

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF IDAHO

3
4 ADREE EDMO (a/k/a MASON EDMO),) CASE NO. 1:17-cv-00151-BLW
5)
6 Plaintiff,) **TELEPHONIC STATUS CONFERENCE**
7)

8 vs.)

9 IDAHO DEPARTMENT OF)
10 CORRECTION; HENRY ATENCIO, in)
11 his official capacity; JEFF)
12 ZMUDA, in his official)
13 capacity; HOWARD KEITH YORDY,)
14 in his official and individual)
15 capacities; CORIZON, INC.;)
16 SCOTT ELIASON; MURRAY YOUNG;)
17 RICHARD CRAIG; RONA SIEGERT;)
18 CATHERINE WHINNERY; and DOES)
19 1-15,)

20 Defendants.)
21)
22)
23)
24)
25)

26 **TRANSCRIPT OF PROCEEDINGS**
27 **BEFORE THE HONORABLE B. LYNN WINMILL**
28 **TUESDAY, APRIL 9, 2019, 2:05 P.M.**
29 **BOISE, IDAHO**

30 Proceedings recorded by mechanical stenography, transcript
31 produced by computer.
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34 **TAMARA I. HOHENLEITNER, CSR 619, CRR**
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P R O C E E D I N G S

April 9, 2019

(Telephonic status conference.)

13:42:39 1
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13:49:47 3
14:07:34 4 THE COURT: Counsel, this is Judge Winmill. Just --
14:07:38 5 again, we're on the record, so I'm going to ask you to be very
14:07:41 6 careful to identify yourself before you start speaking. And if
14:07:48 7 you don't do that, I'll probably interject myself and cut you
14:07:52 8 off and require you do that. It's very hard for the court
14:07:56 9 reporter to take down what is being said unless she knows
14:08:00 10 clearly who is speaking.

14:08:01 11 Counsel, from my viewpoint, there is really only two
14:08:05 12 issues to consider today. The first has to do with the
14:08:11 13 plaintiff's motion for -- or requesting that the court offer a
14:08:19 14 kind of a preliminary indication as to how I would rule if this
14:08:22 15 matter were remanded because I didn't make specific findings
14:08:27 16 under the PLRA, the -- what is it? -- well, I forget the
14:08:32 17 specific language of the statute, so I won't even try to
14:08:35 18 paraphrase it.

14:08:38 19 And, then, secondly, to see where we are in terms of
14:08:41 20 planning for the surgery.

14:08:44 21 Judge Tallman, I believe, issued a decision clarifying
14:08:48 22 the stay that was granted by the circuit to indicate that that
14:08:51 23 was not intended as a stay of any planning for the surgery, but
14:08:55 24 only a stay of the actual ordering of the surgery. At least
14:09:00 25 that's my reading of his decision. I suppose counsel may have a

14:09:05 1 different take.

14:09:06 2 With regard to the first issue, that is, the need
14:09:11 3 to -- as to whether the court should issue a decision under I
14:09:15 4 think it's Rule 62, I don't intend really to have oral argument,
14:09:22 5 per se, but I did want to give you a chance to weigh in.

14:09:26 6 I can tell you what my feeling is. I do this quite
14:09:30 7 often during any kind of an oral argument, is to give counsel
14:09:34 8 the benefit of my thinking.

14:09:35 9 My own feeling is that it's really not necessary.
14:09:39 10 Because as I went back and reread the decision, I feel that I
14:09:45 11 very clearly did, in fact, make requisite findings under the
14:09:50 12 PLRA. I did not use the precise language of the PLRA, but I
14:09:55 13 think it's absolutely clear that I made those findings.

14:09:57 14 And so barring, you know, being persuaded otherwise by
14:10:02 15 counsel, my inclination is to deny the motion but indicate that
14:10:06 16 my reason for denying the motion is that I just feel it's
14:10:09 17 unnecessary at this time.

14:10:11 18 Of course, if the circuit disagrees and they feel that
14:10:14 19 you have to employ very specific language, then, of course, I'll
14:10:19 20 do what the circuit says. But that would be a very quick
14:10:24 21 turnaround for me to simply use the precise language of the
14:10:28 22 statute to reflect what I intended from my decision.

14:10:36 23 I suppose that doesn't -- isn't what the plaintiffs
14:10:39 24 want and is probably not what the defendants want, but it does
14:10:42 25 strike me that I guess I -- from my review of the case law, I

14:10:48 1 don't think there is any requirement of using that precise
14:10:50 2 language. And I think my decision was sufficiently clear that I
14:10:54 3 had made the requisite findings, that it's probably not
14:10:57 4 necessary to do anything more than that. And perhaps that
14:11:00 5 statement is a signal to the circuit to -- as to what my
14:11:05 6 intention was, in any event.

14:11:07 7 So, with that, from the plaintiffs, is there anything
14:11:10 8 on the issue of your motion? Is there anything you want to add
14:11:14 9 and put on the record?

14:11:17 10 MS. RIFKIN: Your Honor, this is Lori Rifkin.

14:11:20 11 THE COURT: Yes.

14:11:21 12 MS. RIFKIN: Thank you for sharing that.

14:11:24 13 We -- we agree with Your Honor. And that is, in fact,
14:11:29 14 what we argued to the appellate court in our answering brief.
14:11:34 15 Because there is some case law suggesting, particularly from
14:11:40 16 other circuits, that the PLRA could be read very literally to
14:11:44 17 require those precise words.

14:11:46 18 We brought this motion. We think that if you deny the
14:11:49 19 motion in a way that includes the reasoning that you just stated
14:11:54 20 for denying the motion, that that essentially accomplishes the
14:11:58 21 same -- the same piece.

14:12:02 22 We are interested in trying to make sure that the
14:12:04 23 order, if affirmed, is not held up. And so I think that your
14:12:16 24 interpretation of your own order that it made those findings is
14:12:18 25 the same interpretation that we have. So we wouldn't object to

14:12:22 1 that.

14:12:23 2 THE COURT: Ms. Rifkin, I have not read, obviously,
14:12:25 3 the briefing that has been submitted. The one case -- again,
14:12:29 4 it's a somewhat older case, but the -- well, let me -- just a
14:12:36 5 moment. I want to actually find -- well, there is a case,
14:12:39 6 *Gilmore vs. State of California*, it's a Ninth Circuit 2000
14:12:43 7 decision.

14:12:44 8 Was that cited by you in that brief, by chance?

14:12:47 9 MS. RIFKIN: Yes. I believe *Gilmore* was cited by us.

14:12:53 10 THE COURT: All right. I was just curious, because I
14:12:56 11 thought that -- at least my reading of that language, I think
14:12:59 12 it's in a footnote -- in fact, I think it's footnote 25, if
14:13:04 13 memory serves me. But, in any event, I think that language
14:13:06 14 seems to make it clear that what's important is that the court
14:13:11 15 actually make the findings, not that they have to use specific
14:13:13 16 language in so doing. But, you know, that's another issue.

14:13:18 17 So -- all right. Mr. Eaton, anything you want to add?

14:13:22 18 MR. EATON: Your Honor, first of all, we don't believe
14:13:30 19 that it's before the court in the correct procedural posture.
14:13:33 20 We read the rule as requiring plaintiff to first file a motion
14:13:39 21 to modify, which I don't believe they have done, and then
14:13:44 22 subsequently ask for the indicative ruling.

14:13:49 23 They also brought up the -- from what I could tell,
14:13:52 24 they tried to raise the issue under Rule 60(a). And we believe
14:13:57 25 that the plain language of that rule says that leave of the

14:14:02 1 circuit court would be required, and we are not aware of any.
14:14:07 2 In that rule, also, we believe that that is to make clerical
14:14:13 3 errors and corrections and not to be used to make substantive
14:14:17 4 issues and changes, which we believe they are asking for with
14:14:21 5 the PLRA.

14:14:21 6 We respectfully still take the position that the court
14:14:26 7 did not make the requisite PLRA finding and preserve that issue
14:14:33 8 on appeal.

14:14:40 9 And I would also indicate that plaintiffs appear to
14:14:46 10 have, in their reply, brought up new arguments and rules that
14:14:51 11 were not -- you know, this is filed on an emergency basis. And
14:14:55 12 they brought up Rule 62(d), which we don't think applies anyway,
14:15:00 13 but that was brought up for the first time in the reply and
14:15:03 14 should not be considered by the court.

14:15:08 15 I believe at this point, I would just defer to our
14:15:11 16 briefing at this point.

14:15:13 17 THE COURT: All right. Mr. Hall.

14:15:16 18 MR. HALL: Your Honor, this is Brady Hall. And --

14:15:22 19 THE COURT: Mr. Hall, could you speak up? You are
14:15:24 20 just a little faint there.

14:15:27 21 MR. HALL: Can you hear me now, Judge?

14:15:30 22 THE COURT: That's better.

14:15:31 23 MR. HALL: The IDOC defendants join in with what
14:15:35 24 Mr. Eaton has just stated and all the arguments and do not waive
14:15:38 25 any arguments contained in the briefing, including that the

14:15:41 1 court's order did not meet the requisite
14:15:45 2 need-narrowness-intrusiveness findings or providing any weight,
14:15:49 3 let alone substantial, to the adverse impact on the operation of
14:15:53 4 the criminal justice system.

14:15:54 5 But understanding the court's position on this issue
14:15:58 6 today and plaintiffs response, I don't think it's necessary to
14:16:02 7 make any further argument.

14:16:04 8 THE COURT: All right. Thank you.

14:16:05 9 Well, Counsel, I have actually -- we have been working
14:16:09 10 on a decision. Mr. Cole in my chambers and I have -- and
14:16:12 11 actually others -- we have been kind of batting this around a
14:16:15 12 bit. So don't be surprised if a decision is issued before the
14:16:19 13 end of the day on this.

14:16:22 14 I want to give it a little more thought, but don't
14:16:25 15 think that just because you get a quick decision, that we didn't
14:16:28 16 spend a lot of time thinking about it. I have spent a good
14:16:32 17 chunk of the last day -- well, last day at least, thinking about
14:16:36 18 this a bit. So we'll issue something probably before 5:00
14:16:41 19 today.

14:16:42 20 So let's turn to the second issue, and that is where
14:16:46 21 we are in terms of planning for the surgery. I know one issue
14:16:52 22 was the defendants' position that the doctor they have
14:16:56 23 identified was not willing to provide the necessary surgery
14:17:03 24 because the treating physicians provided by Corizon and IDOC --
14:17:09 25 who, of course, testified in this proceeding -- do not agree

14:17:12 1 with my decision that the surgery is necessary or that the WPATH
14:17:16 2 standards have been satisfied. That's kind of the proverbial
14:17:21 3 catch-22 for Ms. Edmo.

14:17:24 4 And I suggested in our last discussion that there
14:17:27 5 ought to be some direct communication between perhaps the
14:17:31 6 plaintiff's experts who testified or someone else with -- who
14:17:38 7 worked with Ms. Edmo and the doctor in Moscow, but I guess I
14:17:46 8 need a status report where we are.

14:17:48 9 I'll start with the plaintiffs. Ms. Rifkin or
14:17:53 10 Ms. Whelan or Ms. Ferguson -- I don't know who is going to
14:17:55 11 address this.

14:17:58 12 MS. RIFKIN: Your Honor, this is Lori Rifkin.

14:18:02 13 We have been in contact with counsel for the
14:18:06 14 defendants following the modification of the stay order to
14:18:10 15 confirm that the appointment -- the presurgical consultation
14:18:14 16 with Dr. Stiller is going forward. And it is our understanding
14:18:20 17 from them that that is taking place.

14:18:22 18 We heard from them that Ms. Edmo was transferred to
14:18:26 19 the prison closer to Moscow as of -- I believe it was
14:18:32 20 accomplished as of yesterday. And so our understanding is that
14:18:35 21 she has a mid-April appointment scheduled that is moving
14:18:39 22 forward.

14:18:39 23 THE COURT: Oh, well, that's good news.

14:18:41 24 I would say, Ms. Rifkin, you revealed your nonIdaho
14:18:49 25 background by referring to it as "Moscow" instead of "Moscow."

14:18:55 1 It's kind of like Nevada, Nevada. In Idaho, Moscow is
14:18:59 2 pronounced "Moscow." Why that is, I don't know, but it's just
14:19:04 3 the way it is.

14:19:05 4 Of course, you can continue calling it "Moscow," and
14:19:08 5 I'll understand. But if you want to fit in, you probably ought
14:19:13 6 to change that.

14:19:14 7 All right. Then, basically, there is nothing more to
14:19:18 8 report except things are underway. Ms. Rifkin, is that fair to
14:19:22 9 say?

14:19:22 10 MS. RIFKIN: As far as we are aware, that is the case.
14:19:28 11 We haven't heard anything otherwise.

14:19:30 12 THE COURT: All right. Very good.

14:19:31 13 Mr. Eaton, Mr. Hall, maybe that's all we need to know.
14:19:34 14 Is there anything you want to add?

14:19:36 15 I express my appreciation for IDOC's willingness to
14:19:41 16 move forward in the way that they have. I know it's not what
14:19:43 17 you wanted to do, but your willingness to comply with the
14:19:48 18 court's order and Judge Tallman's modification of the stay is
14:19:52 19 much appreciated.

14:19:53 20 But anything you want to add?

14:19:56 21 MR. HALL: Your Honor, this is Brady Hall.

14:19:58 22 I'll just speak to two points. The first one being
14:20:01 23 that it is correct that Ms. Edmo was transported yesterday to
14:20:06 24 ICIO, Correctional Institution in Orofino, and will be
14:20:13 25 transferred to Moscow for the preop as scheduled. And that is

14:20:19 1 consistent with what the Ninth Circuit has ordered in the
14:20:26 2 modification of the stay, which only applies to the preoperative
14:20:31 3 appointment, and the remaining stay is in place.

14:20:37 4 Another issue, Your Honor, I want to make very clear
14:20:40 5 is it appears as though the court was under the impression that
14:20:45 6 Dr. Stiller, the surgeon in Moscow, is not willing to do the
14:20:50 7 procedure. I think the better way to say that is: What he
14:20:53 8 needs pursuant to the WPATH is letters of referral from at least
14:21:00 9 two mental health providers and a medical provider saying that
14:21:07 10 she meets the criteria for the WPATH gender confirmation surgery
14:21:15 11 and that she is a good candidate for the procedure.

14:21:19 12 The question that we had raised last point and wanted
14:21:24 13 to emphasize that maybe the court's order had put the cart
14:21:27 14 before the horse, so to speak, was that if the court ordered a
14:21:32 15 surgery that no surgeon has yet to determine as being medically
14:21:37 16 necessary or even appropriate, since our staff are unable to
14:21:44 17 provide those referral letters, that creates kind of a catch-22
14:21:47 18 from our position as to how we go about fulfilling that when
14:21:52 19 those letters are not on the record.

14:21:55 20 I believe the court indicated that plaintiffs would
14:21:57 21 have an opportunity to provide certain referrals to Dr. Stiller,
14:22:03 22 and I'm not aware if they have done that to date, if they have
14:22:07 23 any such referrals. But I also understood that the court was in
14:22:13 24 agreement that the defendants can also provide certain referrals
14:22:19 25 to the court or evidence in the record providing a full history.

14:22:25 1 And this is largely an issue that I don't think the
14:22:29 2 court has authority to address at this point because of the stay
14:22:32 3 of the order. But, Your Honor, I think I wanted to just let you
14:22:38 4 know kind of the status update on the parties' positions on
14:22:42 5 this.

14:22:42 6 THE COURT: Well, I have not reviewed Judge Tallman's
14:22:46 7 order specifically. I just saw a reference to it. So I don't
14:22:51 8 know exactly what he did or did not do by way of modification.

14:22:57 9 But, of course, if -- if the -- if there is some
14:23:01 10 ambiguity in that regard, it may be that that issue will need to
14:23:04 11 be revisited by Judge Tallman; or, if not, then if the
14:23:13 12 plaintiffs are satisfied with the status, then that's all I
14:23:16 13 guess I'm concerned about.

14:23:18 14 If there is a feeling that there is a need to move
14:23:20 15 forward in terms of these references and how that's going to be
14:23:23 16 accommodated or provided, then I guess I need to know that
14:23:31 17 Judge Tallman's order allows that to go forward despite the stay
14:23:34 18 or it does not, and the issue has been placed back before
14:23:39 19 Judge Tallman.

14:23:39 20 But, as I noted, if the plaintiffs don't raise the
14:23:44 21 issue, I'm not going to concern myself with it. So I think we
14:23:47 22 will just leave it at that.

14:23:48 23 Mr. Eaton anything you want to add?

14:23:51 24 MR. EATON: Your Honor, I agree with what Mr. Hall has
14:23:58 25 said. And I didn't understand the order for modification from

14:24:05 1 the Ninth Circuit to address all planning for surgery. I
14:24:10 2 thought it had addressed the initial consult with the surgeon.
14:24:16 3 But, in any event, I can confirm that I have talked to my
14:24:19 4 client, Corizon, and they have confirmed that Ms. Edmo is
14:24:24 5 scheduled for the initial consult at this time still in
14:24:30 6 mid-April.

14:24:31 7 THE COURT: All right.

14:24:35 8 MS. RIFKIN: Your Honor, this is Lori Rifkin. Can I
14:24:38 9 address the issue briefly?

14:24:39 10 THE COURT: You may, yes.

14:24:40 11 MS. RIFKIN: I agree with defense counsel. The
14:24:44 12 modification addressed the presurgical appointment.

14:24:49 13 From plaintiff's perspective, based on the discussion
14:24:52 14 during the last status conference, we -- we can provide the
14:24:58 15 letters of referral, and we are ready to do so. And that does
14:25:03 16 not -- we do not think the stay has any bearing on our ability
14:25:07 17 to obtain those letters and provide them and make sure that the
14:25:14 18 surgery can move forward as quickly as possible once your order
14:25:17 19 is affirmed.

14:25:18 20 We think that once the order is affirmed, Your Honor
14:25:23 21 can address the issue, if defendants still raise it, of what
14:25:27 22 information is appropriate for them to provide. As I said last
14:25:30 23 time, we agree -- we do not object to the provision of the
14:25:33 24 medical records, which would usually be provided to a surgeon at
14:25:37 25 this point.

14:25:39 1 And so we think we can hopefully quickly address those
14:25:42 2 issues if the Ninth Circuit affirms the order and lifts the
14:25:47 3 stay.

14:25:48 4 THE COURT: All right. That's, frankly, what I was
14:25:51 5 going to comment on.

14:25:52 6 I think that in terms of what I will or will not
14:25:58 7 allow, that's premature at this point. I do think that,
14:26:02 8 certainly, the medical records should be made available, and
14:26:05 9 must be made available to the surgeon.

14:26:09 10 But on the other hand, I -- of course, if I am
14:26:12 11 affirmed, I would not anticipate that either of the defendants
14:26:17 12 would affirmatively try to use their own doctors' opinions as a
14:26:23 13 way of undermining the court's order that the surgery take
14:26:27 14 place.

14:26:27 15 But -- I'm confident counsel would not do that as
14:26:30 16 officers of the court. But that would not preclude them from
14:26:33 17 providing the treating surgeon with the medical records that
14:26:39 18 have been developed.

14:26:40 19 So let's just leave it at that at this point, and
14:26:43 20 we'll address it later if we need to.

14:26:45 21 Okay. Ms. Rifkin, anything else from the plaintiff?

14:26:48 22 MS. RIFKIN: No, Your Honor. Nothing else.

14:26:50 23 THE COURT: Mr. Eaton, from Corizon?

14:26:52 24 MR. EATON: Your Honor, when you say "medical records
14:26:57 25 provided to the surgeon," are you including mental health

14:27:02 1 records as well?

14:27:03 2 THE COURT: Well, I'm -- I don't know what I mean at
14:27:08 3 this point. I need to see it more in the concrete.

14:27:12 4 I guess whatever the surgeon feels that he or she
14:27:15 5 needs to prepare for and perform or decide whether to perform
14:27:23 6 the surgery, that's fine, but I think that has to be driven by
14:27:28 7 the surgeon, not by anyone else. It's whatever the surgeon
14:27:30 8 feels that he or she needs. And that, in my mind, would include
14:27:34 9 medical records and mental health records if that's what they
14:27:37 10 ask for.

14:27:38 11 But I don't think that we necessarily have to
14:27:41 12 volunteer or provide them with information they don't ask for.

14:27:44 13 Is that clear enough, Mr. Eaton?

14:27:51 14 MR. EATON: I believe so, Your Honor. I just -- I
14:27:55 15 guess it goes to what I raised at the last status conference,
14:27:58 16 which is the fairness of the information provided. But I
14:28:02 17 understand you to be saying not to provide information from the
14:28:10 18 defendants' experts and to provide medical and possibly mental
14:28:16 19 health records that would be in the chart, I guess, is my
14:28:21 20 understanding -- the prison chart.

14:28:22 21 THE COURT: Well, it's premature at this point. All
14:28:24 22 I'm saying is: I don't think the doctor should be called upon
14:28:28 23 to revisit my decision and sit in judgment from a medical point
14:28:35 24 of view, of my decision.

14:28:37 25 On the other hand, he or she has to perform the

14:28:39 1 surgery or at least has to make the decision whether to perform
14:28:43 2 the surgery or whether they are willing to do so. And I think,
14:28:46 3 therefore, this is not -- we're not at a point of advocacy
14:28:53 4 before the doctor. We're at a point now of medical decision.
14:28:58 5 And that decision should be driven by medical needs and medical
14:29:02 6 knowledge and not the advocacy of one side or the other.

14:29:08 7 That's why I'm a little concerned, when you talk about
14:29:12 8 the fairness of the information, that it's not fair that the
14:29:15 9 doctor only see one side or the other. That's a legitimate
14:29:18 10 argument in a court of law. The questions of fairness I don't
14:29:24 11 think typically enter into a medical decision as to the
14:29:26 12 propriety of a certain type of treatment. It's either indicated
14:29:32 13 or it's not. And I think it needs to be left in that -- in that
14:29:36 14 situation.

14:29:38 15 Is that understood?

14:29:39 16 MR. EATON: I believe I understand you, Your Honor,
14:29:43 17 yes.

14:29:43 18 THE COURT: All right. Mr. Hall.

14:29:44 19 MR. HALL: Your Honor, this is Brady Hall for the
14:29:48 20 Department of Corrections.

14:29:49 21 And this dialogue -- and I do recognize it's largely
14:29:55 22 premature, but to the extent the parties are wanting to get
14:29:59 23 moving on this and provide certain information, I think that
14:30:04 24 this is an extremely important issue that must be clarified or
14:30:08 25 nothing should be done.

14:30:10 1 The court's comments have raised a lot of concern for
14:30:13 2 me and I'm assuming my client. You know, we certainly would not
14:30:19 3 take an advocacy approach, but I think this court has recognized
14:30:23 4 and would continue to recognize that this surgeon, Dr. Stiller,
14:30:27 5 must be provided with the full picture.

14:30:31 6 And one thing that's going to have to be clarified,
14:30:33 7 Your Honor, is -- I think as officers of the court, I have an
14:30:37 8 obligation to make sure that this surgeon is provided with the
14:30:40 9 full information.

14:30:42 10 One thing this surgeon -- if you read the WPATH -- is
14:30:45 11 very -- is in need of is those mental health providers who know
14:30:51 12 the patient in this case, Ms. Edmo, what do they say? What do
14:30:56 13 they say about her mental health and her criteria for surgery?

14:31:00 14 And defendants' mental health providers -- not just
14:31:04 15 retained experts but mental health providers, those who know
14:31:07 16 her -- have all determined that they do not think that she meets
14:31:12 17 the criteria, or that she needs to address coexisting mental
14:31:16 18 health concerns.

14:31:17 19 So is the court directing the defendants not to
14:31:21 20 provide the opinions and viewpoint of those mental health
14:31:28 21 providers that know her?

14:31:30 22 THE COURT: Counsel, I'm not directing anything. I am
14:31:34 23 saying that this is not a time for advocacy. And whatever the
14:31:37 24 doctor feels that he or she needs is what he or she should be
14:31:40 25 given.

14:31:41 1 And if they feel they need that information that
14:31:43 2 you're suggesting should be given, then it, by all means, should
14:31:48 3 be given to them. But it should not be given to them as a means
14:31:51 4 of trying to dissuade the doctor from providing the surgery that
14:31:54 5 the court has ordered; only should be provided when it's
14:31:58 6 medically indicated, not, as I said, as part of some secondary
14:32:03 7 advocacy before the doctor where that matter has already been
14:32:08 8 decided by the court.

14:32:10 9 I can't be more clear than that. It's just my general
14:32:13 10 observations. And I think to beyond that, we probably do need
14:32:17 11 to have some further hearings. But to do so, if the defendants'
14:32:23 12 position has not changed, then you either need to reach a
14:32:26 13 stipulation to modify the stay further or take the matter before
14:32:32 14 Judge Tallman so that we can address this issue now.

14:32:34 15 But I guess I would say that if I thought either -- or
14:32:38 16 any party was lobbying the doctor in some fashion or providing
14:32:43 17 him with information which would appear to have the -- with the
14:32:48 18 intent or with the effect of dissuading them from providing the
14:32:52 19 surgery, and it was not requested by the treating physician, I
14:32:55 20 would look a bit askance at that.

14:32:59 21 That's just an observation. Because, as I said, I
14:33:02 22 think medical treatment is not an issue of -- is not where this
14:33:06 23 issue should be retried. That really is a medical decision
14:33:13 24 which I think the treating physician needs to determine.

14:33:19 25 All right?

14:33:20 1 MS. RIFKIN: Your Honor, this is Lori Rifkin. May I
14:33:24 2 just respond briefly --

14:33:26 3 THE COURT: Yes.

14:33:27 4 MS. RIFKIN: -- since we're on the record?

14:33:28 5 THE COURT: Yes. Go ahead.

14:33:30 6 MS. RIFKIN: I just want to clarify. We agree. And
14:33:32 7 what Mr. Hall just represented about the WPATH requirements is
14:33:38 8 an inaccurate representation of the WPATH's requirements.

14:33:41 9 The WPATH requirements address two referral letters
14:33:45 10 from a qualified mental health provider. They describe
14:33:47 11 qualified mental health providers as people with expertise --
14:33:50 12 and they describe how -- in treating gender dysphoria. That
14:33:53 13 issue has been litigated extensively to the court.

14:33:57 14 We do not object, again, to the actual medical records
14:34:00 15 being provided. We are unaware of any surgeon who has ever
14:34:04 16 said: You must go out and solicit additional mental health
14:34:08 17 opinions from providers who are not qualified.

14:34:11 18 And so we think that would absolutely be
14:34:15 19 inappropriate.

14:34:21 20 THE COURT: Okay. All right. Duly noted, Ms. Rifkin.

14:34:29 21 The only concern I have -- I want this clear; you
14:34:30 22 know, it's one of those that what's good for the goose is good
14:34:32 23 for the gander kind of things. What I said about advocacy
14:34:34 24 before the doctor would apply to both plaintiffs and the
14:34:37 25 defendants.

14:34:39 1 I think we need to find out what the doctor thinks
14:34:42 2 that he or she needs -- probably needs to have some
14:34:46 3 understanding of the context in which this arose, and then honor
14:34:50 4 the doctor's request, not as a matter of advocacy but as a
14:34:56 5 matter of good medical judgment and treatment.

14:34:59 6 So let's -- you know, I really would suggest that if
14:35:02 7 either of you have some concerns about what I have said or what
14:35:06 8 I intend here, it might be good to, either by stipulation or by
14:35:10 9 getting before Judge Tallman, ask for a further modification so
14:35:13 10 that we can address these issues while the appeal is being
14:35:18 11 heard.

14:35:18 12 You know, we are now I think, what, about a month away
14:35:21 13 from the argument. So we're -- we probably will have a decision
14:35:26 14 in 45 days, I would think. I don't think they would expedite
14:35:28 15 the hearing and then sit on it for a long time before issuing a
14:35:32 16 decision.

14:35:33 17 But, in the meantime, if time is of the essence from
14:35:36 18 either point of view, it might be good to get Judge Tallman to
14:35:40 19 relook at the stay and/or just see if you can agree upon it.

14:35:46 20 All right. I think maybe that's all we need to talk
14:35:49 21 about, but I'll give you all one last chance.

14:35:52 22 Ms. Rifkin, anything else?

14:35:53 23 MS. RIFKIN: Nothing further, Your Honor.

14:35:55 24 THE COURT: Mr. Eaton?

14:35:56 25 MR. EATON: Not at this time, Your Honor. Thank you.

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THE COURT: Mr. Hall?

MR. HALL: Nothing further. Thank you, Your Honor.

THE COURT: All right. Thank you, Counsel.

(Proceedings concluded at 2:36 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Tamara Hohenleitner, Federal Official Realtime Court Reporter, in and for the United States District Court for the District of Idaho, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 3rd day of June, 2019.

/S/ TAMARA I. HOHENLEITNER

TAMARA I. HOHENLEITNER, CSR NO. 619, CRR
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