing of harm.” *Stone v. Peacock*, 968 F.2d 1163, 1167 (11th Cir. 1992).

This “Court has a long-standing preference for live testimony.” *White v. United States*, No. 8:11-CV-1355-T-33EAJ, 2013 WL 3422965, at *2 (M.D. Fla. July 8, 2013). Indeed, “[i]n both civil and criminal cases, our common law heritage has always favored the presentation of live testimony.” *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977). And the Federal Rules of Civil Procedure likewise display a “decided preference for live testimony in open

court.” *Hamprecht v. Hamprecht*, No. 2:12-cv-125-FTM-29, 2012 WL 1367534, at *2 (M.D. Fla. Apr. 19, 2012) (citing to Rule 43(a), Fed. R. Civ. P.). Indeed, “[t]he restrictions imposed by Rule 32,” regarding the use of deposition testimony as a preservation mechanism, “make it clear that the federal rules have not changed the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute **only if the witness is not available to testify in person.**” *White*, 2013 WL 3422965, at *2 (quoting 8A Fed. Prac. & Proc. Civ. § 2142 (3d ed.) (emphasis added)).

Courts “traditionally have accommodated the schedules of expert witnesses.” *Lis v. Robert Packer Hosp.*, 579 F.2d 819, 823 (3d Cir. 1978). While it is true that this Court has “allow[ed] the parties to perpetuate testimony of the witness who is unavailable during the week of December 11, 2017,” Dkt. 59 at para. 2, Dr. Ehrensaft is available to testify live during this trial, albeit out of turn. While calling Dr. Ehrensaft “out of turn” on December 13 “may technically disrupt the normal presentation of the case, this decision is committed to the discretion of the trial court.” *Lis*, 579 F.2d at 823. And, given the importance of Dr. Ehrensaft’s testimony in this case, discretion should be exercised in favor of allowing her to testify live. Put simply, “[t]he importance of presenting live testimony in court cannot be forgotten.” *Hamprecht*, 2012 WL 1367534, at *2. To prohibit Dr. Ehrensaft from presenting live testimony on December 13, “would exalt form over substance.” *Lis*, 579 F.2d at 823.

“If convinced that practical reasons justify calling a witness out of turn and that the testimony will not produce undue confusion in the minds of the jurors, experienced trial courtswill permit the practice.” *Lis*, 579 F.2d at 823. Here, practical reasons necessitate that Dr. Ehrensaft be permitted to present her live expert testimony on December 13. The

unplanned scheduling of her son's surgery prevent Dr. Ehrensaft from appearing in person on December 11 and 12. As this case involves a non-jury trial, permitting Dr. Ehrensaft to testify out of turn will not cause any undue confusion in the minds of jurors. Moreover, the presentation of live testimony would allow the Court to ask any questions of Dr. Ehrensaft the Court deems appropriate, to fully evaluate her credibility and expertise in the areas for which she is slated to testify, and to rule on objections in real time. The importance of these factors cannot be overstated. Finally, Defendant will have the full opportunity to cross-examine Dr. Ehrensaft and is by no means prejudiced by allowing this minor accommodation.

CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that the Court enter an order permitting Dr. Ehrensaft to testify live out of turn on December 13, 2017.

CERTIFICATE OF 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 in writing with the attorneys representing Defendant regarding the relief requested in the motion. The parties were unable to reach a resolution and Defendant's counsel does not consent to the relief requested.

Dated this 27th of November, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2017, the foregoing motion was filed electronically using the Court's ECF system, which will provide electronic notice to all counsel of record, including:

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