

1 UNITED STATES OF AMERICA
2 EASTERN DISTRICT OF MISSOURI
3 EASTERN DIVISION

3 JESSICA HICKLIN,)
4 Plaintiff,)
5 vs.) No. 4:16-CV-1357 NCC
6 GEORGE LOMBARDI, et al.,)
7 Defendants.)

8 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
9 (REVISED VERSION)

10 BEFORE THE HONORABLE NOELLE C. COLLINS
11 UNITED STATES MAGISTRATE JUDGE

12 May 23, 2017

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1 (The following proceedings were held in open court
2 on May 23, 2017 at 10:10 a.m.):

3 THE COURT: You may be seated. Good morning.

4 ALL ATTORNEYS: Good morning.

5 THE COURT: This is the case of Jessica Hicklin
6 versus George Lombardi, et al., it's Case No. 4:16-CV-01357
7 NCC. I have set this matter this morning on the Plaintiff's
8 Motion for a Preliminary Injunction. Counsel is present on
9 behalf of Plaintiff, Ms. Gordon. Will you be speaking this
10 morning?

11 MS. GORDON: Yes, Your Honor.

12 THE COURT: All right. And your co-counsel is also
13 present. Would you like to announce who they are for the
14 record.

15 MS. GORDON: Yes, Your Honor. I have Richard Saenz
16 with me along with Kevin Schriener, both appearing for the
17 Plaintiff.

18 THE COURT: All right. And for the Defendants,
19 Mr. Luepke?

20 MR. LUEPKE: Henry Luepke for the State Defendants,
21 Director Lombardi and the State of Missouri.

22 THE COURT: All right. And on behalf of Corizon?

23 MR. ECKENRODE: Thad Eckenrode for Corizon, Corizon
24 Defendants and my co-counsel Kevin Peek is with me.

25 THE COURT: All right. And who will be speaking for

1 Corizon?

2 MR. ECKENRODE: I will.

3 THE COURT: All right. Thank you. I want to give
4 both sides some time to make argument. I do have some
5 questions as well. So I guess, Ms. Gordon, if you would like
6 to begin. Do you want to approach the podium?

7 MS. GORDON: Yes, Your Honor.

8 THE COURT: I didn't know if you had any prepared
9 statements or --

10 MS. GORDON: I did.

11 THE COURT: All right. You may begin.

12 MS. GORDON: Thank you, Your Honor. Your Honor,
13 Ms. Hicklin brings this motion at this time because she's
14 suffering intense and unremitting pain due to Defendants'
15 actions which are causing her irreparable harm and worsening
16 mental and physical injury that is certain to continue
17 without court intervention. Ms. Hicklin has shown the Court
18 that despite being aware of her serious medical need for
19 gender dysphoria treatment, Defendants have continuously
20 denied her that treatment.

21 And we know that this denial isn't based on any
22 medical reasons because the medical records show that
23 Corizon's own psychiatrists have prescribed the treatment
24 that Ms. Hicklin seeks, and Corizon in its own brief states
25 that it is not the party that's denying Ms. Hicklin this

1 treatment. Rather what Defendants are doing is they are
2 denying her treatment in accordance with the prevailing
3 standards of care as set forth by the World Professional
4 Association for Transgender Health, or WPATH for short, based
5 on blanket nonmedical MDOC policies, including its policy and
6 or practice of not giving hormone treatment to any
7 transgender person who wasn't getting such treatment before
8 they entered prison.

9 THE COURT: And that's the freeze frame policy?

10 MS. GORDON: Yes, Your Honor.

11 THE COURT: Is that -- do you have a copy of that
12 policy?

13 MS. GORDON: We perhaps think we might at this
14 point, and I'll explain. We've been asking for a copy of
15 this policy since the beginning of this case. In fact,
16 before we even came on the scene Ms. Hicklin requested a copy
17 of the policy. We repeatedly weren't given one. Late last
18 week we got some documents from the Missouri Department of
19 Corrections, one of which is somewhat vaguely worded, but
20 it's the closest thing to a freeze frame policy that we've
21 seen. And basically says that, you know, they have a policy
22 of not initiating, which is I guess the important point here,
23 they have a policy of not initiating hormone treatment for
24 anyone who is in Missouri Department of Corrections. Which I
25 guess by inference means that they don't have a policy of

1 giving it to people who -- for whom they don't have to
2 initiate it but it's just continued care. So that's the
3 closest thing that we've seen to date, and I'm still not even
4 sure if that's the official policy because it was, like I
5 said, somewhat vaguely worded and was just like a block of
6 text on a piece of paper. So it was unclear who it was from
7 or to or what it actually represented, but that's the closest
8 thing we've seen to date. There have been references to it
9 in the medical records, but those aren't actual policies,
10 they are just references to the fact that MDOC has this
11 policy.

12 THE COURT: All right. You may proceed.

13 MS. GORDON: So you know basically what this case
14 comes down to is we have nonmedical MDOC personnel ultimately
15 calling the shots on what should be medical decisions in
16 blatant violation of the Eighth Amendment. Ms. Hicklin has
17 provided the Court with ample documentary and expert evidence
18 showing that she is suffering irreparable harm, and she cited
19 to numerous cases establishing that she is likely to prevail
20 on the merits of her claims.

21 Defendants' actions have caused Ms. Hicklin
22 irreparable harm not just because her constitutional rights
23 are continuously being violated, which in and of itself
24 establishes irreparable harm, but also because as the medical
25 records and our expert testimony show, she's suffering from a

1 long list of mental and physical symptoms including severe
2 anxiety and depression, sleep and appetite disturbances,
3 ongoing headaches, heart palpitations, and intrusive and
4 worsening thoughts of self surgery by removing her testicles,
5 which she understands to be the source of the testosterone
6 that significantly contributes to her gender dysphoria.

7 The evidence also shows that without treatment she
8 is at imminent risk of actually attempting to remove her
9 testicles, which she has attempted in the past actually. And
10 she is also at risk for death by suicide, which she also has
11 a past history of, suicidal attempts.

12 Ms. Hicklin also has a high likelihood of succeeding
13 on the merits because it's solidly established that denying
14 treatment for a known serious medical need violates the
15 Eighth Amendment's prohibition on cruel and unusual
16 punishment. And there's no gender dysphoria exception to
17 this well-established rule. In fact, a strong and growing
18 body of case law as we've cited in our briefs establishes
19 that gender dysphoria is a serious medical condition and that
20 denying to provided adequate -- and that's the important key
21 word here -- adequate medical treatment for that condition
22 constitutes deliberate indifference.

23 THE COURT: And so it's your position that the
24 therapy, and I don't know if at this point she's taking
25 medications, I know there was some point in time where

1 certain medications were offered and she declined, is not
2 adequate.

3 MS. GORDON: That is correct, Your Honor. There are
4 several cases that have shown that providing only therapy
5 and/or psychotropic medications to someone who has gender
6 dysphoria and for whom it is shown that the adequate
7 treatment includes hormone therapy and perhaps other
8 modalities, but here what we're talking about is hormone
9 therapy and being able to live as a woman and express herself
10 as a woman, that when that is medically indicated, defaulting
11 to just providing talk therapy and/or medications is not
12 constitutionally adequate under the Eighth Amendment.

13 THE COURT: All right. Before you continue, let me
14 also -- and I'm going to ask defense counsel the same
15 question. And we've discussed this matter of the canteen
16 items previously.

17 MS. GORDON: Yes, Your Honor.

18 THE COURT: But I would really like some specific
19 detail.

20 MS. GORDON: Sure.

21 THE COURT: If there's certain canteen items -- what
22 I am not clear from the parties' briefs is these canteen
23 items, are these items that are available to other inmates
24 that have not been made available to Ms. Hicklin? And by
25 "available" I mean because at one point in time Dr. Throop

1 may have prescribed certain or recommended certain canteen
2 items. Is it Ms. Hicklin's expectations that these items
3 would be provided without cost? So, again, what I'm trying
4 to figure out, if any inmate goes to a canteen and says, I
5 want a razor or I want hair removal products, are there other
6 inmates who can get those products, and your client has been
7 denied access to those clients (sic) or do these products
8 simply not exist because this is a male facility and the --
9 what is stocked in the canteen would be generally for men?

10 MS. GORDON: I think I understand your question. So
11 I think one part of your question is is Ms. Hicklin asking to
12 be provided with canteen -- the canteen items she seeks at
13 the cost of MDOC? I think that was part of your question
14 that I heard.

15 THE COURT: Yeah.

16 MS. GORDON: She is not. She's asking for access to
17 canteen items the same way anyone goes to the canteen. And
18 my understanding anyway is they buy them out of their own
19 funds.

20 THE COURT: Okay.

21 MS. GORDON: So that's specific to the canteen
22 items. The second part of your question as I understand it
23 is are these available to other inmates in Potosi
24 Correctional Center or in MDOC at large.

25 THE COURT: Are there other inmates who have -- who

1 have been diagnosed with gender dysphoria but maybe possibly
2 were getting hormone treatment before they entered the
3 system --

4 MS. GORDON: Uh-huh.

5 THE COURT: -- and therefore they are not subject to
6 the freeze frame policy --

7 MS. GORDON: Right, right, right.

8 THE COURT: -- and have access to certain items that
9 your client is seeking? If you know the answer.

10 MS. GORDON: Yeah, so -- so we know that there are
11 people in MDOC who are being treated for gender dysphoria,
12 including being given hormone therapy. I am not 100 percent
13 clear whether those people are also being given access to
14 gender affirming canteen items. I would assume so, but I
15 don't know that for sure.

16 What I do know is what Ms. Hicklin seeks is to be
17 able to go to the canteen and purchase the same items that
18 other women in MDOC purchase. So she's not asking for them
19 to start -- to get a new contract, to get new things. There
20 are existing contracts for MDOC to purchase these things.
21 She's asking for them to be made available to her.

22 And it's unclear why they are not being made
23 available to her, but I think it's some combination of MDOC's
24 belief that because she wasn't diagnosed with gender
25 dysphoria before she came to prison that they are just going

1 to maintain her where she is, hence the "freeze" in freeze
2 frame, but also probably some aspect of the fact that she's
3 being housed in a prison that's been designated for male
4 inmates. I think it's some combination of those two things.

5 But, again, these are items that are available.
6 There is a mechanism for someone incarcerated in MDOC to get
7 those things. So there is no physical impediment to her
8 getting them, it's just a matter of policy and/or practice by
9 the Defendants.

10 THE COURT: All right. Please continue.

11 MS. GORDON: Okay. So MDOC's own doctors have
12 warned them that continuing to withhold this treatment from
13 Ms. Hicklin poses serious risk to her. Thus in this case
14 what we have is medical decisions being blocked by blanket
15 nonmedical policy, which violates the Eighth Amendment. So
16 Ms. Hicklin is likely to succeed on the merits of her claims
17 based on the plethora of case law that we've cited.

18 But also the balance of the harms weighs in her
19 favor because while she's already suffering irreparable harm
20 and will continue to do so without treatment, defendants have
21 not pointed to a single injury they would face if they were
22 to provide her the harm. And it would be hard for them to do
23 so given the fact that as we just went over, they are already
24 providing this treatment to other transgender people in their
25 care.

1 Issuing a preliminary injunction is also in the
2 public interest as courts have frequently recognized that
3 it's always in the public interest to enforce constitutional
4 rights. And they've recognized that in cases very similar to
5 this one involving a transgender plaintiff who was
6 incarcerated and wasn't being provided medically necessary
7 treatment.

8 Now, neither sets of Defendants have provided any
9 real rebuttal to any of these points. In fact, while
10 Ms. Hicklin has cited -- has presented substantial factual
11 and expert evidence to the Court and cited to numerous
12 on-point cases in support of her motion, Defendants on their
13 part have relied on misrepresentations of the factual record,
14 old and inapposite case law, and unscientific un-peer
15 reviewed report that espouses views about transgender people
16 and gender dysphoria that has been roundly criticized --
17 rejected by the courts and roundly criticized by the medical
18 and scientific communities.

19 There are a lot of misrepresentations and we cover a
20 few of them in our brief, but I want to focus in on this
21 point for the Court that MDOC has previously admitted that it
22 has a freeze frame policy. And like I said, they produced a
23 document very recently that seems to embody this policy.
24 They've also admitted that this policy was the basis for
25 denying Ms. Hicklin the care, so this court really should

1 reject any after-the-fact attempts to suggest that this
2 decision was made on any kind of medical basis.

3 One of the ways that they've tried to do that is to
4 attach certain documents that were never produced before to
5 MDOC's brief in particular, but the documents don't help
6 them. One, they are either inapplicable or they show what
7 we've been saying, which is that ultimate decision-making
8 policy on medical decisions are being left with nonmedical
9 MDOC staff.

10 They also try to argue that Ms. Hicklin was assessed
11 or evaluated by Drs. Babich and McKinney, and that those
12 doctors determined that she shouldn't get hormone treatment
13 and the other treatments that she seeks.

14 The medical records does not support this at all and
15 neither Dr. Babich or Dr. McKinney ever evaluated or assessed
16 Ms. Hicklin for gender dysphoria. And they wouldn't be
17 qualified to do so because under the controlling standards of
18 care, gender dysphoria has to be evaluated and treated by
19 mental health professionals who are knowledgeable and
20 experienced in treating gender dysphoria. The only medical
21 personnel who actually assessed Ms. Hicklin for gender
22 dysphoria were Dr. Throop and Dr. Stephens, both of whom
23 either had or continue to have a clinical relationship with
24 Ms. Hicklin. They conducted in-depth evaluations and
25 assessments, made in-depth notes memorializing those

1 assessments, and based on those assessments and in accordance
2 with a recognized expert in gender dysphoria, Dr. Randi
3 Ettner, they determined that she has gender dysphoria and
4 that adequate treatment for that gender dysphoria included
5 hormone therapy, access to gender affirming canteen items,
6 and permanent body hair removal. With respect to the case
7 law --

8 THE COURT: So let me ask you, with respect to
9 the -- and I understand that there are three generalized
10 categories.

11 MS. GORDON: Yes, Your Honor.

12 THE COURT: But if the -- if the State decided to
13 allow her to receive the gender affirming products and the
14 hair removal but not the hormone therapy, would that be
15 adequate?

16 MS. GORDON: No, Your Honor.

17 THE COURT: All right. So it's all three or none --
18 in other words, it's a package request of all three
19 categories. One category being provided would not satisfy
20 your position that that would be adequate medical care?

21 MS. GORDON: Right. And to be clear, I'm not an
22 expert in gender dysphoria treatment. You know, I've tried
23 to educate myself, but what we know from the people who are
24 experts is that this particular person needs certain specific
25 things, and those things are what we're asking for today.

1 We're not asking the Court to do anything other than what the
2 Eighth Amendment requires, which is that this person get
3 adequate medical treatment in accordance with the prevailing
4 standards of care as tailored to her individualized needs.
5 So that's the key here. And that's why we're asking for what
6 we're asking for, no other reason but that.

7 You know, I couldn't stand here and tell you what
8 Jessica Hicklin needs, but I'm going off of what the evidence
9 shows. And that's why we're asking for the components of
10 treatment that we're asking for.

11 With respect to the case law, I just want to say
12 quickly that we've cited lots of cases, you know, on-point
13 cases showing that Ms. Hicklin is likely to prevail on the
14 merits of her claims. The other side spends most of their
15 time talking about, you know, an old Medicaid case, MDOC
16 specifically that, A, doesn't have anything to do with this
17 case because it's applying a completely different legal
18 standard, but probably more importantly it was based on a
19 quarter century old research. I mean, this is the area where
20 there's been vast advancements in the understanding of how to
21 treat and how to approach gender dysphoria. And in those 25
22 years we've had a plethora of modern scientific research
23 showing us that gender dysphoria is safe, effective,
24 medically necessary, and in many cases lifesaving for
25 transgender people.

1 All of the -- you know, they've cited by my count
2 only three cases that ever had anything to do with medical
3 treatment for gender dysphoria in the prison context, two of
4 which are inapposite factually because they don't present
5 someone who had recognized gender dysphoria, who was assessed
6 and who was recommended certain treatment modalities. And
7 the third, *Phillips*, actually supports her claim because it
8 had to do with someone who was being denied medically
9 necessary hormone treatment and for whom the Court granted
10 preliminary injunction.

11 So, you know, the Plaintiffs have provided an expert
12 who, you know, is a recognized expert, 40 years of experience
13 doing this, including specifically in the prison context, has
14 treated thousands of transgender people and testified in
15 numerous cases, and all they have on the other hand is this
16 report that a court very recently, another federal district
17 court completely rejected in another case involving
18 transgender plaintiffs stating that it had, quote, no indicia
19 of reliability. This court should do the same here.

20 In fact, not only have courts rejected it, but it's
21 been roundly criticized and rejected by the medical and
22 scientific community, so much so that 600, six-zero-zero,
23 mental health professionals rejected it recently.

24 So, you know, Your Honor, Ms. Hicklin is continuing
25 to suffer from irreparable harm, and she shouldn't have to

1 wait these several months or even several years for this case
2 to resolve for her to get the care that she so desperately
3 needs and that the Constitution requires that she receive.
4 So for these reasons we respectfully ask that the Court grant
5 her motion. Thank you.

6 THE COURT: Thank you. All right. I'll hear from
7 Mr. Luepke. And so my first question for you before you
8 begin is what is the harm to the State as you see it? What
9 are the harms that the State faces? I know there's maybe
10 some costs associated with the requested course of treatment
11 that the Plaintiff has requested, but is there anything else
12 besides that?

13 MR. LUEPKE: Well, as to the cost, it sounds like
14 counsel is willing to pay for the items that are now being
15 requested, so I haven't discussed with the client, you know,
16 what the costs of the hormone replacement therapy is that
17 apparently the Plaintiff is willing to pay for. But with
18 respect to the decision -- and, again, we just produced these
19 documents. I just received them from the client and --

20 THE COURT: So is that document then this policy?
21 Is that the policy?

22 MR. LUEPKE: I'm not sure if it's the policy that
23 counsel is referring to, but I'd like to hand this to Your
24 Honor.

25 THE COURT: All right. But, I mean, I think this is

1 certainly -- I think the Court would like to -- if there is a
2 written policy and there are some protocols, there is a
3 freeze frame policy in place with the State; is that correct?

4 MR. LUEPKE: It is my understanding, yes, Your
5 Honor. And I think counsel accurately represented that we
6 have a policy that we're not going to, you know, provide
7 treatment for those such as Plaintiff who 25 years later
8 announces in prison that she has gender dysphoria. But to
9 those that have been diagnosed prior to prison, I believe
10 there is a policy to provide more medical treatment to those
11 inmates.

12 Now, I think it's important to keep in mind that
13 it's on a case-by-case basis as to what they are being
14 provided, whether it's hormone replacement therapy or some
15 other type of therapy. You know, I can't stand here and say
16 that that is true. You now have in front of you a written
17 policy that says that, "The department believes that the
18 initiation of hormone replacement therapy is not appropriate
19 in a prison environment. An attempt at such transition in
20 the prison venue severely compromises the safety of the
21 offender and places them in substantial risk of sexual abuse
22 and harassment. Therefore, after carefully balancing the
23 potential benefit of hormone replacement therapy to an
24 offender, the increased risk to their personal safety as well
25 as the impact on the safety and the security of the other

1 offenders and staff, we conclude such therapy is not
2 appropriate in a prison setting and is not approved."

3 Now, these are the professionals that are trying to
4 run a prison, a state prison that has 11,000 inmates
5 statewide. And in their considered judgment they have
6 determined that this hormone replacement therapy for an
7 inmate is not appropriate.

8 Now, they want to say that the State has been
9 deliberately indifferent. They have been deliberate, Your
10 Honor, but it hasn't been indifferent. The record that you
11 have now in front of you shows that this inmate is receiving
12 extensive treatment, extensive therapy, monthly
13 psychoanalysis, psychology, counseling, and is allowed to
14 have showers, you know, not with other male inmates if that's
15 what she chooses. The prison has not been indifferent. And
16 they've come forward with no evidence of what I understand
17 indifference to be.

18 Now you're going to say, well, Luepke, you're not
19 the Supreme Court. Indifference is ignoring. And if it's
20 deliberate it's, yeah, we know that you need help and you
21 ain't getting any. That hasn't happened here. What's
22 happened here is that we have dedicated professionals that
23 have gone to great effort to treat this inmate and what's
24 been diagnosed as the gender dysphoria.

25 Now, counsel is right, I did attach a recent article

1 by, you know, an esteemed doctor and psychiatrist who wrote
2 an article deciding that gender dysphoria is a mental and
3 emotional condition as much as it is medical. And it's kind
4 of unclear and they've come forward with a lot of other
5 doctors that say that's a bunch of BS and, you know, gender
6 dysphoria is a medical condition, not psychological. Well,
7 that just shows there's some dispute, if you will, in the
8 professional community.

9 That's not a dispute, though, that the Missouri
10 State prison system is engaging in. They've diagnosed -- our
11 State doctors have diagnosed the Plaintiff with gender
12 dysphoria. They are doing their best to treat that gender
13 dysphoria. They have not been deliberately indifferent to
14 it. The State of Missouri, the Director of the Department of
15 Corrections has not been deliberately indifferent. We're
16 providing monthly counseling, more if needed. And it's in
17 the record. We tell this inmate, let us know, tell us what
18 you need, we will evaluate and assess it and treat it and
19 provide counseling and do as much as we can.

20 But you have this policy, Your Honor. We have
21 11,000 other inmates. We're trying to do our best to run a
22 prison here on a limited budget that the State taxpayers are
23 funding. And doing our best, I think it's inappropriate for
24 now, particularly at the preliminary injunction stage, for a
25 federal court to come in and say, no, State of Missouri,

1 before I hear any evidence, you're going to provide this
2 therapy.

3 THE COURT: So let me ask you this. With respect
4 to -- I think there's no dispute that there's been a
5 diagnosis. And a course of treatment, whether or not the
6 course of the treatment is sufficient, is a big part of this
7 litigation.

8 MR. LUEPKE: Yes.

9 THE COURT: And whether or not it meets what may be
10 medically necessary is also obviously part of this
11 litigation. But let's say this was a different type of --
12 and apparently there's also not a dispute that there is this
13 freeze frame policy, whether -- how explicit it is, whether
14 it's part of a policy manual or not, I'm still not exactly
15 clear. What you've provided to the Court today is a one
16 paragraph -- it's one paragraph that looks like it was
17 probably part of a redacted something else. I'm sure this
18 doesn't exist on its own, this must be part of some other
19 larger policy manual, internal policy manual. So to the
20 extent that it does provide some information and you're
21 representing that this was created in the Department of
22 Corrections as to a written policy, then I'll take you at
23 your word that this is part of the policy.

24 But my question is, let's say you have someone who
25 is incarcerated and over the course of years they develop

1 some type of renal problem, renal failure and they have been
2 diagnosed with the need for dialysis. It didn't exist before
3 they were incarcerated and this is a post-incarceration
4 diagnosis. I assume that there would not be a freeze frame
5 policy that because the person did not have -- they were not
6 in kidney failure or had kidney disease before they were
7 incarcerated, then because that did not exist beforehand they
8 are now not able to get that medically necessary treatment of
9 dialysis or what other Corizon diagnosis and course of
10 treatment might be prescribed.

11 MR. LUEPKE: That's correct.

12 THE COURT: So how is this different?

13 MR. LUEPKE: How is this different? It's -- this is
14 not renal failure. And renal failure, for instance, I think
15 would be covered by insurance. That brings us to the Eighth
16 Circuit opinion. Now, counsel say it's almost 20 years old
17 and, boy, that's really old --

18 THE COURT: So heart disease -- I'll change my
19 hypothetical because it's not really about the -- the point
20 is if someone developed some other diagnosable condition, a
21 medical condition after they are incarcerated, how is the
22 approach and why is the approach different than it would be
23 for a diagnosis of gender dysphoria if the recommendation of
24 the doctors who are treating that inmate includes a course of
25 treatment that is maybe larger or different than what the

1 policy provides.

2 MR. LUEPKE: Okay. Your Honor, thank you. I think
3 I understand what you may be getting at. And the answer, of
4 course, is that we have a male inmate in a male
5 institution -- I'm sorry, genetically male inmate in a male
6 institution who is now transitioning to becoming a female in
7 that male institution, genetically and physically a female.
8 And, again, we're trying to run a prison here. That in our
9 considered judgment creates a problem, safety problem, not
10 only for the inmate that is receiving such treatment but for
11 the other inmates.

12 And, you know, as indicated, this is the Prison Rape
13 Enforcement Act, I think is the PREA designation. And in
14 trying to treat not just this one inmate but our 11,000
15 inmates that we have in this prison system, whereas we can
16 treat the prisoner with heart disease and with renal failure
17 and provide that treatment to that inmate and they can
18 continue on in the prison population, whether it be male or
19 female without incident, that's not the case here. We have
20 in this case an inmate who is transitioning to becoming a
21 female in a male institution. That creates a problem.

22 THE COURT: Do you have other male inmates who are
23 in male facilities receiving hormone treatment?

24 MR. LUEPKE: I'm not aware of any, Your Honor. I
25 mean, again, we're at this stage of litigation, we're just

1 getting the discovery, so maybe that will come out that that
2 is happening and of course we'll address it. But I think at
3 this preliminary stage that, you know, it just kind of
4 highlights that we don't have, I'll admit, some of the
5 information that you'll need to make a decision in this case.

6 THE COURT: All right. You may proceed.

7 MR. LUEPKE: Well, just to conclude, Your Honor, at
8 this time and in this case at this stage of the litigation I
9 think that the Court at this point lacks the authority it
10 needs to overrule the considered judgment of these State
11 prison officials that have decided, again, in their
12 considered judgment that our best approach for this inmate
13 and in light of our entire institution is to deny the hormone
14 replacement therapy that is being demanded in this
15 preliminary mandatory injunction proceeding.

16 THE COURT: All right. Thank you.

17 MR. LUEPKE: Thank you, Your Honor.

18 THE COURT: All right.

19 MR. ECKENRODE: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. ECKENRODE: As you know, I represent Corizon.
22 If you're not aware, let me kind of explain what that is.
23 Corizon is a company that provides medical services to the
24 DOC here in the State of Missouri and in other states. It's
25 basically privatized healthcare.

1 Our position on this issue is rather simple, and
2 that is we're here today for what I consider to be an
3 extraordinary remedy. And I think the *Dataphase* case is the
4 only case that you really need to look at because that's
5 what's applicable here. So our position is that under the
6 four prongs of the *Dataphase* case, where we are right now
7 doesn't qualify for the entry of an order as extraordinary as
8 a preliminary injunction. Our position is at least with
9 regard to those issues, on the issue of success on the merits
10 as against Corizon, we don't think the Plaintiffs can
11 prevail. As the Court knows in a deliberate indifference
12 case, they have to show that it's a serious medical need.
13 Nobody is denying that at all. But they also have to show
14 that the Defendants were deliberately indifferent to that.

15 The records are clear, and I think even Ms. Gordon's
16 statements are clear that my clients have been providing care
17 to this individual since the time the individual or at least
18 since the time my clients have had the contract. They are
19 continuing to provide that care now, they provide it on a
20 monthly basis. They provide medical care, they provide
21 psychiatric care. They have, in fact, come up with a
22 diagnosis of gender dysphoria. And they have, in fact,
23 recommended the initiation of hormone therapy. That's as far
24 as they can go.

25 It seems unusual and perhaps counterintuitive that

1 my clients can't implement the therapy that they had
2 suggested, but they do have to defer to the DOC on certain
3 things. As Mr. Luepke just said, the DOC has to make
4 decisions regarding the safety of patients and things of that
5 nature. Corizon is not part of the DOC. Corizon has no
6 authority outside of the medical area in any one of the
7 prison systems. Corizon cannot make policy for the DOC.

8 So when Corizon determines that it should implement
9 some type of care, most of the time that is going to be
10 approved by the DOC, but there are certain circumstances
11 where it may not because of safety issues. As an example, if
12 you were to determine that a patient has a separated shoulder
13 and needs a sling, the DOC may choose not to implement the
14 sling because the sling can be a weapon. Same thing with
15 certain orthopedic devices. Likewise there are medications
16 that Corizon might otherwise have suggested be offered, for
17 instance, opiates for patients who have severe pain, but in
18 the system we don't use opioids. So there are certain
19 things, certain types of medical treatments or therapies that
20 we have to defer to the DOC on their decision not to
21 implement them even when we think it may be the best thing to
22 do.

23 In this case Corizon has literally gone as far as it
24 can go. So insofar as the Plaintiff is concerned, I don't
25 think that as against Corizon, as against the ten named

1 Corizon Defendants the Plaintiff can prevail on the merits as
2 to us. You know, she made the comment earlier about
3 Dr. McKinney and Dr. Babich's examples. They are both named
4 Defendants in this case, and as she noted, neither of them
5 even evaluated the patient. One of the reasons why I'm
6 taking kind of an aggressive approach to this is I want my
7 clients out of this case. I don't think they deserve to be
8 in this case.

9 But on this issue that we're here for today, and
10 this issue is just that of an extraordinary remedy, do the
11 *Dataphase* criteria exist, and I don't believe they do.

12 Now, on the issue of risk of harm, there's been some
13 conflicting issue or some conflicting I won't say testimony
14 but evidence about that. The medical records that exist, and
15 I know that we've supplied Plaintiff's counsel with
16 everything at least up-to-date to reflect that on a bimonthly
17 basis, every other week, the healthcare providers, the mental
18 healthcare providers evaluating Ms. Hicklin will always ask
19 questions about this individual's mental state. As an
20 example, they routinely ask, do you have suicidal ideations,
21 do you feel that you'll commit self harm. Consistently those
22 answers have been no. Hicklin has not indicated a desire to
23 commit self harm or suicide.

24 The individual does have some anxiety, does have
25 some depression. In March when asked to rate the depression,

1 the individual rated the depression as a two out of ten.
2 Rated anxiety as a five or six out of ten. A part of that
3 anxiety as Hicklin has said to the healthcare providers
4 several times is because of the duration of his sentence or
5 her sentence. She's in -- I believe is on a life sentence,
6 and there is some belief she thinks that she may be able to
7 be released early. And part of her concern is, am I going to
8 get out. And I think that's a problem that anybody in the
9 system would have, how long am I going to be here.

10 So while there are issues related to the gender
11 dysphoria and she does make that known to the healthcare
12 providers, that's one part of her anxiety, but it's not all
13 of her anxiety. And there isn't any strong evidence that
14 even with her concerns about gender dysphoria that she's
15 going to commit an act of self harm.

16 So those are the two main interests. I tend to
17 agree that in general there's case law that says there's a
18 public interest in making sure somebody's civil rights aren't
19 violated. But at least in this particular case I don't think
20 there's an immediate public interest in this court granting a
21 preliminary injunction. I don't think that that exists.

22 On the balance of harm issue, the one thing that
23 concerns me always in a case like this would be the precedent
24 that some type of a preliminary injunction here might set for
25 future cases.

1 That's basically all I have to address. I'm happy
2 to answer any of your questions, Your Honor.

3 THE COURT: Thank you. Actually I was going to ask
4 you questions about just the standard on the preliminary
5 injunction, and I think you have laid out your case well.

6 MR. ECKENRODE: Thank you.

7 THE COURT: So thank you. I will give Plaintiff an
8 opportunity to rebut the statements made by defense counsel
9 now.

10 MS. GORDON: Thank you, Your Honor. Your Honor, as
11 an additional matter I just want to point out for the Court
12 that again, you know, Defendants have had this policy in
13 place for a long time. They are only just now confirming
14 that they have it, even though we've asked them about it
15 several times. And so I really do think it's improperly
16 before the Court. But be that as it may, it confirms what
17 we've been saying from day one, what they have is a blanket
18 policy based on nonmedical unsupported MDOC justifications
19 which are wholly unfounded. They cited to no cases to
20 support this belated safety argument. And they have zero
21 evidence of any kind to show that they are incapable of
22 housing Ms. Hicklin safely and providing her the
23 constitutionally required medical treatment that she needs,
24 including hormone therapy.

25 In fact, the evidence actually disproves any

1 argument based on safety or security because the Defendants
2 admit that they are right now housing transgender people who
3 are getting hormones and who given the freeze frame policy
4 presumably have been getting it for quite some time, and so
5 have developed the secondary sex characteristics that you get
6 when you've been on hormones for awhile including breasts and
7 other secondary sex characteristics, and they are already
8 dealing with whatever safety and security implications come
9 with housing people who are on hormones and --

10 THE COURT: Not to cut you off, but I'm not sure if
11 that is what Mr. Luepke verified today. He did not seem to
12 state affirmatively --

13 MS. GORDON: They have before. I missed the back
14 and forth with you on that. But they have admitted on the
15 record in their answers that they are housing transgender
16 people --

17 THE COURT: Thank you.

18 MS. GORDON: -- who are getting it. Courts have
19 rejected similar safety-based arguments in other cases
20 involving treatment for transgender inmates. In the *Fields*
21 case, the Seventh Circuit case, safety was raised as an issue
22 and the Court rejected that argument. In *Norsworthy v.*
23 *Beard*, officials argued that providing surgery actually in
24 that case would pose safety risks, and the Court rejected
25 that argument stating that it was not persuaded that the

1 prison's stated safety and security concerns should override
2 the Plaintiff's interest in receiving constitutionally
3 adequate care. And in that case --

4 THE COURT: Were those on motions for a preliminary
5 injunction?

6 MS. GORDON: Yes, Your Honor, both -- well, excuse
7 me, *Fields* was not. *Norsworthy* was, but -- and I want to get
8 to that point actually because both Corizon and MDOC have
9 seemed to argue that this is an extraordinary remedy, that
10 you would, you know, perhaps be the first court in the nation
11 to do this. Nothing could be further from the truth. We've
12 cited to several cases in our briefs where on these very same
13 kinds of facts, transgender person, gender dysphoria, the
14 kind of treatment that's been prescribed and was being held,
15 preliminary injunction sought, that was granted. And these
16 are from all over the country. *Battista v. Clarke*,
17 preliminary injunction granted in the First Circuit on a case
18 where the Plaintiff was seeking hormones and female clothing.
19 *Gammett v. Idaho* in the District of Idaho, Plaintiff was
20 seeking hormones. *Norsworthy v. Beard*, I just mentioned
21 that, in the North District of California, Plaintiff was
22 seeking surgery. *Phillips v. Michigan* in I believe the Sixth
23 Circuit, hormones were being sought there. There are others.
24 So this is by no means -- this would by no means be
25 the first time that a court has grappled with this issue and

1 has granted preliminary injunction. In those cases, most of
2 those cases, not all the Defendants presented much stronger
3 evidence than Defendants have presented here, they presented
4 experts who knew about gender dysphoria to rebut the
5 Plaintiff's experts. They put forward, you know, pages and
6 pages of safety studies. Here we have none of that. We have
7 no expert testimony on the other side to rebut the very
8 strong expert and documentary evidence we have.

9 They've come up with this, you know, belated one
10 paragraph statement about PREA. Nothing in PREA, which is
11 the Prison Rape Elimination Act, nothing in PREA even
12 suggests that transgender people should be denied
13 constitutionally adequate care for safety reasons,
14 particularly where there's no evidence whatsoever that the
15 Defendants cannot safely house Ms. Hicklin while also
16 providing her the care she needs. Ms. Hicklin has told
17 fellow inmates that she's a woman, that she uses the name
18 Jessica, that she'd liked to be called by female pronouns.
19 She wears her hair in a feminine style. She has not had any
20 issues with harassment, sexual assault, or anything for many,
21 many years. So actually the evidence in the record combined
22 with the fact that they have admitted that they are housing
23 transgender women now who are getting cross-sex hormones
24 shows that the evidence actually goes the other way.

25 And so this court really should reject this

1 after-the-fact, late-in-the-day attempt to create this wholly
2 new argument about safety and security as many other courts
3 have done in similar cases.

4 I just want to note for the Court also that we now
5 have Defendants admitting that they have a freeze frame
6 policy on the books, the same kind of blanket
7 non-individualized policy that courts have time and time and
8 time again rejected as violating the Eighth Amendment,
9 including the *Fields* case, which analogizes to cancer saying,
10 you know, we would never say because that giving someone
11 therapy and drugs is sufficient to treat cancer, we would
12 never say that because you didn't either know or had been
13 diagnosed with either cancer or diabetes, kidney, whatever it
14 is, that you shouldn't get treatment.

15 Here we have compelling evidence that this person is
16 at serious risk of imminent harm and needs certain kinds of
17 treatment to address that risk. And the other side has put
18 forward nothing to dispute that.

19 And I think this Court has more than enough evidence
20 in front of it to grant the Plaintiff's Motion for
21 Preliminary Injunction. Thank you, Your Honor.

22 THE COURT: Thank you. All right. Let me just ask
23 the parties, does any party want the opportunity to file any
24 additional briefs on this matter?

25 MS. GORDON: I would like the opportunity. I'm not

1 necessarily saying we'll take it.

2 THE COURT: All right.

3 MS. GORDON: But we'd like --

4 THE COURT: You'd like some days to think about it?

5 MS. GORDON: Yes.

6 THE COURT: So I will provide you with that
7 opportunity or that option. And also would you like a
8 transcript prior to making that decision or no?

9 MS. GORDON: What we said here today I think that we
10 have enough sense of the arguments I believe here today in
11 order to make a decision based on that.

12 THE COURT: All right. So seven days enough time or
13 ten, what would you like?

14 MS. GORDON: So is the seven to ten days to get
15 something on file with the Court?

16 THE COURT: Yes. Or would you like seven days to
17 decide?

18 MS. GORDON: To let the Court know?

19 THE COURT: Correct.

20 MS. GORDON: Seven days to let the Court know.

21 THE COURT: All right. And so -- and how much
22 approximate time do you think you would -- if you decide you
23 would like to prepare a brief, how much time would you like
24 to prepare the brief?

25 MS. GORDON: I think ten days would be sufficient.

1 THE COURT: All right.

2 MR. LUEPKE: And, Your Honor, could we get five days
3 to respond to any brief that's filed?

4 THE COURT: Absolutely. And that will be for both
5 Corizon and for the Department of Corrections. All right.
6 Today is the 23rd. So if -- I will give Plaintiff until
7 May 30th to notify the Court whether there is an intention to
8 file a post-hearing brief. And if so that brief would then
9 be due, I'll make it -- I'll give you a little additional
10 time, Wednesday, June 14. And the Defendants would have
11 until Monday, June 19 to file any responses.

12 Is there anything else that the Court should
13 consider before ending this hearing today?

14 MR. LUEPKE: Nothing for Defendant, Your Honor.

15 THE COURT: All right. And let me ask, though, with
16 respect to the -- what has been provided, would you like this
17 marked as -- to be made part of the record as Defendants'
18 exhibit or how would you like me --

19 MR. LUEPKE: We'll call it Exhibit A, sure.

20 THE COURT: Exhibit A. So that will be included as
21 Defendants' Exhibit A as to the Department of Corrections.

22 MR. LUEPKE: Actually now that I say that, Your
23 Honor, we have other exhibits we were wanting to --

24 THE COURT: Oh, all right.

25 MR. LUEPKE: Let's call it Exhibit L.

1 THE COURT: All right. Exhibit L. But you're not
2 seeking to admit the other exhibits that you had prepared
3 today, just so I'm clear?

4 MR. LUEPKE: Well, they are in the court record.

5 THE COURT: All right. So they are already in the
6 record, but this will be Defendant MDOC Exhibit L. All
7 right.

8 If there's nothing further then we will be in
9 recess. Thank you.

10 (Court in recess at 10:57 a.m.)
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C E R T I F I C A T E

I, Susan R. Moran, Registered Merit Reporter, in and for the United States District Court for the Eastern District of Missouri, do hereby certify that I was not present at the proceedings in the above-mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of the electronic recording.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys in this action, nor financially interested in the action.

I further certify that this transcript contains pages 1 - 36 and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

IN WITNESS WHEREOF, I have hereunto set my hand at St. Louis, Missouri, this 13th day of June, 2017.

/s/ Susan R. Moran
Registered Merit Reporter