

APPEAL NO. 18-13592-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DREW ADAMS,
Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
District Court No. 3:17-cv-00739-TJC-JBT

**APPELLANT'S APPENDIX IN SUPPORT OF INITIAL BRIEF
VOLUME XIV**

Terry J. Harmon FBN 0029001
Jeffrey D. Slanker FBN 0100391
Robert J. Sniffen FBN 000795
Michael P. Spellman FBN 937975

SNIFFEN & SPELLMAN, P.A.
123 North Monroe Street
Tallahassee, FL 32301
Telephone: (850) 205-1996
Fax: (850) 205-3004
Counsel for Appellant

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1 UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF FLORIDA
3 JACKSONVILLE DIVISION
4 No. 3:17-cv-00739-TJC-JBT

5
6 DREW ADAMS, et al.,)
7)
8 Plaintiff,)
9)
10 vs.)
11)
12 THE SCHOOL BOARD OF ST. JOHNS)
13 COUNTY, FLORIDA,)
14)
15 Defendant.)
16 _____)

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18
19
20 TRIAL VIDEOTAPED DEPOSITION OF
21 DEANNA ADKINS, M.D.

22
23 (Taken by Plaintiff)
24 Durham, North Carolina
25 Wednesday, December 6th, 2017

26
27
28 PREPARED BY: Amy A. Brauser, RPR, RMR, CRR
29 RUFFIN CONSULTING, INC.
30 DIRECT DIAL: 252-243-9000
31 WWW.RUFFINCONSULTING.COM

1 APPEARANCES

2 ON BEHALF OF THE PLAINTIFF:

3 SHANI RIVAUX, Esquire
4 JENNIFER ALTMAN, Esquire (via telephone)
5 Pillsbury Winthrop Shaw Pittman, LLP
6 600 Brickell Avenue, Suite 3100
7 Miami, Florida 33131
8 (786) 913-4900
9 shani.rivaux@pillsburylaw.com

10 (and)

11 TARA L. BORELLI, Esquire
12 Lambda Legal Defense and Education Fund, Inc.
13 730 Peachtree Street NE, Suite 640
14 Atlanta, Georgia 30308
15 (404) 897-1880
16 tborelli@lambdalegal.org

17

18 ON BEHALF OF THE DEFENDANT:

19

20 R. CHRIS BARDEN, Ph.D., Esquire
21 5193 Black Oaks Court North
22 Plymouth, Minnesota 55446
23 (801) 230-8328
24 rcbarden@mac.com

25

26 (and)

27

28 KEVIN KOSTELNIK, Esquire
29 TERRY J. HARMON, Esquire (via telephone)
30 Sniffen & Spellman, P.A.
31 123 North Monroe Street
32 Tallahassee, Florida 32301
33 (850) 205-1996
34 kkostelnik@sniffenlaw.com
35 tharmon@sniffenlaw.com

36

37 ALSO PRESENT:

38

39 Annette Atkinson, Videographer

1 INDEX OF EXAMINATIONS

2 By Ms. Rivaux Page 5, 153

3 By Dr. Barden Page 50, 156

4

5 PREVIOUSLY MARKED EXHIBITS

6 NUMBER DESCRIPTION MARKED/IDENTIFIED

7 Exhibit 30 Endocrine Society's Clinical 25

8 Practice Guideline on Treatment

9 of Gender Dysphoric and Gender

10 Incongruent Persons.

11

12 Exhibit 47 Pediatric Endocrine Society's 35

13 statement promoting the safety of

14 transgender youth.

15

16 Exhibit 43 Endocrine Society's position 47

17 statement on transgender health.

18

19 MARKED EXHIBITS

20 NUMBER DESCRIPTION MARKED/IDENTIFIED

21 Exhibit 1 Informed Consent Form 88

22

23 Exhibit 2 Drew Adams Records 116

24

25

1 TRIAL VIDEOTAPED DEPOSITION OF DEANNA

2 ADKINS, M.D., a witness called on behalf of Plaintiff,
3 before Amy A. Brauser, Notary Public, in and for the
4 State of North Carolina, at the Millenium Hotel
5 Durham, 2800 Campus Walk Avenue, Durham, North
6 Carolina, on Wednesday, the 6th day of December, 2017,
7 commencing at 8:56 a.m.

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1 THE VIDEOGRAPHER: We're now on the
2 record. This is the beginning of Media Unit
3 Number 1. Today is December 6, 2017. The time
4 is 9:00 a.m. The location is Millennium Hotel
5 Durham, 2800 Campus Walk Avenue, Durham, North
6 Carolina. The deponent is Deanna Adkins, M.D.,
7 in the matter of Drew -- Drew Adams, et al.,
8 Plaintiff in -- versus The School Board of
9 St. Johns County, Florida, Defendant, in the
10 United States District Court for the Middle
11 District of Florida, Jacksonville Division. The
12 civil action number is 3:17-cv-00739-TJC-JBT.
13 My name Annette Atkinson, video specialist, and
14 the court reporter is Amy Brauser. We are both
15 representing Ruffin Consulting, Inc.

16 Would the court reporter, please, swear
17 in the witness?

18 DEANNA ADKINS, M.D.,
19 having been first duly sworn to tell the truth, was
20 examined and testified as follows:

21 EXAMINATION

22 BY MS. RIVAUX:

23 Q. Good morning, Doctor. Can you, please,
24 state your name for the record?

25 A. Uh-huh. Deanna Adkins.

1 Q. And can you, please, tell the court what
2 you do for a living?

3 A. Yes, I am a pediatric endocrinologist and
4 I practice at Duke University.

5 Q. And what is your position at Duke
6 University?

7 A. I am a -- sorry. I am a clinician
8 educator and an assistant professor of pediatrics.

9 Q. Okay. And do -- are you involved in
10 the -- the Duke Clinic for Child and Adolescent Gender
11 Care?

12 A. Yes, I am the director.

13 Q. And what is the Duke Center for Child and
14 Adolescent Gender Care?

15 A. This is a multi-disciplinary clinic that
16 was started in July of 2015 to take care of kids with
17 differences of sex development as well as kids with
18 gender dysphoria and transgender kids.

19 Q. And were you involved in the creation of
20 the clinic?

21 A. Yes, it was myself that started the
22 clinic, yes.

23 Q. And what were your reasons for opening the
24 clinic?

25 A. Well, they were twofold because there are

1 two sort of groups of patients that we take care of.
2 The first group are the kids with differences of sex
3 development and typically those are cared for by a
4 multi-disciplinary team at most institutions and so we
5 wanted to develop that at Duke. And -- and we had
6 made an attempt a few years prior and decided to -- to
7 do that again and so I worked with a urologist on
8 working with that team and putting it together. And
9 then because the same sort of team is needed with kids
10 who are transgender, we decided to do them all in one
11 clinic, and -- and so that was the reason, because I
12 had begun to see a few transgender kids and realized
13 that I really needed the multi-disciplinary team.

14 Q. And how many transgender and differences
15 of sexual disorder patients do you have currently at
16 the clinic?

17 A. So we only started tracking the kids that
18 I see with differences of sex development in the
19 clinic when it started in July of 2015, so there are
20 around 20 patients or so. I've seen more prior to
21 that, but they haven't been seen in the
22 multi-disciplinary clinic. And then we have around
23 221 or so patients, transgender patients.

24 Q. And are you involved in the treatment of
25 all of these patients?

1 A. I am.

2 Q. When did you start treating transgender
3 patients?

4 A. I think it was 2014, may have been 2013.

5 Q. And how do you become involved in
6 treatment for a transgender patient?

7 A. So my start was because I had a colleague
8 who called me up from New York in -- at Columbia and
9 said that there was a patient here in North Carolina
10 who was seeking care there because they couldn't find
11 someone to help them here in North Carolina. He asked
12 me if I would be willing to work with the family
13 around this and so I, you know, expressed my concern
14 that I hadn't had any training at that point and --
15 and he offered to mentor me. So that was Wylie
16 Hembree.

17 Q. And as part of your work even before you
18 were -- you began working in the clinic, were you
19 called to assist upon sex assignments in infants?

20 A. Yes, throughout my career since I started
21 in pediatric endocrinology, that's been part of my
22 job.

23 Q. And can you briefly describe your
24 educational background and training to become a
25 pediatric endocrinologist?

1 A. Sure. First you do training to become a
2 pediatrician so you spend three years in a residency
3 for pediatrics after medical school and then a
4 fellowship follows that in -- specifically in
5 pediatric endocrinology. The -- I spent three years
6 doing the standard fellowship and an extra year of --
7 of research.

8 Q. And when did you become licensed to
9 practice medicine?

10 A. I had a -- a license that was a training
11 license starting in 1997 in the State of North
12 Carolina and my official license was 2001 in North
13 Carolina.

14 Q. And currently, how do you divide your time
15 between clinical work and how much -- what percentage
16 of your time is devoted to seeing patients?

17 A. So I spend three and a half days a week in
18 clinic seeing patients, typically.

19 Q. And what is the other time that you are --
20 you spend? What -- what are your other duties?

21 A. So the other day -- day and a half or so
22 is administrative, so related to patient care, but in
23 addition, because I'm a clinician educator, I do a lot
24 of teaching during that time.

25 Q. And can you explain for the court what

1 your involvement is in the education and the -- the
2 role that you play in education of transgender care in
3 sex assignment?

4 A. Sure. So first, I'm the fellowship
5 program director for pediatric endocrinology at Duke
6 so I'm involved in the curriculum development and
7 running that program, and then I also do lectures to
8 our pediatric endocrine fellows. In addition, I do
9 lectures to the adult endocrine fellows and -- and so
10 that's around differences of sex development. In
11 addition, I also do that sort of topic for both of
12 those groups as well. For transgender care, I've also
13 done probably around five or six different
14 departments, grand rounds at Duke, related to that.
15 Excuse me. And then I have done lectures in the
16 school of nursing, in a physician assistant school on
17 these topics, and then as well in the undergraduate
18 area in guest lecture and neuroscience as well as in
19 the social sciences and in the global health. And
20 then in clinic, I also have people who rotate with me
21 and I teach them during that time from, let's see, med
22 peds, pediatric psychiatry, social work, pediatrics,
23 the physician assistant school, nurse practitioners.

24 Q. And you mentioned that you're the
25 fellowship director --

1 A. Uh-huh.

2 Q. -- at Duke. Do you ever mentor fellows

3 regarding specifically transgender care in sex

4 classification?

5 A. Yes. So certainly, differences of sex

6 development is the standard core that we teach all of

7 our fellows who come as well and then I have another

8 fellow who comes over for a special rotation from

9 UNC-Chapel Hill for transgender care because they

10 don't have that available at their institution.

11 Q. Are you a member of any medical

12 organizations in your field of specialty?

13 A. I am.

14 Q. And what are those organizations?

15 A. Currently I'm a member of the American

16 Academy of -- AAP, American Academy of Pediatrics,

17 AAP, and then Pediatric Endocrine Society and the

18 Endocrine Society and the WPATH.

19 Q. And do you know the Plaintiff in this

20 case?

21 A. I do.

22 Q. And how do you know Drew Adams, the

23 Plaintiff?

24 A. Drew is one of my patients.

25 Q. And how long has he been your patient?

1 A. Since -- almost two years. March will be
2 two years.

3 Q. And what were you asked to do in this
4 case?

5 A. I was asked to testify about the care that
6 I provided for Drew as well as as a medical expert on
7 transgender care as well as differences of sex
8 development.

9 Q. Are you being compensated for your
10 opinions or your testimony in this case?

11 A. No.

12 Q. Have you ever testified in court as an
13 expert witness before?

14 A. Yes.

15 Q. Okay. So I just want to turn for a moment
16 to talk about some of the definitions of the terms
17 that you've mentioned. What does it mean to be
18 transgender?

19 A. So someone who's transgender has a sex
20 assigned at birth that doesn't match their gender
21 identity or their core knowledge of what their gender
22 is.

23 Q. And is being transgender a choice?

24 A. No.

25 Q. Is being transgender voluntary?

1 A. No.

2 Q. Does being transgender limit one's ability

3 to function in society?

4 DR. BARDEN: Leading.

5 THE WITNESS: No.

6 DR. BARDEN: If she asks a question, if

7 you could give a little pause in there, I may

8 have an objection and then you can answer.

9 BY MS. RIVAUX:

10 Q. Based on your training, experience, and

11 knowledge, do you have an opinion on whether Drew is

12 transgender?

13 A. Yes.

14 Q. And what is your opinion?

15 DR. BARDEN: Lack of foundation.

16 THE WITNESS: So my opinion is that

17 Drew is transgender.

18 BY MS. RIVAUX:

19 Q. And what is the basis of your opinion?

20 A. So in my experience with my patients, I

21 have seen many transgender patients. I have -- in

22 addition with the criteria that are elucidated in our

23 clinical guidelines with the Endocrine Society and the

24 SOC, standards of care, with WPATH, Drew meets the

25 criteria.

1 Q. And what is -- you mentioned gender

2 identity. What is gender identity?

3 A. So gender identity is really what you know

4 to be your gender at your core.

5 Q. And does everyone have a gender identity?

6 A. Yes.

7 Q. And how do you determine gender identity?

8 A. Gender identity is something that you have

9 to ask the patient and they know for themselves.

10 Q. Can someone's gender identity be changed?

11 A. No.

12 Q. Is gender identity a choice?

13 A. No.

14 DR. BARDEN: We're going to object that

15 that question was leading.

16 Again, just a little pause there.

17 BY MS. RIVAUX:

18 Q. Based on your training and treatment of

19 Drew, what is Drew's gender identity?

20 A. Male.

21 Q. And what is the basis of your opinion?

22 A. So there are several sources. Primarily

23 talking with Drew and using my experience in this

24 area. In addition, my clinical social worker has done

25 assessment of Drew with regard to gender and gender

1 identity that corroborate this information, and in
2 addition, we talk with the family. And all of these
3 have led us to this.

4 DR. BARDEN: Objection, hearsay.

5 MS. RIVAUX: There was no question.

6 She had answered the question.

7 BY MS. RIVAUX:

8 Q. What is gender dysphoria?

9 A. So gender dysphoria is when you have an
10 incongruence between your sex assigned at birth and
11 your gender identity and there is significant distress
12 regarding this incongruence.

13 Q. And the information that you mentioned
14 that you rely on in determining gender identity, is
15 that information that you rely on for medical
16 treatment and diagnosis?

17 A. Yes.

18 DR. BARDEN: Leading.

19 BY MS. RIVAUX:

20 Q. Was Drew diagnosed with gender dysphoria?

21 A. Yes.

22 DR. BARDEN: Hearsay.

23 BY MS. RIVAUX:

24 Q. What's the difference between gender
25 dysphoria diagnosis and being transgender?

1 A. So in both conditions there's a
2 discordance or discrepancy between your sex assigned
3 at birth and your gender identity, but people with
4 gender dysphoria have significant distress around this
5 discordance.

6 Q. Did you diagnose Drew's gender dysphoria?

7 A. I did not.

8 Q. Who diagnosed Drew's gender dysphoria?

9 A. Drew had a therapist that diagnosed that
10 and provided information to us in the form of a
11 letter, as well as my licensed clinical social worker
12 who I work with and my multi-disciplinary team.

13 Q. Can you, please, describe the process at
14 which your clinic and your multi-disciplinary team
15 diagnose an individual when they come in for
16 treatment?

17 A. Sure.

18 DR. BARDEN: Objection, relevance as to
19 this individual patient.

20 THE WITNESS: So -- so typically when a
21 patient comes in, they will have a -- a primary
22 mental health provider whom they've seen before
23 who will provide information with regard to the
24 fact that there may be gender dysphoria or that
25 the patient might be gender -- might be

1 transgender, and then they spend almost a full
2 day with us and -- several hours for sure. I do
3 a medical evaluation, physical exam, laboratory,
4 and history review, and then they spend time
5 with my licensed clinical social worker who
6 performs a number of batteries of testing
7 regarding gender, gender identity, anxiety,
8 depression, a number of things that go along
9 with that we might be concerned about. She
10 speaks with the patient alone, with their
11 family, and then the family by themselves as
12 well.

13 BY MS. RIVAUX:

14 Q. Does your clinic follow the standards of
15 care in diagnosing gender dysphoria?

16 A. Yes.

17 Q. And what are the Endocrine Society
18 clinical guidelines?

19 A. So the Endocrine Society has come out with
20 clinical guidelines on a number of different things.
21 In particular for transgender care, they've come out
22 with two different sets of guidelines that tell us the
23 best information available on how to take care of --
24 of people with gender dysphoria.

25 Q. And is the protocol that is used at your

1 clinic for confirming the diagnosis of gender
2 dysphoria consistent with the requirement of the
3 Endocrine Society's clinical guidelines?

4 DR. BARDEN: Objection, leading.

5 THE WITNESS: Yes.

6 BY MS. RIVAUX:

7 Q. Let me rephrase that. What role does the
8 Endocrine Society clinical guidelines, how does that
9 impact the protocol that you have for diagnosing
10 gender dysphoria?

11 A. So we specifically designed our -- our
12 clinic around the recommendations made in the clinical
13 guidelines from the Endocrine Society.

14 Q. Now, is this same protocol that you
15 described to the court in your -- in your clinic for
16 diagnosing gender dysphoria, did you follow this
17 protocol for diagnosing Drew?

18 A. Yes.

19 Q. In the regular course of your practice, do
20 you rely on the information from your clinical
21 licensed social worker's analysis?

22 DR. BARDEN: Objection, leading.

23 THE WITNESS: So as part of our
24 multi-disciplinary team and our protocol as I
25 described, we -- she does a definite portion of

1 our analysis and care of the patient and we

2 discuss that as part of our -- our

3 decision-making process.

4 BY MS. RIVAUX:

5 Q. And what -- what information, before you

6 begin to treat a patient, what information do you rely

7 upon in determining that -- let me restate that.

8 Before determining whether to treat a

9 patient, what information from your clinic do you rely

10 upon before making that determination to begin

11 treatment?

12 A. So I -- I rely on all the information that

13 we accumulate from my information as well as my

14 licensed clinical social worker's information.

15 Q. Does that include the notes and

16 evaluations from your clinical social worker?

17 A. Yes.

18 Q. And is this the type of information you

19 routinely rely upon in your practice?

20 A. Yes.

21 Q. In the information that you told the court

22 that you rely upon for coming to your opinions on

23 whether to make a determination on whether to begin

24 treatment, do you remember whether Drew reported his

25 reasons for seeking treatment?

1 A. Yes. So Drew was very concerned that he
2 didn't appear male, he didn't have a low voice, he
3 didn't have the -- the physique of a male. His body
4 was too curvy, breasts were there, and that was
5 distressing. And I think those were the main concerns
6 that we had.

7 Q. Are these types of complaints typical
8 in -- in the type of information that you rely upon to
9 determine your course of treatment?

10 DR. BARDEN: Objection, leading.

11 THE WITNESS: Drew's complaints were
12 consistent with many of my patients' concerns.

13 That -- sorry, yes.

14 BY MS. RIVAUX:

15 Q. Did you rely upon the representations from
16 Drew in determining your course of treatment?

17 A. Yes.

18 Q. Did you have an opportunity to observe
19 dysphoria in your patients?

20 A. Yes. During my discussions with Drew,
21 Drew was able to tell me and both in observing his
22 behavior, he was distressed.

23 Q. Throughout your course of treatment, did
24 Drew report any other issues that he reported directly
25 to you?

1 A. So later on as we were moving through
2 treatment, Drew's periods started back and that was
3 really distressing to Drew. In addition, his voice
4 wasn't changing much and so that was a concern.

5 Q. And when you say "his voice wasn't
6 changing," can you describe for the court what it is
7 that -- for the voice to change, what -- what is the
8 impact?

9 A. So for someone to have acceptance as a
10 male, it's typical that you would want your entire
11 physical appearance and sound to be male. And that
12 alignment is really important in people who have
13 gender dysphoria, and a -- a lower voice is a -- a big
14 signal for people that -- that they're talking to or
15 working with or interacting with a male.

16 Q. Now, once your clinic confirms a gender
17 dysphoria diagnosis and you understand your patient's
18 reasons for seeking treatment, for you as the
19 pediatric endocrinologist, how do you determine the
20 proper treatment protocol?

21 A. One more time.

22 Q. Sure. You had mentioned that one of the
23 processes is that your clinic, you somewhat -- you go
24 through a process to confirm the diagnosis.

25 A. Uh-huh.

1 Q. You also talked about understanding your
2 patient's reasons for seeking treatment. My question,
3 Doctor, is, as the treating physician how do you
4 determine what the proper treatment protocol is?

5 A. Ah, yes. So well, the idea is to address
6 the dysphoria, so the treatment is targeted at the
7 things that are most dysphoric to the patient. And in
8 addition, of course, we have to weigh the plusses and
9 minuses of whether there is a family history of
10 something that might preclude our use of our
11 medications or our personal medical history as well.

12 Q. And what is the ultimate goal of the
13 treatment?

14 A. To align the body with the gender identity
15 so that the dysphoria is relieved.

16 Q. And in coming to your determination on the
17 treatment protocol, is your description here your
18 routine practice?

19 A. Yes.

20 Q. Is your practice consistent with the
21 standards of care in your field?

22 DR. BARDEN: Objection, leading.

23 THE WITNESS: Yes, they are.

24 BY MS. RIVAUX:

25 Q. In your field, what do the standards of

1 care lay out for the proper treatment for gender
2 dysphoria in adolescents?

3 A. So in adolescents, there are a number of
4 different things that the standards of care recommend.

5 First is a social transition and that is where a
6 patient or person would change their appearance to
7 look more like their gender identity. So if they
8 were -- gender identity is male, they may cut their
9 hair, they may change their clothing to male clothing,
10 they may change the sports team that they're on, and
11 in all aspects of their life, they would be acting as
12 a male.

13 Q. Okay.

14 A. Yes.

15 Q. And you had mentioned part of it was
16 social transition. Are there other aspects of the
17 standards of care?

18 A. So typically the -- the social transition
19 happens first, but sometimes it happens with the
20 medical transition together and sometimes
21 sequentially, and the medical transition is more what
22 I'm involved in as the endocrinologist and that is
23 where we provide gender-affirming hormones or hormones
24 that match the gender identity of the patient to allow
25 their body to change to match their gender identity.

1 In addition, we may provide medications that block the
2 hormones that the patient's own body is making that
3 might interfere with those hormones that we're giving
4 them to change their physical appearance to match
5 their gender identity.

6 Q. I'm going to give you what we have
7 pre-marked as Plaintiff's Exhibit 30. And I want
8 to -- let me know if you recognize this document.

9 A. Yes, I do.

10 Q. And what is this document?

11 A. This is the Endocrine Society's Clinical
12 Practice Guideline on Treatment of Gender Dysphoric
13 and Gender Incongruent Persons.

14 Q. And do you find this guideline to be
15 authoritative?

16 A. I do.

17 Q. Do you find it to be reliable?

18 A. I do.

19 Q. Do you use it in your routine practice?

20 A. I do.

21 Q. Can you, please, explain to the court the
22 significance of these clinical guidelines in your
23 field of practice?

24 A. So in clinical practice, clinical
25 guidelines, and specifically these guidelines for me

1 in the care of my gender dysphoric patients, give the
2 best approach to managing a patient with the
3 particular condition that you're looking at and it is
4 supported by their peer-reviewed medical literature in
5 their design of the clinical guidelines.

6 Q. And what is the Endocrine Society's
7 recommendations regarding gender-affirming treatments?

8 A. So the recommendation is that it is the
9 most appropriate treatment for gender dysphoria with
10 regard to these patients.

11 Q. Can I ask you -- I'm going to move the --
12 the guidelines into evidence.

13 (EXHIBIT NUMBER 30 WAS MARKED FOR IDENTIFICATION)

14 BY MS. RIVAUX:

15 Q. And can I ask you to read the first two
16 sentences.

17 DR. BARDEN: We're going to object,
18 lack of foundation, hearsay, and improper
19 opinion.

20 MS. RIVAUX: Okay.

21 BY MS. RIVAUX:

22 Q. Can I ask you to read from the conclusion,
23 the first two sentences?

24 A. Conclusion, first two sentences.

25 (Reading)

1 Gender affirmation is a
2 multi-disciplinary treatment in which
3 endocrinologists play an important
4 role. Gender dysphoric, gender --
5 slash, gender incongruent persons seek
6 and/or are referred to
7 endocrinologists to develop the
8 physical characteristics of the
9 affirmed gender.

10 Is that all?

11 Q. Yes, that's -- thank you.

12 And are you aware whether there were any
13 cosponsoring associations involved in coming together
14 with the Endocrine Society guidelines?

15 A. Yes.

16 Q. And what were those cosponsoring
17 associations?

18 A. So the American Association of Clinical
19 Endocrinologists, the American Society of Andrology,
20 European Society of Pediatric Endocrinology, European
21 Society of Endocrinology, Pediatric Endocrine Society,
22 and the World Professional Association for Transgender
23 Health.

24 DR. BARDEN: Move to strike as hearsay
25 and lack of foundation.

1 BY MS. RIVAUX:

2 Q. Now, you -- you spoke a little bit about
3 the social transition. Now, does social transition
4 involve bathroom use matching gender identity?

5 DR. BARDEN: Objection, leading, very
6 leading.

7 THE WITNESS: So --

8 BY MS. RIVAUX:

9 Q. Let me -- I'm sorry. Let me rephrase the
10 question.

11 A. Sure.

12 Q. You mentioned what social transition is.
13 Can you explain for the court what social transition
14 entails?

15 A. Sure. So social transition involves
16 changing your appearance, your activities, and your
17 actions completely to the gender that matches your
18 gender identity so that everything you do from the
19 time you get up in the morning and you go to bed at
20 night is in that particular gender.

21 Q. Okay. And can you -- you also mentioned
22 medical transition and you spoke a little bit about
23 the hormone treatments. Can you explain what does the
24 medical transition entail for the -- for an individual
25 patient?

1 A. So once we've decided to move forward with
2 the medical transition, typically that would involve
3 giving hormones that match the gender identity of the
4 person and, again, maybe blocking the hormones that
5 they're making in their own body so that it doesn't
6 interfere with that. And those changes will make
7 their body look more and more like the gender
8 identity. And the goal is to have them completely
9 appear the gender that matches their gender identity.

10 Q. And for Drew, did you come to a conclusion
11 and a determination as to the proper course of
12 treatment?

13 A. Yes. After our meetings and our
14 evaluations and our team discussions, we recommended
15 that Drew continue to try to do his social transition
16 to complete that as well as moving forward with the
17 medical transition.

18 Q. And has Drew taken steps to socially
19 transition?

20 A. He has.

21 Q. And has Drew taken steps to medically
22 transition?

23 A. He has.

24 Q. Are you aware of any steps Drew has taken
25 to surgically transition?

1 A. So yes, typically the third step in
2 transition is medical -- I mean is surgical, sorry,
3 and that includes often having your breasts removed if
4 that is part of the dysphoria and Drew has done that.

5 Q. And are there other aspects to surgical
6 transition?

7 A. Yes, there are a number of different
8 things that -- that can happen. If you need to appear
9 more feminine, for example, if you were transitioning
10 the other way, you might have facial feminization
11 surgery or changes to your -- the appearance of your
12 voicebox and then you might have surgery to change the
13 appearance of your genitals to match that of the
14 gender that you -- is -- matches your gender identity.

15 Q. And is the genital surgery -- genital
16 surgical transition, is that recommended for minors?

17 DR. BARDEN: Objection, leading.

18 THE WITNESS: Surgical transition for
19 the -- the particular genital surgeries are not
20 recommended until over the age of 18.

21 BY MS. RIVAUX:

22 Q. In your treatment protocol that you -- you
23 prescribed for Drew, what was -- what is the goal of
24 your treatment?

25 A. The goal of my treatment is to eliminate

1 Drew's gender dysphoria.

2 Q. And how will Drew's -- will Drew's
3 physical appearance change with the treatment?

4 A. That is the goal. To relieve the gender
5 dysphoria, we want to have Drew appear male to
6 everyone that he meets, yes.

7 Q. And can you describe for the court how
8 Drew's physical appearance will change through
9 treatment?

10 A. So typically, testosterone, which is the
11 hormone we're using for Drew, can cause a number of
12 physical changes, and I kind of like to think of them
13 from top to bottom so I don't forget them. So some
14 people have hair loss if the men in their family have
15 male pattern baldness. They may have acne. They will
16 get more facial hair. Their voice will deepen. They
17 may have some decrease in the size of their breasts
18 but not a lot, but a little bit. They will have more
19 body hair. They may have enlargement of their
20 clitoris a little bit. And those are the major
21 things.

22 Q. Is your treatment of Drew consistent with
23 the standards of care and clinical guidelines in your
24 practice?

25 DR. BARDEN: Objection, leading.

1 THE WITNESS: Yes. Oh, and I forgot,
2 testosterone also typically eliminates periods
3 which is a big source of dysphoria for a number
4 of my patients.

5 BY MS. RIVAUX:

6 Q. So let me just go back and ask that
7 question just so that it's clear on the record.

8 A. Sure.

9 Q. You had mentioned some of the aspects of
10 changes to physical appearance that Drew might
11 experience. In addition to the list that -- that you
12 provided, are there additional physical changes that
13 Drew may experience?

14 A. In addition, Drew's periods should go away
15 and that is one of our goals because that's part of a
16 significant dysphoria for a number of patients,
17 including Drew.

18 Q. In your experience, have you -- in your
19 experience in treating the transgender population,
20 have you noticed whether there is any impact from
21 denying bathroom access that's consistent with gender
22 identity?

23 A. One more time.

24 DR. BARDEN: Objection, lack of
25 foundation.

1 BY MS. RIVAUX:

2 Q. Based on your experience in treating the
3 transgender population, have you observed any impact
4 from any denial of access to bathrooms that are
5 consistent with gender identity?

6 A. So I have had experience with this. So
7 since I practice in North Carolina, there was a period
8 of time recently where transgender individuals were
9 not allowed by law to go to bathrooms that matched
10 their gender identity. In particular, I think it was
11 government buildings, but many of my patients were
12 confused and thought it was all -- all public
13 restrooms. And so many of them were really upset and
14 afraid to go to the restroom anywhere outside of home.
15 And if they were to go to the restroom that matched
16 their sex assignment at birth, the individuals who
17 were far along in their transition who looked the
18 opposite completely of their sex assigned at birth and
19 they went to that bathroom had some significant
20 issues. Some of them were -- were bullied. Some of
21 them, you know, were very upset by that. In addition,
22 most of them just chose to avoid the whole situation
23 and they would not drink any fluids during the day so
24 that they could wait to get home and go which puts
25 them at increased risk for things like urinary tract

1 infections and dehydration. It's just really
2 uncomfortable.

3 Q. Based on your knowledge, training, and
4 experience, does this kind of denial to bathrooms
5 impact an ability to properly transition?

6 DR. BARDEN: Objection, lack of
7 foundation.

8 THE WITNESS: So the recommendations
9 are to completely socially transition, and as I
10 stated before, that includes everything you do
11 all day long, including going to the bathroom.
12 And so to sort of have this one aspect of your
13 life during the day where you're not in your
14 gender identity is not consistent with a -- a
15 complete social transition.

16 BY MS. RIVAUX:

17 Q. Is access to a gender neutral bathroom
18 sufficient to avoid this impact?

19 DR. BARDEN: Objection, leading.

20 THE WITNESS: So my --

21 BY MS. RIVAUX:

22 Q. Let me restate the -- the question. Is
23 there any difference if their access is given to a
24 gender neutral bathroom?

25 DR. BARDEN: Objection, lack of

1 foundation.

2 THE WITNESS: So in my experience --

3 DR. BARDEN: And calls for speculation.

4 THE WITNESS: In my experience with my

5 patients who I've talked to about this, they

6 feel that they are stigmatized when they're

7 asked to go to a gender neutral bathroom because

8 no one else has to go to the gender neutral

9 bathroom. Everyone else can choose the -- the

10 male or the female bathroom and aren't sort of

11 pushed into this position where they're now

12 recognized and can be picked on by other

13 individuals.

14 BY MS. RIVAUX:

15 Q. In discussions with your patients about

16 bathroom use, is that conversations that you have in

17 diagnosis and treatment of your patients?

18 A. Yes.

19 Q. We talked earlier about the Endocrine

20 Society. What is the Pediatric Endocrine Society?

21 A. So that is a group of pediatric

22 endocrinologists that are specifically trained and it

23 is an academic society.

24 Q. I am going to hand you what's been

25 pre-marked as Plaintiff's Exhibit 47. Have you seen

1 this document before?

2 A. Yes, I have.

3 Q. Do you recognize it?

4 A. I do.

5 Q. Can you describe for the court what the
6 document is?

7 A. So this is the Pediatric --

8 DR. BARDEN: Objection, lack of
9 foundation.

10 THE WITNESS: So this is the Pediatric
11 Endocrine Society's statement promoting the
12 safety of transgender youth.

13 BY MS. RIVAUX:

14 Q. Do you find that this position statement
15 is authoritative?

16 A. I do.

17 Q. And do you find it reliable?

18 A. I do.

19 Q. I'm going to move this into evidence.

20 (EXHIBIT NUMBER 47 WAS MARKED FOR IDENTIFICATION)

21 DR. BARDEN: We'd object due to lack of
22 foundation.

23 MS. RIVAUX: Okay.

24 DR. BARDEN: And hearsay.

25

1 BY MS. RIVAUX:

2 Q. Are you aware of whether this statement
3 represents the official position of the Pediatric
4 Endocrine Society?

5 DR. BARDEN: Objection, lack of
6 foundation and hearsay.

7 THE WITNESS: Yes, it does.

8 BY MS. RIVAUX:

9 Q. Okay. And what is the position of the
10 Pediatric Endocrine Society regarding the denial of
11 access to restrooms that match gender identity?

12 DR. BARDEN: Objection, hearsay, lack
13 of foundation.

14 THE WITNESS: So their opinion is that
15 it's a violation of human rights.

16 BY MS. RIVAUX:

17 Q. Can I ask you to read the second full
18 paragraph?

19 A. Sure.

20 DR. BARDEN: Objection, hearsay, lack
21 of foundation.

22 THE WITNESS: (Reading)

23 As medical providers of
24 transgender youth, we have seen the
25 discrimination and safety concerns

1 that this population faces which may
2 lead to mental illness and high risk
3 of suicide. Transgender children and
4 adolescents need a safe and supportive
5 school environment in order to thrive
6 like any other young person. Not
7 allowing them to use the restroom that
8 matches their gender identity is a
9 violation of human rights and sends a
10 message of intolerance that will
11 promote further discrimination and
12 segregation.

13 BY MS. RIVAUX:

14 Q. And can I ask you to read the last
15 paragraph, please?

16 A. (Reading)

17 As experts in the care of
18 transgender youth, we strongly oppose
19 the decision by the Department of
20 Justice and Education and ask that the
21 rights and safety of transgender
22 children and adolescents be protected.

23 Q. Do you know when this statement was made
24 by the Pediatric Endocrine Society?

25 A. It's labeled as March 2017.

1 Q. Are you aware of whether the American
2 Medical Association's house of delegates has taken a
3 position on the treatment of transgender people?

4 DR. BARDEN: Objection, lack of
5 foundation and hearsay.

6 THE WITNESS: I am.

7 BY MS. RIVAUX:

8 Q. And what is their position?

9 A. So their --

10 DR. BARDEN: Objection, lack of
11 foundation and hearsay.

12 THE WITNESS: They support protecting
13 the rights of -- of people who are transgender
14 to use the bathroom that matches their gender
15 identity as well.

16 BY MS. RIVAUX:

17 Q. Did Drew ever report to you any concerns
18 he had about using the restroom at school?

19 A. At our initial appointment, Drew was
20 concerned that he was not being allowed to use the
21 bathroom that matched his gender identity.

22 Q. And what did you observe about Drew when
23 he told you that?

24 A. He -- he appeared very distressed about
25 it.

1 Q. Based on your knowledge, training, and
2 experience and treatment of Drew, does this represent
3 any interference with Drew's transition?

4 DR. BARDEN: Objection, leading.

5 BY MS. RIVAUX:

6 Q. I'm sorry, let me rephrase that. What
7 impact does this interference have on Drew's ability
8 to transition?

9 A. So since Drew isn't being allowed to
10 completely socially transition, it completely
11 interferes with that whole step. You really have to
12 do the full transition in order to meet the -- meet
13 the recommendations.

14 Q. Does that include your recommendations?

15 A. Yes, those are my recommendations.

16 Q. So which bathroom should Drew use to
17 support his transition?

18 A. The men's bathroom.

19 Q. And why is the men's bathroom the
20 appropriate bathroom?

21 A. Because Drew is a man.

22 Q. I want to turn for a moment to talking
23 about another topic. You had mentioned that part of
24 your job requires you to make sex assignments. And
25 can you describe for the court what it is that your

1 job entails in doing that?

2 A. Yes, so that is the other sort of part of
3 that clinic. But when a baby is born and you can't
4 tell whether the patient -- the baby is male or female
5 based on a physical exam which is the typical way you
6 would decide the sex assignments, then they consult
7 endocrinology, which would be my team, to come in and
8 do an evaluation of that infant. And as part of that,
9 we gather as much information as we can about that
10 infant, and we check their chromosomes to see what
11 their chromosomes point to as far as their gender, we
12 look at hormonal profiles, all the different kinds of
13 hormones, to see where that might point us as well.
14 And then, of course, we do a physical exam to look at
15 the external parts to see what they most look like as
16 well as ultrasound and sometimes some other radiologic
17 procedures to see what structures are internal for the
18 patients.

19 Q. And is this the population that you
20 referred to earlier as the individuals who have
21 differences of sexual development?

22 A. Yeah, these are the children with
23 differences of sexual developments.

24 Q. And does Drew have any differences of
25 sexual development?

1 A. No.

2 Q. Has your work in treating patients with
3 differences in sexual development informed your
4 understanding in any way about gender identity?

5 DR. BARDEN: Objection, leading.

6 THE WITNESS: So, yes. This population
7 is sort of the -- the group that helped us
8 figure out a lot about gender identity. The --
9 some of these particular kids are lacking all of
10 those -- one or more of those components that I
11 mentioned that we look at to sort of help inform
12 us what sex assignment should be given. And so
13 when we are unable to -- or when we make a
14 gender assignment or sexual assignment at birth
15 that later the child doesn't recognize as their
16 true gender, then we realize that there's more
17 involved here than what meets the eye. It's not
18 just your chromosomes or your hormones or what
19 parts are there that determine your gender
20 identity.

21 BY MS. RIVAUX:

22 Q. Can you provide the court with an example
23 of a patient that has differences of sexual
24 development that helped inform you on what the role is
25 of gender identity?

1 A. Yeah. I -- I think the clearest,
2 probably, example would be kids with something called
3 cloacal exstrophy. So this is an area where the
4 children have underdevelopment or no development of
5 the abdominal structures and the genitals. So in this
6 case, they're likely lacking any external physical
7 structures and sometimes they're also lacking the
8 hormonal component to help direct us in which way to
9 do a gender assignment. And so in those cases,
10 oftentimes you may just rely on chromosomes or you may
11 rely on -- in the past, sort of what the surgeon felt
12 they could do to make the most normal looking genitals
13 for the patient to assign them that particular
14 assignment at -- at birth. But in this group, because
15 you're lacking a lot of the tools, there have been
16 more cases where the children grow up and that we've
17 made an assignment that doesn't match their gender
18 identity at all.

19 Q. When you say you made the assignment,
20 did -- was that the assignment that you made at birth?

21 A. At birth, yes.

22 Q. And in those cases where the sex
23 assignment that was made at birth conflicts with
24 gender identity, what is the proper sex assignment?

25 A. It -- it should really match the gender

1 identity. When we look at these kids long-term, they
2 often are very distressed, suicidal, and very --
3 struggle in their life if -- if their gender identity
4 isn't matching their sex assigned at birth, especially
5 if they have had a procedure in infancy to change the
6 appearance of their genitals to match the sex
7 assignment, but that -- because of that and because of
8 these issues that we've come across, we don't really
9 recommend doing those surgeries now. It's really
10 considered sort of unethical to make those -- those
11 surgeries early on.

12 Q. And has your work with this population,
13 has it informed you for the transgender population how
14 to make a sex assignment in any way?

15 A. Well, it -- it just goes to show you that
16 the gender identity isn't always something that's
17 related to the three things that we've always relied
18 on to make that assignment, that there's definitely
19 something else going on, and that when you look at
20 long-term outcomes for people, they thrive and do much
21 better when their gender identity is aligned with
22 their body.

23 Q. If there is a conflict between the sex
24 that's assigned at birth and the gender identity in
25 the populations that you were talking about, do the

1 sexual characteristics that you talked about, do
2 that -- does that ever override gender identity?

3 DR. BARDEN: Objection, leading, lack
4 of foundation.

5 THE WITNESS: No.

6 BY MS. RIVAUX:

7 Q. Based on your work treating and
8 classifying sex, do you have an opinion as to what the
9 proper determinant of sex is?

10 DR. BARDEN: Objection, lack of
11 foundation.

12 THE WITNESS: So really, as I said,
13 gender identity is the key component to be most
14 successful.

15 BY MS. RIVAUX:

16 Q. Does gender identity have any biological
17 underpinning?

18 DR. BARDEN: Objection, lack of
19 foundation.

20 THE WITNESS: Right. So we have been
21 trying to find out these underpinnings over the
22 years, especially when we started to note these
23 discrepancies that occurred in the individuals I
24 mentioned before. So we started trying to look
25 at, you know, was it chromosomes, was it

1 hormonal influence, could different influences
2 during growth and development in the uterus be
3 an issue, could it be some mutation and
4 receptors, could it be exposure to medications.
5 And sort of looking at gender identity being
6 from your mind, we started looking at -- at the
7 brain as well to see if that might be something
8 that was related. And so there have been
9 anatomical and functional studies of the brain
10 where we look at the very -- how they function
11 between male and female, and there's structures
12 that are definitely have -- are different
13 between a male and a female, and when we look at
14 them in people who are transgender, what we find
15 is not really that they're either, like matching
16 their sex assigned at birth or their gender
17 identity, but that in most cases, they're sort
18 of somewhere in between, both functionally and
19 anatomically.

20 BY MS. RIVAUX:

21 Q. And based on this research that you've
22 reviewed, your training, and your experience, does
23 that lead you to conclude whether gender identity has
24 a biological underpinning?

25 DR. BARDEN: Lack of foundation,

1 hearsay, improper opinion, and calls for
2 speculation.

3 THE WITNESS: It certainly raises the
4 concern in that -- in that that is something
5 that is what we're -- we're really looking at
6 to -- to move forward with this because it's an
7 interesting finding.

8 BY MS. RIVAUX:

9 Q. And you mentioned earlier that you're
10 familiar with the Endocrine Society. I'm going to
11 show you now what's pre-marked as Plaintiff's
12 Exhibit 43, and I'm going to ask you if you recognize
13 this document.

14 A. Yes.

15 Q. And what is this document?

16 A. It's the -- the Endocrine Society's
17 position statement on transgender health.

18 Q. Are you familiar with it?

19 A. Yes.

20 Q. Do you find it to be reliable?

21 A. Yes.

22 Q. Do you find it to be authoritative?

23 DR. BARDEN: Objection, lack of
24 foundation.

25 THE WITNESS: Yes.

1 DR. BARDEN: Calls for speculation.

2 THE WITNESS: Yes.

3 BY MS. RIVAUX:

4 Q. What is the Endocrine Society's position
5 regarding the -- whether gender identity has
6 biological underpinnings?

7 DR. BARDEN: Objection, hearsay, lack
8 of foundation, calls for speculation.

9 THE WITNESS: Yes, they do have --
10 definitely talk about the underpinnings being
11 potentially biological.

12 BY MS. RIVAUX:

13 Q. I'm going to introduce this document into
14 evidence.

15 (EXHIBIT NUMBER 43 WAS MARKED FOR IDENTIFICATION)

16 DR. BARDEN: Call -- we're going to
17 object, lack of foundation, hearsay, calls for
18 speculation.

19 BY MS. RIVAUX:

20 Q. Can I turn -- have you turn to page 2, the
21 second page of the document?

22 A. Uh-huh.

23 Q. And read the first bullet point under what
24 is called, Positions?

25 A. Uh-huh.

1 DR. BARDEN: Same -- same objections.

2 THE WITNESS: Sorry. (Reading)

3 There is a durable biological
4 underpinning to gender identity that
5 should be considered in policy
6 determinations.

7 BY MS. RIVAUX:

8 Q. Thank you, Dr. Adkins.

9 Do you use the term "biological sex" in
10 your field of practice?

11 A. No, not really.

12 Q. Why not?

13 A. It really lacks specificity and it's a bit
14 inaccurate.

15 Q. Does the Endocrine Society have a position
16 regarding the use of the term "biological sex"?

17 A. Yes.

18 Q. And what is their position?

19 A. They also --

20 DR. BARDEN: Objection, calls for
21 speculation, hearsay, and lack of foundation.

22 THE WITNESS: Also in their
23 publications, they state that they feel it's not
24 very specific.

25

1 BY MS. RIVAUX:

2 Q. Do they -- does the Endocrine Society take
3 a position on whether the term "biological sex" should
4 be used?

5 DR. BARDEN: Objection --

6 THE WITNESS: Yeah --

7 DR. BARDEN: -- lack of foundation,
8 relevance, calls for speculation.

9 THE WITNESS: Sorry. I'm trying. I
10 apologize.

11 Yeah -- yes, they do not recommend it
12 to be used.

13 BY MS. RIVAUX:

14 Q. In my opinion based on your knowledge,
15 experience, and training in assigning sex in your
16 personal treatment of Drew, what is Drew's sex?

17 A. Male.

18 Q. If I can have one moment.

19 All right, Dr. Adkins, that's all the
20 questions that I have for you on the direct
21 examination.

22 A. Okay. Could we take a break?

23 DR. BARDEN: And we don't even have the
24 door like pressing open.

25 THE VIDEOGRAPHER: Off the record at

1 10:00.

2 (RECESS TAKEN)

3 THE VIDEOGRAPHER: Back on record at

4 10:19.

5 EXAMINATION

6 BY DR. BARDEN:

7 Q. All right. Good morning, Dr. Adkins.

8 A. Good morning.

9 Q. So I'm going to ask you some questions,
10 it's called a voir dire. Okay?

11 A. Okay.

12 Q. Is it true that you are not an expert in
13 science?

14 MS. RIVAUX: Objection to relevance.

15 THE WITNESS: So there's a -- that's a
16 broad category.

17 BY DR. BARDEN:

18 Q. Okay. I'll ask you a different question.

19 Isn't it true, Dr. Adkins, that you are not an expert
20 in research methodology?

21 MS. RIVAUX: Objection, relevance.

22 THE WITNESS: I don't do research on
23 research methodology. I use research
24 methodology.

25

1 BY DR. BARDEN:

2 Q. Isn't it true that you have zero federal
3 research grants as a principal investigator?

4 MS. RIVAUX: Objection, relevance.

5 THE WITNESS: I am not currently funded
6 by the Federal Government. I do have other
7 grants -- well, a grant.

8 DR. BARDEN: Objection, move to strike
9 all portions as nonresponsive other than the --
10 I'm looking for the number.

11 BY DR. BARDEN:

12 Q. You have zero federal research grants as a
13 principal investigator, correct?

14 MS. RIVAUX: Objection, relevance.

15 THE WITNESS: I have no federal
16 funding.

17 BY DR. BARDEN:

18 Q. You have zero state research grants as a
19 principal investigator, correct?

20 MS. RIVAUX: Objection, relevance.

21 THE WITNESS: Yes.

22 BY DR. BARDEN:

23 Q. You have zero private research grants as a
24 principal investigator, correct?

25 MS. RIVAUX: Objection, relevance.

1 THE WITNESS: No, that's not true.

2 BY DR. BARDEN:

3 Q. And what is your private research grant?

4 A. I have a Trent grant currently, that's a
5 private grant, Josiah Trent's Foundation.

6 Q. And you're the principal investigator of
7 that?

8 A. I was awarded the grant as the principal
9 investigator, yes.

10 Q. What is -- what is the dollar amount on
11 that?

12 A. \$5,000.

13 Q. And what is that for?

14 A. It's for a study on trans images, is what
15 it's called. Looking at variations in autonomic
16 feedback in patients who are transgender.

17 Q. Okay. Other than the \$5,000 private grant
18 for trans images, do you have any other grant funding
19 federal, state or private with you as a principal
20 investigator?

21 MS. RIVAUX: Objection, relevance.

22 THE WITNESS: There was -- I guess I'm
23 technically still listed on the Type 1 Diabetes
24 Exchange study at Duke as one of the
25 investigators, principal investigators. I'm not

1 involved as much anymore in that study, though.

2 BY DR. BARDEN:

3 Q. What is your understanding of the term
4 "principal investigator" as it's used in the medical
5 field?

6 A. So there are the primary person involved
7 in managing a study. In funding there's a primary
8 person listed. There's also a primary principal
9 investigator listed on the IRB protocols as well that
10 that person is the primary person directing the study.

11 Q. And is it your testimony that you've ever
12 been listed on any documents as a principal
13 investigator?

14 MS. RIVAUX: Asked and answered.

15 THE WITNESS: Again, in my -- in the
16 IRB I'm listed as the principal investigator, I
17 believe, for the Type 1 Diabetes Exchange study.

18 And then on the grant for the Josiah Trent
19 Foundation.

20 BY DR. BARDEN:

21 Q. What was the year of the IRB study?

22 A. You have to renew that every year,
23 so . . .

24 Q. And what's the name of it again?

25 A. Which one?

1 Q. The name of the IRB study that you believe
2 you're listed as a principal investigator?

3 A. Oh, the Type 1 Diabetes Exchange. That's
4 a --

5 Q. How do you spell that?

6 A. Type 1, T-Y-P-E --

7 Q. Okay.

8 A. -- 1 Diabetes --

9 Q. Okay.

10 A. -- Exchange.

11 Q. So that's not a -- that's not a
12 transgender study?

13 A. No.

14 Q. Okay. So, then, you've never had any
15 dollar amounts as a peer -- as a principal
16 investigator for any research grant from any state or
17 federal sources, correct?

18 MS. RIVAUX: Objection, relevance.

19 THE WITNESS: No.

20 BY DR. BARDEN:

21 Q. So have you ever published as a leading
22 author, as the first author, in a peer-reviewed
23 science journal?

24 MS. RIVAUX: Objection, relevance.

25 THE WITNESS: No.

1 BY DR. BARDEN:

2 Q. And you have zero science journal

3 editorial board positions, correct?

4 MS. RIVAUX: Objection, relevance.

5 THE WITNESS: I do not serve as an

6 editorial board member of a science journal.

7 BY DR. BARDEN:

8 Q. So that would be zero editorial board

9 positions, correct?

10 MS. RIVAUX: Objection, relevance.

11 THE WITNESS: Yes.

12 BY DR. BARDEN:

13 Q. Okay. You have zero national science

14 awards, correct?

15 MS. RIVAUX: Objection, relevance.

16 THE WITNESS: Correct.

17 BY DR. BARDEN:

18 Q. And you have spent zero days in any

19 position with tenure in any medical school or

20 university anywhere, correct?

21 MS. RIVAUX: Objection, relevance.

22 THE WITNESS: Correct.

23 BY DR. BARDEN:

24 Q. You were asked a number of questions about

25 the position statements of various associations. Do

1 you recall that?

2 A. Yes, I do.

3 Q. Were you present at the voting of those

4 associations for their statements?

5 MS. RIVAUX: Objection, relevance.

6 THE WITNESS: I was not.

7 BY DR. BARDEN:

8 Q. Do you know the names of the people who

9 voted for these association statements?

10 MS. RIVAUX: Objection, relevance.

11 THE WITNESS: So, typically, those are

12 written and offered for feedback from the entire

13 association. But I have no idea who was present

14 at the small group committee.

15 DR. BARDEN: Objection, move to strike

16 all parts of the answer except for no.

17 BY DR. BARDEN:

18 Q. So you -- you don't know the names of who

19 voted for these, correct?

20 MS. RIVAUX: Objection, relevance,

21 misleading, asked and answered.

22 THE WITNESS: So for the Pediatric

23 Endocrine Society actually I do know two of the

24 individuals who were involved in that.

25

1 BY DR. BARDEN:

2 Q. And how many others voted other than those

3 two?

4 MS. RIVAUX: Objection, relevance,

5 misleading.

6 THE WITNESS: There's no way for me to

7 know.

8 BY DR. BARDEN:

9 Q. What was the methodology by which the

10 associations put together the committee that created

11 these statements? Do you know?

12 MS. RIVAUX: Objection, relevance.

13 THE WITNESS: So the Pediatric

14 Endocrine Society's group was, I believe,

15 written by the special interest group on

16 transgender care. But I am not aware of who put

17 together the Endocrine Society ones.

18 BY DR. BARDEN:

19 Q. What percentage of these societies do not

20 agree with these statements?

21 MS. RIVAUX: Objection, relevance.

22 THE WITNESS: I -- I have no idea.

23 DR. BARDEN: We'll go off the record

24 for a moment, please.

25 THE VIDEOGRAPHER: Off record at 10:27.

1 (DISCUSSION HELD OFF THE RECORD)

2 THE VIDEOGRAPHER: We're back on record

3 at 10:28.

4 DR. BARDEN: Okay. I just want to

5 clarify for the record. So counsel objected to

6 relevance to those questions. What was the

7 objection?

8 MS. RIVAUX: On which question?

9 DR. BARDEN: A number of them.

10 MS. RIVAUX: Well, there were different

11 reasons for different ones.

12 DR. BARDEN: Okay.

13 BY DR. BARDEN:

14 Q. You've never published an article on

15 research methodology, have you?

16 A. No.

17 MS. RIVAUX: Relevance.

18 DR. BARDEN: And what's the nature of

19 that?

20 MS. RIVAUX: I don't think that her --

21 whether she -- first of all, I think that --

22 well, we can deal with this with the court, but

23 I will state that whether she had any -- any

24 experience in research methodology has any

25 relevance of whether she's qualified as an

1 expert in this case.

2 BY DR. BARDEN:

3 Q. Is it your understanding that you're
4 testifying both as a treating physician and as an
5 expert in this same case?

6 A. Yes.

7 Q. Do you recall in your deposition we talked
8 about ethical problems with doing that?

9 MS. RIVAUX: Objection, assumes facts
10 not in evidence, relevance, attorney testifying.

11 THE WITNESS: I remember some questions
12 regarding that.

13 BY DR. BARDEN:

14 Q. What's your understanding of the ethical
15 controversies regarding your testifying as a treating
16 physician and an expert in the same case?

17 MS. RIVAUX: Objection, relevance,
18 foundation, assumes facts not in evidence,
19 attorney testifying.

20 THE WITNESS: So I have no concerns
21 about my particular activity with regard to
22 ethics of testifying on both sides of the --
23 those two questions with regard to my patient,
24 and I have made that clear with my chairman
25 prior to starting.

1 BY DR. BARDEN:

2 Q. Are you aware of any published
3 controversies regarding ethics problems with someone
4 testifying as both a treating physician and an expert
5 witness in the same case?

6 MS. RIVAUX: Objection, assumes facts
7 not in evidence, relevance, foundation, attorney
8 testifying.

9 THE WITNESS: I have been -- the reason
10 that I asked the question in the beginning, of
11 my chairman, was to make sure that that wasn't
12 an issue. So I'm aware that there have been
13 some concerns in some cases.

14 DR. BARDEN: Objection, move to strike.

15 BY DR. BARDEN:

16 Q. Are you aware of any publications on
17 ethical controversies regarding someone testifying as
18 both a treating physician and an expert witness in the
19 same case?

20 MS. RIVAUX: Objection, relevance,
21 assumes facts not in evidence, attorney
22 testifying, misleading.

23 THE WITNESS: I have heard that there
24 are, but I have not read them.

25

1 BY DR. BARDEN:

2 Q. So you have not done an investigation of
3 whether there are ethical controversies regarding your
4 testifying as both a treating physician and an expert
5 in the same case?

6 MS. RIVAUX: Objection, relevance,
7 assumes facts not in evidence, attorney
8 testifying, misleading.

9 THE WITNESS: So I, prior to agreeing
10 to participating, contacted my chairman, and my
11 chairman also looped in our attorney at Duke
12 and -- to make sure that it was appropriate. I
13 didn't want to take a chance that my chairman
14 might not want me to do that.

15 BY DR. BARDEN:

16 Q. Do you know what methodology, if any, your
17 chairman used before making that decision?

18 MS. RIVAUX: Objection --

19 THE WITNESS: No.

20 MS. RIVAUX: -- relevance.

21 THE WITNESS: Other than contacting
22 the -- our lawyer.

23 BY DR. BARDEN:

24 Q. Do you know what methodology your lawyer
25 used before answering that question?

1 MS. RIVAUX: Objection, relevance,
2 invades attorney-client privilege.

3 BY DR. BARDEN:

4 Q. Just to be clear. I will never ask you
5 for any conversations you've had with your lawyers.

6 Is that okay?

7 A. Sure, yes.

8 Q. Okay.

9 (PREVIOUS QUESTION READ BACK BY THE REPORTER)

10 MS. RIVAUX: Objection, relevance,
11 invades attorney-client privilege and work
12 product.

13 THE WITNESS: No.

14 BY DR. BARDEN:

15 Q. Is it true you have not personally
16 diagnosed gender dysphoria in Drew Adams?

17 A. Yes, that's true.

18 Q. Is it true that you have not personally
19 diagnosed any psychological or psychiatric disorder or
20 label for Drew Adams?

21 MS. RIVAUX: Compound.

22 THE WITNESS: Yes, that's true.

23 BY DR. BARDEN:

24 Q. Do you recall in your deposition you
25 testified that you had spent many hours working with

1 the Plaintiff's attorneys in this case?

2 MS. RIVAUX: Objection, assumes facts

3 not in evidence.

4 THE WITNESS: Yes.

5 BY DR. BARDEN:

6 Q. How many hours have you spent working with

7 Plaintiff's lawyers in this case to prepare for your

8 testimony in this matter?

9 A. I can't tell you precisely because I

10 haven't tracked them. I would have to look back at

11 the estimates that I provided before. I don't

12 remember. Like four or five occasions an hour and a

13 half or so each, and then we met yesterday as well.

14 Q. So four and a half hours -- four and a

15 half times times an hour and a half plus yesterday.

16 So how many hours are we talking total?

17 A. That would be ten with the previous one, I

18 think, if I did my math right. And then yesterday,

19 maybe eight-ish so 18.

20 Q. Pardon?

21 A. Eighteen-ish.

22 Q. Eighteen hours?

23 A. Ish, yes.

24 Q. Okay. Is it your understanding that these

25 lawyers here for the Plaintiff are representing you?

1 A. No.

2 Q. Okay. In your discussion with the
3 lawyers, did they tell you why they have not called a
4 single witness in this case who actually diagnosed
5 Drew Adams as having gender dysphoria?

6 MS. RIVAUX: Objection, relevance.

7 THE WITNESS: No, we didn't have that
8 conversation.

9 BY DR. BARDEN:

10 Q. Were you aware that the Plaintiff, Drew
11 Adams, has been broadcasting YouTube videos?

12 A. No.

13 Q. Have you seen his YouTube videos?

14 A. No.

15 Q. Have you seen any YouTube videos in which
16 he denies having gender dysphoria?

17 MS. RIVAUX: Objection, relevance.

18 THE WITNESS: No, I haven't seen them.

19 BY DR. BARDEN:

20 Q. Did you ask Drew Adams if he was
21 broadcasting YouTubes or any social media regarding
22 his symptoms?

23 MS. RIVAUX: Objection, relevance.

24 THE WITNESS: The -- the only social --

25 MS. RIVAUX: Misleading, sorry.

1 THE WITNESS: -- the only social media
2 I knew about for Drew, Drew told me the day he
3 started testosterone that he was going to post
4 that on social media. That was my only
5 information that I've been aware of.

6 BY DR. BARDEN:

7 Q. And you didn't ask him to review his
8 social media postings?

9 MS. RIVAUX: Objection, relevance.

10 THE WITNESS: I don't ask any of my
11 patients to reveal their social media postings.
12 We're not supposed to be involved in social
13 media with our patients.

14 BY DR. BARDEN:

15 Q. Wouldn't that be excellent information on
16 whether your patient was offering you reliable
17 self-report information?

18 MS. RIVAUX: Objection, relevance.

19 THE WITNESS: I don't find that it's
20 really proper medical activity to be looking at
21 my patients' social media. And, in fact, we
22 have specific policies around that. I expect my
23 patients to represent themselves in the clinic
24 when I'm discussing with them what their issues
25 are and properly.

1 BY DR. BARDEN:

2 Q. So, then, you don't know if Drew Adams has
3 been broadcasting YouTube videos that have information
4 contrary to what he told you in clinical setting?

5 MS. RIVAUX: Objection, misleading,
6 relevance.

7 THE WITNESS: I do not.

8 BY DR. BARDEN:

9 Q. How much time have you spent with Drew
10 Adams? How many hours?

11 A. We've had three visits. My portion of the
12 visit in the first one is an hour-ish, that's just my
13 portion, and then a half an hour or sometimes a little
14 longer for the follow-ups. So -- and then we've had
15 two of those. So two, two and a half, maybe three
16 hours in person face-to-face.

17 Q. Was it two or three hours? You've
18 described two hours.

19 MS. RIVAUX: Objection, asked and
20 answered.

21 BY DR. BARDEN:

22 Q. Is there more time?

23 A. I can only give you an estimate of the
24 time. I cannot give you a precise time.

25 Q. So all of your opinions and testimony in

1 this case are based on two or three hours of
2 face-to-face interaction with Drew Adams --

3 MS. RIVAUX: Objection --

4 BY DR. BARDEN:

5 Q. -- plus the other information you've
6 discussed, correct?

7 A. So that is not the only information I use.
8 I rely on my clinical social worker and our
9 multi-disciplinary team where we get together and
10 discuss that information, as well as Drew's
11 personal -- oh, sorry, my mind just went blank --
12 mental health provider and parents as well.

13 Q. So I'm just trying to make a clear record.
14 So two or three hours of face-to-face time with Drew
15 Adams is your total for this entire case, right?

16 MS. RIVAUX: Objection, vague.

17 THE WITNESS: Face-to-face, yes.

18 BY DR. BARDEN:

19 Q. Okay. Have you done any other interviews
20 of Drew by Skype or audio or anything else?

21 A. I have not talked to Drew in any other
22 method other than his mother e-mailing me specific
23 medical questions, but not directly with Drew.

24 Q. Okay. So the two to three hours of
25 talking to Drew is -- is the total?

1 MS. RIVAUX: Objection, vague.

2 THE WITNESS: Correct.

3 BY DR. BARDEN:

4 Q. Okay. Isn't it true that you have not
5 diagnosed this Plaintiff with urinary tract
6 infections?

7 MS. RIVAUX: Objection, relevance.

8 THE WITNESS: That's true.

9 BY DR. BARDEN:

10 Q. Isn't it true that you have not diagnosed
11 this Plaintiff with impacted bowels?

12 MS. RIVAUX: Objection, relevance,
13 scope.

14 THE WITNESS: That's true.

15 BY DR. BARDEN:

16 Q. Isn't it true that you have never
17 communicated with any individuals that work for the
18 St. Johns County Schools?

19 A. That's true.

20 MS. RIVAUX: Relevance.

21 BY DR. BARDEN:

22 Q. Isn't it true that you have never
23 communicated with any parents from St. Johns County
24 Schools with the exception of the Plaintiff's parents?

25 A. That's true.

1 MS. RIVAUX: Objection, relevance.

2 BY DR. BARDEN:

3 Q. Isn't it true that you have never
4 communicated with any students of St. Johns County
5 Schools with the exception of the Plaintiff?

6 MS. RIVAUX: Objection, relevance.

7 THE WITNESS: That's true.

8 BY DR. BARDEN:

9 Q. Isn't it true that you have not reviewed
10 all of the Plaintiff's medical records?

11 MS. RIVAUX: Objection, relevance.

12 THE WITNESS: If you're talking about
13 outside of my records and the mental health
14 provider, that's -- those are the only records.
15 So I haven't reviewed the others if they're out
16 there.

17 BY DR. BARDEN:

18 Q. So you mentioned that you work with a
19 social worker; is that correct?

20 A. Uh-huh.

21 Q. Is that --

22 A. Yes, sorry.

23 Q. -- that Kristen Russell?

24 A. Yes.

25 Q. Okay. Isn't it true that Kristen Russell

1 does not have a medical degree?

2 A. That's true.

3 Q. Isn't it true that Kristen Russell is not
4 a scientist?

5 MS. RIVAUX: Objection, relevance.

6 THE WITNESS: That's true.

7 BY DR. BARDEN:

8 Q. To the best of your knowledge Kristen
9 Russell has no research grants, correct?

10 MS. RIVAUX: Objection, relevance.

11 THE WITNESS: That's true.

12 BY DR. BARDEN:

13 Q. To the best of your knowledge, Kristen
14 Russell has no publications in peer-reviewed science
15 journals, correct?

16 MS. RIVAUX: Objection, speculative,
17 relevance.

18 THE WITNESS: I can't really answer
19 that question. It's possible that she could
20 have done some publications prior to being
21 involved with me. We have not published
22 anything together. That's the only thing I can
23 state.

24 DR. BARDEN: Objection, move to strike
25 as nonresponsive.

1 BY DR. BARDEN:

2 Q. To the best of your knowledge, she has
3 zero publications in peer-reviewed science journals,
4 right?

5 MS. RIVAUX: Relevance, speculation.

6 THE WITNESS: I have not done a
7 literature search to see that, she has any
8 publications.

9 BY DR. BARDEN:

10 Q. So to the best of your knowledge, she has
11 zero, correct?

12 MS. RIVAUX: Objection, relevance,
13 speculation.

14 THE WITNESS: I haven't done the proper
15 research to answer that question in the way it's
16 framed.

17 BY DR. BARDEN:

18 Q. To the best of your knowledge, Kristen
19 Russell has never had a tenured job in any university
20 or medical school, correct?

21 MS. RIVAUX: Objection, relevance.

22 THE WITNESS: Correct.

23 MS. RIVAUX: Speculation.

24 BY DR. BARDEN:

25 Q. To the best of your knowledge, Kristen

1 Russell does not have any editorial board positions,
2 correct?

3 MS. RIVAUX: Objection, relevance,
4 speculation.

5 THE WITNESS: Correct.

6 BY DR. BARDEN:

7 Q. And to the best of your knowledge, Kristen
8 Russell has not been asked to review articles for
9 science journals, correct?

10 MS. RIVAUX: Objection, relevance,
11 speculation.

12 THE WITNESS: I don't know that I can
13 answer that question. I know we've discussed
14 articles that she's worked on, but I don't know
15 if it was a review or -- I don't know.

16 BY DR. BARDEN:

17 Q. So to the best of your knowledge, she has
18 zero -- she's been asked to review zero articles for
19 science journals?

20 MS. RIVAUX: Relevance, speculation,
21 asked and answered.

22 THE WITNESS: Again, to the best of my
23 knowledge I don't know the answer to that
24 question.

25

1 BY DR. BARDEN:

2 Q. So you mentioned that a therapist in
3 Florida diagnosed Drew Adams with gender dysphoria,
4 correct?

5 A. Yes.

6 Q. Do you know the name of that therapist?

7 A. I can't remember.

8 Q. Do you know the training of that
9 therapist?

10 MS. RIVAUX: Objection, relevance.

11 THE WITNESS: I can't remember.

12 BY DR. BARDEN:

13 Q. Do you have any idea at all?

14 MS. RIVAUX: Objection, asked and
15 answered.

16 THE WITNESS: I can't remember.

17 BY DR. BARDEN:

18 Q. To the best of your knowledge, the
19 therapist in Florida is not a scientist, correct?

20 MS. RIVAUX: Objection, relevance,
21 vague.

22 THE WITNESS: I don't know.

23 BY DR. BARDEN:

24 Q. To the best of your knowledge, the
25 therapist in Florida has no research grants, correct?

1 MS. RIVAUX: Relevance, vague,
2 speculation.

3 THE WITNESS: I have no idea.

4 BY DR. BARDEN:

5 Q. To the best of your knowledge, the
6 therapist in Florida has no publications in any
7 peer-reviewed science journals, correct?

8 MS. RIVAUX: Relevance, speculative,
9 vague.

10 THE WITNESS: I don't know.

11 BY DR. BARDEN:

12 Q. To the best of your knowledge, the
13 therapist in Florida has no national science awards,
14 correct?

15 MS. RIVAUX: Objection, relevance
16 speculative, vague.

17 THE WITNESS: And it's possible, I
18 don't know.

19 BY DR. BARDEN:

20 Q. To the best of your knowledge, the
21 therapist in Florida does not -- has never had tenure
22 in any university or medical school, correct?

23 MS. RIVAUX: Objection, relevance
24 speculation, vague.

25 THE WITNESS: I don't know.

1 BY DR. BARDEN:

2 Q. To the best of your knowledge, the
3 therapist in Florida has never been asked to review
4 articles for science journals; isn't that right?

5 MS. RIVAUX: Objection, relevance,
6 vague, speculative.

7 THE WITNESS: I have no way of knowing
8 the answer to that question.

9 BY DR. BARDEN:

10 Q. You were not present in the room when the
11 therapist in Florida interviewed Drew Adams which
12 resulted in a diagnosis of gender dysphoria; isn't
13 that true?

14 MS. RIVAUX: Objection, relevance.

15 THE WITNESS: I'm never in the room
16 when a therapist diagnoses a patient with gender
17 dysphoria.

18 BY DR. BARDEN:

19 Q. The therapist in Florida did not audio
20 record the interview with Drew Adams that led to his
21 diagnosis of gender dysphoria; isn't that true?

22 MS. RIVAUX: Objection, speculation.

23 THE WITNESS: I have no way to know
24 that.

25

1 BY DR. BARDEN:

2 Q. You've not seen any audio -- I'm sorry,
3 you haven't heard any audio recording of that
4 interview, have you?

5 MS. RIVAUX: Objection, relevance.

6 THE WITNESS: I have not.

7 BY DR. BARDEN:

8 Q. The therapist in Florida, to the best of
9 your knowledge, did not video record the interview
10 with Drew Adams that led to his diagnosis of gender
11 dysphoria; isn't that correct?

12 MS. RIVAUX: Objection, relevance,
13 speculation.

14 THE WITNESS: I have no idea.

15 BY DR. BARDEN:

16 Q. Now, you mentioned -- did you see -- have
17 you seen all the records of the therapist in Florida
18 that diagnosed Drew Adams as having gender dysphoria?

19 MS. RIVAUX: Objection, asked and
20 answered.

21 THE WITNESS: I haven't reviewed the
22 records. I have the letter that they sent.

23 BY DR. BARDEN:

24 Q. Okay. So you have one letter, but you
25 don't have the rest of the therapy records, correct?

1 MS. RIVAUX: Objection, asked and

2 answered twice now.

3 THE WITNESS: Those are not typically

4 shared with the medical provider.

5 BY DR. BARDEN:

6 Q. And, thus, you have not seen them,

7 correct?

8 MS. RIVAUX: Objection, asked and

9 answered.

10 THE WITNESS: Correct.

11 BY DR. BARDEN:

12 Q. You have not seen any informed consent

13 form for the therapist's treatment in Florida, have

14 you?

15 MS. RIVAUX: Objection, relevance,

16 scope.

17 THE WITNESS: I have not seen a paper

18 labeled informed consent from the therapist.

19 BY DR. BARDEN:

20 Q. You've not seen any therapy notes from the

21 therapist in Florida's treatment of Drew Adams, have

22 you?

23 MS. RIVAUX: Objection, asked and

24 answered, relevance.

25 THE WITNESS: No, I have seen a summary

1 letter.

2 BY DR. BARDEN:

3 Q. The therapist in Florida did not write
4 down the questions she asked and the answers Drew
5 Adams gave her that formed the basis of her diagnosis
6 of gender dysphoria, did she?

7 MS. RIVAUX: Objection, relevance
8 scope, compound.

9 THE WITNESS: I would have to assume
10 that you're saying in the letter, because you
11 didn't state where they were writing it down. I
12 would think she would have written it down in
13 her notes, but they were not written in the
14 letter.

15 BY DR. BARDEN:

16 Q. And you haven't seen her notes, correct?

17 MS. RIVAUX: Objection, asked and
18 answered.

19 THE WITNESS: Correct.

20 BY DR. BARDEN:

21 Q. So you don't know whether she asked
22 leading, suggestive and improper questions, do you?

23 MS. RIVAUX: Objection, speculation.

24 THE WITNESS: I don't know what
25 questions she asked, in what manner.

1 BY DR. BARDEN:

2 Q. You don't know the methodology she used to
3 arrive at her diagnosis of gender dysphoria, do you?

4 MS. RIVAUX: Objection, vague,
5 speculative, relevance.

6 THE WITNESS: So a therapist has the
7 methodology that they are using and is
8 recommended by psychiatry and psychological
9 associations. I rely on the therapists to use
10 proper methodology.

11 DR. BARDEN: Objection, move to strike
12 as nonresponsive.

13 BY DR. BARDEN:

14 Q. So you do not know what methodology she
15 used to diagnose Drew Adams as having gender
16 dysphoria, do you?

17 MS. RIVAUX: Objection, asked and
18 answered, speculative, relevance.

19 THE WITNESS: So in the letters they
20 use the criteria from the DSM in their
21 diagnostic criteria.

22 BY DR. BARDEN:

23 Q. But, again, you don't know how she
24 obtained that information, do you?

25 MS. RIVAUX: Objection, asked and

1 answered, speculative, calls for speculation.

2 THE WITNESS: Yeah, I'm not -- I'm not

3 even sure what the question is.

4 BY DR. BARDEN:

5 Q. You don't know the questions she asked, do

6 you?

7 A. I don't know the questions she asked.

8 Q. You don't know what answers he gave, do

9 you?

10 MS. RIVAUX: Objection, relevance.

11 THE WITNESS: No.

12 BY DR. BARDEN:

13 Q. Did you ever ask -- did you ever ask the

14 therapist what questions she asked and what answers

15 Drew gave?

16 A. My clinical social worker typically

17 contacts the therapist since they are practicing in

18 the same field, one-on-one, to discuss any concerns

19 there. I don't know what that conversation would have

20 looked like between the two of them, and I did not

21 personally call.

22 DR. BARDEN: Objection, move to strike

23 everything except for "I did not personally

24 call."

25

1 BY DR. BARDEN:

2 Q. So you don't know if your social worker
3 contacted the therapist in Florida or not, do you?

4 MS. RIVAUX: Objection, misleading,
5 mischaracterizes testimony.

6 DR. BARDEN: Just a minute. What's --
7 what's misleading?

8 MS. RIVAUX: The question of --

9 DR. BARDEN: Why is --

10 MS. RIVAUX: Because she just said that
11 her social worker did contact the therapist.

12 DR. BARDEN: Okay. Then, for the
13 record, that's not accurate. She said
14 "typically."

15 MS. RIVAUX: Okay.

16 DR. BARDEN: So -- okay?

17 BY DR. BARDEN:

18 Q. So do you have any personal knowledge of
19 your social worker contacting the therapist in Florida
20 who diagnosed Drew Adams as suffering from gender
21 dysphoria?

22 A. I'd have to review her records. I don't
23 know off the top of my head.

24 Q. Do you know if your social worker made any
25 assessment of the reliability of the methodology of

1 the therapist who diagnosed Drew Adams with gender
2 dysphoria?

3 MS. RIVAUX: Objection, relevance.

4 THE WITNESS: So if she did contact
5 them, she would have tried to understand whether
6 the therapist had any background in this area.

7 But I don't know --

8 DR. BARDEN: Objection, move to strike
9 as nonresponsive everything other than "I don't
10 know."

11 BY DR. BARDEN:

12 Q. What, if any, assessment did you undertake
13 to investigate the competence of the therapist who
14 diagnosed Drew Adams as gender dysphoric?

15 MS. RIVAUX: Objection, relevance.

16 THE WITNESS: So, again, I can -- all I
17 can state is what I've said before. Typically,
18 we would contact with my -- my social worker
19 would contact the therapist to see if they felt
20 comfortable with this particular topic. And, in
21 general, people who are therapists who write
22 these letters do not write them if they feel
23 that they do not have the ability to properly
24 make the diagnosis. I've had a number of
25 patients who switched therapists because their

1 therapist didn't feel that they were capable.

2 DR. BARDEN: Objection, move to strike

3 the entire answer as nonresponsive.

4 BY DR. BARDEN:

5 Q. Again, what did you personally do to

6 assess, if anything, the competence of the therapist

7 in Florida who diagnosed Drew Adams as suffering from

8 gender dysphoria?

9 MS. RIVAUX: Objection, relevance.

10 THE WITNESS: I only saw that they

11 were -- their credentials. That's my only

12 verification.

13 BY DR. BARDEN:

14 Q. What were her credentials?

15 A. I don't remember. I noted them on the --

16 on the letter, but I don't remember what they were.

17 Q. In your 18 hours of working with the

18 lawyers in this case, did they explain to you, at any

19 time, why they failed to call a therapist who

20 diagnosed Drew Adams as gender dysphoric as a witness

21 in this case?

22 MS. RIVAUX: Objection, relevance,

23 argumentative, compound.

24 THE WITNESS: I'm not sure why they

25 would have discussed that with me, no.

1 DR. BARDEN: Objection, move to strike

2 as nonresponsive.

3 BY DR. BARDEN:

4 Q. Did they discuss it with you or not?

5 MS. RIVAUX: Objection -- same

6 objections.

7 THE WITNESS: No.

8 BY DR. BARDEN:

9 Q. Are you aware of research on how common it

10 is for therapists to ask improperly leading and

11 suggestive questions, thus, contaminating the

12 responses of the patients?

13 MS. RIVAUX: Objection, attorney

14 testifying, assumes facts not in evidence,

15 argumentative, relevance, scope.

16 THE WITNESS: I don't think that it's

17 appropriate for me to talk about those sorts of

18 things in a different area, unrelated to my

19 pediatric endocrinology training.

20 DR. BARDEN: Objection, move to strike

21 as nonresponsive.

22 BY DR. BARDEN:

23 Q. Are you -- let me ask you this. As a

24 clinician, do you talk to people?

25 A. I do.

1 Q. Do you interview people?

2 A. I do.

3 Q. Are you aware of research on the
4 reliability of clinical interviews?

5 A. Interviews?

6 MS. RIVAUX: Objection, relevance.

7 THE WITNESS: I have not kept
8 up-to-date with the research on clinical
9 interviews.

10 BY DR. BARDEN:

11 Q. Are you aware -- as someone who does
12 clinical interviews, are you aware of any research on
13 how leading and suggestive questions can contaminate
14 the memory and responses of patients?

15 MS. RIVAUX: Objection, relevance,
16 assumes facts not in evidence, argumentative and
17 attorney testifying.

18 THE WITNESS: I have not read those
19 research papers.

20 BY DR. BARDEN:

21 Q. Have you had any conversations with your
22 social worker with regard to research on the
23 unreliability of clinical interviews?

24 MS. RIVAUX: Objection, assumes facts
25 not in evidence, attorney testifying,

1 argumentative.

2 THE WITNESS: I have not.

3 BY DR. BARDEN:

4 Q. Have you had any discussions with your
5 social worker regarding research on leading and
6 suggestive questions?

7 MS. RIVAUX: Objection, assumes facts
8 not in evidence, argumentative, attorney
9 testifying, asks for hearsay.

10 THE WITNESS: I have not.

11 BY DR. BARDEN:

12 Q. Is it true that Drew Adams is still
13 experiencing menstruation?

14 A. At my last visit with Drew, yes, that was
15 true.

16 Q. Do you recall receiving a subpoena for
17 your medical records in this case?

18 A. Yes.

■ ■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

█ [REDACTED]
█ [REDACTED]
█ [REDACTED]
█ [REDACTED]
█ [REDACTED]

6 DR. BARDEN: Why don't we take a break?

7 You're going to change the tape, right?

8 THE VIDEOGRAPHER: This concludes

9 Media 1. The time is 11:15.

10 (RECESS TAKEN)

11 THE VIDEOGRAPHER: This is Media 2.

12 The time is 11:25.

13 BY DR. BARDEN:

14 Q. Dr. Adkins, we've talked about the
15 therapist in Florida and your social worker, and I
16 just want to make it very clear on this record, isn't
17 it true that you did not personally observe anyone
18 diagnosing Drew Adams as having gender disorder or
19 gender dysphoria; isn't that true?

20 MS. RIVAUX: Objection, relevance,
21 scope, asked and answered.

22 THE WITNESS: I did not sit in on the
23 assessments at the time, if that's the question
24 you're asking.

25

1 BY DR. BARDEN:

2 Q. And once again, just to clarify, we've
3 talked about the therapist in Florida and your social
4 worker. To the best of your knowledge, there's no
5 audio recording with anyone conducting a diagnostic
6 interview of the Plaintiff at any time; isn't that
7 correct?

8 MS. RIVAUX: Objection, asked and
9 answered, relevance.

10 THE WITNESS: I am not aware of any,
11 and we do not do that at my clinic.

12 BY DR. BARDEN:

13 Q. Also just to be clear, we've talked about
14 the therapist in Florida and your social worker. To
15 the best of your knowledge, you're not aware of any
16 video recording of any diagnostic interviews with the
17 Plaintiff by anyone at any time?

18 MS. RIVAUX: Objection, relevance,
19 asked and answered.

20 THE WITNESS: I'm not aware of any.

21 BY DR. BARDEN:

22 Q. Isn't it true that given your lack of
23 knowledge of the diagnostic interviews and your lack
24 of knowledge of the questions asked and answered and
25 your lack of knowledge of the methodology used that

1 you cannot have any opinions as to whether the
2 Plaintiff was properly diagnosed as suffering from
3 gender dysphoria?

4 (CONFERENCE ROOM INTERRUPTION)

5 MS. RIVAUX: Objection, relevance.

6 THE WITNESS: So I follow a protocol
7 that states that I rely on my mental health
8 providers for that purpose and I personally am
9 not the one doing that.

10 (CONFERENCE ROOM INTERRUPTION)

11 MR. KOSTELNIK: Can we go off the
12 record for a second?

13 DR. BARDEN: Is someone knocking?

14 THE VIDEOGRAPHER: We're off record at
15 11:28.

16 (DISCUSSION HELD OFF THE RECORD)

17 THE VIDEOGRAPHER: We're back on record
18 at 11:29.

19 BY DR. BARDEN:

20 Q. Okay. Dr. Adkins, you've talked about
21 what's typically done in your program and what you
22 believe was done by the therapist in Florida. Is it
23 your understanding that Drew Adams was diagnosed as
24 suffering from gender dysphoria based upon his
25 self-report?

1 MS. RIVAUX: Objection, vague.

2 THE WITNESS: So our protocol in our
3 office involves both self-report and parental
4 report so it would not have been based on --
5 solely on self-report.

6 BY DR. BARDEN:

7 Q. So it's the self-report of the patient and
8 the self-report of the parents, correct?

9 A. Yes.

10 Q. It's conversation, right?

11 A. A discussion, yes.

12 Q. Okay. There are no brain scans that you
13 used to diagnose Drew Adams; isn't that correct?

14 A. That is correct.

15 Q. There are no blood tests that you used;
16 isn't that correct?

17 A. That is not part of the criteria for
18 diagnosis so, no, I would not have done that.

19 Q. There's no biochemical data or
20 measurements that were used, correct?

21 A. Not for gender dysphoria.

22 Q. There were no psychological tests given,
23 correct?

24 A. Our clinical social worker does a number
25 of tests when they come in as far as that goes.

1 Q. And what are the tests that were used --
2 again, I'm not interested in typically, I'm interested
3 in Drew Adams. What were the tests that Drew Adams
4 received as part of your treatment protocol with him?

5 A. So my licensed clinical social worker
6 performs those, she has them in her purview. I
7 know -- I can give you the names, but I'm likely to
8 make errors, but I'll tell you what I know. We have a
9 gender identity --

10 Q. Okay.

11 DR. BARDEN: Stop and move to strike as
12 nonresponsive.

13 BY DR. BARDEN:

14 Q. I'm just interested in your knowledge, not
15 what's typically done, not what she typically does,
16 not what you're -- just what you have seen and heard
17 with your own eyes and ears, the tests that Drew Adams
18 received in this case?

19 A. So I have seen the documents that are
20 involved with these screenings for Drew. There's a
21 gender identity questionnaire. There is a body
22 dysphoria scale. There is, and I'm going to not know
23 the name, but an evaluation of anxiety, an evaluation
24 of depression, and -- oh, and then there's a
25 psychosocial assessment which involves family,

1 background, supportive things, drug use, those sorts
2 of things. Let's see. Those are the ones I can think
3 of right now.

4 Q. So you mentioned the gender ID
5 questionnaire.

6 A. Uh-huh.

7 Q. What, if any, information can you give us
8 as to the published reliability and validity of the
9 so-called gender ID questionnaire?

10 MS. RIVAUX: Objection, relevance,
11 scope, argumentative --

12 THE WITNESS: So --

13 MS. RIVAUX: -- assumes facts not in
14 evidence.

15 THE WITNESS: So --

16 BY DR. BARDEN:

17 Q. And I'm looking for numbers.

18 A. Uh-huh. So I would have to pull the
19 report from the Dutch study to give you that
20 information, but it has been validated for use in this
21 population.

22 Q. What's the citation for the Dutch study
23 that you claim?

24 A. I don't know the name. Most likely, it
25 would be DeVries or Steensma.

1 Q. You've never published an article on
2 reliability and validity data for psychological
3 testing, have you?

4 MS. RIVAUX: Objection, relevance.

5 THE WITNESS: It's not my field, so no.

6 BY DR. BARDEN:

7 Q. Do you know the percentage of
8 psychological tests that were later found to be
9 inadequate?

10 MS. RIVAUX: Objection, relevance,
11 scope, assumes facts not in evidence, attorney
12 testifying, argumentative.

13 THE WITNESS: I don't know the
14 percentage. I do know they are frequently
15 updated to improve validity and reliability.

16 BY DR. BARDEN:

17 Q. Do you know of any publications that list
18 the reliability and validity data of psychological
19 tests?

20 MS. RIVAUX: Objection, relevance,
21 scope.

22 THE WITNESS: You can look for that in
23 the -- the literature for any test that's
24 developed. It should be available if it's been
25 tested.

1 BY DR. BARDEN:

2 Q. Did you do that in this case?

3 MS. RIVAUX: Objection, relevance,
4 scope.

5 THE WITNESS: So prior to starting
6 the -- the clinic, my clinical social worker and
7 I sat down and looked through the measures and
8 looked for the best measures, so we would have
9 looked at and did look at those things. I just
10 don't recall the numbers.

11 BY DR. BARDEN:

12 Q. So can you give me the name of any
13 licensed Ph.D. psychologist you consulted to determine
14 whether the gender ID questionnaire was a reliable and
15 valid instrument for use in your treatment?

16 MS. RIVAUX: Objection, relevance,
17 scope --

18 BY DR. BARDEN:

19 Q. And I'm looking --

20 MS. RIVAUX: -- argumentative.

21 BY DR. BARDEN:

22 Q. I'm looking for a name.

23 A. Sure. I consult with, regarding our
24 assessments, Nancy Zucker and Nicole Heilbron who are
25 at the Duke Child Evaluation Center at Duke

1 University.

2 Q. Is it your testimony that they reviewed
3 the gender ID questionnaire and told you that it was a
4 reliable and valid instrument?

5 MS. RIVAUX: Objection, calls for
6 hearsay --

7 BY DR. BARDEN:

8 Q. And that's Nancy --

9 MS. RIVAUX: -- relevance, scope.

10 BY DR. BARDEN:

11 Q. -- Nancy Zucker, did she give you that
12 opinion?

13 MS. RIVAUX: Same objections.

14 THE WITNESS: So we are using these
15 instruments in ongoing studies that she has
16 approved for them to be used in, so yes, Nancy
17 Zucker has approved the use of these particular
18 instruments in our studies.

19 BY DR. BARDEN:

20 Q. And did Nancy Zucker or any other licensed
21 psychologist approve the body dysphoria scale as being
22 reliable and valid?

23 MS. RIVAUX: Objection, relevance,
24 scope, calls for hearsay.

25 THE WITNESS: So we're using that as

1 well in those studies going forward, so she's
2 been involved in developing those studies.

3 BY DR. BARDEN:

4 Q. What -- what, if any, knowledge do you
5 have of research documenting that clinicians are
6 highly unreliable lie detectors and, thus, easily
7 fooled by patients?

8 MS. RIVAUX: Objection, relevance,
9 scope, assumes facts not in evidence,
10 argumentative, attorney testifying, compound,
11 misleading.

12 THE WITNESS: Sorry, excuse me.

13 So -- so the only thing that I would
14 know of would be the instruction from medical
15 school, but not -- not research recently.

16 BY DR. BARDEN:

17 Q. So you're -- you're -- you're not aware of
18 any research documenting that clinicians are
19 unreliable lie detectors who might be easily fooled by
20 patients?

21 MS. RIVAUX: Objection, asked and
22 answered, relevance, scope, compound, assumes
23 facts not in evidence, argumentative, attorney
24 testifying, outside the scope of expert
25 expertise.

1 THE WITNESS: That is not -- no, I

2 don't read that literature.

3 BY DR. BARDEN:

4 Q. Okay. Let's address that. Do you, in

5 fact, interview people in your work?

6 A. I do.

7 Q. Would it not be --

8 MS. RIVAUX: Objection, asked and

9 answered.

10 BY DR. BARDEN:

11 Q. -- would it not be relevant and important

12 for you to know if there was research indicating that

13 your methodology, that is sitting in a room talking to

14 people, might have limitations?

15 MS. RIVAUX: Objection, assumes facts

16 not in evidence, argumentative, attorney

17 testifying, relevance, scope.

18 THE WITNESS: So I keep up with the

19 general medical literature that applies to what

20 I'm doing and if I see something that I am

21 concerned about, I would have not gone in and

22 investigated specifically those things. I may

23 have read them in general reading, but I don't

24 recall reading them.

25

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13 BY DR. BARDEN:

14 Q. And if the research indicated that
15 clinicians were poor lie detectors, wouldn't your,
16 quote, trusting your patients, unquote, be a naive and
17 unreliable methodology?

18 MS. RIVAUX: Objection, assumes facts
19 not in evidence, argumentative, attorney
20 testifying, compound, scope, relevance.

21 THE WITNESS: Since I have not read
22 that information and I can't comment on what its
23 report is and whether or not it was actually
24 saying that physicians are not good lie
25 detectors.

1 BY DR. BARDEN:

2 Q. Do you believe you've ever read any
3 peer-reviewed publication that physicians are good lie
4 detectors?

5 MS. RIVAUX: Objection, argumentative,
6 assumes facts not in evidence, relevance, scope.

7 THE WITNESS: I have not read anything
8 that directly stated that. I have read on
9 interviewing techniques and best practices with
10 regard to that.

11 BY DR. BARDEN:

[REDACTED]

[REDACTED]

[REDACTED]

15 BY DR. BARDEN:

16 Q. Do you have any idea at all what
17 percentage of the statements made to the therapist in
18 Florida during the diagnostic interview with Drew
19 Adams were false statements?

20 MS. RIVAUX: Objection, speculation,
21 foundation, relevance, scope, argumentative.

22 THE WITNESS: I know nothing about
23 those discussions, so no, there's no way for me
24 to know that.

25

1 BY DR. BARDEN:

2 Q. Are you aware of statements that Drew
3 Adams has made with regard to how far he had to walk
4 to restrooms?

5 A. I don't think we talked about distance. I
6 don't think I've directly talked with Drew about
7 distance to the bathroom.

8 Q. Have you read the depositions in this
9 case?

10 A. Which deposition?

11 Q. Any of them.

12 A. I've read mine, I've read Dr. Hruz, and
13 I've read Dr. Josephson's.

14 Q. That's it?

15 A. Yes.

16 Q. Okay. So you have not read the
17 depositions of any fact witnesses, correct?

18 A. Umm.

19 Q. I'm sorry, I'll clarify that without the
20 legal term.

21 A. Thank you.

22 Q. You have not read the depositions of Drew
23 Adams or his mother?

24 A. That's correct.

25 Q. Okay. In your 18 hours of work with

1 Plaintiff's attorneys, did you ever discuss whether
2 Drew made objectively false statements about how far
3 he had to walk to restrooms?

4 A. We did not --

5 MS. RIVAUX: Objection, assumes facts
6 not in evidence, argumentative.

7 THE WITNESS: We did not have
8 conversations around that. Sorry.

9 BY DR. BARDEN:

10 Q. Okay. Do you know if Drew -- of any
11 claims that Drew has made either to you or to anyone
12 else about how far he had to walk to restrooms?

13 MS. RIVAUX: Objection, argumentative.

14 THE WITNESS: I'm not aware of any
15 discussions about distance to the restroom.

16 BY DR. BARDEN:

17 Q. Do you know any claims that Drew has made
18 with regard to whether he suffered bladder infections?

19 MS. RIVAUX: Objection, asked and
20 answered.

21 THE WITNESS: I don't -- I have not
22 heard anything around bladder injections.

23 BY DR. BARDEN:

24 Q. Do -- what, if any, information do you
25 have as to whether Drew Adams ever claimed trouble

1 from impacted bowels?

2 MS. RIVAUX: Objection, relevance.

3 THE WITNESS: I have -- I have not been

4 aware of any problems with those.

5 BY DR. BARDEN:

6 Q. What, if any, steps did you take to

7 investigate any alternative hypotheses in this case?

8 MS. RIVAUX: Objection, relevance,

9 scope.

10 THE WITNESS: Alternative hypotheses to

11 which question?

12 BY DR. BARDEN:

13 Q. To what's wrong or what's troubling Drew

14 Adams?

15 A. So the mental health provider is the

16 person who does the diagnosis. I don't do that

17 diagnosis so I don't do that investigation as the

18 pediatric endocrinologist.

19 DR. BARDEN: Objection, move to strike

20 as nonresponsive.

21 BY DR. BARDEN:

22 Q. So what, if any, alternative hypotheses

23 did you investigate with regards to this case?

24 MS. RIVAUX: Objection, asked and

25 answered.

1 THE WITNESS: That is not the scope of
2 my -- my position.

3 BY DR. BARDEN:

4 Q. Is it --

5 A. Go ahead.

6 Q. Is it your understanding as a physician
7 that it is not your duty in every case to generate and
8 investigate alternative hypotheses?

9 MS. RIVAUX: Objection, argumentative.

10 THE WITNESS: So certainly when I see
11 patients, if there is a complaint that doesn't
12 have a diagnosis, I would investigate those
13 complaints.

14 DR. BARDEN: I'm at a good spot to stop
15 now for lunch, if you want to do that.

16 THE VIDEOGRAPHER: We're off record at
17 11:55.

18 (RECESS TAKEN)

19 THE VIDEOGRAPHER: Back on the record
20 at 12:51.

21 DR. BARDEN: Okay. We're back on the
22 record.

23 BY DR. BARDEN:

24 Q. Dr. Adkins, we were discussing the
25 possibility of alternative hypotheses when we broke

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12 Q. If Drew made objectively verifiable false
13 and manipulative statements about the time it took him
14 to travel to restrooms at school, would that be
15 consistent with the alternative hypothesis that I have
16 described?

17 MS. RIVAUX: Objection, foundation,
18 relevance, assumes facts not in evidence,
19 argumentative, mischaracterizes evidence,
20 speculative, calls for speculation.

21 THE WITNESS: I don't think it's
22 related directly to the hypothesis that you've
23 stated.

24 BY DR. BARDEN:

25 Q. It does go to the credibility of the

1 patient, correct?

2 MS. RIVAUX: Objection, assumes facts

3 not in evidence.

4 THE WITNESS: Every teenager has some

5 dishonesty. And it is our ability to work

6 through that and understand when you have

7 something like that going on, to address it.

8 BY DR. BARDEN:

9 Q. You give me any peer-reviewed, cited

10 scientific evidence that you can, quote, work through

11 a patient who's lying to you and you haven't been able

12 to discern that?

13 MS. RIVAUX: Objection, ambiguous,

14 argumentative, relevance, scope.

15 THE WITNESS: In any physician's

16 education, there's clinical practice education

17 with regard to techniques to interview patients

18 and discuss with them whether they're honest or

19 not. So for a physician, that's part of our

20 training. I cannot cite you medical literature

21 that is word-for-word any of that.

22 DR. BARDEN: Objection, move to strike

23 all of that answer except for no.

24 BY DR. BARDEN:

25 Q. Isn't it, in fact, the case, Doctor, that

1 the peer-reviewed literature shows that you can't deal
2 with that, because as a clinician you are not a human
3 lie detector?

4 MS. RIVAUX: Objection, relevance,
5 scope, assumes facts not in evidence, attorney
6 testifying, argumentative, calls for hearsay.

7 THE WITNESS: I can't testify to that,
8 because I haven't seen that information.

9 BY DR. BARDEN:

10 Q. Okay. I'm going to ask you what I'll call
11 Alternative Hypothesis 2?

12 A. Like number 2?

13 Q. Uh-huh.

14 A. Okay.

15 Q. You said you read the deposition of
16 Dr. Hruz, correct?

17 A. Yes.

18 Q. Does Dr. Hruz have a M.D. and a Ph.D.?

19 A. Yes.

20 Q. And does he sit on editorial boards of
21 science journals?

22 MS. RIVAUX: Objection, relevance.

23 THE WITNESS: Yes.

24 BY DR. BARDEN:

25 Q. And has he received research grants as a

1 principal investigator?

2 MS. RIVAUX: Objection, relevance,

3 scope, calls for hearsay.

4 THE WITNESS: Not in his field, but

5 yes.

6 BY DR. BARDEN:

7 Q. Do you recall him saying: (Reading)

8 Quote, as a --

9 -- in the transcript that you read:

10 (Reading)

11 Quote, as a hypothesis one

12 could postulate that the increasing

13 awareness of the condition of

14 transgenderism can drive individuals

15 that have psychosocial dysfunction to

16 attribute that dysfunction to

17 transgenderism, unquote.

18 Do you recall that?

19 MS. RIVAUX: Objection --

20 THE WITNESS: Yeah.

21 MS. RIVAUX: -- relevance, scope, calls

22 for hearsay.

23 BY DR. BARDEN:

24 Q. What, if any, steps did you take to

25 investigate that alternative hypothesis, we'll call it

1 Number 2, in this case?

2 MS. RIVAUX: Objection, foundation,

3 relevance, scope, calls for hearsay.

4 THE WITNESS: Gosh, that's putting a

5 whole lot together there from your initial long

6 sentence. So the obligation of a mental health

7 provider in diagnosing gender dysphoria is to

8 rule out all other causes, that's part of their

9 criteria. So I would expect that one would have

10 a mental health provider that would do that as

11 well. That is part of the obligation of the

12 investigation.

13 BY DR. BARDEN:

14 Q. But we've already established that you

15 were not present for any of the diagnostic interviews

16 in this case, correct?

17 A. That's not part of my scope of practice.

18 Q. Okay.

19 A. So your question would not be within the

20 scope of my practice either.

21 Q. So you gave us some professional

22 association statements. Do you recall that?

23 A. Uh-huh. I'm sorry, yes, I do.

24 Q. Do you have those in front of you? Were

25 those marked as exhibits?

1 MS. RIVAUX: If they haven't been

2 moved, then they're here.

3 THE WITNESS: Oh, here.

4 DR. BARDEN: Oh, just these two?

5 MS. RIVAUX: It should be underneath.

6 THE WITNESS: Endocrine Society,

7 Pediatric Endocrine and Endocrine Society, yes.

8 BY DR. BARDEN:

9 Q. Okay. Let's look at the -- this one

10 (indicating). What number is that marked as or was it

11 marked?

12 A. It wasn't marked.

13 Q. Okay.

14 MS. RIVAUX: It's --

15 THE WITNESS: Plaintiff Trial

16 Exhibit 47.

17 BY DR. BARDEN:

18 Q. Okay. 47.

19 A. Uh-huh.

20 Q. Okay. So this says, Pediatric Endocrine

21 Society. Do you see that?

22 A. I do.

23 Q. All right. See it says in the second

24 paragraph: (Reading)

25 Not allowing them to use the

1 restroom that matches their gender

2 identity is a violation of human

3 rights.

4 Did I read that right?

5 A. You did.

6 Q. So that's a legal and political statement,

7 isn't it, not a medical one?

8 MS. RIVAUX: Objection, relevance,

9 calls for speculation.

10 THE WITNESS: So I don't know how --

11 would I qualify that statement, necessarily,

12 that way. I mean, human rights are a vital part

13 of what we do in medicine. You certainly have

14 to pay attention to those when you're

15 practicing.

16 BY DR. BARDEN:

17 Q. Do you -- what, if any, personal knowledge

18 do you have of the methodology used to create that

19 sentence for this statement?

20 A. Oh, I was not involved, so, no.

21 Q. Okay. Then it says: (Reading)

22 Not allowing them to use the

23 restroom that matches their gender

24 identity is a violation of human

25 rights and sends a message of

1 intolerance that will promote further
2 discrimination and segregation.

3 So in looking at this, did they fail to
4 inform the reader that there is zero research
5 indicating that bathroom use is a necessary or central
6 part of treatment for transgenderism?

7 MS. RIVAUX: Objection, assumes facts
8 not in evidence, argumentative, attorney
9 testifying.

10 THE WITNESS: So let's see. Just from
11 that sentence you can't really get the answer to
12 that question.

13 BY DR. BARDEN:

14 Q. It is the case they did not report that
15 there's zero research on that, correct?

16 MS. RIVAUX: Objection -- same
17 objections.

18 THE WITNESS: They are talking, further
19 down, about things that do occur with regard to
20 that, use of bathrooms and those adverse
21 consequences. There are no literature citations
22 on this page.

23 BY DR. BARDEN:

24 Q. You read Dr. Ehrensaff's deposition,
25 correct?

1 A. I did not.

2 Q. Oh, you didn't?

3 A. No.

4 Q. Looking at the third paragraph --

5 A. Uh-huh.

6 Q. (Reading)

7 Quote, on the other hand, no

8 adverse consequences have occurred

9 when schools have allowed transgender

10 students to use the restroom that is

11 consistent with their gender identity.

12 Do you have any idea how in the world they

13 would be able to know that that's an accurate

14 statement? And, again, I'm looking for the

15 methodology used to produce that sentence.

16 A. I would have to make assumptions in this,

17 so there's nothing I can say about their methodology.

18 Q. So this statement, there's no editorial

19 board listed on this statement, correct?

20 A. Not on this sheet of paper.

21 Q. This is not a peer-reviewed journal

22 publication, correct?

23 A. This was not published in a journal.

24 Q. There's no reliable methodology that's

25 documented in this statement marked Trial Exhibit 47,

1 correct?

2 A. There's no method section on this paper.

3 Q. There's no error rate listed for any of

4 the claims on what's marked as Plaintiff Trial

5 Exhibit 47, correct?

6 A. Correct.

7 Q. There's no statement of the percentage of

8 the members of this organization that signed on to

9 this so-called statement, correct?

10 MS. RIVAUX: Objection, argumentative.

11 THE WITNESS: No.

12 BY DR. BARDEN:

13 Q. There's zero fair and accurate disclosures

14 of the controversy surrounding the statements in this

15 statement marked Trial Exhibit 47; isn't that correct?

16 MS. RIVAUX: Objection, argumentative,

17 attorney testifying, assumes facts not in

18 evidence.

19 THE WITNESS: I don't see a controversy

20 listed on this page.

21 BY DR. BARDEN:

22 Q. And there's zero fair and accurate

23 disclosures of methodological limitations in this

24 statement marked Trial Exhibit 47; isn't that also

25 correct?

1 MS. RIVAUX: Objection, assumes facts

2 not in evidence, argumentative.

3 THE WITNESS: I'm sorry, could you

4 please repeat the question?

5 BY DR. BARDEN:

6 Q. Yeah.

7 There's zero discussion on this Trial

8 Exhibit 47 of any fair and accurate disclosure of

9 methodological limitations?

10 MS. RIVAUX: Object -- same objections.

11 THE WITNESS: So it's not a study, it's

12 a statement, so there's no methodology here,

13 section-like. I think that's what you're trying

14 to ask me here. Normally, if you were having a

15 study, you would have a method section. But

16 this is a statement.

17 BY DR. BARDEN:

18 Q. Are you aware of a history of professional

19 associations getting involved in making scientifically

20 unsupported and controversial political ideological

21 statements to the public?

22 MS. RIVAUX: Objection, argumentative,

23 assumes facts not in evidence, attorney

24 testifying, foundation, relevance, scope.

25 THE WITNESS: There was something that

1 you mentioned from the deposition regarding
2 those things. I don't -- I don't know any that
3 I can think of off the top of my head.

4 BY DR. BARDEN:

5 Q. What, if any, knowledge do you have as to
6 how many decades the American Psychiatric Association
7 told the public that homosexuality was a psychiatric
8 illness?

9 MS. RIVAUX: Objection, assumes facts
10 not in evidence, argumentative, attorney
11 testifying foundation, relevance, scope.

12 DR. BARDEN: What are the facts not in
13 evidence.

14 MS. RIVAUX: About the psychiatric
15 association and what their -- what their
16 position might be.

17 DR. BARDEN: Okay.

18 BY DR. BARDEN:

19 Q. Go ahead. What, if any, knowledge do you
20 have of that?

21 MS. RIVAUX: Same objections.

22 THE WITNESS: So that's not within my
23 scope of practice.

24 BY DR. BARDEN:

25 Q. Are you aware that the American

1 Psychiatric Association for decades labeled
2 homosexuality as a psychiatric mental illness?

3 MS. RIVAUX: Objection, foundation,
4 relevance, scope, assumes facts not in evidence,
5 calls for speculation.

6 THE WITNESS: Yeah. During
7 my -- during my training and medical school
8 there were times in the history of medicine and
9 psychiatry and psychology that that was the
10 case.

11 BY DR. BARDEN:

12 Q. And those public statements did not list
13 any fair and accurate disclosure of methodological
14 limitations either, did they?

15 MS. RIVAUX: Objection, foundation,
16 argumentative, assumes facts not in evidence,
17 attorney testifying, seeks speculation.

18 THE WITNESS: So I can't tell you what
19 they said, because I don't -- didn't read those
20 position statements. I'm talking about from
21 just from the DSM education that I have.

22 BY DR. BARDEN:

23 Q. So we had the Endocrine Society. Do you
24 see that?

25 A. Uh-huh.

1 Q. What's that listed as?

2 A. Trial -- Plaintiff's Trial Exhibit 43.

3 Q. 43?

4 A. Uh-huh.

5 Q. Okay. Thank you.

6 So looking at Trial Exhibit Number 43,
7 what, if any, knowledge do you have as to ethical
8 requirements for expert witnesses to disclose
9 limitations on their statements?

10 MS. RIVAUX: Objection, ambiguous.

11 THE WITNESS: I don't see how that's
12 related to this physician statement. If you
13 could repeat the question.

14 BY DR. BARDEN:

15 Q. What, if any, knowledge do you have as to
16 ethical requirements for an expert witness to disclose
17 limitations on their methods for their opinions?

18 MS. RIVAUX: Objection, ambiguous.

19 THE WITNESS: So the idea is to, as a
20 medical expert, to testify only what you know
21 and to be truthful and to be complete.

22 BY DR. BARDEN:

23 Q. So looking on page 1 of Trial Exhibit 43,
24 do you see in her considerations?

25 A. Uh-huh.

1 Q. See where it says: (Reading)
2 Transgender individuals are
3 often denied insurance coverage for
4 appropriate medical and psychological
5 treatment.

6 Do you see that?

7 A. I do.

8 Q. Have you ever heard of the phrase
9 financial bias?

10 MS. RIVAUX: Objection, relevance.

11 THE WITNESS: I have not heard that
12 phrase, no.

13 BY DR. BARDEN:

14 Q. Do you know anything about financial bias?

15 MS. RIVAUX: Objection, relevance.

16 THE WITNESS: I don't.

17 BY DR. BARDEN:

18 Q. Do you know whether there would be a --
19 potentially an enormous pot of money for people who
20 specialize in this treatment if the treatment were to
21 be legally recognized?

22 MS. RIVAUX: Objection,
23 mischaracterizes evidence, relevance,
24 argumentative.

25 THE WITNESS: So that's a complicated

1 question to answer. So currently individuals
2 are most often being covered by their -- for
3 their coverage of mental health, but not always.
4 Because mental health coverage in general is
5 pretty poor. And it's pretty difficult to even
6 find a mental health provider these days, there
7 just aren't enough of them. So I doubt there's
8 going to be any extra money to the mental health
9 providers that isn't already there.

10 For my practice, you know, we barely
11 get reimbursed the cost of covering and seeing
12 the patients even when it is covered. And so,
13 you know, an endocrine -- a pediatric
14 endocrinologist almost always runs in the -- in
15 debt. And this is the same sort of treatments
16 and tests and time, so it's not going to add to
17 any benefit for us. We just hope that we break
18 even.

19 And after that, that's about all I can
20 say as far as that goes.

21 BY DR. BARDEN:

22 Q. But the political statements made here
23 could, certainly, vastly improve the financial status
24 of transgender clinics; isn't that correct?

25 MS. RIVAUX: Objection,

1 mischaracterizes evidence, relevance, scope.

2 THE WITNESS: You mean other than
3 making us get out of bankruptcy, perhaps. That
4 would be ideal to be able to cover our costs.

5 But it's not going to make anyone a ton of
6 money, that I know of.

7 BY DR. BARDEN:

8 Q. And then same thing under considerations
9 on first page of Trial 43: (Reading)

10 Quote, there is also a growing
11 understanding of the impact that
12 increased access to such treatments
13 can have on the mental health of these
14 individuals.

15 Do you see that?

16 A. No. Again, which -- where are you?

17 Q. Under considerations.

18 A. Oh, yeah, here we go.

19 Q. On the right side.

20 A. Right.

21 Q. That same -- it's the last sentence in the
22 same paragraph we were just looking at. (Reading)

23 Quote, there's also a growing
24 understanding of the impact that
25 increased access to such treatments

1 can have on the mental health of these
2 individuals, unquote.

3 A. Yes.

4 Q. Right. Again, increased access would mean
5 increased fees to providers, correct?

6 MS. RIVAUX: Objection,
7 mischaracterizes --

8 THE WITNESS: I doubt that people are
9 going to increase their fees just because
10 they're seeing a transgender patient versus a
11 depressed patient versus an anxious patient.
12 Most providers are limited by their ability and
13 time to see patients, they're not limited
14 because they can't charge for that particular
15 fee or an increased fee.

16 BY DR. BARDEN:

17 Q. But if the social contagion theory is
18 correct, then you're going to get many, many, many
19 more paying patients; isn't that correct?

20 A. No.

21 MS. RIVAUX: Objection, argumentative,
22 assumes facts not in evidence --

23 THE WITNESS: Again --

24 MS. RIVAUX: -- calls for speculation.

25 THE WITNESS: Right. Again, no, I can

1 only see the number of patients I see right now.

2 There's going to be no change in the number of

3 patients that I can possibly see in a day's

4 time, I'm only one person. Most people who do

5 this care are in the same situation. Um, no.

6 BY DR. BARDEN:

7 Q. Isn't it true that we've seen a dramatic

8 increase in the number of transgender patients claimed

9 in the United States over the past few years?

10 A. There are studies in the literature that

11 reflect that people are self-identifying more often in

12 the US as transgender.

13 Q. And that would be completely consistent

14 with the social contagion hypothesis; isn't that

15 correct?

16 MS. RIVAUX: Objection, foundation,

17 relevance, calls for speculation, assumes facts

18 not in evidence.

19 THE WITNESS: Yeah, there's nothing

20 there that points directly to that being a

21 social contagion.

22 BY DR. BARDEN:

23 Q. What, if anything, do you know about the

24 multiple personality disorder social contagion of the

25 '90s when MPD patients went from 300 worldwide to

1 millions of people?

2 MS. RIVAUX: Objection, foundation,
3 relevance, attorney testifying, assumes facts
4 not in evidence, argumentative, calls for
5 hearsay, call for speculation.

6 THE WITNESS: You know, I may have seen
7 something like that on like Dateline or
8 something, but I -- I -- it's not my area of
9 practice.

10 BY DR. BARDEN:

11 Q. Is it not your area of practice to be
12 aware of the possibility of social contagion damaging
13 your patients?

14 MS. RIVAUX: Objection, foundation,
15 relevance, assumes facts not in evidence.

16 THE WITNESS: Sorry, can you repeat the
17 question? I just want to make sure I'm
18 answering it correctly.

19 BY DR. BARDEN:

20 Q. Isn't it part of -- shouldn't it be part
21 of your practice to be aware of the potential for
22 social contagion to damage your patients?

23 MS. RIVAUX: Same objection.

24 THE WITNESS: To damage my patients.
25 If that were the case, I would be worried about

1 them being damaged.

2 BY DR. BARDEN:

3 Q. Have there been public statements
4 published that show an increase by a factor of 40 or
5 more in the number of transgender patients in the
6 United States?

7 MS. RIVAUX: Objection, assumes facts
8 not in evidence.

9 THE WITNESS: I -- I haven't done the
10 math on it, and I don't remember. But there are
11 definitely newer reports that show a higher rate
12 of people identifying themselves as transgender
13 compared to those who would identify as
14 transgender prior.

15 BY DR. BARDEN:

16 Q. Isn't it true that in your direct
17 testimony in this case you failed to disclose the
18 methodological limitations or self-report data?

19 MS. RIVAUX: Objection, relevance.

20 THE WITNESS: I've reported nothing on
21 self-reported data and the reliability of that.

22 BY DR. BARDEN:

23 Q. Isn't it true that in your direct
24 testimony in this case you failed to disclose the
25 methodological controversies regarding limitations on

1 the judgment of clinicians?

2 MS. RIVAUX: Objection, argumentative,

3 attorney testifying, assumes facts not in

4 evidence, relevance.

5 THE WITNESS: I have not put anything

6 along those lines in any of what I've stated.

7 BY DR. BARDEN:

8 Q. Isn't it true that in your -- in your

9 direct testimony in this case you failed to disclose

10 any methodological controversies regarding expertise

11 in clinical fields?

12 MS. RIVAUX: Objection, ambiguous,

13 mischaracterizes the evidence, assumes facts not

14 in evidence, attorney testifying, relevance.

15 THE WITNESS: I wasn't asked to present

16 anything on that.

17 BY DR. BARDEN:

18 Q. Isn't it true that in your direct

19 testimony in this case you failed to disclose

20 controversies and methodological limitations regarding

21 memory of patients?

22 MS. RIVAUX: Objection, assumes facts

23 not in evidence, attorney testifying,

24 argumentative, mischaracterizes evidence,

25 relevance.

1 THE WITNESS: I was not asked to
2 discuss the reliance of memory or any of
3 the -- of that information, so it was not
4 stated.

5 BY DR. BARDEN:

6 Q. What are the advocacy groups that you
7 belong to, if any?

8 MS. RIVAUX: Ambiguous -- objection,
9 ambiguous.

10 THE WITNESS: So I -- I don't know that
11 I understand. There are lots of organizations
12 who have advocacy as part of their mission
13 including the American Academy of Pediatrics.

14 BY DR. BARDEN:

15 Q. Any others?

16 A. Well, when I was a member of the American
17 Diabetes Association, which I'm not currently, they
18 also have an advocacy section. Endocrine Society has
19 an advocacy, Pediatric Endocrine Society. Most
20 societies have advocacy for taking care of their
21 patients so that they get the best care possible, and
22 WPATH.

23 DR. BARDEN: Let's go off the record
24 for a moment.

25 THE VIDEOGRAPHER: We're off record at

1 1:21.

2 (RECESS TAKEN)

3 THE VIDEOGRAPHER: We're back on record

4 at 1:33.

5 BY DR. BARDEN:

6 Q. Okay. Dr. Adkins, you have never worked
7 as a K through 12 school teacher; isn't that correct?

8 A. That's correct.

9 Q. And you have never worked as a member of a
10 school board; isn't that correct?

11 A. That's correct.

12 Q. And you've never worked as a member of a
13 school administrative staff?

14 A. That's correct.

15 Q. And you've never had the responsibility of
16 implementing school policy in a public school setting,
17 correct?

18 A. That's correct.

19 DR. BARDEN: That's all I have.

20 THE WITNESS: Okay.

21 MS. RIVAUX: If we can have just a
22 couple minutes to organize our thoughts and --

23 DR. BARDEN: Okay.

24 MS. RIVAUX: -- hopefully, we'll be
25 done in a little bit.

1 THE VIDEOGRAPHER: Need to go back off?

2 MS. RIVAUX: Yes, we can go back off.

3 THE VIDEOGRAPHER: Off record at 1:34.

4 (RECESS TAKEN)

5 THE VIDEOGRAPHER: We're back on record

6 at 1:47.

7 EXAMINATION

8 BY MS. RIVAUX:

9 Q. Good afternoon, Dr. Adkins. I just have a
10 few follow-up questions for you. I just want to
11 clarify, if you can, for the court, what information
12 do you traditionally rely on in the regular course of
13 your business in making determinations on the proper
14 course of treatment for your patients?

15 A. So we gather information from our patient
16 themselves, the parents as well, of course, blood
17 tests and x-rays if those are required. And then in
18 my multi-disciplinary clinics I rely on other members
19 of the team who gather information as well, so my
20 mental health provider, nutritionist, whoever is
21 working with me.

22 Q. And in the part -- in referencing the
23 licensed social worker that works as part of your
24 team, what information from your licensed social
25 worker do you rely upon?

1 A. So I rely on her conversations with the
2 patients as well as her specific assessments -- the
3 assessment tools that she uses.

4 Q. When a patient makes a report to you or to
5 your clinical social worker in the medical context, do
6 you rely on that information?

7 A. I do.

8 Q. Are you entitled in your field of practice
9 to rely on statements patients make to you in a
10 medical context?

11 DR. BARDEN: Objection, move to strike
12 as irrelevant, speculation, lack of foundation
13 and leading.

14 THE WITNESS: Could you repeat, I'm
15 sorry?

16 DR. BARDEN: Oh, and vague as to
17 entitled.

18 BY MS. RIVAUX:

19 Q. Okay. Dr. Adkins, if you understand the
20 question, in your practice, are you entitled to rely
21 on statements a patient made to you in the medical
22 context?

23 A. Entitled to rely on.

24 Q. Let me rephrase it.

25 A. Sorry.

1 Q. No problem.

2 Do you rely on statements that patients

3 make to you in the medical context?

4 A. Yes.

5 Q. Do you have any reason to believe that

6 Drew's statements that were made to you in the medical

7 context were inaccurate?

8 A. I have no reason to believe that Drew's

9 statements were inaccurate.

10 Q. Do you have any reason to believe that

11 Drew's statements to your licensed social worker were

12 inaccurate?

13 A. No.

14 Q. After sitting here today and answering

15 questions regarding your treatment of Drew, do you

16 have any doubt in your mind regarding Drew's gender

17 dysphoria diagnosis?

18 DR. BARDEN: Objection, speculation, a

19 lack of foundation, hearsay, leading and

20 improper opinion.

21 THE WITNESS: I do not.

22 BY MS. RIVAUX:

23 Q. After sitting here today and hearing and

24 answering all the questions you were asked today, do

25 you have any question in your mind whether Drew is

1 transgender?

2 DR. BARDEN: Objection, lack of
3 foundation, speculation, hearsay, improper
4 opinion.

5 THE WITNESS: I -- I don't have any
6 doubt that he's transgender.

7 BY MS. RIVAUX:

8 Q. Do you have any doubt in your mind of
9 whether Drew was diagnosed with gender dysphoria?

10 DR. BARDEN: Objection, lack of
11 foundation, speculation, hearsay, leading and
12 improper opinion.

13 THE WITNESS: I do not have any doubt
14 as part of our team's assessment, that is part
15 of what we do. I have no doubt.

16 MS. RIVAUX: All right. I have no
17 further questions.

18 EXAMINATION

19 BY DR. BARDEN:

20 Q. Okay. Dr. Adkins --

21 MS. RIVAUX: Oh, wait, is there -- this
22 is not a --

23 DR. BARDEN: This is re-cross. You
24 asked questions, I'm going to follow up. It's
25 a --

1 MS. RIVAUX: I don't know that you just

2 get --

3 DR. BARDEN: It's a trial.

4 MS. RIVAUX: -- entitled to re-cross.

5 Most judges do not allow re-cross. I object to

6 you re-crossing but . . .

7 MR. KOSTELNIK: That's noted. Noted

8 for the record.

9 DR. BARDEN: Okay.

10 BY DR. BARDEN:

11 Q. You mentioned that you traditionally rely

12 upon information from parents, correct?

13 A. I do.

14 Q. But nobody gave you the information the

15 parents gave Dr. Naomi Jacobs; isn't that correct?

16 MS. RIVAUX: Objection, relevance,

17 scope.

18 THE WITNESS: I don't know if the mom

19 gave me any of the same information or not,

20 because I don't have those records to compare

21 the two.

22 BY DR. BARDEN:

23 Q. You say that you rely upon your team, but

24 as we've already discussed, you have no information on

25 what they do in their closed rooms with the patient,

1 correct?

2 MS. RIVAUX: Objection, relevance --

3 THE WITNESS: I know --

4 MS. RIVAUX: -- asked and answered.

5 THE WITNESS: -- I know exactly what

6 my -- my provider does; outside providers, no.

7 BY DR. BARDEN:

8 Q. And you were not in the room when your

9 provider asked and answered questions with Drew Adams,

10 correct?

11 MS. RIVAUX: Objection, asked and

12 answered, scope.

13 THE WITNESS: No, I was provided with

14 those details afterward.

15 BY DR. BARDEN:

16 Q. You were asked if you are, quote, entitled

17 to rely upon patient information. Can you give me any

18 peer-reviewed studies either science or ethics that

19 you are, quote, entitled, unquote, to rely, without

20 any search for alternative hypothesis you're entitled

21 to rely upon the statements of patients?

22 MS. RIVAUX: Objection,

23 mischaracterizes evidence, argumentative,

24 assumes facts not in evidence.

25 THE WITNESS: So I didn't answer that

1 question, it was rephrased.

2 BY DR. BARDEN:

3 **[REDACTED]**

4 **[REDACTED]**

5 **[REDACTED]**

6 **[REDACTED]**

7 **[REDACTED]**

8 MS. RIVAUX: Objection, relevance --

9 BY DR. BARDEN:

10 Q. Was that part of that answer?

11 MS. RIVAUX: Objection relevance,
12 mischaracterizes evidence, assumes facts not in
13 evidence, hearsay.

14 THE WITNESS: No, that would not
15 characterize those specific statements. I was
16 discussing my direct conversations with Drew.

17 BY DR. BARDEN:

18 Q. And then, finally, you were asked if you
19 had, quote, any doubts. Do you remember that?

20 A. I do.

21 Q. And you said you had no doubt, correct?

22 A. Correct.

23 Q. And that's malpractice, correct?

24 MS. RIVAUX: Objection, relevance.

25 THE WITNESS: No.

1 BY DR. BARDEN:

2 Q. For a physician to have no doubt in a
3 complex controversial diagnostic case is malpractice;
4 isn't that correct?

5 A. No.

6 MS. RIVAUX: Objection, relevance --

7 BY DR. BARDEN:

8 Q. You think that as --

9 MS. RIVAUX: -- assumes facts not in
10 evidence --

11 BY DR. BARDEN:

12 Q. You believe --

13 MS. RIVAUX: -- argumentative.

14 BY DR. BARDEN:

15 Q. -- you believe that as a clinician sitting
16 in a room chitchatting with people that you are able
17 to produce 100 percent certainty in your practices,
18 Dr. Adkins?

19 MS. RIVAUX: Objection,
20 mischaracterizes testimony, argumentative,
21 assumes facts not in evidence.

22 THE WITNESS: So, you know, in
23 medicine, luckily, we have the opportunity to
24 have an ongoing relationship with patients and
25 we can re-evaluate things if things come up.

1 And, certainly, I would keep that window open

2 and look for things that might be atypical.

3 That is certainly something that I would do.

4 DR. BARDEN: Objection, move to strike

5 as nonresponsive.

6 BY DR. BARDEN:

7 Q. Do you believe that sitting in a room

8 chatting with people using the methodologies that you

9 use that you're capable of 100 percent, no doubt,

10 certainty in the work that you do? Do you really

11 believe that?

12 MS. RIVAUX: Objection,

13 mischaracterizes testimony, argumentative,

14 assumes facts not in evidence, relevance.

15 THE WITNESS: So no, that's not what I

16 was trying to get across. If you thought that,

17 then that's not exactly what I was trying to

18 say. Certainly, as a medical provider, there is

19 always some opening for -- you would never say

20 anything's 100 percent.

21 DR. BARDEN: Thank you.

22 MS. RIVAUX: All right. I think

23 we're -- we're done. Thank you.

24 DR. BARDEN: Okay. Have a nice

25 afternoon.

1 THE WITNESS: You too.

2 MS. RIVAUX: Thank you, Dr. Adkins.

3 THE VIDEOGRAPHER: This concludes the

4 deposition -- this concludes the deposition of

5 Deanna Adkins, M.D. The time is 1:56.

6 (SIGNATURE RESERVED)

7 (DEPOSITION CONCLUDED AT 1:56 P.M.)

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1 DEPOSITION ERRATA SHEET

2 I, DEANNAADKINS, M.D., do hereby certify that I have
3 read the foregoing transcript of my testimony, and further
4 certify that it is a true and accurate record of my
5 testimony (with the exception of the corrections listed
6 below):

7	Page	Line	Correction
8	_____	_____	_____
9	_____	_____	_____
10	_____	_____	_____
11	_____	_____	_____
12	_____	_____	_____
13	_____	_____	_____
14	_____	_____	_____
15	_____	_____	_____

16
17 WITNESS my hand and seal on this the _____ day of
18 _____, 20__.

19 _____
20 DEANNAADKINS, M.D.

21
22 This deposition certificate was signed in my presence by
23 _____ on the _____ day of _____, 20__.

24
25 _____

26 NOTARY PUBLIC

27 NOTARY NO. _____

28 My commission expires: _____

1 STATE OF NORTH CAROLINA

2 COUNTY OF DAVIDSON

3

4 C E R T I F I C A T E

5 I, Amy A. Brauser, Registered Merit

6 Reporter/Certified Realtime Reporter, the officer

7 before whom the foregoing deposition was taken, do

8 hereby certify that the witness was duly sworn by me

9 prior to the taking of the foregoing deposition; that

10 the testimony of said witness was taken by me to the

11 best of my ability and thereafter reduced to

12 typewriting under my direction; that I am neither

13 counsel for, related to, nor employed by any of the

14 parties to the action in which this deposition was

15 taken, and further that I am not a relative or

16 employee of any attorney or counsel employed by the

17 parties thereto, nor financially or otherwise interest

18 in the outcome of the action.

19

20 This is the 7th day of December, 2017.

21

22

Amy A. Brauser, RPR RMR CRR

23

24

Notary Public # 20023030055

25

DE 172

**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.

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

**THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,**

Defendant.

_____ /

**DEFENDANT'S SUPPLEMENTAL BRIEF REGARDING ITS UNWRITTEN
BATHROOM POLICY**

Defendant, **the School Board of St. Johns County, Florida** in accordance with the Court's January 15 and 19, 2018, Orders [Docs. 159, 164], hereby submits its Supplemental Brief Regarding its Unwritten Bathroom Policy.

INTRODUCTION

The Court has concerns that Plaintiff's constitutional challenge to the School Board's unwritten bathroom policy may not be ripe, because the policy may not have been the subject of public input and final decision by the School Board. [Doc. 159]. The School Board submits that issues regarding the constitutionality of its bathroom policy are ripe for review for the reasons stated herein. Alternatively, even if Plaintiff's constitutional challenge is not ripe for review, Plaintiff's claim under Title IX of the

Education Amendments of 1972 is independently capable of being adjudicated and dismissed by the Court.

RELEVANT FACTS FOR PURPOSES OF THIS BRIEF¹

OCR Investigation, the Lawsuit and Subsequent Public Meetings

1. Plaintiff filed a complaint with the U.S. Department of Education’s Office for Civil Rights (“OCR”) in November of 2015. *T. I P. 259-260, 16-25, 1-25.*

2. On March 30, 2016, in response to Plaintiff’s OCR complaint, the District fervently opposed Plaintiff’s position and asserted its bathroom policy was legal and authorized under Title IX. *T. III P. 74-75 L. 16-25, 1-12; D. Ex. 40.* School Board members were sent copies of the response. *T. III P. 74-75 L. 16-25, 1-12; D. Ex. 40.*

3. In May of 2016, in response to a joint publication from OCR and the U.S. Department of Justice (“DOJ”)(“2016 Guidance”), then-superintendent Dr. Joseph Joyner released an official statement on behalf of the District stating that the District did not agree with the 2016 Guidance; instead, the District asserted that its practice of providing gender-neutral bathrooms for transgender students was lawful and reasonable. *T. III P. 75-78 L. 19-25, 1-25, 1-24; D. Ex. 84, 106A.*

4. On February 22, 2017, OCR and DOJ withdrew the 2016 Guidance. *D. Ex. 106B, 237.*

¹ Citations to the trial transcript will be to the volume, page(s) and line number(s). For example, Volume 2, pages 16-17, lines 1-25 and lines 1-5 will be cited as *T. II P. 16-17 L. 1-25, 1-5*. Citations to the parties’ exhibits will be noted as either *P. Ex.* or *D. Ex.*

5. This lawsuit was filed on June 28, 2017. [Doc. 1].

6. On July 11, 2017, just two weeks after Plaintiff initiated this lawsuit, the School Board held a regularly scheduled public meeting during which five individuals expressed their opinions about transgender bathroom rights during the public comment portion of the meeting, including their disagreement with not permitting students to use the bathroom consistent with their gender identity.² During the meeting, the School Board expressed that it was committed to following the law by respecting the rights of all students; however, it could not discuss the matter further due to pending litigation.³

7. On November 14, 2017, the School Board held a shade meeting in accordance with F.S. §286.011 (8) to discuss this case.⁴

The Unwritten Bathroom Policy and Written Best Practices

8. The School Board does not formally adopt a policy and engage in rule-making for each law to which it adheres. *T. III P. 46-47 L. 25, 1-4.*

9. Unlike policies, procedures and best practices are not required to be adopted through the statutory rule-making process. *T. III P. 43-44 L. 25, 1-15.*

10. The School Board provides sex-segregated bathrooms in accord with Title IX, meaning boys must use the boys' bathrooms and girls must use the girls'

² <http://www.stjohns.k12.fl.us/board/wp-content/uploads/sites/11/2017/03/2017-7-11-School-Board-Meeting-minutes-1.pdf> (last visited January 25, 2018). See also, <https://vimeo.com/225272890> (31:13 through 45:28)(last visited January 25, 2018)

³ <https://vimeo.com/225272890> (45:00 through 45:28)(last visited January 25, 2018)

⁴ <http://www.stjohns.k12.fl.us/events/event/school-board-meeting-4/> (last visited January 25, 2018).

bathrooms. *T. II P. 149 L. 8-13, P. 227 L. 6-24; T. III P. 11-12 L. 22-25, 1-2, P. 34-35 L. 20-25, 1-3, P. 44-45 L. 20-25, 1-18.* The policy is unwritten. *T. III P. 45 L. 16-18.* It has been the School Board's policy for as long as anyone can remember, and it separates boys and girls as those terms have been traditionally defined. *T. III P. 45-46 L. 19-25, 1-23, P. 99-100 L. 20-25. 1-5.*

11. Frank Upchurch, Esq., the School Board's attorney, was able to trace the policy back to at least the early 1950s. *T. III P. 45-46 L. 16-25, 1-7.* Likewise, Sallyanne Smith testified that in her 17 years as an employee with the District, students of one biological sex were never permitted to use the bathroom of the opposite biological sex. *T. II P. 149-150 L. 14-15, 1-8; P. 181 L. 2-6.*

12. The School Board's long-standing custom and practice creates an expectation of privacy among students and their parents that the two biological sexes will not share or infringe on each other's privacy in school bathrooms. *T. III P. 67 L. 12-20.* The policy has been successful. *T. II P. 248-249 L. 25, 1-7.*

13. The unwritten policy is enforced through the student code of conduct. *T. II P. 227-228 L. 6-25, 1-15.* If students of one sex go into the bathroom of the opposite sex, it would be considered misconduct warranting possible discipline under the student code of conduct. *T. II P. 228 L. 4-18; T. III P. 36 L. 10-15.*

14. The sex of a student is determined at registration through enrollment materials. *T. II P. 205 L. 10-23.* When a student enrolls, he or she is required to submit

a number of documents, including a Student Information/Entry Form, a Home Language Survey, a School Entry Health Exam document, and a birth certificate. *T. II P. 229-234; D. Ex. 142-145.* The District determines a student's sex by reviewing all of these documents. *T. II P. 234 L. 14-23.* Once a student enrolls and identifies their sex in enrollment documents, the student is treated consistent with the sex in their enrollment materials for purposes of bathroom use. *T. II P. 234-235 L. 24-25, 1-2.* This method of determining student sex has not been a problem. *T. III P. 54-55 L. 9-25, 1-4.* The District accepts at face value the sex of students as represented in enrollment documents unless or until it is put on notice that there is an issue. *T. III P. 53 L. 5-22.*

15. In or around August or September of 2015, the District's Executive Cabinet⁵ finalized the written Best Practices ("Best Practices"). *T. II P. 242-243 L. 20-25, 1-11, P. 246-247 L. 6-25, 1-3.* The Best Practices were created to provide guidance to teachers and staff and apply to all students. *T. II P. 247 L. 4-7; T. III P. 110 L. 4-21.*

16. The Best Practices provide students access to a gender-neutral bathroom or the bathroom matching their biological sex. *T. II P. 199 L. 5-20; D. Ex. 33.*⁶ It did/does not change the School Board's unwritten bathroom policy. *T. II P. 247 L. 13-16; T. III P. 61 L. 6-13.*

⁵ The Executive Cabinet is comprised of the Superintendent, Assistant or Associate Superintendent, and Directors. *T. II P. 169 L. 4-10.* The Executive Cabinet met weekly to discuss various situations and initiatives. *T. II P. 237-238 L. 22-25, 1-2.*

⁶ This provision is also consistent with Cathy Mittelstadt's actions prior to the development of the Best Practices when she served as a principal. *T. II P. 228-229 L. 16-25, 1-5.*

17. The Best Practices do not prohibit transgender students from using the bathroom that matches their gender identity; rather, it is the School Board's unwritten, long-standing policy of assigning bathrooms on the basis of sex. *T. III P. 97 L. 4-11*.

ARGUMENT AND AUTHORITY

A. The School Board's Unwritten Bathroom Policy

The School Board has separated bathrooms based on the two biological sexes for as far back as anyone can remember. Trial testimony traced the District's widespread practice back to the early 1950's and established that the District has been providing sex-segregated bathrooms consistent with the 1974 Federal Regulation adopted by DOE which permits educational institutions to "provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. §106.33 (emphasis added).⁷ The District has enforced this policy through the application of the student code of conduct.

B. The School Board's Bathroom Policy is a Long-Standing, Widespread Custom or Practice Under §1983

School boards, like other public entities, can be held liable under §1983 if they have a policy or custom that causes injury to a plaintiff. Florida Family Ass'n, Inc. v.

⁷ Plaintiff agrees that the School Board may utilize the provisions set forth in 34 C.F.R. §106.33 to provide sex-segregated bathrooms. See, Doc. 22 at p.20, n. 10 ("A Title IX regulation permits schools to maintain 'comparable' separate restrooms for boys and girls. 34 C.F.R. §106.33. [Plaintiff] does not challenge that regulation; to the contrary, he seeks only equal access to the boys' restrooms permitted by that regulation.")

Sch. Bd. of Hillsborough County, 494 F. Supp. 2d 1311, 1322 (M.D. Fla. 2007). “A policy is an officially promulgated policy....[a] custom is ‘a practice that is so settled and permanent that it takes on the force of law.’” (internal citations omitted). Id. at 1323. To establish a “practice” or “custom,” as opposed to a promulgated policy, the following must be proven:

...it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom or policy.

Church v. City of Huntsville, 30 F.3d 1332, 1345 (11th Cir. 1994).

The School Board’s unwritten bathroom policy is ripe for review in this case, because it is a custom that is so widespread that it has the force of law under §1983. Monell v. Dep’t of Soc. Services of City of New York, 436 U.S. 658, 690–91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)(“although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments... may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body's official decisionmaking channels”); Bd. of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 137, 137 L. Ed. 626 (1997)(“an act performed pursuant to a ‘custom’ that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to

have the force of law”); Denno v. Sch. Bd. of Volusia County, Fla., 218 F.3d 1267, 1277 (11th Cir. 2000)(“In order for the Board to be held liable under the custom or practice prong of Monell, Denno must demonstrate that a custom or practice of banning the Confederate flag at high schools within the school district is so well-settled and pervasive that it assumes the force of law”); Cox v. McCraley, 993 F. Supp. 1452, 1456 (M.D. Fla. 1998)(“a custom may only give rise to municipal liability if it is so entrenched and long-standing that it carries the force of law”); Cuesta v. Sch. Bd. of Miami-Dade County, Fla., 285 F.3d 962, 966 (11th Cir. 2002).

As the evidence at trial reflected, the School Board’s unwritten policy of separating bathrooms based on biological sex has been a persistent and widespread practice for as far back as anyone can remember. Testimony from Ms. Smith, Mr. Upchurch, and Ms. Mittelstadt established that the District has never permitted students to use a bathroom that differs from their biological sex (except for gender-neutral bathrooms). Denying Plaintiff’s request to use the boys’ bathrooms was not a random act or isolated incident; instead, it was based on the District’s long-standing and enforced practice. Finally, the School Board has actual or constructive knowledge of these customs as demonstrated by the fact that it was informed in March of 2016 of the District’s position with respect to Plaintiff’s claim before OCR, then-Superintendent Dr. Joyner released a public statement in May of 2016 reiterating the District’s position on bathroom use, the School Board held a public meeting on July 11, 2016, during

which the School Board's practices were addressed by members of the public, and the School Board held a shade meeting on November 14, 2017, in regard to this case.

C. Plaintiff has Not Initiated a Rule Challenge

Plaintiff's lawsuit only contains actions under Title IX and the Equal Protection Clause. Plaintiff has not initiated a rule challenge under Florida law. See, F.S. §120.56. Thus, any arguments as to whether Defendant's unwritten policy is in accord with Florida's Administrative Procedure Act are not before this Court.

D. The School Board's Adherence to §106.33 Does Not Require Rulemaking

For the past several decades, it has been unnecessary for the School Board to engage in formal rulemaking to memorialize its long-standing unwritten bathroom policy or to define the word "sex," because there has never been confusion or disagreement as to whether "sex" under Title IX and §106.33 meant anything other than biological sex.⁸ While Plaintiff's argument in this case is premised on a recent phenomenon that the term "sex" under Title IX and §106.33 allegedly means something other than biological males and biological females, the School Board is simply unaware of any legal requirement mandating that it engage in rulemaking to define the unambiguous term "sex" in Title IX and its implementing regulations.

⁸ Trial testimony established that Defendant's unwritten bathroom policy was a custom in the District at least as early as the 1950's – which predates the adoption of Florida's Administrative Procedure Act. Administrative Procedure Act, ch. 74-310 (1974).

**E. In the Event Plaintiff's Constitutional Challenge is Not Ripe for Review,
Plaintiff's Title IX Claim Should Still be Dismissed**

The School Board submits that Plaintiff's constitutional challenge to its unwritten policy is ripe for adjudication by this Court; nonetheless, if the Court were to decide otherwise, Plaintiff's Title IX claim still remains ripe for review. Based on the arguments set forth in the various pleadings and other filings in this action [Docs. 54, 63, 64, 116, and 138.1], in addition to the School Board's Post-Trial Proposed Findings of Fact and Conclusions of Law, the School Board respectfully submits that this Court should dismiss Plaintiff's cause of action under Title IX.

Dated this 2nd day of February, 2018.

Respectfully submitted,

/s/ Terry J. Harmon

TERRY J. HARMON

Trial Counsel

Florida Bar Number: 0029001

tharmon@sniffenlaw.com

/s/ Robert J. Sniffen

ROBERT J. SNIFFEN

Florida Bar Number: 0000795

rsniffen@sniffenlaw.com

/s/ Michael P. Spellman

MICHAEL P. SPELLMAN

Florida Bar Number: 937975

mspellman@sniffenlaw.com

/s/ Kevin C. Kostelnik

KEVIN KOSTELNIK

Florida Bar Number: 0118763

kkostelnik@sniffenlaw.com

SNIFFEN & SPELLMAN, P.A.

123 North Monroe Street

Tallahassee, Florida 32301

Telephone: (850) 205-1996

Facsimile: (850) 205-3004

Counsel for St. Johns County School Board

CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of February, 2018, 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

DE 173

**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 NOTICE OF FILING POST-TRIAL PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

Defendant, **THE SCHOOL BOARD OF ST. JOHNS COUNTY FLORIDA**, by and through undersigned counsel and in accordance with the Court's Orders [Docs. 154, 165] hereby gives notice of filing its Post-Trial Proposed Findings of Fact and Conclusions of Law. A copy of the Post-Trial Proposed Findings of Fact and Conclusions of Law shall be filed as an exhibit to this Notice.

Dated this 2nd day of February, 2018.

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Respectfully submitted,

/s/ Terry J. Harmon

TERRY J. HARMON

Trial Counsel

Florida Bar Number: 0029001

tharmon@sniffenlaw.com

/s/ Michael P. Spellman

MICHAEL P. SPELLMAN

Florida Bar Number: 937975

mspellman@sniffenlaw.com

/s/ Robert J. Sniffen

ROBERT J. SNIFFEN

Florida Bar Number: 0000795

rsniffen@sniffenlaw.com

/s/ Kevin C. Kostelnik

KEVIN C. KOSTELNIK

Florida Bar Number: 0118763

kkostelnik@sniffenlaw.com

SNIFFEN & SPELLMAN, P.A.

123 North Monroe Street

Tallahassee, Florida 32301

Telephone: (850) 205-1996

Facsimile: (850) 205-3004

Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of February, 2018, 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

DE 173-1

**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.

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

**THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,**

Defendants.

**DEFENDANT'S POST-TRIAL PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Introduction

This Court must resolve whether Defendant's policy of separating showers, locker rooms, and bathrooms on the basis of a student's biological sex violates Title IX of the Education Amendments of 1972 or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. After hearing testimony and receiving evidence over a three-day trial, carefully reviewing the trial record and the parties' written submissions, and hearing oral argument, the Court finds that Defendant's policy is lawful and constitutional.

Findings of Fact¹

The St. Johns County School Board/St. Johns County School District

1. The School Board of St. Johns County, Florida is the governing body of the St. Johns County School District, a K-12 school district responsible for the operation, control, and supervision of all public schools located in the County. Fla. Stat. §§1001.30; 1001.32(2). Authorized to exercise any power not expressly prohibited by law, Fla. Stat. §1001.32(2), the School Board is made up of five members elected from geographic districts within the County. Among its many duties, the School Board is responsible for providing “proper attention to [the] health, safety, and other matters relating to the welfare of students.” Fla. Stat. §1001.42(8)(a); see also, Fla. Stat. §1006.07. The School Board is also required to “[e]nsure that all plans and specifications for buildings provide adequately for the safety and well-being of students...” Fla. Stat. §1001.42(11)(b)8.

2. The District’s Superintendent, is responsible for the administration and management of schools and for the supervision of instruction. Fla. Stat. §1001.32(3); see also, Fla. Stat. §§1001.49; 1001.51.

3. There are approximately 40,000 students enrolled in the District’s 36 schools. *T. II P. 254-255 L. 23-25, 1-2*. High school students’ ages range from age 13

¹ Citations to the trial transcript will be to the volume, page(s) and line number(s). For example, Volume 2, pages 16-17, lines 1-25 and lines 1-5 will be cited as *T. II P. 16-17 L. 1-25, 1-5*. Citations to the parties’ exhibits will be noted as either *P. Ex.* or *D. Ex.* Citations to the Court’s exhibits will be noted as *C. Ex.*

to 21. *T. II P. 256 L. 18-24*. Only 16 of the 40,000 students enrolled in the District identify as transgender (nine of whom have not asked to use the bathroom conforming to their gender identity). *T. III P. 106-107 L. 17-25, 1-3*. There are five transgender students at Nease High School, *T. III P. 136 L. 2-4*; only Plaintiff has violated the District's bathroom policy. *T. III P. 142 L. 4-15*.

4. The School Board does not formally adopt a policy for each law it implements or that it is required to follow. *T. III P. 46-47 L. 25, 1-4*. Unlike policies, procedures and best practices are not adopted through statutory rule-making. *T. III P. 43-44 L. 25, 1-15*.

5. Student safety is vital. *T. III P. 69-70 L. 22-25, 1-5*. Schools must take precautions and protect students from foreseeable risks. *T. III P. 69-70 L. 22-25, 1-5*.

The School Board's Unwritten Bathroom Policy

6. The District provides sex-segregated bathrooms, meaning boys must use the boys' bathrooms and girls must use the girls' bathrooms. *T. II P. 149 L. 8-13, P. 227 L. 6-24; T. III P. 11-12 L. 22-25, 1-2, P. 34-35 L. 20-25, 1-3, P. 44-45 L. 20-25, 1-18*. The policy, in place for as long as anyone can remember, is unwritten and has successfully separated boys and girls as those terms have been traditionally defined. *T. II P. 248-249 L. 25, 1-7; T. III P. 45-46 L. 16-25, 1-23, P. 99-100 L. 20-24, 1-5*² This

² Mr. Upchurch was able to trace the policy back to the early 1950s. *T. III P. 45-46 L. 16-25, 1-7*. In Ms. Smith's 17 years as an employee in St. Johns County, students of one biological sex were never permitted to use the bathroom of the opposite biological sex. *T. II P. 149-150 L. 14-15, 1-8; P. 181 L. 2-6*.

long-standing practice creates an expectation of privacy, which begins at the bathroom door, for students and parents that the two biological sexes will not share bathrooms. *T. III P. 67-68 L. 12-20, 23-25, 1-6.*

7. The policy is enforced through the student code of conduct. *T. II P. 227-228 L. 6-25, 1-15.* If a student of one sex enters the bathroom of the opposite sex, it would be considered misconduct subject to discipline under the student code of conduct. *T. II P. 228 L. 4-18; T. III P. 36 L. 10-15.*

8. The sex of a student is determined at registration through enrollment materials. *T. II P. 205 L. 10-23, P. 234 L. 14-23.* When a student enrolls, he or she is required to submit a number of documents, including a Student Information/Entry Form, a Home Language Survey, a School Entry Health Exam document, and a birth certificate. *T. II P. 229-234; D. Ex. 142-145.* The District accepts at face value the sex of students as represented in enrollment documents unless or until it is put on notice that there is an issue, *T. III P. 53 L. 5-22,* and treats students consistent with the sex at enrollment for purposes of bathroom use. *T. II P. 234-235 L. 24-25, 1-2.* This method of determining student sex has not been a problem. *T. III P. 54-55 L. 9-25, 1-4.* Plaintiff identified as a female, and submitted documents consistent therewith, at enrollment. *T. II P. 234 L. 8-13; D. Ex. 142-145.*

Development of the District's Written Best Practices for LGBTQ Students

9. Sallyanne Smith, a former District employee, worked with transgender students in her role as Director of Student Services, a department which addressed all at-risk programs and students in the County. *T. II P. 143 L. 3-25.*³ Administrators often called upon her for advice on transgender student issues. *T. II P. 145 L. 16-25.*

10. Cathy Mittelstadt is the Deputy Superintendent for Operations. *T. II P. 226 L. 9-22.* She also previously served the District as an Associate Superintendent for Student Services, principal, and assistant principal. *T. II P. 226 L. 6-22.*

11. Ms. Smith began working on LGBTQ student issues in 2012. *T. II P. 146 L. 12-23.* The District sent Ms. Smith and other employees to LGBTQ student conferences in 2013-2015. *T. II P. 146 L. 16-23.* Ms. Smith also educated herself by researching articles, attending Gay-Straight Alliance (“GSA”) club meetings, talking to students, and meeting with JASMYN – a group in Duval County that works with LGBTQ students. *T. II P. 146-147 L. 24-25, 1-7.* Ms. Smith’s determined that Florida school districts did not handle LGBTQ issues uniformly. *T. II P. 163 L. 9-14.*

12. Due to emerging LGBTQ issues in 2012, Ms. Smith formed a task force to get information from administrators, principals, attorneys, guidance counselors, and

³ Ms. Smith holds a master’s degree in Education Administration Supervision. *T. II P. 139 L. 1-8.* She is certified by the Florida Department of Education in K-8, early childhood education and administration supervision. *T. II P. 139-140 L. 16-25, 1-2.*

mental health counselors. *T. II P. 150-151 L. 22-25, 1-18*. Ms. Smith also formed a smaller focus group to help her. *T. II P. 152 L. 10-20*.

13. Task force and focus group members collected and reviewed policies from other counties and states. *T. II P. 174-179; D. Ex. 85, 157-159, 161-163, 168, 170-171, 177-179, 187-191, 203-204, 213, 217, 223, 225, 228*. Florida school districts did not uniformly include nondiscrimination language protecting individuals based on their gender identity. *D. Ex. 85 at SJCSB-DA PRR 1437, 1439, 1446-1447, 1453*.

14. In 2014, the task force obtained information on LGBTQ student issues from high school principals. *D. Ex. 27, 66*. The task force also utilized club sponsors at schools to learn how students felt. *T. II P. 158-159 L. 18-25, 1-3*. Student input was relayed to the task force through club sponsors. *T. II P. 201-202 L. 17-25, 1-21*.

15. On October 8, 2014, the focus group, which included District employees and members from the public, met to discuss various children's behavioral health issues, including the need to develop best practices. *T. II P. 161 L. 3-9; D. Ex. 90*.

16. On November 5, 2014, and again on February 18, the task force and focus group met separately to discuss LGBTQ student issues (including bathroom issues). *T. II P. 162-163 L. 1-25, 1-23; D. Ex. 66-70*. The focus group meeting included mental health therapists, a bullying coordinator, and gay and lesbian club sponsors from high schools. *T. II P. 162 L. 16-24; D. Ex. 70*.

17. On March 3, 2015, the task force proposed recommendations to the focus group to be submitted to the Superintendent's Executive Cabinet regarding LGBTQ student issues. *T. II P. 170 L. 4-22; D. Ex. 28.*⁴ With respect to bathroom use, the task force recommended giving students access to a gender-neutral bathroom instead of forcing them to use the bathroom corresponding to their biological sex, as an exception to the District's long-standing policy requiring students use the bathroom of their biological sex. *T. II P. 171-72 L. 21-25, 1-4.*

18. In developing the recommendations for the Executive Cabinet, the District considered student safety and privacy issues, since bathrooms were unsupervised areas where students as young as 13 may be sharing a bathroom with older students. *T. II P. 172-173 L. 25, 1-21, P. 212 L. 222, P. 248 L. 12-20.* The District's concerns included students changing clothes (both inside and outside of stalls), going to the bathroom, and gender-fluid individuals (i.e. students whose gender changes on potentially a daily basis).⁵ *T. II P. 212-214. L. 23-25, 1-25, 1-8, P. 221-222 L. 23-25, 1-10, P. 248 L. 2-11.* Gender-fluid student issues "came up several times" with the task force. *T. II P. 216 L. 10-16.*⁶ The task force was primarily concerned about

⁴ The Executive Cabinet is comprised of the Superintendent, Assistant or Associate Superintendent, and Directors. *T. II P. 169 L. 4-10.* The Executive Cabinet met weekly to discuss various situations and initiatives. *T. II P. 237-238 L. 22-25, 1-2.*

⁵ Plaintiff's personal view is that individuals get to decide whether they are a boy, a girl, or neither (non-binary). *T. I P. 190-192 L. 9-25, 1-25, 1-11.*

⁶ See also, *P. Ex. 66 at Plaintiff 1587* for an explanation of gender fluidity under the definition of "genderqueer."

privacy issues outside the bathroom stalls, *T. II P. 223 L. 1-11*,⁷ with a focus on creating a policy that would prevent as many incidents as possible. *T. II P. 215 L. 12-21*.

19. The District's privacy concerns also arose under case law, the Florida Constitution, and the State Requirements for Educational Facilities ("SREF"). *T. III P. 66-67 L. 5-25, 1-10*.

20. Ms. Smith and her team also attended and obtained input at GSA club meetings where JASMYN was also present. *T. II P. 179-180 L. 10-25, 1-9*.

21. In July of 2015, Ms. Mittelstadt became Ms. Smith's supervisor. *T. II P. 181-182 L. 20-25, 1-15, P. 236 L. 2-19*. Ms. Mittelstadt's role was to help develop a final draft of the Guidelines for LGBTQ students – Follow Best Practices ("Best Practices"), bring it to the Executive Cabinet for discussion and approval, and ultimately implement it. *T. II P. 241 L. 1-7*. In August of 2015, Ms. Mittelstadt worked with Mr. Upchurch on various drafts of the Best Practices. *D. Ex. 71, 72, 120 at SJCSB-DA 1370-1416*.⁸

22. The Executive Cabinet finalized the Best Practices in late August or early September of 2015. *T. II P. 242-243 L. 20-25, 1-11, P. 246-247 L. 6-25, 1-3; D. Ex. 33*. The Best Practices provided guidance to teachers and staff. *T. III P. 110 L. 4-21*.

⁷ The "boys" and "girls" bathroom signs are located on the outside of each group bathroom. *T. II P. 221-222 L. 15-25, 1-2*.

⁸ Frank Upchurch has served as the School Board's attorney since 2007. *T. III P. 43 L. 1-7*.

23. By September 10, 2015, Ms. Mittelstadt had met with the District's principals and assistant principals to introduce the Best Practices. *T. II P. 243-245 L. 14-25, 1-25, 1-23, P. 246-257 L. 22-25, 1-3; D. Ex. 87.*

24. Under the Best Practices, students are permitted access to a gender-neutral bathroom or the bathroom matching their biological sex. *T. II P. 199 L. 5-20; D. Ex. 33.*⁹ In this way, the Best Practices balance the plea of some transgender students while preserving the District's long-standing policy and concerns about students' safety and privacy. *T. II P. 247 L. 13-16; T. III P. 61 L. 6-13, P. 62 L. 5-12, 14-23. T. III P. 61 L. 6-13.*¹⁰ It also accommodates gender fluid students, gender non-binary students (students who do not want to identify as a particular gender), and transgender students who may not want to use the bathroom matching their gender identity. *T. III P. 70-71 L. 21-25, 1-7, 15-21.* The Best Practices apply to all students. *T. II P. 247 L. 4-7.*

Guidance from DOE/DOJ/U.S. Attorney General

25. In May of 2016, The U.S. Departments of Education ("DOE") and Justice ("DOJ") issued guidance ("2016 Guidance") that the term "sex" under Title IX included gender identity. *D. Ex. 84, 106A.* In response, the District released a public statement through its then-superintendent Dr. Joseph Joyner that the District disagreed with the

⁹ This provision is also consistent with Ms. Mittelstadt's actions prior to the development of the Best Practices document when she served as a principal in the District. *T. II P. 228-229 L. 16-25, 1-5.*

¹⁰ The Best Practices do not prohibit transgender students from using the bathroom that matches their gender identity; rather, it is the District's unwritten, long-standing policy of assigning bathrooms on the basis of sex. *T. III P. 97 L. 4-11.*

2016 Guidance, and asserting that its practice of providing gender-neutral bathrooms for transgender students was lawful and reasonable. *T. III P. 75-78 L. 19-25, 1-25, 1-24; D. Ex. 84, 106A.*

26. On February 22, 2017, DOE and DOJ withdrew (“2017 Guidance”) the 2016 Guidance. *D. Ex. 106B, 237.*

27. On October 4, 2017, the Office of the U.S. Attorney General issued a memorandum stating that the term “sex” under Title VII of the Civil Rights Act of 1964 “does not encompass discrimination based on gender identity *per se*, including transgender status.” *D. Ex. 106D, 248.*

Complaints and Community Concerns

28. Plaintiff is the only transgender student in the District to complain about the Best Practices. *T. II P. 255 L. 17-20.*

29. Certain parents of students and students in the St. Johns County School District object to a policy or practice that would allow students to use a bathroom that matches their gender identity as opposed to their sex assigned at birth. These individuals believe that such a practice would violate the bodily privacy rights of students and raise privacy, safety and welfare concerns. [Doc. 116 at p. 11].

Broward County (Fla.) and Jefferson County (Ky.)

30. The Broward County School District (“Broward”) has 271,000 students in 340 schools and is the sixth largest school district in the Country. *T. II P. 53 L. 19-*

21, P. 254-255 L. 23-25, 1-2. Michele Valbrun-Pope, an administrator from Broward, conceded that communities in Broward County and St. Johns County are different. *T. II P. 70 L. 4-16.*

31. Two major differences include: 1) Broward's nondiscrimination policy, which expressly distinguishes between gender identity and sex; *T. II P. 53-54 L. 22-25, 1-4; P. Ex. 65*; and 2) the adoption by Broward County of a local ordinance prohibiting discrimination on the basis of, among other things, sex and gender identity. *T. II P. 82 L. 11-14; P. Ex. 66 at Plaintiff 1593.*

32. Of the 271,000 students in Broward, Principal Michelle Kefford has only directly dealt with 12 transgender students. *T. II P. 109-110 L. 20-25, 1-2.* Ms. Kefford only has two transgender students in her high school of 2,600 students. *T. II P. 117 L. 8-11.*

33. Ms. Valbrun-Pope testified that there is a right to privacy in the bathroom, and it is possible for students in Broward to be punished for going in the bathroom of the opposite sex. *T. II P. 80-81 L. 16-25, 1-8.*

34. In addition to the nondiscrimination policy, Broward staff developed "guidance documents," including Broward's LGBT Critical Support Guide ("Broward's Guide"). *T. II P. 58 L. 2-12; P. Ex. 66.* Broward's Guide relies on the obsolete 2016 Guidance. *P. Ex. 66 at Plaintiff 1580, 1611, 1666; D. Ex. 84, 106B, 237.* Broward's Guide is not an adopted school board policy. *T. II P. 72 L. 6-17; P. Ex. 66*

at Plaintiff 1588. Broward does not have a written bathroom policy. *T. II P. 77 L. 20-22.*

35. Broward's Guide recognizes there is a difference between biological sex and gender identity, and it also permits students to use the bathroom that matches their gender identity or a gender-neutral bathroom. *T. II P. 80 L. 12-15, P. 99-102 L. 5-25, 1-25, 1-25, 1-17; P. Ex. 66.* Ms. Kefford testified that some students did not want to use the bathroom matching their gender identity. *T. II P. 111-112, L. 23-25, 1-3.* In her words, "[e]very case is different. So it's not like a one size fits all with these cases." *T. II P. 112 L. 8-9.* Even Broward's Guide recognizes that bathroom and changing facility issues are "among the more challenging issues presented by gender identity law and policy guidelines," thereby such issues should be "resolved on a customized case-by-case basis..." *P. Ex. 66 at Plaintiff 1618.*

36. Despite being published in 2012 and shared at conferences with other local and out-of-state school districts, only nine of the 67 school districts in Florida "have taken some of the pieces" of Broward's Guide and implemented "gender communication plans to help to affirm names and other areas in support of transgender students." *T. II P. 59-60 L. 21-25, 1-5 and 65-66 L. 22-25, 1-10.*

37. The District's task force reviewed and discussed Broward's Guide but elected not to adopt it. *T. II P. 216 L. 10-16.*

38. Dr. Thomas Aberli, a principal in Jefferson County, Kentucky, testified regarding Atherton High School's local decision to adopt a school policy permitting students to use the bathroom matching their gender identity. *T. I P. 22 L. 11-16, P. 43-44 L. 23-25, 1-7; P. Ex. 147.* The local policy-making body at Atherton made the decision after it adopted a nondiscrimination statement providing protections to individuals based on gender identity. *T. I P. 21 L. 21-25, P. 33, L. 10-23, P. 43-44, L. 23-25, 1-7; P. Ex. 146, 147.* Dr. Aberli conceded that one of the reasons schools provide separate bathrooms for boys and girls is to protect privacy rights. *T. I P. 65 L. 1-4.*¹¹

39. Atherton's nondiscrimination statement distinguishes between sex and gender identity. *T. I P. 70 L. 6-9; P. Ex. 146.* Atherton's school space policy also distinguishes between gender identity and sex. *T. I P. 70-71 L. 10-25, 1-24; P. Ex. 147.* Similar to Broward's Guide, Atherton's school space policy fails to address the 2017 Guidance. *P. Ex. 147; D. Ex. 106B, 237.*

40. The Jefferson County School District (which includes Atherton) has not adopted a bathroom policy addressing transgender students. *T. I P. 60 L. 20-23.* Likewise, Dr. Aberli's current school (Highland Middle School) has elected not to adopt a transgender bathroom policy. *T. I P. 20 L. 4-29, P. 63 L. 14-19.*

¹¹ Dr. Aberli has suspended students for going into the bathroom of the opposite sex. *T. I P. 65 L. 5-7.*

Plaintiff and Nease High School

41. Plaintiff was born a female. *T. I P. 83 L. 2-4, 15-17*. His original birth certificate identified him as a female. *T. I P. 83 L. 8-10*. Plaintiff's mother knew she was having a girl before Plaintiff was born. *T. II P. 31 L. 20-25*.

42. Plaintiff has a vagina. *T. I P. 127 L. 15-24, P. 195 L.2-3*. He still experiences female-specific health issues. *C. Ex. 2 at P. 86 L. 12-15*. He has not presented any evidence to the District that he is a biological male. *T. III P. 36 L. 3-8*.

43. Plaintiff's enrollment documents identified him as a female. *T. II P. 234 L. 8-13; D. Ex. 142-145*. Plaintiff's official school records identify him as a female. *T. II P. 253 L. 6-15*

44. Plaintiff identified as a girl throughout elementary and middle school. *T. I P. 79 L. 4-10, P. 127-128 L. 25, 1-17*. He used the girls' bathroom in middle school. *T. I P. 129 L. 3-5*.

45. Plaintiff is a junior at Nease. *T. I P. 79 L. 2-3*. He attended Nease for his freshman (2015-2016) and sophomore years (2016-2017). *T. I P. 79 L. 2-3*. There are 2,450 students at Nease. *T. III P. 132 L. 8-9*.

46. Plaintiff began having issues with anxiety and depression in sixth or seventh grade. *T. I P. 130 L. 6-16, P. 215-216 L. 24-25, 1-5*. He attended therapy and took prescribed medication to treat his mental health conditions beginning in February of 2015. *T. I P. 90-92*.

47. In May of 2015, Plaintiff was hospitalized for issues related to depression and anxiety. *T. I P. 135 L. 2-18*. That same month, Plaintiff felt he was a male after watching an episode of The Ellen Show featuring a transgender male. *T. I P. 103-104, L. 2-25, 1-19*. He returned to school after the District implemented extra precautions. *D. Ex. 7*.

48. During the summer of 2015, Plaintiff started referring to himself using male pronouns and used male-segregated public bathrooms. *T. I P. 96 L. 16-25*. He announced on social media that he was a transgender boy. *T. I P. 149 L. 12-15*. He notified Nease during the summer that he would be presenting as a male when he began his freshman year. *T. I P. 112 L. 9-15*. Plaintiff was never told he could use the boys' bathroom. *T. I P. 155 L. 3-5*. Likewise, Plaintiff's mother does not recall discussing bathrooms or locker rooms with anyone at Nease prior to the beginning of the school year. *T. I P. 252-253 L. 20-25, 1*.

49. Aside from bathroom use and official school records, Nease staff have treated plaintiff as a boy. *T. I P. 170 L. 22-25*.

50. Plaintiff claims he used the boys' bathrooms at Nease from August through September of 2015. *T. I P. 112-114, L. 22-25, 1-20*. This practice ended in September 2015 after a student or students complained to Nease administrators, and District staff met with Plaintiff and instructed him he could use gender-neutral or girls'

bathrooms but not the boys' bathrooms. *T. I P. 114-115 L. 10-25, 1-15. P. 117 L. 12-25; T. II P. 34 L. 14-24; D. Ex. 34.*

51. On October 9, 2015, Plaintiff and his mother met with then-Nease Principal Kyle Dresback and District staff Holly Arkin (social worker), Ms. Smith, and Christy McKendrick. *T. I P. 159-160, 254 L. 17-25, 1-1, 17-11; T. II P. 37-38 L. 21-25, 1-8.* Plaintiff was aware that the District's policy prohibited him from using the boys' bathroom. *T. I P. 160 L. 7-12; T. II P. 38 L. 12-17.* Ms. Smith explained it was a "district-level rule" that was based on the District's long-standing, unwritten policy. *T. I P. 255 L. 7-13; T. II P. 185 L. 14-17.* Ms. Smith also showed Plaintiff and his mother the Best Practices. *T. II P. 187-188 L. 15-25, 1-10.*

52. On November 23, 2015, Plaintiff's mother met with Ms. Mittelstadt and Brennan Asplen, the District's Deputy Superintendent for Academic and Student Services to discuss the District's policy. *T. I P. 256 L. 3-16; T. II P. 38 L. 18-21.* Ms. Mittelstadt explained the District's privacy concerns following the meeting. *T. II P. 251 L. 6-14.* Mr. Asplen did not say he was concerned about a transgender girl waiving her penis around in a bathroom. *T. II P. 251 L. 17-25.*

53. Plaintiff filed a complaint with DOE's Office of Civil Rights ("OCR") in November of 2015. *T. I P. 259-260, 16-25, 1-25.* On March 30, 2016, the District filed its response to Plaintiff's complaint, asserting its bathroom policies complied with Title

IX. *T. III P. 74-75 L. 16-25, 1-12; D. Ex. 40.* School Board members received copies of the District's response. *T. III P. 74-75 L. 16-25, 1-12; D. Ex. 40.*

54. Plaintiff's mother received a copy of the Best Practices in March of 2016 but never shared or discussed them with Plaintiff. *T. I P. 164 L. 16-25, P. 261-262 L. 16-25, 1-14; D. Ex. 14.* Ms. Mittelstadt also met with Plaintiff and his mother at the end of the 2015-2016 school year to see how he was doing, but there was no discussion regarding bathroom use. *T. II P. 252 L. 2-20.*

55. In June of 2016, Plaintiff started testosterone therapy, and he had. *T. I P.* a double mastectomy in May of 2017. *T. I P. 99-101, 105 L. 7-11.*

56. Plaintiff took steps to change his Florida driver's license and his birth certificate, both of which now identify him as a male. *T. I P. 109 L. 9-14, T. I P. 110 L. 10-20.*

57. Plaintiff has used the gender-neutral bathrooms at Nease since September of 2015. *T. I P. 118 L. 6-9.*¹² Plaintiff only uses the bathroom during class, which is typical of other students. *T. I P. 172 L. 8-10; P. 179 L. 5-10.* With respect to the current school year, the following is approximately how long it takes Plaintiff to walk to various bathrooms from each class (*T. I P. 176-178 L. 5-25, 1-25, 1-21; D. Ex. 133*):

¹² During the 2016-2017 school year, Plaintiff was only tardy to class three times, including twice for first period. *D. Ex. 41.*

Class	Walking Distance
1 st	*Rarely ever uses the bathroom
2 nd	2:06 for gender-neutral bathroom 0:39 for boys' bathroom
3 rd	0:48-0:49 for gender-neutral bathroom 0:12 for boys' bathrooms
4 th	2:53 for gender-neutral bathroom 0:44 for boys' bathrooms
5 th	*Almost never uses the bathroom
6 th	0:08-0:09 (bathroom is in classroom)
7 th	0:32-0:34 for gender-neutral bathroom 0:33 for boys' bathroom

Nease Site Visit and Description of Bathrooms/Locker Rooms>Showers

58. Nease has five sets of gang-style, sex-segregated bathrooms on campus. *T. III P. 131 L. 16-19*. There are two stalls in each boy's bathroom for a total of 10 on campus. *T. III P. 132-133 L. 1-25, 1-4*. There are 11 single-stall, gender-neutral bathrooms located on the first floor of Nease. *T. III P. 133-134 L. 5-25, 1-21*.

59. On January 5, 2018, this Court conducted a view at Nease accompanied by counsel for each party and Nease's principal.

60. The urinals in the boys' bathrooms are not divided by partitions. There were no urinals in the girls' bathrooms. The stall doors in both the boys' and girls' bathrooms have slight gaps on the outer edges of each door making some portion of the inside of the stall visible, and the tops and bottoms of the stall doors are open.

61. The boys' and girls' locker room changing areas are open such that students are in plain view of each other-meaning students see each other change clothes. The shower in the boys' locker room is a single room within the locker room with

several shower heads. There are no dividers or curtains and male students shower in plain view of each other. There is no door between the shower room and changing area of the boys' locker room. Students in the locker room can see into the shower. The showers in the girls' locker room are different. Girls are provided individual stalls within which to shower.

62. Contrary to Plaintiff's mother's testimony, Plaintiff had access to a gender-neutral bathroom during lunch. *T. I P. 279-280 L. 15-25, 1-8.*

Medical Issues

Gender Dysphoria/Bladder and Urinary Tract issues

63. No medical providers who allegedly diagnosed Plaintiff with gender dysphoria testified at trial.¹³ Plaintiff's counsel conceded at trial that whether Plaintiff has gender dysphoria is irrelevant in determining whether the District's policy is constitutional. *T. I P. 244 L. 1-11.*

64. In February or March of 2017, unbeknownst to Dr. Adkins, Plaintiff professed publicly on YouTube that he does not have "dysphoria." *T. I P. 197-198 L. 24-25, 1-17; D. Ex. 238; C. Ex. 2 at P. 64 L. 10-14.*

65. Plaintiff has never disclosed to anyone at the District or been diagnosed with urinary or bladder problems. *T. P. 179 L. 11-14; C. Ex. 68 at P. 68 L. 10-20.*

¹³ See also *T. I P. 240-251* (discussion of Defendant's position with respect to inadmissibility and relevance of the alleged gender dysphoria diagnosis).

Dr. Adkins and Dr. Ehrensaft

66. Plaintiff did not tender Dr. Adkins as an expert in any particular field during her videotaped trial deposition on December 6, 2017. *C. Ex. 1, 2.*¹⁴ Dr. Adkins has no experience working in a K-12 public school setting. *C. Ex. 2 at P. 152 L. 6-18.*

67. Plaintiff has seen Dr. Adkins three times for testosterone treatments for a combined total of 75 minutes. *T. I P. 166, 169 L. 7-14, 3-13.*

68. Dr. Adkins did not diagnose Plaintiff with gender dysphoria or any other psychological or psychiatric disorder. *C. Ex. 2 at P. 16 L. 6-7, P. 62 L. 18-22.* She did not review Plaintiff's therapy records, including records from the individual who allegedly diagnosed him with gender dysphoria (Dr. Adkins did not even know the name of the therapist). *C. Ex. 2 at P. 76-77 L. 8-25, 1-10.* She likewise did not know whether her social worker contacted Plaintiff's therapist who allegedly diagnosed him with gender dysphoria. *C. Ex. 2 at P. 81 L. 18-23.* She did not review Plaintiff's or his mother's deposition transcripts. *C. Ex. 2 at P. 122 L. 22-24.* She did not review records regarding Plaintiff's mother's concerns about Plaintiff in August of 2016. *C. Ex. 2 at P. 112-122; D. Ex. 20, 255.*¹⁵

¹⁴ In addition to the arguments raised in Defendant's pending Motion to Exclude Expert Testimony of Deanna Adkins, M.D., and Diane Ehrensaft, Ph. D. (Daubert Motion)(Doc. 129), Defendant would refer the Court to the additional grounds stated during trial. *T. II P. 24-30; T. III P. 159-166.*

¹⁵ Plaintiff's mother forgot during her deposition that she prepared the document but recalled sometime later that she prepared it. *C. Ex. 5 at P. 232-235, 249-251.*

69. Dr. Adkins was unable to point to any methodology relied upon by the Pediatric Endocrine Society when it concluded that “no adverse consequences have occurred when schools have allowed transgender students to use the restroom that is consistent with their gender identity.” *C. Ex. 2 at P. 137 L. 4-23; P. Ex. 47*. The statement from the Pediatric Endocrine Society is not in a peer-reviewed journal. *C. Ex. 2 at P. 137 L. 21-23*. It is not a study. *C. Ex. 2 at P. 139 L. 7-16*.

70. With respect to the term “sex,” clinical practice guidelines from the Endocrine Society introduced into evidence by Plaintiff and relied upon/deemed authoritative by Dr. Adkins define “sex” as “...attributes that characterize biological maleness or femaleness. The best known attributes include the sex-determining genes, the sex chromosomes, the H-T antigen, the gonads, sex hormones, internal and external genitalia, and secondary sex characteristics.” *C. Ex. 2 at P. 24 L. 6-18. P. Ex. 30 at Plaintiff 1245*. This is separate and distinct from “gender identity,” which is an internal sense of gender. *P. Ex. 30 at Plaintiff 1245*. Dr. Adkins believes Plaintiff’s “sex” is male which is in direct conflict with the definition of “sex” as set forth in the clinical practice guidelines from the Endocrine Society. *T. I P. 127 L. 15-24, P. 195 L.2-3; C. Ex. 2 P. 49 L. 14-17, P. 86 L. 12-15; P. Ex. 30 at Plaintiff 1245*.

71. Dr. Adkins also testified that the typical method to determine sex is through a physical exam at birth. *C. Ex. 2 at P. 39-40 L. 22-25, 1-18*.

72. Plaintiff, as part of this litigation and through the assistance of his legal team, met privately with Dr. Diane Ehrensaft three times over the internet for a combined total of three hours. *T. I P. 180-181 L. 8-25, 1-12*. Dr. Ehrensaft spent more time talking to Plaintiff's lawyers in preparation for her deposition than she did talking to Plaintiff. *C. Ex. 5 at P. 84 L. 8-21*. Dr. Ehrensaft is not licensed in Florida. *C. Ex. 3 at P. 45-46 L. 23-25, 1*. She has never taught, served as an administrator, or been responsible for implementing policies in a public school. *C. Ex. 5 at P. 67-68 L. 17-25, 1-6*. Dr. Ehrensaft directed the conversation with Plaintiff. *T. I P. 181-182 L. 24-25, 1*. She did not speak to Plaintiff's parents. *C. Ex. 3 at P. 49 L. 7-10*.

73. Plaintiff told Dr. Ehrensaft that it took him 10-20 minutes to walk to the bathroom, use it, and walk back to class. *C. Ex. 5 at P. 175 L. 5-14*.¹⁶

74. Dr. Ehrensaft's opinions in her July 14, 2017, Declaration are based solely on the Complaint and the Declarations of Plaintiff and his mother (neither of which is admitted as evidence). *C. Ex. 3 at ¶¶17-18*.

75. Dr. Ehrensaft did not conduct any diagnostic formulations of Plaintiff. *C. Ex. 3 at P. 49-50 L. 21-25, 1-6*. She did not evaluate Plaintiff or his self-reported levels of stress. *C. Ex. 3 at P. 55-56 L. 20-25, 1-13, P. 58 L. 1-15*. She did not obtain enough data to offer an evaluation or an opinion as to Plaintiff's mental status. *C. Ex. 3 at P. 56 L. 14-2; C. Ex. 5 at P. 165-166 L. 25, 1-18*.2. It would be unethical for her to testify

¹⁶ This is a gross exaggeration when comparing the times reflected in ¶63.

about clinical impressions; instead, she can only testify to her clinical observations. *C. Ex. 3 at P. 57 L. 5-16*. Despite her admitted limitation, Dr. Ehrensaft testified at deposition that she could have used the word “observe” instead of “assess” when referring to her impression of whether Plaintiff was traumatized as stated in her expert report. *C. Ex. 5 at P. 167-168 L. 19-25, 1-14*.

76. Dr. Ehrensaft did not recommend therapy. *C. Ex. 3 at P. 50 L. 8-11*. She did not review Plaintiff’s educational records or deposition. *C. Ex. 5 at P. 36 L. 9-18; P. 64-65 L. 6-25, 1, P. 146 L. 1-16*. She did not review all of Plaintiff’s medical or psychological records, including the concerns expressed by Plaintiff’s mother in August of 2016. *D. Ex. 20, 255*.

77. Dr. Ehrensaft testified that there are no studies with a published error rate that focus on the use of public school bathrooms as part of a treatment plan. *C. Ex. 5 at P. 128-130*. She also acknowledged that there have been controversies about the usefulness, validity and reliability of the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition: DSM-5. *C. Ex. 5 at P. 143 L. 2-12*.

78. Dr. Ehrensaft admitted that there are controversies about whether gender identity is an immutable characteristic. *C. Ex. 5 at P. 144 L. 12-25*.

79. Dr. Ehrensaft’s description of a person’s “sex” also conflicts with the definition of “sex” as set forth in the clinical practice guidelines from the Endocrine Society. *C. Ex. 3 at ¶20; P. Ex. 30 at Plaintiff 1245*.

Plaintiff's Alleged Harm

80. Plaintiff attends therapy on as-needed basis, and the frequency that he seeks therapeutic intervention has decreased. *T. I P. 131 L. 14-18*. Plaintiff has not taken medication since late 2016/early 2017. *T. I P. 187-188 L. 20-25, 11-13*.

81. At the time of trial, Plaintiff was taking the most rigorous classes offered at Nease and was a member of the National Honor Society. *T. III P. 129-130 L. 24-25, 1-3; D. Ex. 42, 43*. His academic performance has not declined during the 2017-2018 school year. *T. III 130 L. 18-20*.

Conclusions of Law

A. Background

Federal district courts must exercise judicial restraint when asked to enjoin the development or implementation of a school policy in light of the long-standing recognition by the Supreme Court that a State has broad authority to protect the physical, mental, and moral well-being of its youth. See Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 72-74 (1976); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); Prince v. Massachusetts, 321 U.S. 158, 170 (1944). Indeed, education is not among the federal government's enumerated powers but rather one of the powers reserved to the states and the people, absent a constitutional restriction:

[S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, *running public schools*, and zoning

property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so.

Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012) (emphasis added).

Local control over public education is “deeply rooted” in American tradition; and “local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.” Milliken v. Bradley, 418 U.S. 717, 741-742 (1974). Judicial restraint should, therefore, characterize any federal attempt to intervene in public education. See Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Students v. U.S. Dept. of Educ., No. 16-cv-4945, 2016 WL 6134121 at *24 (N.D. Ill. Oct .18, 2016).

In the context of sex-segregated facilities, DOE specifically stated in its 2017 Guidance that school districts should play the “primary role” in “establishing educational policy.” Enjoining the federal government’s enforcement of the 2016 Guidance, the court in Texas v. United States, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016), observed, “the Constitution assigns . . . policy choices (such as bathroom use) to the appropriate elected and appointed officials” even if the issue required balancing the protection of students’ rights and that of personal privacy when using school bathrooms . . . while ensuring that no student is unnecessarily marginalized while attending school.” See also G.G. ex rel., Grimm v. Gloucester County School Bd., 822 F.3d 709, 724 (4th Cir. 2016), vacated and remanded, 137 S.Ct. 1239 (2017)(where the court decided to “leave policy formulation to the political branches.”).

Further, the School Board, which stands *in loco parentis*, is directly responsible for the health, safety, and welfare of St. Johns County children who attend its schools. Morse v. Frederick, 551 U.S. 393, 416 (2007) (Thomas, J. concurring). In exercising that responsibility, the School Board must establish policies and practices that protect the privacy rights of the children in its charge, as prescribed by the United States and Florida Constitutions. The policy and practice at issue here – segregating bathrooms (and locker rooms) on the basis of biological sex – protect those privacy interests and comply with Title IX and the Equal Protection Clause.

B. Title IX

To succeed on his Title IX claim, Plaintiff must prove that (1) he was excluded from participation in, denied benefits of, or was subjected to discrimination in an educational program; (2) the exclusion was on the basis of sex; and (3) the Defendant receives federal financial assistance.¹⁷ Milward v. Shaheen, No. 6:15-cv-785-Orl- 31, 2017 WL 3336471 at *6 (M.D. Fla. Aug. 4, 2017), reconsidered on other grounds, 2017 WL 3662432 (M.D. Fla. Aug. 24, 2017).

Initially, the Court notes that several cases which held that separating bathrooms based on biological sex violates Title IX relied on and gave deference to the obsolete 2015 and 2016 Guidances. See Students; Board of Educ. of Highland Local School Dist. v. U.S. Dept. of Edu., 208 F.Supp.3d 850 (S.D. Ohio 2016); Carcaño v. McCrory,

¹⁷ There is no dispute that Defendant receives federal financial assistance.

203 F. Supp. 3d 615 (M.D. N.C. 2016); G.G. As such, their holdings are inconsequential to the Court's analysis under Title IX.

This Court's responsibility is to give meaning to the phrase "on the basis of sex" as used in Title IX and its implementing regulations. Plaintiff claims the term "sex" includes gender identity while the School Board asserts the term means biological sex. The fundamentals of statutory interpretation easily answer this question. In the end, the term is not ambiguous, and should be given its plain and ordinary meaning. BEDROC Ltd., LLC v. United States, 541 U.S. 176, 183 (2004)("[I]nquiry begins with a statutory text and ends there as well if the text is unambiguous.>").

"Ordinarily, a word's usage accords with its dictionary definition," Yates v. United States, 135 S. Ct. 1074, 1082 (2015). In 1972, when Congress enacted Title IX, "sex" was universally understood as referring to the biological or physiological characteristics that constitute a person's sex, and not an internal identification with one gender or the other.¹⁸ As used in Title IX, "sex" unambiguously means the sex that an individual possesses by virtue of being born with certain immutable, physiological and

¹⁸ See Judge Niemeyer's dissent in G.G., 822 F.3d at 736 (noting dictionaries contemporaneous to Title IX's enactment relied on biological distinctions to define sex, and including the following, among other examples: The Random House College Dictionary 1206 (rev. ed. 1980)("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); American Heritage Dictionary 1187 (1976)("the property or quality by which organisms are classified according to their reproductive functions"); The American College Dictionary 1109 (1970)("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished...")).

biological characteristics such as an alignment of chromosomes and the possession of reproductive organs.

Independent of the definition of the key term “sex,” additional language in Title IX confirms that it was not intended as an absolute mandate barring all distinctions between men and women, including distinctions tied to biological differences or required by common decency. To the contrary, Title IX includes an explicit statutory exemption to protect privacy in intimate settings: “... nothing contained herein shall be construed to prohibit any educational institution... from maintaining separate living facilities for the different sexes.” 20 U.S.C. §1686. Shortly after Title IX’s passage, DOE elaborated in an implementing regulation that an educational institution “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex.” 34 C.F.R. §106.33.

The legislative history of Title IX provides further support of Congress’ intent. On the heels of the Equal Rights Amendment being defeated, Title IX’s sponsor, Senator Birch Bayh, stated on the Senate floor that the law was meant to serve as a “guarante[e] of equal opportunity in education for men and women,” 118 Cong. Rec. 5,808 (1972), and was not “requiring integration of dorms between sexes,” 117 Cong. Rec. 30,407 (1971). The intent of Title IX was not to desegregate “the men’s locker

room,” but rather to “provide equal access for women and men students to the educational process and the extracurricular activities in a school...” Id.¹⁹

The meaning of “sex” in Title IX is further cemented by the manner in which Congress has employed it in legislation enacted both before and after 1972. Never before has it been suggested that Congress meant the word “sex” to refer to something other than anatomy-based distinctions between males and females; in most instances, the context makes clear that an anatomy-based understanding was intended. See 10 U.S.C. §4320 (requiring that the housing provided to army recruits during basic training be limited “to drill sergeants and other training personnel who are the same sex as the recruits housed in that living area”); 19 U.S.C. §1582 (authorizing customs officials “to employ female inspectors for the examination and search of persons of their own sex”).

In contrast, where Congress has affirmatively decided to proscribe discrimination based on gender identity, it has done so clearly and expressly, and independently of “sex” or “gender.” In 2009, for example, Congress passed “hate crime” legislation that prohibits inflicting “bodily injury to any person because of [his or her] actual or perceived religion, national origin, *gender*, sexual orientation, *gender*

¹⁹ Although the congressional record reflects the concern that lack of women’s living facilities was used to deny educational opportunities to women, 118 Cong. Rec. 5, 811 (1972), that concern was addressed by the statutory exemption permitting single-sex “living facilities,” and the regulatory requirement that such facilities be “comparable,” not that single-sex intimate facilities would be prohibited. In other words, Title IX and its implementing regulations permitted “differential treatment by sex” in “instances where personal privacy must be preserved.” 118 Cong. Rec. 5,807 (1972).

identity, or disability.” 18 U.S.C. §249(a)(2)(emphasis added). In 2013, Congress amended portions of the Violence Against Women Act to encompass discrimination “on the basis of actual or perceived race, color, religion, national origin, *sex*, *gender identity*...sexual orientation, or disability.” 34 U.S.C. §12291(b)(13)(A)(emphasis added). These enactments make plain that Congress recognizes and differentiates between “sex,” “gender,” and “gender identity.” See also, 20 U.S.C § 1092(f)(1)(F)(ii).²⁰

The support for grafting gender identity onto the definition of “sex” for Title IX purposes appears to originate with two now-withdrawn letters issued by DOE. Without any semblance of rulemaking, DOE unilaterally proclaimed in the 2016 Guidance that schools “must allow transgender students access to [bathrooms and locker rooms] consistent with their gender identity” or risk losing federal funding. On August 21, 2016, a federal district court enjoined enforcement of that guidance and held, “[I]t cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in §106.33 based on the biological differences between male and female students.” Texas, 201 F. Supp. 3d at 833. DOE’s edict was short lived. The 2017 Guidance repudiated DOE’s gender identity interpretation of “sex” and expressly withdrew the statements of guidance reflected in the 2015 and 2016 Guidances.

²⁰ Conversely, Congress has rejected attempts to amend Title IX (the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015)) and Title VII (the Equality Act, S. 1858 (114th Cong. 2015) and S. 106 (115th Cong. 2016)) to include gender identity as a prohibited basis of discrimination.

Further retreating from the theory that “sex” includes gender identity, on October 4, 2017, the Attorney General issued a Memorandum, which explicitly rejected interpreting “sex” to mean gender identity in the analogous Title VII context:

Title VII expressly prohibits discrimination “because of ... sex” and several other protected traits, but it does not refer to gender identity. “Sex” is ordinarily defined to mean biologically male or female. See, e.g., Etsitty v. Utah Transit Auth., 502 F. 3d 1215, 1221-22 (10th Cir. 2007); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339,362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (citing dictionaries). Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, “gender identity” discrimination, which Congress lists in addition to, rather than within, prohibitions on discrimination based on “sex” or “gender.” See, e.g., 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A) ... Although Title VII bars “sex stereotypes” insofar as that particular sort of “sex-based consideration[]” causes “disparate treatment of men and women,” Price Waterhouse v. Hopkins, 490 U.S. 228, 242, 251 (1989) (plurality op.), Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex, see, e.g., Jespersen v. Harrah’s Operating Co., Inc., 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc).

Without the support of DOE or DOJ and the deference that was previously afforded, Plaintiff’s argument that “sex” under Title IX means gender identity collapses. As the better-reasoned decisions recognized, there is nothing ambiguous about the word “sex.” See Johnston v. University of Pittsburgh, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015)(“On a plain reading of the statute, the term ‘on the basis of sex’ in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one’s birth or biological sex”); Texas, 201 F. Supp. 3d at 832-33; Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 688 (N.D. Tex.

2016) (“[T]he text, structure, and purpose reveal that the definition of sex in Title IX’s prohibition of sex discrimination unambiguously prevented discrimination on the basis of the biological differences between males and females.”).

Notwithstanding DOE’s and DOJ’s explicit withdrawal of their 2015 and 2016 Guidances, some courts continue to incorrectly interpret Title IX as prohibiting schools from segregating bathrooms on the basis of biological sex. See Whitaker By Whitaker v. Kenosha Unified School Dist., 858 F.3d 1034, 1049 (7th Cir. 2017); A.H. by Handling v. Minersville Area School Dist., No. 3:17-CV-391, 2017 WL 5632662 at *5 (M.D. Pa. Nov. 22, 2017).

In Whitaker, the Seventh Circuit relied heavily on decisions interpreting Title VII to conclude that sex discrimination includes discrimination against a transgender person for gender non-conformity. Whitaker, 858 F.3d at 1048. Whitaker then bootstrapped this idea and held: “[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes an individual for his or her gender non-conformance, which in turn violates Title IX.” Id. at 1049.

In Evancho v. Pine-Richland School Dist., 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017), the court denied an injunction requested by a student but still concluded “Title IX’s prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity.” In doing so, the court relied on Whitaker and cases considering the “corollary” provisions in Title VII.

In denying a motion to dismiss, the court in Minersville rejected a school district's argument that the withdrawal of the 2015 and 2016 Guidances foreclosed a claim for discrimination based on transgender status under Title IX. 2017 WL 5632662 at *4, 6. Rather, the court found that the 2015 and 2016 Guidances could no longer form a basis of a Title IX claim. Id. Still, relying on Whitaker and Evancho, the court allowed plaintiff's claim under Title IX to proceed.

Unquestionably, Title VII prohibits employers from discriminating against employees for their failure to conform to sex stereotypes. See Evans v. Georgia Regional Hospital, 850 F.3d 1248, 1254-55 (11th Cir. 2017); Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011)(citing cases). Whitaker, Minersville, and Evancho all rely on Title VII gender nonconformity cases to create a violation of Title IX. Such rationale effectively abolishes the grant of authority to school districts under §106.33 to provide sex-segregated bathrooms. Plaintiff is excluded from the boys' bathroom solely because of his sex – not because he fails to conform to any particular stereotype of gender expectation. Simply stated, whether Plaintiff “acts like” a girl or boy has no bearing on the application of the School Board's policy.

There is no binding legal precedent to support Plaintiff's position that the term “sex” as used in Title IX and §106.33 includes “... gender nonconformity, transgender

status, gender expression, and gender transition.” [Doc. 1 at ¶78]. Plaintiff’s Title IX claim must fail, and judgment shall be entered in the Defendant’s favor.²¹

C. Equal Protection

1. The School Board’s Policy is Not Invidious Discrimination

The guarantee of equal protection does not exist in a vacuum but rather “must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” Romer v. Evans, 517 U.S. 620, 631 (1996). Indeed, the District’s policy denying Plaintiff access to his bathroom of choice only denies him equal protection if it reflects “invidious” discrimination. Personnel Adm’r of Mass. v Feeney, 442 U.S. 256, 274 (1979). “[P]urposeful discrimination is ‘the condition that offends the Constitution.’” Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 16 (1971)).

While willing to strike down classifications premised on “administrative convenience,” Reed v. Reed, 404 U.S. 71, 77 (1971), “archaic and overbroad” generalizations, Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), or “old notions,”

²¹ Plaintiff amended the sex marker of his birth certificate and driver’s license. Apparently, the Florida Department of Highway Safety and Motor Vehicles relied on an inter-office manual which cites to no rule or authority. [Doc. 147-1]. Rule 64V-1.003, Florida Administrative Code, allows limited amendments to a birth certificate if certain conditions are met. However, the Florida Department of Health disregarded its own rule by amending Plaintiff’s Birth Certificate. See Rule 64V-1.003(2)(requiring that any supporting documents submitted to change the sex of a child under the age of 18 must be established within seven years of the date of birth); *T. I.P.* 96 L. 16-25.

Stanton v. Stanton, 421 U.S. 7, 14 (1975), courts have historically been willing to take into account actual differences between the sexes, including physical ones. “Physical differences between men and women ... are enduring: ‘[T]he two sexes are not fungible.’” United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting United States v. Ballard, 329 U.S. 187, 193 (1946)). The Supreme Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981)(citations omitted). It is hard to conceive of a circumstance which could expose these physical differences more explicitly than a high school bathroom or locker room.

Plaintiff has been denied access to the boys’ bathroom as a result of the District’s long-standing policy which is purely based on the “physical differences between men and women,” Virginia, 518 U.S. at 533, and the grant of authority under §106.33.²² Undeniably, a school district does not engage in invidious discrimination when it follows an implementing regulation promulgated by DOE.

Plaintiff’s claim that the School Board engaged in invidious discrimination by barring him from using the boys’ bathroom collides with and runs afoul of Title IX and §106.33. Defendant did not engage in purposeful, invidious discrimination when it merely followed Title IX. While the practice denies Plaintiff access to the bathroom of

²² Plaintiff has not challenged the validity of §106.33 or the District’s ability to provide separate bathrooms for boys and girls.

his choice, that is simply an incidental and constitutionally permissible disadvantage of the legitimate classification of students according to the long-standing and generally accepted definition of “sex.” See Romer, 517 U.S. at 631; Feeney, 442 U.S. at 271-72; Nguyen v. I.N.S., 533 U.S. 53, 60-61 (2001); Johnston, 97 F. Supp. 3d at 670; Carcaño, 203 F.3d at 640, 644.

2. Plaintiff is Not Similarly Situated to Biological Male Counterparts

Plaintiff must establish that the School Board’s policy treats individuals who are similarly situated in all relevant aspects differently. Bumpus v. Watts, 448 Fed. Appx. 3, 5 (11th Cir. 2011); Nordlinger v. Hahn, 505 U.S. 1, 10, (1992). Ultimately, Plaintiff cannot make this showing. Plaintiff seeks to use the boys’ bathroom at Nease; but Plaintiff is not a biological boy. Instead the District treats Plaintiff the same as all other biological females and therefore, does not violate Plaintiff’s equal protection rights.

3. Intermediate Scrutiny Applies to Plaintiff’s Claim

Of the three tests²³ used for analyzing Equal Protection claims, intermediate scrutiny applies to the School Board’s policy. That is the scrutiny applied to

²³ Strict scrutiny does not apply in this case. Strict scrutiny is reserved for state “classifications based on race or national origin or classifications affecting fundamental rights,” Clark v. Jeter, 486 U.S. 456, 461 (1988)(citation omitted). Plaintiff cannot establish that transgender individuals are a suspect class subject to a strict scrutiny analysis. See Kirkpatrick v. Seligman & Latz, Inc., 475 F. Supp. 145, 147 (M.D. Fla. 1979), aff’d, 636 F.2d 1047 (5th Cir. 1981. Plaintiff has failed to prove that being transgender is based on an immutable characteristic. See Chapman v. A1 Transport, 229 F.3d 1012, 1036 (11th Cir. 2000) (en banc) (distinguishing between a mutable trait and an impermissible consideration that is a protected category).

classifications based on sex, including discrimination against a transgender person for gender non-conformity. Glenn, 663 F.3d at 1316-17, 1320; Chavez v. Credit Nation Auto Sales, LLC., 641 Fed. Appx. 883, (11th Cir. 2016). Accord Ryan Karnoski, et al v. Donald J. Trump, et al., No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 12 2017); Stone v. Trump, No. MJG-17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017); Doe1 v. Trump, No. 17-1597 (CKK), 2017 WL 4873042 (D.D.C. Oct. 30, 2017).²⁴ The District's policy here is subject to intermediate scrutiny because, in spite of being expressly authorized under §106.33, it makes distinctions based on sex.

Under this standard, the District must prove that its justification for denying Plaintiff use of the boys' bathroom is, "at minimum, substantially related to the furtherance of an important government interest." Nicholson v. Georgia Dept. of Human Res. (DHR), 918 F.2d 145, 148 (11th Cir. 1990). Furthermore, the justification for the policy must be "genuine, not hypothesized or invented post hoc in response to litigation." Virginia, 518 U.S. at 533; Carcaño, 203 F. Supp. 3d at 640.

4. Protecting the Privacy of School Children in Sex-Segregated Bathrooms is an Important Government Interest

The District's policy of segregating bathrooms on the basis of sex promotes the "important government interest" of "the protection of [students'] bodily privacy" by "excluding members of the opposite sex from places in which individuals are likely to

²⁴ Karnoski, Stone, and Doe1 all challenged a policy which specifically targeted transgender individuals, making those cases factually distinguishable from this case.

engage in intimate bodily functions.” Carcaño, 203 F. Supp. 3d at 641. As Judge Niemeyer explained in his G.G. dissent:

Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females ... Title IX’s allowance of the separation, based on sex, of living facilities, restrooms, locker rooms and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes.

822 F.3d at 734-735 (emphasis added).

In the school setting, courts nationwide have recognized that separating males and females serves the interest of protecting bodily privacy and avoiding the unwanted exposure of one’s body parts. See Virginia, 518 U.S. at 533, 550 n. 19 (recognizing that the two sexes “are not fungible” because of the “enduring” and manifest “[p]hysical differences between men and women,” and that “[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from members of the other sex.”); Dawson v. Clayton Cty. Sch. Dist., 830 F.3d 1306, 1313–14 (11th Cir. 2016); Brannum v. Overton County School Bd., 516 F.3d 489, 499 (6th Cir. 2008) (“... teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty...”); Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) (recognizing “society’s undisputed approval of separate public restrooms for men and women based on privacy concerns [and observing that] [t]he need for privacy justifies separation and

the differences between the genders demand a facility for each gender that is different.”); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) (“Students of course have a significant privacy interest in their unclothed bodies.”); Johnston, 97 F. Supp. 3d at 668, 678 (recognizing university’s interest “in providing its students with a safe and comfortable environment consistent with society’s long-held tradition of performing [personal bodily] functions in sex-segregated spaces based on biological or birth sex” and holding that “the University’s policy of separating bathrooms and locker rooms on the basis of birth sex is permissible under Title IX and the United States Constitution.”); Carcaño, 203 F. Supp. 3d at 641 (“All parties agree that bodily privacy qualifies as an important state interest and that sex-segregated facilities are substantially related to that interest.”).

Females “using a women’s restroom expect [] a certain degree of privacy from...members of the opposite sex.” State v. Lawson, 340 P.3d 979, 982 (Wash. Ct. App. 2014). Likewise, teenagers are “embarrass[ed]...when a member of the opposite sex intrudes upon them in the lavatory.” St. Johns Home for Children v. W. Va. Human Rights Comm’n, 375 S.E.2d 769, 771 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their “permanent emotional impairment” under the mere “guise of equality.” City of Phila. v. Pa. Human Relations Comm’n, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

These privacy interests are why a girls' locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." People v. Grunau, No. H015871, 2009 WL5149857, at *3 (Cal. Ct. App. Dec. 29, 2009). As the Kentucky Supreme Court observed, traditionally, there is no "mixing of the sexes" in school locker rooms and bathrooms. Hendricks v. Commw., 865 S.W.2d 332, 336 (Ky. 1993); McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty., 384 N.E.2d 540, 542 (Ill. App. Ct. 1978)(refusing to place male teacher as overseer of school girls' locker room).

The express and explicit right to privacy set forth in Article I, Section 23 of the Florida Constitution requires the Defendant to protect its students' rights to privacy, including but not limited to bodily privacy, independent of their rights under the United States Constitution. See Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017) (finding that under the Florida Constitution the right to privacy is a fundamental right); In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (holding that the Florida Constitution's right to privacy embraces more privacy interests and extends more protection than the Federal Constitution). This fundamental right guaranteed by the Florida Constitution undercuts the precedent Plaintiff cites for the proposition that the privacy rights of other students are inferior to the bathroom choice of a transgender student. Specifically, the decisions in G.G. Whitaker, Highland, Evancho, and Doe by and through Doe v. Boyertown Area School Dist., No. 17-1249, 2017 WL 3675418

(E.D. PA Aug. 25, 2017), are inapposite as none of the four State Constitutions involved in those cases – Virginia, Wisconsin, Ohio, or Pennsylvania, respectively – has an express Constitutional right to privacy.

Defendant's policy does not violate any federal laws. Unlike California, Massachusetts, or Washington D.C., there is no Florida law that prohibits discrimination on the basis of gender identity. Unlike Broward County, there is no ordinance in St. Johns County Ordinance that prohibits discrimination based on gender identity. Additionally, the Florida Constitution recognizes that individuals have a right to privacy and the State's own requirements for its school facilities segregate bathrooms on the basis of sex. See Fla. Admin. Code. R. 6A-20010 (State Requirements for Educational Facilities, Section 6.1, pages 90, 103)(2014).²⁵

If the Court adopts Plaintiff's position and imposes it upon the District, it would be trampling the long-standing principals of federalism that allow for state and local decision-making authority. These notions directly protect state and local government's ability to make decisions that rest on the knowledge of local circumstances and help to develop a sense of shared purpose and commitment among local citizens. See Stephen Breyer, Active Liberty, 57 (Vintage Books 2006).

In light of §106.33, the abundance of case law recognizing the importance of protecting bathroom privacy and the Court's recognition of the need to respect local

²⁵<https://www.flrules.org/gateway/readRefFile.asp?refId=4664&filename=SREF%20for%20FAC.pdf> (last visited January 30, 2018)

decision-making authority, the Court concludes that protecting the bathroom privacy of school children is an important government interest.

5. Separating Bathrooms Based on Biological Sex is Substantially Related to the School Board's Interest in Protecting Privacy

The District's policy is not only substantially related to the protection of student privacy, it directly assures the traditional and expected level of bathroom privacy by keeping biological boys out of the girls' bathroom and vice versa. Section 106.33 employs the same means to achieve the same purpose, yet its validity is not in question. Plaintiff has not explained how the practice of following §106.33 is unconstitutional when its validity has not been challenged.

There is simply "no question that the protection of bodily privacy is an important government interest, and that the State may promote that interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions." Carcaño, 203 F. Supp. 3d at 641.²⁶ Society has long approved the separation of bathrooms on the basis of sex to address privacy concerns. See Faulkner, 10 F.3d at 232; §106.33.

Plaintiff suggests that separating bathrooms on the basis of biological sex may be difficult to apply in rare situations, such as where a student undergoes sex change

²⁶ The parties in Carcaño agreed that protecting bodily privacy is an important government interest and that sex-segregated facilities are substantially related to that interest. 203 F.Supp.3d at 641. The plaintiffs in Carcaño were represented by legal counsel from Lambda Legal as is Plaintiff in this case.

surgery or, due to extensive hormone therapy, acquires the physical characteristics of the opposite sex. These hypothetical scenarios, however, are not before this Court, and in any event, intermediate scrutiny does not require that the means for achieving the important government objective must be the least intrusive possible. United States v. Staten, 666 F.3d 154, 159 (9th Cir. 2011); “[T]he fit needs to be reasonable; a perfect fit is not required.” Id. at 162; Carcaño, 203 F. Supp. 3d at 640.

The Court is aware of other cases where courts have rejected the idea that separating bathrooms based on biological sex is an important governmental interest. All of these cases were decided without the benefit of a trial, and the facts upon which their decisions rest or the legal standard applicable distinguish them from the instant case.

For example, in Whitaker, the court recognized the school district’s “legitimate interest in ensuring bathroom privacy rights” of students, but found that on the record before it, that privacy argument was “sheer conjecture.” Whitaker, 858 F.3d at 1052. Underpinning this finding was the fact that plaintiff had used the boys’ bathroom for nearly six months while at school or school-sponsored events without a single incident or complaint from another student. Id. Here, the record is quite different from that in Whitaker. First, the parties stipulated that students and parents within the District objected to bathroom use by a student which is inconsistent with the student’s biological sex due to privacy, safety, and welfare concerns. (Doc. 116 at p. 22 ¶3) Second, the testimony at trial confirmed that a student complained within the first few weeks of

Plaintiff's freshman year that he was using boys' bathroom.

In Evancho, the court focused on the physical layout of the bathrooms and the lack of any evidence that the presence of the plaintiff would violate any cisgender student's privacy rights. Evancho, 237 F. Supp. 3d at 290-91. The court also had concerns that the policy implemented by the district essentially targeted three transgender students. Id. at 275-76. Here, the policy affects St. Johns County's estimated 40,000 students equally on the basis of biological sex. No evidence has been presented that Plaintiff or any other student was targeted by the School Board's policy (or Best Practices) Additionally, after examining the bathrooms at Nease, as well as the locker rooms, the Court is not persuaded that Evancho's analysis is applicable here.

In Boyertown, the court upheld a school district's policy allowing children to use a bathroom consistent with their gender identity. In doing so, the court cited to the numerous privacy protections the school installed which prevented students from involuntarily exposing their partially clothed or unclothed bodies, including single user showers, single user bathrooms, and urinal dividers. Id. at *12-13. Here, no such protections exist.

In Students, the court found that school children do not have a fundamental constitutional right to not share bathrooms or locker rooms with transgender students. Further, the court held that, because of the privacy measures the district put into place, no student was forced to expose themselves to a person of the opposite sex and thus

their privacy rights were protected. Id. at 29. Again, here there are no privacy measures.

Taking the reasoning in Evancho, Boyertown, and Students to their logical conclusion, there would be no need to separate bathrooms or locker rooms on the basis of sex. So long as the bathroom or locker room has stalls, urinal partitions and private showers, an individual's privacy would be protected regardless of the sex of the individuals within the facilities. Such an interpretation runs rough shot over the prevailing view that States may promote bodily privacy by excluding members of the opposite sex from places where individuals engage in intimate bodily functions. See Carcaño, 203 F. Supp. 3d at 641; Faulkner, 10 F.3d at 232; G.G., 822 F. 3d at 734 (Niemeyer dissenting); Virginia, 518 U.S. at 550 n. 19.

In Highland, the court rejected the school district's argument that its classification was rationally and substantially related to its privacy interest, because it was expressly permitted under §106.33. Highland, 208 F. Supp. at 876. However, the rationale for the Court's rejection of this argument on Equal Protection grounds was based on DOE's and DOJ's now-withdrawn 2016 Guidance. Id. Additionally, the court rejected the school district's privacy argument, reasoning that there was no evidence plaintiff would infringe upon the privacy rights of any other students. Id. This narrow view ignores the responsibility of schools to prevent problems – not simply to react to them. The evidence in this case overwhelmingly establishes that the School Board's policy is motivated by a desire to prevent foreseeable risks to the safety, privacy, and

welfare of students.

Accordingly, the Court finds that the School Board's policy is substantially related to protecting the bodily privacy rights of its students.

6. The School Board's Bathroom Policy is Not a Post Hoc Invention

The evidence is undisputed that the District's bathroom policy is "genuine," and was not "hypothesized or invented post hoc in response to litigation." Carcaño 203 F. Supp. 3d at 640 (quoting Virginia, 518 U.S. at 533). Plaintiff cannot dispute that Defendant has always maintained sex-segregated multi-user or group bathrooms, even before the enactment of Title IX. The age and undisputed provenance of the Board's separate bathroom policy clearly establish that it did not target transgender students. To put it colloquially, the transgender bathroom issue was not even on the radar when Title IX was enacted in the 1970s, much less in the 1950s, when the District's schools were already separating bathrooms on the basis of biological sex.

In addition, the evidence is clear the Defendant's Best Practices were thoroughly researched and in final draft form long before Plaintiff informed the District he was transgender. Again, there is no evidence to support any inference that the creation of the Best Practices was a post hoc invention to respond to Plaintiff's notification or the filing of his complaint with OCR or this Court.

Unlike the schools in Whitaker and Evancho, the District's bathroom policy is long-standing and has been consistently applied. Moreover, dissimilar to Whitaker and

Evancho, the District never permitted Plaintiff to use the boys' bathroom. There is nothing about the Board's position in this case to suggest that it was an afterthought, or pretext, prompted by the threat of litigation, as it was in those cases.

D. Plaintiff Cannot Prevail on a Sex-Stereotyping Theory under Title IX or the Equal Protection Clause

In Glenn v. Brumby, the Eleventh Circuit held, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination." 663 F.3d at 1317. Brumby testified he fired Glenn because Glenn was "a man dressed as a woman and made up as a woman" which he considered "unnatural," "unsettling," and "inappropriate." Id. at 1320. As his "only one putative justification", Brumby offered that women might object to or even sue over Glenn's use of the single-user restroom. Id. at 1321. Applying intermediate scrutiny²⁷, the court tersely noted Brumby's reason failed to qualify as a governmental purpose, much less an "important governmental purpose." Id.

By using the phrase "because of" Glenn explicitly requires conduct based on gender-nonconformity to constitute sex discrimination. Here, there is no evidence the School Board is discriminating on that basis. In fact, the evidence overwhelmingly counters this assertion. Instead of penalizing, the School Board's Best Practices allow

²⁷ Importantly, Brumby defended the case under a rational basis test. At the lower level, he based "his entire defense" on Glenn not being a member of a protected class." Id. quoting Glenn, 724 F. Supp. 2d at 1302. Indeed, Brumby testified the possibility of a lawsuit by a co-worker was "unlikely" if Glenn was retained

and encourage transgender students to dress as they want, be called the name and pronoun of their choice, and, in all respects other than bathroom and locker room use, be treated consistent with their gender identity.

As in other bathroom cases, Plaintiff relies heavily on Glenn positing, “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” Id. at 1316.²⁸ This is pure dicta, however.²⁹ This case is about Plaintiff identifying as transgender³⁰, not the Defendant “defining” him as such. While that definition may have been applicable in light of Brumby’s specific testimony, it does not apply here.

Glenn, for the most part, extended Price Waterhouse, 490 U.S. 228 (1989). There, Hopkins sued after her employer denied her partnership because her demeanor was insufficiently feminine. The Court recognized in the analogous Title VII context that stereotyped remarks could be used as evidence an employer made a decision based on gender because a woman failed to dress or act like the employer thought a woman

²⁸ The court did not cite to a decision from any court for this proposition, instead citing to two law review articles including Taylor Finn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L.Rev. 392 (2001).

²⁹ See Black’s Law Dictionary (9th ed. 2009)(defining “obiter dictum” as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)”), as cited in Hitchcock v. Secretary, Florida Dept. of Corrections, 745 F.3d 476, 490 (11th Cir. 2014).

³⁰ Plaintiff specifically alleged, “Transgender persons are people whose gender identity diverges from the sex they were assigned at birth.” (Doc. 60 at ¶21).

should. Id. at 235, 250-51.

Employers in both Price Waterhouse and Glenn took adverse employment actions because their employees did not act or dress in conformance with their gender. Here, the School Board's policy is based solely on biological sex - an objective standard applicable to all students regardless of whether they conform to their gender. Courts have been clear that biological sex and the physiological differences between men and women are facts, not stereotypes, and cannot serve as the basis of sex stereotype discrimination. See Nguyen, 533 U.S. at 60-66; Bauer v. Lynda, 812 F.3d 340 (4th Cir. 2016). "Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." Etsitty, 502 F.3d 1215, 1224 (10th Cir. 2007).

In Nguyen, the Supreme Court upheld an INS regulation that treated the children of non-citizen mothers born abroad out of wedlock differently than children of non-citizen fathers. The Court rejected the argument the policy was based on stereotypes about the roles of mothers and fathers in child-rearing, stating, "the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis." Id. The Court concluded:

To fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class.

Id. So too, the distinction between boys and girls in the District’s separate bathroom policy is based on the very real “basic biological differences” between the sexes, not misconception or prejudice.

Were the Court to find that separating bathrooms, locker rooms, or other areas of privacy on the basis of sex is sex stereotyping which violates the Equal Protection Clause, it would be required to render portions of Title IX and §106.33 unconstitutional. The Court is unwilling to do so here. Accordingly, the District’s policy does not violate the Equal Protection Clause, and judgment must entered in its favor.

Accordingly, it is hereby **ORDERED** that the Clerk of Court shall enter judgment in favor of Defendant and close the file.

DONE and **ORDERED** in Jacksonville, Florida this ____ day of _____, 2018.

TIMOTHY J. CORRIGAN
United States District Judge

DE 174

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

PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESPONSE
TO THE COURT'S JANUARY 15, 2018 ORDER

Pursuant to this Court's January 15, 2018 Order, Plaintiff Drew Adams ("Drew"), a minor, by and through his next friend and mother, Erica Adams Kasper (collectively, "Plaintiff"), respectfully submits this supplemental brief for the Court's consideration.

Specifically, this Court directed the parties to provide their respective analysis of whether Plaintiff's claims are ripe for adjudication in light of the fact that Defendant's policy or custom barring transgender students from using the restrooms consistent with their gender identity "has not been the subject of public input and a final decision by the governing authority of the School District, the School Board of St. Johns County." Order (Doc. 159) at 1. ***The answer is unequivocally yes.***

Here, the trial record contains ample evidence that Defendant School Board of St. Johns County ("Defendant" or the "School Board") has ratified, endorsed, and vigorously defended

its policy or custom barring transgender students from using the restrooms consistent with their gender identity. Defendant does not contest this fact. To the contrary, Defendant's own witnesses have confirmed the prohibition on transgender students using the restrooms consistent with their gender identity is the policy and custom of the School Board. And because Plaintiff is presently and indisputably barred from using the boys' restrooms on account of his sex and transgender status under the threat of school discipline, there can be no question that there is an actual case or controversy ripe for this Court's consideration.

Plaintiff's civil and constitutional rights are not dependent upon "public input" or a formal vote by Defendant's members. Plaintiff should not be subjected to additional delay in favor of public debate and voting that may never occur. To do so would deprive Plaintiff of his civil and constitutional rights and eliminate any real opportunity for Plaintiff to obtain redress while he remains a student at Nease High School. Such a scenario would wrongly incentivize the School Board to avoid liability and permit it to hold student's rights captive by simply withholding a policy or custom from a vote or public hearing, while simultaneously implementing the unlawful and unconstitutional policy or custom without any redress for those who are aggrieved. When a public school student is subjected to discrimination by his school district, neither the manner in which a policy or custom was adopted, nor public sentiment should be allowed to perpetuate the discrimination.

Accordingly, the Court should find this case to be ripe for adjudication.

ARGUMENT

I. A SCHOOL POLICY NEED NOT BE FORMALLY ADOPTED BY A VOTE FOR A SCHOOL BOARD TO BE LIABLE.

A school board, such as Defendant, may be held liable for a policy or custom, regardless

of whether it was formally adopted by a school board vote, if such policy or custom purports to carry the force of law. Here, Defendant can and must be held liable both under 42 U.S.C. § 1983 and Title IX. And while the standards for liability under Section 1983 and Title IX “may not be wholly congruent,” *Hill v. Cundiff*, 797 F.3d 948, 976–77 (11th Cir. 2015), Plaintiff has met his burden under both statutes.

Under Section 1983, a school board, such as Defendant, may be held liable for its deprivation of Plaintiff’s “constitutional rights by either an express policy or a ‘widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom and usage with the force of law.’” *Cuesta v. Sch. Bd. of Miami-Dade Cty., Fla.*, 285 F.3d 962, 966 (11th Cir. 2002) (quoting *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir. 1991)); *see also* 42 U.S.C. § 1983; *Sauls v. Pierce Cty. Sch. Dist.*, 399 F.3d 1279, 1287 (11th Cir. 2005) (“Similarly, an act performed pursuant to a ‘custom’ that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.” (quoting *Bd. of Cty. Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403-04 (1997))). This includes a school board’s “acquiescence in a longstanding practice or custom which constitutes the ‘standard operating procedure’ of the local governmental entity.” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). “Under Florida law, final policymaking authority for a school district is vested in the School Board.” *K.M. v. Sch. Bd. of Lee Cty. Fla.*, 150 F. App’x 953, 957 (11th Cir. 2005).

Here, the testimony by Defendant’s witnesses and Defendant’s own actions, *see* Part II, *infra*, demonstrate that Defendant has officially ratified and endorsed the policy or custom

at issue. *See, e.g.*, Trial Tr. Vol. I 165:3-6 (“THE COURT: So is that what the district considers to be the policy? MR. HARMON: The district’s long-standing policy is biological sex separating bathrooms based on biological sex.”); *id.* at 269:21-22. Defendant is aware of the policy or custom at issue since *at least* 2015 when Plaintiff was advised of the policy and told that it prohibits his use of the boys’ restrooms (which are consistent with his gender identity), under penalty of disciplinary action. Trial Tr. Vol. I 114:14-117:25; Trial Tr. Vol. III 17:14-18:1. Indeed, Defendant confirmed through multiple witnesses and counsel the policy or custom at issue is, in fact, an official, “long-standing” policy of the School Board and expected to be followed by its schools. Trial Tr. Vol. II 244:17-247:4; *id.* 74:1-4; Trial Tr. Vol. III 137:25-138:10. Yet, even after Plaintiff complained of this discriminatory policy or custom, rather than rectify the situation, Defendant hired private counsel to defend the merits of the policy or custom both before the U.S. Department of Education’s Office for Civil Rights (“OCR”) and before this Court. *See* Def.’s Trial Ex. 40; Trial Tr. Vol. II 76:21-77:2; Trial Tr. Vol. III 75:9-12. It is such “persistent failure to take disciplinary action against officers [that] give[s] rise to the inference that [the School Board] has ratified conduct, thereby establishing an unconstitutional custom that can subject [it] to liability.” *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1175 (11th Cir. 2001) (cleaned up).¹ Moreover, by retaining private counsel to defend the policy or custom, the School Board specifically endorsed such policy. *See* Sch.

¹ “‘Cleaned up’ is a new parenthetical used to eliminate unnecessary explanation of non-substantive prior alterations.” *United States v. Steward*, No. 16-3886, 2018 WL 541771, at *2 n. 3 (8th Cir. Jan. 25, 2018). “This parenthetical can be used when extraneous, residual, non-substantive information has been removed, in this case, internal quotation marks, brackets, additional quoting parentheticals and an ellipsis.” *Id.*

Bd. of St. John Cty., *Sch. Bd. Rules Manual – Policy 2.12 Legal Services* (last revised July 8, 2004), available at <https://perma.cc/5P9M-685P> (“Special counsel may be retained to assist the General Counsel in any litigation or other matter when specifically approved by the School Board.”). As Defendant’s corporate witness designee testified, “The school board has supported maintaining the policy since this issue surfaced.” Trial Tr. Vol. III 79:3-4. Thus, Defendant has officially ratified and endorsed the policy or custom of barring transgender students from the restrooms consistent with their gender identity.

But even if that were not the case, Defendant can be held liable because the policy or custom constitutes “a persistent and widespread practice,” *Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994) (quoting *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986)), and such practice is “extensive enough to allow actual or constructive knowledge” of the policy or custom “to be attributed to” Defendant. *Daniel v. Hancock Cty. Sch. Dist.*, 626 F. App’x 825, 832 (11th Cir. 2015). “In other words, a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it.” *Brown*, 923 F.2d at 1481. Again, Defendants have known of this policy since *at least* 2015 when the Superintendent and executive cabinet approved the LGBTQ Best Practices document memorializing the “longstanding policy” and subsequently distributed the directive to the School Board as well as to all district staff for enforcement. Trial Tr. Vol. II 244:17-247:4. In the almost three years since that time, Defendants have done absolutely nothing to stop this unlawful and unconstitutional policy or custom. To the contrary, Defendant has vigorously defended the policy or custom. It is also undisputable that the policy or custom is a persistent and widespread practice through the St.

Johns County School District. *See* Part II, *infra*. Put simply, the policy or custom of barring transgender students from using the restrooms consistent with their gender identity is in every way the “standard operating procedure” of Defendant and the St. Johns County School District.

Further, under Title IX, Defendant may be held liable based on a showing of “deliberate indifference of an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the organization’s behalf and who has actual knowledge of discrimination in the organization’s programs and fails adequately to respond.” *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 349 (11th Cir. 2012) (cleaned up). There is no question that officials at the highest levels of the St. Johns County School District were and are aware of the discrimination that Plaintiff has been subjected to on account of the policy or custom, and that these officials have failed to redress this discrimination by rescinding, revising, or otherwise ceasing to enforce the policy or custom barring Plaintiff from the boys’ restroom. For example, Plaintiff complained to and met with school and district level officials, including Assistant Superintendents, before filing a Title IX complaint with OCR when the district refused to take action. Trial Tr. Vol. I 254:7-261:11; Trial Tr. Vol. II 37:21-39:1. Even then Defendant could have remediated the situation by rescinding or ceasing to enforce the discriminatory policy, but Defendant chose instead to double down and defend it. Given the evidence here regarding Defendant’s enforcement and knowledge of this discriminatory policy or custom, Plaintiff has more than met his burden of showing that an official with authority to address the discrimination had actual knowledge of the discrimination and failed to address it.

Finally, it should be noted that neither of the policies barring transgender students from using the restrooms consistent with their gender identity enjoined by the courts in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016), *aff'd*, 858 F.3d 1034 (7th Cir. 2017), and *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016), were the subject of public hearings or a vote by the respective school board in each of those school districts. Nonetheless, each of those courts considered those challenges presenting equal protection and Title IX claims—virtually identical to this case—to be ripe for adjudication.

From any angle, the evidence shows Defendant is liable for its policy or custom barring transgender students from using the restrooms consistent with their gender identity.

II. DEFENDANT'S ACTIONS AND THE TESTIMONY OF ITS WITNESSES DEMONSTRATE THAT DEFENDANT HAS RATIFIED AND ENDORSED THE POLICY OR CUSTOM AT ISSUE.

As denoted above, Defendant's actions and the testimony of its witnesses demonstrates that Defendant School Board has ratified and endorsed the policy or custom of barring transgender students from the restrooms consistent with their gender identity.

First, Defendant's corporate witness designee testified that the policy or custom of barring transgender students from the restrooms consistent with their gender identity represents the position of the school district and the school board. *See* Trial Tr. Vol. III 47:21-48:1 (THE COURT: "How do I know that this policy that you're defending in this suit represents the position of the school district or the school board." MR. UPCHURCH: "My personal and professional assurance, Your Honor.").

Second, all of Defendant’s witnesses testified that the policy or custom at issue here represented the position of the School District as far back as they could remember. In other words, all of Defendant’s witnesses testified that the policy or custom at issue here was a “longstanding practice or custom which constitutes the ‘standard operating procedure’ of the [St. Johns County School District].” *Jett*, 491 U.S. at 737. For one, Sallyanne Smith testified that in her 11 years as director of student services the policy or custom of the School District was that transgender students could not use the restrooms consistent with their gender identity. *See* Trial Tr. Vol. II 149:8-12 (“Q. So you were the director of student services for 11 years. What was the school district’s policy with respect to bathroom use in the school district? A. Well, it was basically that the biological sex boys use the boys’ room and biological sex girls use the girls’ room.”); *id.* at 150:1-3 (“Q. Were biological boys allowed to go into the biological girls bathroom? A. No.”).

Similarly, Cathy Mittelstadt, the deputy superintendent for operations at St. Johns School District and a corporate witness designee, testified that the policy or custom at issue here is “the way we’ve been doing our business.” Trial Tr. Vol. III 11:3-4. Indeed, it is “the way [the] district has carried out [its] business over the course of time.” *Id.* at 11:16-18. And Frank Upchurch, the school board attorney and a corporate witness designee, testified that the policy or custom has “been part of the school system’s DNA as long as anybody can remember.” Trial Tr. Vol. III 45:23-24; *see also id.* at 67:18-20 (“Based on those facts and the history in St. Johns County, there is an expectation that biological boys will not be in the girls’ room and vice versa.”). Finally, Lisa Kunze, the principal at Nease High School, testified she had no discretion in enforcing the policy or custom barring transgender students from the

restrooms consistent with their identity “[b]ecause it’s the district policy, and it’s [her] job to enforce the district policy.” *Id.* at 138:6-7; *see also id.* at 136:24-137:2 (“Q. And you would also agree that none of the transgender students can use the bathroom that corresponds with their gender identity? A. That is correct.”).

Third, Defendant has vigorously defended the merits of the policy or custom not only before the Court, after its formal and specific approval, but also before OCR. Indeed, as far back as May 2016, Defendant represented to OCR that “the District provides separate restroom facilities on the basis of sex, as well as gender-neutral facilities. The girls’ and boys’ restrooms are designated for biological females and biological males, respectively.” Def.’s Trial Ex. 40. And Defendant represented to OCR that such statement represented the “School District’s legal position.” *Id.*; *see also* Trial Tr. Vol. III 74:21-24 (“Q. Okay. Was the school board of St. Johns County aware that this was the position that was taken with respect to that investigation? A. Yes.”); *id.* at 73:11-14. Thus, the School Board has taken the stance *in writing* that the policy or custom at issue here represents the official position of the School District.

Fourth, Defendant has ratified and endorsed the policy or custom through its obligation to *formally approve* the hiring of outside private counsel to defend the merits of the policy or custom at issue. Indeed, additional private counsel “may be retained” for litigation only “when specifically approved by the School Board.” *School Board Rules Manual – Policy 2.12 Legal Services, supra*; *see also* Trial Tr. Vol. II 76:21-77:2 (“THE COURT: And by what -- so did the school board of St. Johns County authorize the litigation to defend the policy? MR. HARMON: I wouldn’t be standing here if we weren’t authorized to defend the policy.”).

Thus, through its actions and the testimony of its own witnesses, Defendant has ratified and endorsed the policy or custom of barring transgender students from the restrooms consistent with their gender identity at issue here.

III. THE PRESENT CASE IS RIPE FOR ADJUDICATION.

The present case is ripe for adjudication based on the facts adduced at trial and its current procedural stance. “Born from both Article III and prudential concerns, ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.” *Temple B’Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1356 (11th Cir. 2013) (cleaned up). “In deciding whether a claim is ripe for adjudication or review, we look primarily at two considerations: 1) the fitness of the issues for judicial decision, and 2) the hardship to the parties of withholding court consideration.” *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1224 (11th Cir. 2004). Put in other words, the Court need only ask: “Do the conflicting parties present a real, substantial controversy which is definite and concrete rather than hypothetical or abstract? If so, is the factual record nonetheless too undeveloped to produce a well-reasoned constitutional decision?” *Hallandale Prof’l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760 (11th Cir. 1991). Here, Plaintiff presents a clear and substantial controversy that is definite and concrete, and the factual record is painstakingly developed to produce a well-reasoned decision.

“To establish that a facial challenge to a governmental act presents a real and substantial controversy, a plaintiff must show he has sustained, or is in immediate danger of sustaining, a direct injury as the result of that act.” *Hallandale*, 922 F.2d at 760. Here, this case presents a

real and substantial controversy. Plaintiff has sustained and continues to sustain direct injury as a result of Defendant's policy or custom. *See, e.g.*, Trial Tr. Vol. I 116:14 (Plaintiff's testimony that being barred from the boys' restroom felt "humiliating" and "like a slap in the face."); *id.* 117:4-7 (Plaintiff's testimony that being prohibited from the boys' restroom causes him anxiety and depression, including when he has to walk past the boys' restroom to access the gender neutral restroom.); *id.* 204:10-12 (it feels "like a walk of shame," because "I know that the school sees me as less of a person, less of a boy, certainly, than my peers"); Trial Tr. Vol. II 92:13-22 (Scott Adams's testimony that Plaintiff was "devastated" after the school barred him from the boys' restroom, and he returned to the depression and anxiety he had experienced before he transitioned).

Moreover, the trial record in this case includes the testimony of 11 witnesses and dozens of exhibits. Plaintiff presented testimony of: (1) Plaintiff; (2) Plaintiff's mother; (2) Plaintiff's father; (3) Dr. Adkins, a noted endocrinologist, expert in gender identity matters, and Plaintiff's treating physician; (4) Dr. Ehrensaft, a renowned developmental psychologist and expert on transgender youth; (5) Dr. Aberli, a school principal in Kentucky familiar with issues surrounding the use of restrooms by transgender students; (6) Ms. Kefford, a school principal in Broward County familiar with the issues faced by transgender students and their use of restrooms; and (7) Ms. Valdrun-Pope, a school district administrator in Broward County familiar with the promulgation of policies regarding transgender students and their application. Defendant presented the testimony of (and Plaintiff cross-examined): (1) Ms. Smith; (2) Ms. Mittelstadt; (3) Mr. Upchurch; and (4) Ms. Kunze.

The factual record demonstrates in detail how Defendant's policy or custom barring transgender students from using the restrooms consistent with their gender identity has been enforced against Plaintiff; how it has harmed Plaintiff and other transgender students; and how it is unjustified because it does not protect anyone's privacy or safety but rather endangers the safety and privacy of students, such as Plaintiff. This well-developed record evinces a clear case and controversy that is definite and concrete, and merits this Court's adjudication.

Finally, the hardship visited upon Plaintiff by a lack of adjudication in his case now would be enormous. To be sure, because this case is fit for resolution, Plaintiff need not show hardship. *See Harrell v. Florida Bar*, 608 F.3d 1241, 1259 (11th Cir. 2010); *see also AT&T Corp. v. FCC*, 349 F.3d 692, 700 (D.C. Cir. 2003) (“[W]here there are no institutional interests favoring postponement of review, a petitioner need not satisfy the hardship prong.”). Nonetheless, any further delay in adjudicating this case would unquestionably result in unnecessary and serious hardships to Plaintiff. “The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal.” *Harrell*, 608 F.3d at 1258. Here, any delay would cause Plaintiff hardship in several ways.

First, “[h]ardship can sometimes be established if a plaintiff demonstrates that he would have to choose between violating an allegedly unconstitutional statute or regulation and risking criminal or severe civil sanctions.” *Elend v. Basham*, 471 F.3d 1199, 1211 (11th Cir. 2006). In this case, it is undeniable that Plaintiff must either choose to expose himself to school discipline or continue to abide with Defendant's unlawful and unconstitutional policy or custom. *See Order at 1; see also Trial Tr. Vol. III 17:14-18:1.*

Second, further delay in this matter could result in the complete deprivation to Plaintiff of his civil and constitutional rights during his entire tenure at Nease High School. Indeed, the School Board could simply avoid review of its custom or policy by never bringing it to a public hearing or vote. Plaintiff is already more than half way through his junior year at Nease High School. Any further delay could take this case into, or beyond, Plaintiff's final year in high school. No amount of money can compensate Plaintiff for such deprivation.

Put simply, Defendant's unlawful and discriminatory interference with Plaintiff's education constitutes an irreparable harm that should not be unjustly prolonged. *See Virginia Coll., LLC v. SSF Savannah Props., LLC*, 93 F. Supp. 3d 1370, 1379 (S.D. Ga. 2015); *Ray v. Sch. Dist. of DeSoto Cty.*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987). As other courts have recognized, "plaintiff's spending his last school year trying to avoid using the restroom, living in fear of being disciplined, feeling singled out and stigmatized" cannot be "rectified by a monetary judgment, or even an award of injunctive relief, after [another] trial that could take place months or years from now." *Whitaker*, 2016 WL 5239829, at *64.

The parties in this case have spent considerable time and resources in developing the current substantial record. These efforts involved multiple depositions, a three-day trial, the testimony of 11 witnesses, retention of several experts, and other investigation and discovery matters. What is more, Defendant has never questioned the ripeness of this case, nor disavowed the policy or custom as not one adopted by the School Board. To the contrary, Defendant has ratified, endorsed, and vigorously defended the policy or custom at every turn, and its own witnesses have testified to that effect. Thus, raising of "ripeness" *at this juncture* would result in substantial hardship to Plaintiff.

Put simply, this case is ripe for adjudication. Here, not only is there a real and substantial case and controversy based on a well-developed trial record, but the significant hardships imposed upon Plaintiff—indeed, both parties—by the failure to adjudicate this case now, counsels in favor of a finding that this case is ripe for adjudication.

IV. COURTS NEED NOT WAIT FOR LEGISLATIVE ACTION OR PUBLIC INPUT TO DECIDE THE CASES OR CONTROVERSIES BEFORE THEM.

“[I]ndividuals need not await legislative action before asserting a fundamental right.”

Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015). As the Supreme Court recently stated,

The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and *even if the legislature refuses to act*.

Id. (emphasis added). It does not matter how “controversial” a case may be. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). As such, the Court should not delay to adjudicate this case based on whether the policy or custom at issue has “been the subject of public input” or a vote by Defendant School Board.

While Plaintiff wishes Defendant would have addressed this grievous situation in the preceding two years, when he met with its officials and filed a complaint with OCR, the fact that this matter could have been “settled elsewhere” should not delay adjudication of this case *now*. *Kitchen v. Herbert*, 755 F.3d 1193, 1228 (10th Cir. 2014). “The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box.” *Id.*; *see also Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964) (“A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”). “[F]undamental rights may not be submitted to vote; they depend on the outcome

of no elections.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Put simply, the very purpose of our judiciary is to enable us as a “society to ‘withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’” *Republican Party of Minnesota v. White*, 536 U.S. 765, 804 (2002) (quoting *Barnette*, 319 U.S. at 638). All Plaintiff asks is for those legal principles to be applied now.

For too long, Plaintiff has been deprived of his rights. Drew Adams is legally entitled to have his case adjudicated and have the policy or custom voided so that he does not continue to suffer for the remainder of his time at Nease High School. *See Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) (“[C]ommendable good will between the races, [rather than] supporting the need for further delay, can best be preserved and extended by the observance and protection, not the denial, of the basic constitutional rights here asserted. The best guarantee of civil peace is adherence to, and respect for, the law.”).

CONCLUSION

WHEREFORE, based on the foregoing, Plaintiff respectfully requests that the Court hold that this case is ripe for adjudication and that Defendant’s policy or custom barring transgender students from using the restrooms consistent with their gender identity violates Plaintiff’s rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1.

Dated this 2nd day of February, 2018.

Respectfully submitted,

/s/ Omar Gonzalez-Pagan

Omar Gonzalez-Pagan
(*admitted pro hac vice*)
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005-3919
Telephone: 212-809-8585
Facsimile: 212-809-0055
ogonzalez-pagan@lambdalegal.org

Tara L. Borelli (*admitted pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308-1210
Telephone: 404-897-1880
Facsimile: 404-897-1884
tborelli@lambdalegal.org

Paul D. Castillo (*admitted pro hac vice*)
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, Texas 75219
Telephone: 214-219-8585
Facsimile: 214-219-4455
pcastillo@lambdalegal.org

Natalie Nardecchia
(*admitted pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel. 213-382-7600 | Fax: 213-351-6050
nnardecchia@lambdalegal.org

Kirsten Doolittle, Trial Counsel
Florida Bar No. 942391
THE LAW OFFICE OF KIRSTEN DOOLITTLE, P.A.
The Elks Building
207 North Laura Street, Ste. 240
Jacksonville, FL 32202
Telephone: 904-551-7775
Facsimile: 904-513-9254
kd@kdlawoffice.com

Jennifer Altman
Florida Bar No: 881384
Markenzy Lapointe
Florida Bar No: 172601
Shani Rivaux
Florida Bar No: 42095
Aryeh Kaplan
Florida Bar No: 60558
PILLSBURY WINTHROP SHAW PITTMAN, LLP
600 Brickell Avenue Suite 3100
Miami, FL 33131
Telephone: 786-913-4900
Facsimile: 786-913-4901
jennifer.altman@pillsbury.com
markenzy.lapointe@pillsburylaw.com
shani.rivaux@pillsbury.com
aryeh.kaplan@pillsbury.com

Richard M. Segal (*admitted pro hac vice*)
Nathaniel R. Smith (*admitted pro hac vice*)
PILLSBURY WINTHROP SHAW PITTMAN LLP
501 W. Broadway, Suite 1100
San Diego, CA 92101
Telephone: 619-234-5000
Facsimile: 619-236-1995
richard.segal@pillsburylaw.com
nathaniel.smith@pillsburylaw.com

William C. Miller (*admitted pro hac vice*)
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 17th St. NW
Washington, DC 20036-3006
Telephone: 202-663-9455
Facsimile: 202-663-8007
william.c.miller@pillsburylaw.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2018, the foregoing Supplemental Brief was filed electronically using the Court's ECF system, which will provide electronic notice to all counsel of record, including:

Terry J. Harmon (tharmon@sniffenlaw.com)
Robert J. Sniffen (rsniffen@sniffenlaw.com)
Michael P. Spellman (mspellman@sniffenlaw.com)
Lisa B. Fountain (lfountain@sniffenlaw.com)
Kevin Kostelnik (kkostelnik@sniffenlaw.com)
SNIFFEN & SPELLMAN, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

Robert Christopher Barden (rcbarden@mac.com)
RC Barden & Associates
5193 Black Oaks Court North
Plymouth, MN 55446-2603

Attorneys for Defendant, The School Board of St. Johns County, Florida

/s/ Omar Gonzalez-Pagan

Omar Gonzalez-Pagan

(*admitted pro hac vice*)

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

120 Wall Street, 19th Floor

New York, New York 10005-3919

Tel.: 212-809-8585 | Fax: 212-809-0055

ogonzalez-pagan@lambdalegal.org