

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v.

Case No. 4:15-cv-54

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

**BRIEF IN SUPPORT OF MOTION TO STRIKE AND EXCLUDE EXHIBITS FILED
WITH GAVIN GRIMM'S MOTION FOR SUMMARY JUDGMENT AND
REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

On March 26, 2019, Gavin Grimm (“Grimm”) filed his Motion for Summary Judgment against Gloucester County School Board (“School Board”) seeking judgment as a matter of law as to all of the claims in his Second Amended Complaint. ECF Doc. 184. Despite alleging that the use of the boys’ restrooms at school was part of “medically necessary treatment” for gender dysphoria, Grimm did not present expert evidence to support his Motion that he was diagnosed with gender dysphoria, that it was medically necessary for him to use the boys’ restroom, that being provided with a single-stall restroom that was available for all students to use adversely impacted his gender dysphoria, or that he is a boy.

When confronted with this failure of proof, Grimm has attempted to improperly submit this evidence through the introduction of select medical records attached to the Declaration of Shayna Medley-Warsoff which are filed under seal. See ECF Doc. 212. The Court should strike and/or exclude these records from consideration on summary judgment as Grimm did not comply with Rule 26(a)(2)(C).

Grimm’s Memorandum in Support of his Motion for Summary Judgment also relies upon the Declarations of Shayna Medley-Warsoff, Diana Bruce, Thomas Aberli, Janet Rainey, and James Loving and a number of amicus briefs, including the Amicus Br. of Am. Acad. of Pediatrics, *et al.*, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 244 (4th Cir.) (the “AAP Amicus”), the Amicus Br. of Nat’l PTA, *et al.*, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 145-1 (4th Cir.) (the “Nat’l PTA Amicus”), and the Amicus Br. of Sch. Adm’r from Thirty-Three States and D.C., *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 155 (4th Cir.) (the “School Administrator Amicus”), purported standards of care and various policy statements. *See* ECF Doc. 184, p. 2; ECF Doc. 185, pp. 8, 14, 16.¹ The Court should strike and exclude these exhibits from consideration as they are nothing more than an attempt to introduce inadmissible hearsay.

ARGUMENT

I. Grimm did not comply with this Court’s Order or Rule 26 and the Court should strike and/or exclude the medical records submitted in Grimm’s reply brief in support of summary judgment.²

Grimm’s claims are premised on the contention that he needed to use the restroom at school as a “critical component” of his medical care. *See*, ECF Doc. 8, ¶ 23; ECF. 113, ¶ 40; ECF Doc. 177, ¶ 42; Grimm declaration, ¶ 26 (“socially transition at school as part of my medical treatment.”). Grimm alleged that his social transition was “part of medically necessary treatment for gender dysphoria” and that he underwent chest-reconstructions surgery for treating gender dysphoria. ECF Doc. 177, ¶¶ 1, 2, 23, 39, 76. Grimm then alleges the School Board “disregarded Gavin’s medical treatment” in not permitting him to use the boys’ restroom. ECF Doc. 177, ¶ 79.

¹ *See* ECF Docs. 192-5, 192-6, 192-38 - 43.

² ECF Docs. 203-3 (Exhibit B); 203-4 (Exhibit C); 203-5 (Exhibit D); 203-6 (Exhibit E).

On April 9, 2019, the School Board filed its Brief in Opposition to Plaintiff's Motion for Summary Judgment establishing that Grimm did not submit expert evidence to support the allegations in his Second Amended Complaint. ECF Doc. 200. In response, Grimm filed a reply brief attaching a declaration from his attorney with select medical records, including a "treatment documentation letter." Grimm argues that the medical records are admissible under Rule 803(6). ECF 203, p. 3.

Grimm asserts that under the 2010 amendments to Federal Rule of Civil Procedure 56, "facts in support of or in opposition to a motion for summary judgment need not *be* in admissible form; the new requirement is that the party identifies facts that *could be* put in admissible form at trial." ECF Doc. 203, p. 9, n. 2. While the School Board does not dispute that a medical record *may* be admissible if accompanied by an affidavit, Rule 56(c) is not an avenue for Grimm to submit documents that he clearly intends to use as expert testimony.³ Grimm's submission in his reply brief is nothing more than an improper attempt to submit inadmissible expert testimony. Simply put, the medical evidence Grimm supports is not admissible at trial.

Grim did not comply with Rule 26(a)(2).

In his reply brief, Grimm attached a "Business Records Declaration" signed by Dr. Lisa Griffin, a clinical psychologist, with records maintained by Dr. Griffin. ECF Doc. 203-3. Similarly, Grimm attached a "Business Records Declaration" signed by Dr. Hope Sherie, a medical doctor, with records created by Dr. Sherie. ECF Doc. 203-4. Additionally, Grimm attached over 150 medical records concerning his treatment with Dr. Melinda Penn at VCU

³ See e.g. *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 786 (3d Cir. 1996) (holding that Rule 803 does not mandate admission of opinions in medical records and finding district court did not abuse its discretion in not admitting the diagnosis of mesothelioma in medical records where that diagnosis was not subject to "cross-examination in order for it to be meaningful to a jury." Thus, while medical records are admissible as a business record, the Court has sufficient discretion on whether to require the expert to testify to permit cross-examination of the expert.

Medical Center. ECF Doc. 203-5. Grimm claims that these records are submitted as evidence of his diagnosis, treatment plan and need to use the boys' restroom. (ECF Doc. 203, p. 13-15). Grimm effectively seeks to introduce the expert testimony of Dr. Griffin, Dr. Sherie and Dr. Penn through their records.⁴

On September 25, 2018, this Court entered a Rule 16(b) Scheduling Order that required Grimm to identify expert witnesses by December 28, 2018, and submit expert disclosures outlined in Rule 26(a)(2)(B) by January 28, 2019. ECF Doc. 165. Furthermore, Rule 26(a)(2)(C) required Grimm to identify witnesses who were not required to prepare a written report, but were expected to present Rule 702 evidence. This rule required Grimm to state the subject matter on which the witness would present evidence and to provide a summary of the facts and opinions to which the witness is expected to testify.

Grimm did not designate an expert to support his allegations that the use of the boys' restroom at school was medically necessary for Grimm and violated his rights under Title IX or the Equal Protection Clause, nor did he identify any witnesses, including his treating medical

⁴ As set out in the School Board's opposition to Grimm's motion for summary judgment, testimony regarding medical diagnoses, treatments and proximate cause can only be given by an expert as contemplated by Rule 702. *Lane v. District of Columbia*, 887 F.3d 480, 485-86 (D.C. Cir. 2018) (holding that the trial court did not err by excluding testimony of decedent's mother that decedent suffered from ADHD and bipolar disorder.); *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) (Rule 701 does "not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness."); *Edwards v. Graham Cty. Jail*, No. 1:16-CV-315-FDW, 2017 WL 5894496, at *5-6 (W.D.N.C. Nov. 29, 2017) (holding plaintiff could not testify to the diagnosis of a heart attack or existence of a heart attack because it required specialized knowledge which the plaintiff lacked, nor could the plaintiff testify that he was told he had been diagnosed with a heart attack as it is inadmissible hearsay.); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, 227 F. Supp. 3d 452, 469 (D.S.C. 2017), *aff'd sub nom. In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624 (4th Cir. 2018) (noting that all jurisdictions require expert testimony at least where the issues are medically complex and outside common knowledge and lay experience.)

providers, who would present expert evidence to support his claims. See, Plaintiff's Expert Witness Identification. Yet, Rule 26(a)(2) was amended in 2010 to require just this type of disclosure. See Fed. R. Civ. P. 26 ADVISORY COMMITTEE NOTES ("Rule 26(a)(2)(C) is added to *mandate* summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions ... Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C).") (emphasis added).

Grimm's failure to disclose that his treating physicians would provide expert evidence in this case, whether tactical or otherwise, deprived the School Board of the opportunity to present expert testimony of its own. Indeed, if Grimm had properly disclosed that he intended to introduce expert evidence through these witnesses, the School Board would have had the opportunity to designate an expert witness to contest Grimm's diagnoses, treatment plan and whether it was medically necessary for Grimm to use the boys' restroom at school. Moreover, the School Board would have had the opportunity to depose Dr. Griffin, Dr. Sherie, and Dr. Penn concerning their diagnosis and treatment plan for Grimm, including the opinion that he should be permitted to use of the boys' restroom at school.

As the School Board established on summary judgment, using the boys' restroom at school is just one component of an overall social transitioning care plan. Even where a transgender student is not permitted to use the restroom consistent with his expressed gender identity, there are other methods of social transition that can be used to help treat gender dysphoria. Penn, 70:18-71:4. The precise treatment for gender dysphoria depends on each

person's individualized need, and the medical standards of care differ depending on whether the treatment is for a pre-pubertal child, an adolescent, or an adult. Penn Expert Report & Decl. ¶ 23. The "standards of care" that Grimm relies on provide that what helps one person alleviate gender dysphoria might be very different from what helps another person. Penn., 37:18-38:6. Moreover, the "standards of care" that Grimm relies on do not address the use of a transgender student's use of restrooms at school. Penn., 66:21-67:2, 68:15-21; see also Penn., 63:8-65:19. Thus, by not complying with Rule 26(A)(2)(C), Grimm prevented the School Board from exploring and establishing the appropriate and different medical treatment needs for Grimm. The expert discovery deadline has passed and discovery is now closed.

Where a party does not provide the information or identify a witness as required by Rule 26(a), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37. *Morris v. Bland*, 666 F. App'x 233, 238–39 (4th Cir. 2016) (holding that party who did not disclose testimony of treating physicians under Rule 26(a)(2)(B) could not offer expert opinions as to proximate cause outside of the course of treatment); see also *Jordan v. StoneMor Partners L.P.*, No. 6:16-CV-00048, 2018 WL 1074492, at *3 (W.D. Va. Feb. 27, 2018)(excluding testimony of treating physician for failing to disclose experts and comply with Rule 26(a)(2)(C) and despite testimony being necessary to causally connect medical condition to underlying claim.); *Sauers v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, No. 1:15CV427, 2018 WL 1627160, at *5 (M.D.N.C. Mar. 30, 2018) (holding that Plaintiff would not be permitted to use doctor's expert information and report as evidence in opposition to School Board's motion for summary judgment were the plaintiff did not disclose expert pursuant to Rule 26(a)(2)); *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, No. 9:11-CV-1593-RMG, 2017 WL

5957738, at *1 (D.S.C. Dec. 1, 2017) (finding that the testimony of treating physicians that involves diagnosis, prognosis, and future medical care is opinion testimony that falls under Rule 26(a)(2)(A)'s expert disclosure requirement and that the failure to identify these expert witnesses prejudiced the Government because it have the opportunity to procure a rebuttal report or explore the facts and opinions of the physicians in discovery.); *Sarki v. Ourisman RTE 198 Sales, Inc.*, No. 8:13-CV-01913-AW, 2013 WL 5771041, at *2 (D. Md. Oct. 23, 2013) (“hearsay statements or conclusory statements with no evidentiary basis cannot support or defeat a motion for summary judgment.”).

Here, Grimm's failure to designate this testimony cannot be substantially justified. In fact, Grimm chose to designate Dr. Penn as an expert and provide a written report, yet at the same time chose not to disclose that Dr. Penn would offer expert testimony concerning her opinions, diagnosis and treatment of Grimm. As set out above, the failure to designate Dr. Griffin, Dr. Sherie and Dr. Penn is not harmless and prejudices the School Board. Grimm cannot simply use Rule 56(c) as a vehicle to defeat his disclosure requirements under Rule 26(a)(2). To allow otherwise would effectively render the requirements under Rule 26(a)(2)(C) illusory.

II. The records of Dr. Griffin and Dr. Sherie that Grimm submitted are not admissible under 803(6).

The records submitted by Dr. Lisa Griffin are not admissible under FRE 803(6). Grimm did not provide any underlying records, notes or assessments prepared or created by Dr. Griffin. Gender Dysphoria is diagnosed based on subjective factors, but there are no records submitted by Dr. Griffin to verify or corroborate the purported diagnosis. See Penn, 55:15-17. Instead, the “medical records” Grimm attempts to introduce into evidence is a generic “Treatment Documentation Letter”, a “Hormone Recommendation Letter” and a “To Whom It May Concern” letter. These are not the type of medical records regularly kept in the course of a

medical practice as contemplated by Rule 803(6), nor should the circumstances and method of preparation be treated as trustworthy for purposes of Rule 803(6). Indeed, these three letters are nothing more than hearsay statements and opinions to unknown recipients. See, *Garrett v. City of Tupelo, Mississippi*, No. 1:16-CV-197-DMB-DAS, 2018 WL 2994808, at *4 (N.D. Miss. June 14, 2018) (excluding medical records were considered untrustworthy where there was no underlying evidence on how or why plaintiff was diagnosed, citing 2 MCCORMICK ON EVID. § 293 (7th ed.) (“[W]here indications of lack of trustworthiness are shown, which may result from a lack of expert qualifications or from a lack of factual support, exclusion is warranted.”))

Similarly, as part of Dr. Sherie’s declaration, she includes a “To Whom It May Concern” letter dated August 29, 2016. This letter was prepared over two months after Grimm had chest-reconstruction surgery and provides an opinion that she performed “irreversible Female to Male Gender Reassignment Surgery.” Again, this is not the type of medical records regularly kept in the course of a medical practice as contemplated by Rule 803(6), nor should it be considered reliable or trustworthy under the circumstances. According to the evidence and Grimm’s expert, Grimm did not undergo genital surgical gender reassignment as that procedure could not be completed until Grimm was at least 18 years of age. Penn., 78:8-12; 79:19-80:1; Grimm, 118:7-12. The School Board should have had the opportunity to cross examine Dr. Sherie on this issue.

Further, Dr. Sherie attached a “To Whom It May Concern” letter from Eva Abel, Psy.D to her declaration. This record should be excluded for the reasons stated above and because it constitutes double hearsay. Grimm has not submitted a declaration authenticating the records of Eva Abel, Psy.D as required under Rule 803(6) or Rule 902.

Finally, Grimm contends that his “legal claims are not based on the medical necessity of using the restroom or on the Board’s exacerbation of his gender dysphoria. His claims are based on the physical pain and discomfort of being unable to use the restroom and ‘the deprivation of personal

dignity that surely accompanies denials of equal access to public establishments.” ECF Doc. 203, p. 7.⁵ Grimm’s claims are belied by the fact that he has submitted the treatment letter and medical records to support his claims.⁶

III. The WPATH Standards of Care, Endocrine Society Guidelines, Amicus Briefs and policy statements should be stricken.

The School Board also takes issue with a number of documents that Grimm attached to his Memorandum of Law in Support of Motion for Summary Judgment as unsupported hearsay testimony. Grimm includes exhibits which purport to provide testimony regarding medical diagnoses, standards of care, and treatments to the Medley-Warsoff Declaration. ECF Doc. 192. For example, Grimm attached a copy of the World Professional Association for Transgender Health (“WPATH”) Standards of Care. According to Ms. Medley-Warsoff, the WPATH Standards of Care states that the goal of the publication is to:

provide clinical guidance for health professional to assist transsexual, transgender, and gender nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves...This assistance may include primary care, gynecologic and urologic care, reproductive options, voice and communication therapy, mental health services (e.g., assessment, counseling, psychotherapy), and hormonal and surgical treatment.
Medley-Warsoff Dec. Ex. 5.

⁵ If that were true, Grimm’s declaration that he has been diagnosed with gender dysphoria and the submission of medical records would not be material to the issues in this case and should be stricken for that reason alone. See e.g., *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, No. 9:11-CV-1593-RMG, 2017 WL 5957738, at *1 (D.S.C. Dec. 1, 2017) (testimony would not probative of any material issue in this case.)

⁶ Grimm states there is “no triable question of fact to whether (a) Gavin was diagnosed as having gender dysphoria, (b) Gavin underwent hormone therapy as treatment for gender dysphoria, and (c) Gavin had chest-reconstruction surgery as treatment for gender dysphoria.” ECF Doc. 203, p. 15-16. Accordingly, the School Board objects to the medical records submitted by Grimm being considered by the Court for any other purpose on summary judgment, and specifically for whether it was medically necessary for Grimm to use the restroom at school.

However, Ms. Medley-Warsoff has not been designated as an expert as to the standards of care applicable to the treatment of transgender individuals. While Grimm can offer Dr. Penn to testify on the standards of care for the treatment of gender dysphoria, he cannot simply attach the WPATH Standards of Care or Endocrine Society Guidelines as admissible evidence as to the standard of care in this case. These documents are hearsay and should be excluded from consideration on summary judgment. Rule 802.

Grimm also attached as exhibits in support of summary judgment the Amicus Brief of American Academy of Pediatrics, et al. in support of Plaintiff-Appellant, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 244 (4th Cir.) (Exhibit 38), the Amicus Brief of School Administrators from Thirty-Three States and the District of Columbia in support of Plaintiff-Appellant, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 155 (4th Cir.) (Exhibit 39), Amicus Brief of the National PTA, et al. in support of Plaintiff-Appellant, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 145-1 (4th Cir.) (Exhibit 40), the American Psychological Association & National Association of School Psychologists' 2015 *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (Exhibit 41), a copy of Gender Spectrum's 2016 *Transgender Students and School Bathrooms: Frequently Asked Questions* (Exhibit 42); and a copy of the National Association of Secondary School Principals' 2016 *Position Statement on Transgender Students* (Exhibit 43). All of these documents are hearsay under Rule 802 and not admissible for purposes of summary judgment or trial.

As set out in the School Board's opposition to summary judgment, it does not dispute that the statements made in an amicus brief represent the views of the organization that filed the amicus brief. Furthermore, the Board does not dispute that a court might take judicial notice of the fact that an amicus brief has been filed and represents the filing organization's position. Fed

R. Evid. 201 [allowing the court to take judicial notice of adjudicative facts]; *Prime Healthcare Servs. Garden Grove LLC v. Burwell*, No. SACV1700169AGKSX, 2017 WL 6941361, at *1 (C.D. Cal. Aug. 28, 2017)). However, Grimm relies upon the Amicus Briefs to prove the truth of the statements made within those briefs. The Court should not consider the “facts” that Grimm seeks to establish through the contents of the Amicus briefs.

For example, in Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment, the very first citation to the AAP Amicus is attached to the following statements: “Everyone has a gender identity. It is an established medical concept, referring to a person’s deeply felt, inherent sense of belonging to a particular gender.” ECF Doc. 185, p. 8. Grimm does not, for instance, assert that it is the view of the American Academy of Pediatrics that a gender identity is a deeply felt sense of belonging to a particular gender. Instead, Grimm presents this statement as an “Undisputed Fact” and asserts that everyone has a gender identity, and this view is an established medical concept. This is precisely the type of an assertion that requires expert testimony. *See* Federal Rule of Evidence 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”); *Benedict v. Hankook Tire Co. Ltd.*, 286 F. Supp. 3d 785, 791 (E.D. Va. 2018) (“Under Virginia law, issues ‘beyond the realm of common knowledge and experience of a lay jury’ generally require expert testimony.”); *Shortt v. Immigration Reform Law Inst.*, No. 1:11CV144, 2011 WL 4738657, at *3 (E.D. Va. Oct. 3, 2011), *aff’d*, 480 F. App’x 209 (4th Cir. 2012) (“expert testimony is required to establish the appropriate professional standard[.]”)

But Grimm goes much further than simply asserting that everyone has a gender identity through his use of the Amicus briefs. Critically, Grimm asserts, “**The standard of care for the treatment of gender dysphoria** that is recognized by the American Academy of Pediatrics and every major medical and mental health professional organization in the United States is to eliminate the clinically significant causes of distress...” ECF Doc. 185, pp. 10-11. Grimm may be able to assert, through citation to the AAP Amicus, that the American Academy of Pediatrics has stated that eliminating clinically significant causes of distress is the standard of care. What Grimm seeks to do, however, and what Grimm cannot do, is to establish that this *is* the standard of care and that every major medical and mental health professional organization also agrees that this is the standard of care. Plainly, this goes well beyond providing the court with the view of the American Academy of Pediatrics. Grimm impermissibly seeks to establish a standard of care.

Likewise, Grimm cites to the School Administrator Amicus for the assertion that “school administrators across the country recognize that excluding boys and girls who are transgender from using the common restrooms interferes with their ability to learn and thrive at school.” ECF Doc. 185, p. 15. While Grimm may be able to point to the School Administrator Amicus for the assertion of what the filing school administrators believe, Grimm seeks to establish that exclusion from common restrooms interferes with a student’s ability to learn. That assertion requires expert testimony, as it involves scientific opinion regarding causation. The use of the Amicus briefs for causation continues, as Grimm asserts that “major medical organizations...report that ‘avoidance [of the restroom] can have medical consequences, including recurrent urinary tract infections.” ECF Doc. 185, p. 42. Medical causation requires the use of expert testimony, and Grimm has designated no medical causation. He cannot now

attempt to prove his case by citation to the Amicus briefs, the American Psychological Association & National Association of School Psychologists' 2015 *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools*, Gender Spectrum's 2016 *Transgender Students and School Bathrooms: Frequently Asked Questions* or the National Association of Secondary School Principals' 2016 *Position Statement on Transgender Students* for the truth of the statements made therein.

IV. The Court should strike the references to statements by counsel.

Paragraphs 52-55 of Medley-Warsoff Declaration cites to statements made by the School Board's counsel at a February 2019 public hearing on a proposed restroom policy that arose out of settlement negotiations with Magistrate Judge Miller. These statements are not relevant to nor probative to the issues in 2015, nor to the time Grimm was attending Gloucester High School. Indeed, the statements Grimm attempts to rely on were made two years after Grimm graduated from high school. Moreover, the statements were part of settlement negotiations which are inadmissible under Rule 408. See ECF Doc. 200, pp. 35-36.

CONCLUSION

For the foregoing reasons, Gloucester County School Board respectfully requests that the Court exclude from its consideration on summary judgment the forgoing exhibits (ECF Docs. 192-5, 192-6, 192-38-43, 203-3, 203-4, 203-5 and 203-6).

**GLOUCESTER COUNTY SCHOOL
BOARD**

By Counsel

/s/

David P. Corrigan (VSB No. 26341)
Jeremy D. Capps (VSB No. 43909)
Attorneys for Gloucester County School Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 - Fax
dcorrigan@hccw.com
jcapps@hccw.com

CERTIFICATE

I hereby certify that on the 30th day of April, 2019, I filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send a Notice of Electronic Filing to all counsel of record.

/s/

David P. Corrigan (VSB No. 26341)
Jeremy D. Capps (VSB No. 43909)
Attorneys for Gloucester County School Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 - Fax
dcorrigan@hccw.com
jcapps@hccw.com

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v.

Case No. 4:15-cv-54

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

**INDEX OF EXHIBITS TO BRIEF IN SUPPORT OF MOTION TO STRIKE AND
EXCLUDE CERTAIN EXHIBITS FILED WITH GAVIN GRIMM'S MOTION FOR
SUMMARY JUDGMENT AND REPLY IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

- A. Plaintiff's Expert Witness Identification
- B. Melinda Penn, M.D. Deposition Excerpts

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

Civil No. 4:15-cv-00054-AWA-DEM

PLAINTIFF'S EXPERT WITNESS IDENTIFICATION

Plaintiff Gavin Grimm, pursuant to the Rule 16(b) Scheduling Order, identifies the following witnesses who will provide expert testimony. In accordance with the Rule 16(b) Scheduling Order, Plaintiff will provide the expert disclosures outlined in Rule 26(a)(2)(B) on January 28, 2019.

Melinda Penn, MD
Pediatric Endocrinologist
Children's Hospital of the King's Daughters
601 Children's Ln
Norfolk, VA 23518

Dr. Penn will provide expert testimony on the applicable standards of care and treatment guidelines for transgender youth.

Date: December 26, 2018



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
Joshua A. Block*



Leslie Cooper*
Shayna Medley-Warsoff*
American Civil Liberties Union
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2627 (Phone)
(212) 549-2650 (Fax)
jblock@aclu.org
lcooper@aclu.org
smedley@aclu.org

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF VIRGINIA
Eden B. Heilman (VSB No. 93554)
Nicole Tortoriello (VSB No. 91129)
Jennifer Safstrom (VSB No. 93746)
ACLU of Virginia
701E. Franklin Street, Suite 1412
Richmond, VA 23219
(804) 644-8022 (Phone)
(804) 649-2733 (Fax)
eheilman@acluva.org
ntortoriello@acluva.org
jsafstrom@acluva.org

Counsel for Plaintiff Gavin Grimm

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

-----X
GAVIN GRIMM, :
 :
 Plaintiff, :
 :
 v. : CASE NO.:
 :
 GLOUCESTER COUNTY SCHOOL : 4:15-cv-54
 :
 BOARD, :
 :
 Defendant. :
-----X

Deposition of MELINDA PENN, M.D.
Richmond, Virginia
Thursday, March 14, 2019

10:15 a.m.

EXHIBIT
B

Job No.: 234511
Pages 1 - 92
Reported by: Helen B. Yarbrough, RPR, CCR

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

37

1 A No.

2 MR. CAPPS: Do you want to take a quick
3 break? I'm going to transition into those --
4 we're okay to take a quick break if you want.

5 (A recess was taken.)

6 (Penn Deposition Exhibit 1B was marked
7 for identification and is attached.)

8 BY MR. CAPPS: (Continuing)

9 Q I'm showing you what's been marked as
10 Exhibit 1B, which was attached to your expert
11 report. Is that the most current standards of
12 care issued by WPATH that you have been referring
13 to?

14 A Yes.

15 Q And you agree that the WPATH standards
16 of care are intended to be a flexible guideline?

17 A Yes.

18 Q And you agree that the WPATH standards
19 of care state that treatment for gender dysphoria
20 is intended to be individualized?

21 A Yes.

22 Q And the WPATH standards of care state

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

38

1 that what helps one person alleviate gender
2 dysphoria might be very different from what helps
3 another person?

4 A Yes.

5 Q And is that true in your practice?

6 A Yes.

7 Q So in your practice, the treatment of
8 transgender adolescents or children varies from
9 one child to another?

10 A Yes.

11 Q And it may depend on what the parents
12 want?

13 A I talk with the patients and the
14 parents and come up with the best plan.

15 Q And that plan, though, may depend on
16 what the parents want instead of what the child
17 wants?

18 A In order to proceed with any
19 treatments, I have to have -- I require that all
20 parents or guardians agree to the plan.

21 Q And if a parent disagrees with the
22 adolescent that you're treating, does that mean

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

63

1 transition plan?

2 A Yes, it can be a part of that.

3 Q And that there are other components of
4 the social transition plan that can be provided or
5 recommended by a mental health provider to treat
6 gender dysphoria?

7 A Yes.

8 Q I looked at Exhibit 1B, the WPATH
9 standard of care guidelines, and I don't see in
10 those guidelines where the standard of care refers
11 to the use of restrooms in line with a transgender
12 patient's gender identity instead of the sex
13 recognized at birth. Can you tell me if the WPATH
14 standards of care provide any guidance on the use
15 of restrooms to treat gender dysphoria in
16 transgender individuals?

17 A I'd have to review it again to look if
18 there's specific mention about restroom use.

19 Q I'm going to give you that opportunity.

20 A (Witness reviewing document.)

21 MR. BLOCK: Jeremy, since it's a long
22 document, can I help?

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

64

1 MR. CAPPS: Yes, that's fine. I don't
2 mind you saying where you think in the document it
3 is.

4 MR. BLOCK: All right. So I'll
5 identify the points; I'll refer to the pages.

6 So, you might want to look at page 68.
7 There's one other page you might want to look at.

8 MR. CAPPS: Document.

9 A On page 17 there's a section about the
10 social transition in early childhood, and it just
11 refers to the safe and supportive environment for
12 their transitioning, that maintaining a safe and
13 supportive environment in their transitioning
14 child -- for example, in school, peer group
15 settings. It doesn't specifically say restrooms
16 but in general the environment.

17 Q Right. So on page 17 of a -- of the
18 WPATH "Social Transition In Early" -- I'm sorry.
19 I'm going to start over.

20 On page 17 of the WPATH standards of
21 care under the title "Social Transition in Early
22 Childhood," there is a section at the bottom of

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

65

1 the page that states, "If parents do allow their
2 young child to make a gender role transition, they
3 may need counseling to facilitate a positive
4 experience for their child. For example, they may
5 need support in using correct pronouns,
6 maintaining a safe and supportive environment for
7 their transitioning child (e.g. in school, peer
8 group settings), and communicating with other
9 people in their child's life."

10 Do you see that? Yes?

11 A Yes.

12 Q And that standard of care relates to
13 the parents of a transgender child, correct?

14 A Yes.

15 Q And that standard of care does not
16 state anything about the use of restrooms
17 consistent with the child's expressed gender
18 identity, correct?

19 A Not specifically.

20 Q And that standard of care does not
21 relate to the use of a bathroom at a school --
22 strike that. That standard of care -- strike

Transcript of Melinda Penn, M.D.
Conducted on March 14, 2019

1 that.

2 Anywhere else in the document that you
3 believe the standard of care expressed by WPATH
4 references restroom use for transgender
5 individuals?

6 A There's a section in applicability of
7 the standards of care to people living in
8 institutional environments on page 68. It says
9 that, "Housing and shower/bathroom facilities for
10 transsexual, transgender, and gender nonconforming
11 people living in institutions should take into
12 account their gender identity and role, physical
13 status, dignity, and personal safety."

14 Q So the WPATH standard of care that you
15 just referenced relates to transsexual,
16 transgender, and gender nonconforming people
17 living in institutional environments such as
18 prisons, or long-term health care facilities,
19 correct?

20 A Yes.

21 Q WPATH does not have a standard of care
22 related to the use of restrooms by transgender

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

67

1 students at schools, correct?

2 A Not that I see.

3 Q In Exhibit 1C, which is the Endocrine
4 Treatment -- Clinical Practice Guidelines of
5 Gender-Dysphoric/Gender-Incongruent Persons -- do
6 you see that?

7 A Yes.

8 Q And you relied on this document in
9 coming to your opinions, correct?

10 A Yes.

11 Q Do the guidelines issued by the
12 Endocrine Society refer to the use of the
13 restrooms by a transgender person?

14 A Let me review. It's mostly discussing
15 the medical treatment, and I don't think that
16 there's a lot of discussion about social, but let
17 me review it again.

18 I don't think there's a specific
19 reference to the bathroom facility.

20 Q All right. So you would agree, then,
21 that there are no guidelines issued by the
22 Endocrine Society related to transgender students

Transcript of Melinda Penn, M.D.
Conducted on March 14, 2019

68

1 using restrooms consistent with their gender
2 identity in the school?

3 MR. BLOCK: Objection.

4 MR. CAPPS: What's the objection?

5 MR. BLOCK: "Related to" versus
6 "specifically mentioned."

7 Q Okay. You would agree that the
8 Endocrine Society has not issued clinical
9 guidelines for the use of restroom facilities for
10 transgender students consistent with their gender
11 identity in schools?

12 A I believe there's a pediatric endocrine
13 statement in support of transgender care, but I
14 don't know if it specifically states restrooms.

15 Q What I'm asking is, in the guidelines
16 that you relied on, you would agree that there is
17 no guideline on the use of a restroom by a
18 transgender student that is consistent with a
19 student's gender identity in school?

20 A Yes, there's no specific reference to
21 "restroom."

22 Q If, as part of the treatment plan for

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

70

1 single user restroom at school instead of the
2 restroom that is consistent with their gender
3 identity, is that medically appropriate?

4 A If that's the patient's choice, yes.

5 Q Are you aware of whether there have
6 been any studies or research into how many
7 transgender students would prefer to use a single
8 user restroom instead of the restroom that is
9 consistent with their gender identity?

10 A I'm not aware of any studies.

11 Q Are you aware of any scientific or
12 medical research studies into the effect of not
13 permitting a transgender student to use the
14 bathroom consistent with his gender identity in
15 school?

16 A Not specifically looking at the
17 bathroom.

18 Q You would agree that if a student,
19 transgender student, is not permitted to use the
20 bathroom consistent with his gender identity in
21 school, there are other methods of social
22 transition that can be used to help treat that

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

71

1 student's gender dysphoria?

2 A There are a number of components that
3 go into the social transition, and what's required
4 is individual for each person.

5 Q Are you aware of any medical research
6 or studies into the effect of implementing a plan
7 of gender-affirming care that allows a transgender
8 student to wear the clothing that he wants, to
9 change his name to be consistent with his gender
10 identity, and to be referred to with pronouns
11 consistent with his gender identity but not be
12 permitted to use a restroom consistent with his
13 gender identity at school?

14 A I don't think that any of the studies
15 have looked at that precise situation. There are
16 studies that have looked at the effect of social
17 transition on transgender health, but I don't know
18 which specific components they addressed.

19 Q Have you ever treated a transgender
20 student that was not permitted to use the restroom
21 that corresponded with the student's gender
22 identity at school?

Transcript of Melinda Penn, M.D.
Conducted on March 14, 2019

78

1 Q So what is chest reconstructive
2 surgery?

3 A So, that can either be in transgender
4 males where they have a mastectomy and all the
5 breast tissue is removed and reconstructed to
6 appear more masculine, or in transgender females
7 it can include breast augmentation.

8 Q Okay. In the situation where there is
9 a mastectomy for a transgender male, is there --
10 does that procedure create any biological changes
11 in the transgender individual?

12 A It's just physical changes.

13 Q And is that treatment part of a medical
14 treatment plan to address the gender dysphoria or
15 distress associated with gender identity?

16 A It can be, but it is all determined by
17 the individual, whether that's something that they
18 desire.

19 Q And then you state in paragraph 33 that
20 under the WPATH standards of care there can be
21 genital surgery once they reach the age of
22 majority?

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

79

1 A Yes.

2 Q What does that mean?

3 A There are genital surgeries that can be
4 performed to make the external genitalia more
5 similar to the gender identity, and then there are
6 surgeries that can remove the internal genitalia,
7 or the gonads, the testes or the ovaries, to
8 prevent production of those hormones.

9 Q And so under the WPATH standards of
10 care, surgical gender reassignment procedures
11 cannot be completed until the transgender
12 individual is at least 18 years of age, correct?

13 A Yes. In general, any surgical
14 procedure that would affect the fertility is held
15 off until 18.

16 Q I assume as part of your practice you
17 don't perform surgery; is that correct?

18 A Yes. I don't.

19 Q So make sure I've got it clear. So if
20 you have -- if a transgender boy has chest
21 reconstructive surgery, they still have the female
22 genitalia in place; is that correct?

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

80

1 A Yes.

2 Q I think you told me that in the five
3 years that you've been treating transgender
4 patients you have had some patients reach the age
5 of majority?

6 A Yes.

7 Q And have any of those patients elected
8 to undergo genital surgery?

9 A Yes.

10 Q How many?

11 A I can think of two.

12 Q And did you continue to see them after
13 the surgical genital procedure?

14 A Yes.

15 Q What was your role?

16 A Continuing to provide hormone . . .

17 Q And at that time was the hormone
18 therapy that you provided, providing for gender
19 dysphoria, or was it for some other purpose?

20 A With one of the patients, her gonads
21 were removed; and you, therefore, have to receive
22 sex hormones of some sort to maintain good bone

Transcript of Melinda Penn, M.D.

Conducted on March 14, 2019

92

1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

2 I, Helen B. Yarbrough, Registered

3 Professional Reporter, Certified Court Reporter,

4 and Notary Public, the officer before whom the

5 foregoing deposition was taken, do hereby certify

6 that the foregoing transcript is a true and

7 correct record of the testimony given, to the best

8 of my ability; that said testimony was taken by me

9 stenographically and thereafter reduced to

10 typewriting under my supervision; that reading and

11 signing was requested; and that I am neither

12 counsel for, nor related to, nor employed by any

13 of the parties to this case and have no interest,

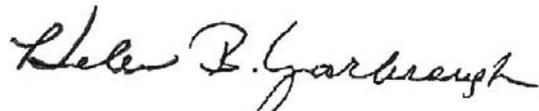
14 financial or otherwise, in its outcome.

15 IN WITNESS WHEREOF, I have hereunto set my

16 hand and affixed my notarial seal this 17th day of

17 March 2019.

18



19

Helen B. Yarbrough, RPR, CCR
VCRA Certification #0313016

20

21 My Commission Expires:

July 31, 2021

22

Notary Registration Number: 158897

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM