UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a Minor; a Minor; By and Through His Guardians John Doe and Jane Doe, MACY ROE, MARY SMITH, JACK JONES, a Minor; By and Through His Parents John Jones and Jane Jones,	.	Case No. 5:17-cv-01249-EGS
Plaintiffs,	.	601 Market Street Philadelphia, PA
vs.	.	
BOYERTOWN AREA SCHOOL DISTRICT, DR. RICHARD FAIDLEY, in His Capacity as Superintendent of The Boyertown Area School District; DR. BRETT COOPER, in His Official Capacity as Principal; DR. E. WAYNE FOLEY, In His Official Capacity as Assistant Principal,	.	July 31, 2017 9:31 a.m.
Defendants,	.	
AIDAN DESTEFANO, Terminated: 07/06/2017; PENNSYLVANIA YOUTH CONGRESS FOUNDATION,	.	
Movants.	.	

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE HONORABLE EDWARD G. SMITH
UNITED STATES DISTRICT JUDGE

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I N D E X

WITNESS FOR THE MOVANTS: **Page**

DR. SCOTT LEIBOWITZ

WITNESS FOR THE DEFENDANTS:

DR. BRETT ADAM COOPER

EXHIBITS	**ID:**	**EVD:**
ON BEHALF OF PLAINTIFFS:		
Exhibit 65	100	100
ON BEHALF OF INTERVENORS:		
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THE CLERK: All rise. The United States District Court is now in session, the Honorable Edward G. Smith presiding.

THE COURT: Good morning. You may be seated.

IN UNISON: Good morning, Your Honor.

THE COURT: The Court is called to order. All parties previously present, for the most part, are once again present. The court is convened today to continue with the cross-examination of the Intervenor's expert in this case. And this is going to be done from -- is it Illinois?

UNIDENTIFIED SPEAKER: Columbus, Your Honor.

THE COURT: Columbus.

MR. LEIBOWITZ: Columbus.

THE COURT: Ohio, okay. And I believe we're prepared to proceed; is that correct?

MR. McCALEB: Yes, Your Honor.

THE COURT: Very well. And this is the continuation of the cross-examination.

Counselor, you may proceed, sir.

MR. McCALEB: Thank you, Your Honor.

///

DR. SCOTT LEIBOWITZ,

a witness, having been previously duly sworn, was examined and testified as follows via telephone:

DIRECT EXAMINATION

BY MR. McCALEB:

Q Good morning, Dr. Leibowitz.

A Good morning, Counsel.

Q And you'll remember me, Gary McCaleb, counsel for the Plaintiffs in this case. And can you hear me okay?

A Round three, yes.

Q -- Dr. Leibowitz? Can you hear me okay, Dr. Leibowitz?

A I hear you fine, yes.

Q Okay, good. Thank you, sir.

THE COURT: Let's see if we can -- can we turn the volume up on the witness.

MR. McCALEB: They're turning the audio up just a little bit here.

THE COURT: Okay. Let's see if that works better.

MR. McCALEB: Okay. Thank you, Your Honor. Is that a little too much or are we okay?

THE COURT: Sir?

BY McCALEB:

Q Okay. I'm going to open, Dr. Leibowitz, with just some of the definitions we discussed in your deposition. You'll recall that you explained at your deposition gender identity -- and I'm

quoting here -- quote, "would be one's personal sense of self as a particular gender, whether that be male or female, in most cases, or a combination thereof in select individuals."

Does that -- is that correct?

A It's from the deposition; that is correct, yes.

Q Thank you. And you defined sex at the deposition as, quote, "sex in a medical sense as being the anatomical and physiological processes that lead to or denote male and female, typically."

Is that correct?

A Correct. I believe that I stated more with that, but, yes.

Q Thank you. And then there's a bit of a longer definition for gender and that is -- quoting again from your deposition -- "Gender is a broader societal construct that really encompasses gender rule, which is now as society defines what male or female is within a certain cultural context. It also encompasses gender identity. So a person's personal sense of who they are as a particular gender, as well as gender expression, which is how someone may express their inner identity within the social construct."

And that's correct from your deposition also, isn't it?

A Correct.

Q Thank you. Dr. Leibowitz, do you take the position now that the standards of care for treating gender dysphoria are scientifically well-grounded; isn't that correct?

A Correct.
Q And at this time, you're strongly committed to gender alignment therapy as the correct approach to treating gender dysphoric adolescence, true?
A I've never heard the term "gender alignment therapy."
Q Gender affirmation therapy. I apologize.
A I've never used that term and never heard that in an evidence-based manner.
Q Then your understanding is the correct approach to treat gender dysphoria is to align the adolescent's body with their perceived gender; isn't that correct?
A I believe that gender dysphoria has multiple, as my deposition may have -- if you look back to the deposition -- may have multiple ways of going about treating it. Some pursue a social transition exclusively. Some pursue hormonal treatments. Some pursue surgical. Some pursue any combination thereof as there's a dimensionality to the degree of distress that one might experience.

So to exclusively state that aligning one's mind and anatomy through medical intervention would not be what I stated in my deposition.
Q But each of those treatments that you've identified -- let me rephrase that. Of those different approaches you just identified, none of those would be intended to align gender to sex, correct?

A Gender -- I think you mean gender identity, if I may presume.
Q Correct. And I should clarify we're speaking of the gender dysphoric patient. Nothing of the methodologies or approaches you described would be intended to align gender identity to that adolescent's sex, correct?
A As I testified, and also I believe in the deposition stated, that medical professional organizations have deemed that practice unethical.
Q And that's the position you accept and take today, correct?
A I take the position that I cannot change one's gender identity, whether they be gender dysphoric or not.
Q Okay, thank you. And you would say today that all -- or that position rests on sound and settled science?
A I believe that position rests on science. I don't describe sound and settled.
Q Okay. You testified in court previously when you were in here in Easton that you had worked with the nation's first gender identity multi-disciplinary clinic in the United States at Boston Children's Hospital, correct?
A Correct.
Q And it's correct that program initially was treating disorders of sexual development, but about 2007, the program expanded to include patients with concerns about gender identity, and thus, became the first major program in the United States to

focus on transgender children and adolescents, correct?
A Correct. Correct.
Q Thank you. So the first gender identity multi-disciplinary clinic in the United States focusing on adolescents is only about ten years old, correct?
A Yes. And now at this point in time, eight out of the top ten children's hospitals by *U.S. News & World Report* all have clinics that are similar to it.
Q But none of those clinics began before the Boston Children's Hospital, correct -- clinic?
A Actually -- so if I want to be precise, one of those clinics -- I should say two of those clinics -- two of those clinics had been treating patients before that. One of those clinics had its own -- been focusing in on one aspect, one discipline.

For example, the D.C. National Children's Medical Center, they had a psychological program only. They did not have a multi-disciplinary clinic.

And I believe the L.A. Children's Clinic were treating patients as well. But the formalized -- the formalization, if that's even a word, of a multi-disciplinary clinic, the first one to be formalized out of those top ten children's hospitals was Boston Children's Hospital. And it was in 2007.
Q Okay, thank you. So you were correct in your statement that was the first major multi-disciplinary clinic at Boston's Children's.

A Yes, to be precise, yes.
Q Okay, thank you. Precision generally helps.
And you've being seeing what you characterize as kids with gender identity issues since about 2008, correct?
A Correct. That's when I moved to Boston, yes.
Q And you would agree the concept of gender dysphoria is a very important, maybe even integral to your ability to address gender identity issues, correct?
A Could you restate that?
Q Sure. We've talked about gender dysphoria already, which is a disconnection -- and I'm not trying to be overly precise here -- but a disconnection between your perceived gender and your birth sex. And you would agree that that concept, that tension of gender dysphoria is a very important concept that you need to employ when you're addressing a child who has -- or, excuse me -- an adolescent with gender identity issues, correct?
A If -- if I'm understanding your correct -- your question correctly, I would say that -- I need to understand the sense in which the person has -- what their gender identity is in order to be able to make sure that they meet the clinical criteria for gender dysphoria. Is that -- is that okay?
Q Yes, I think so.
A And if you hear beeping in the background, I apologize. I have no way of turning off the sound to the browser. I tried. So I hope that's not a distraction.

Q Okay. I think we'll survive the occasional distraction. Technology is daunting to us all, I think.
A Yes.
Q You had previously testified here in Easton that gender dysphoria was added to the diagnostic and statistical manual, the DSM-5 probably around -- well, excuse me -- you testified around 2013 or 2012, correct?
A Correct.
Q And the DSM was what you characterized as a psychiatric manual for classification of disease, correct?
A For psychiatric visits, yes.
Q Yes. And you'd agree that when they made that change in terminology from the older gender identity disorder term to the current DSM-5 term of gender dysphoria, that there were some significant differences in the two concepts: the older GID versus gender dysphoria, correct?
A Yes. And it's important to note that the differences that changed are developmental in nature for the two sub-types.
Q And you also testified in court that the reason for the changed was -- and I'm quoting from the transcript here -- quote, "was a consensus among those who made those who were experts in the field, that the older gender identity disorder terminology didn't accurately constitute or capture what people were going through," correct?
A For children. Did I state that for adolescents as well?

Q Well, let's be precise and check real quick.
A Okay. I mean, technically, yes for both, but it depends on what you're referring to when you say identity -- capturing an identity disturbance. There's two important precise distinctions to make with the children and the adolescents, but I'll let you find it and clarify for me.
Q Well, the term you used was actually a little ambiguous. But what I'm really getting at is not so much whether it was driven toward children or adolescents. They changed the terminology across the board from gender identity to gender dysphoria, and that was really --
A Right.
Q -- based upon a strong consensus in the field that they needed to make that shift, correct?
MS. MAR: Mr. McCaleb, may I interrupt? Can you just point us to the page reference.
MR. McCALEB: Oh, forgive me. It's in the transcript 146, starting about line 12.
MS. MAR: Thank you.
MR. McCALEB: And the actual quote's at line 17.
THE WITNESS: Is this from the deposition, Counsel?
MR. McCALEB: This is from the hearing.
THE WITNESS: Oh, from the hearing, okay.
MR. McCALEB: And it's in your transcript at page 146.
THE WITNESS: Okay.

BY MR. McCALEB:
Q And again, I'm just looking to whether you feel that change or believe that change to be made on the basis of scientific consensus.
A You know, the people that were appointed to the task force to re-constitute or re-define the different chapters in the DSM, were picked by a very rigorous selection process. The members of that task force consisted of psychologists, psychiatrists. I believe -- I don't want to characterize anything. People who have been in the field for 30 years, approximately, who have been doing research for 30 years. As I mentioned, I'm not a researcher.

And it is -- according to that task force that this -- after a rigorous, you know, releasing the preliminary shift in the way they conceptualize diagnosis to the general APA audience. There was a period of online criticism. Then they went back. They made revisions. Determining -- you know, there were pilot studies, I believe, to make sure that this accurately captured the experience and the distress that an individual with gender dysphoria would go through.

So in my mind, if the APA has come up with this process by which to determine how its manual organizes the classification of psychiatric illness, scientifically, that is an extremely rigorous and valid perspective. So, yes.
Q But you're not willing to call that rigorous and valid

position a consensus; is that correct?
A Consensus among who?
Q Among the scientists.
A I don't think you hold that -- I don't believe you hold that consensus belief.
Q Well, I'm not a scientist, Doctor, so it's irrelevant to me.
A Okay.
Q Also, in the previous testimony, Doctor, when you were speaking as to the standards of care which came out of that process, you described that as a, quote, "medical consensus from which you could not deviate," isn't that true?
A You're referring to the WPATH standards of care?
Q Yeah -- well, you referred generally to standards of care. I took those to be the WPATH and also of an APA.
A Yes. Not deviate -- I don't think it's ethical to deviate from what people who are -- about 35 people. I misspoke, by the way, in the testimony. I said 30 people. There's about 37 people that were invited to that -- to author that. I don't think that it's up to me to deviate from what 37 experienced researchers and clinicians have come to the conclusion of after evaluating what they believe is the best evidence to support those standards.
Q So that does reflect a medical consensus from which you cannot deviate, correct?
A That does.

Q Thank you. At your deposition, I had asked you to define scientific consensus as, quote, "tightly and dispositively as you can."

Doctor, your reply was, and I quote, "I don't know that I can answer that question accurately. I think it's subjective scientific consensus, to my knowledge. So when I say what scientific consensus means to me, you might ask four other physicians and get four other answers."

Is that accurate as to what you testified in your deposition?

A That, and then I believe I continued on with additional information.

Q Yes. But that was a correct answer that I just read to you.

A That specific part of my answer is correct.

Q Thank you.

MS. MAR: Mr. McCaleb, I'll just ask again if you could point us to page references as you quote, that would be very helpful.

MR. McCALEB: Thank you, Ria. I will discipline myself. Again, I apologize. That was deposition page 22, picked up in line 10.

MS. MAR: Thank you.

BY MR. McCALEB:

Q And isn't it true you answered the question of whether scientific consensus is stable over time in your deposition,

page 123, line 16, by saying that research is evolving, clinical issues are evolving? Is that accurate?
A I'm sorry. I'm whipping up my deposition if you may give me --
Q Sure.
A I'm sorry, Counsel. Can you please point me to the line there again, please?
Q It is page 123 starting at line 16.
A 123. 120. Okay. Let's see. And you said line 16?
Q The question starts at line 16. Your answer was on line 91, "research is evolving, clinical issues are evolving."
A Yes.
Q Yeah.
A Yes. Yes, okay. So -- yes, I think that's scientific consensus. If a new discovery is made in medicine, if a new discovery is made in the psychological sciences, I believe that scientific consensus can change.
Q Thank you.
MR. McCALEB: And I apologize, Your Honor. My co-counsel just advised me you do not have a copy of the deposition. May he approach and provide a copy if you wish?
THE COURT: Certainly.
MR. McCALEB: Thank you, Your Honor. We're just handing a copy of the deposition to His Honor.
THE COURT: Thank you very much, sir.

MR. WENGER: Your Honor, if I may. I've got a copy of the hearing transcript as well from two weeks ago.

THE COURT: Very well. Thank you very much.

MR. McCALEB: And I apologize, Your Honor, but thank you for the --

THE COURT: That is no problem at all.

MR. McCALEB: -- opportunity.

THE COURT: You may continue, sir.

MR. McCALEB: Thank you.

BY MR. McCALEB:

Q And speaking of that evolution of research and clinical issues, certainly part of that would be major research projects help drive that evolution; is that a fair statement?

A Sure.

Q And one example of research in this field would be the study you previously mentioned in your deposition at page 28 that was pursued by a consortium of clinics. You described it funded by a multi-million grant from the National Institutes of Health. Do you recall that?

A Yes.

Q And that's a good example of research helping the evolution of science in this field, correct?

A That would be.

Q And you described that research as being, quote -- again at page 28 of your deposition starting about line 8 -- quote,

"First of its kind following youth adolescents only, not children, but adolescents from, you know, early adolescence into late adolescence, looking at the safety of the medical treatments that are offered," correct?

A Correct.

Q And the safety of medical treatments referred to there were referring to treatments for gender dysphoria, or approaches and methodologies to resolve gender dysphoria, correct?

A Correct. And by first of its kind, I meant the first multi-site study in the United States.

Q Thank you. And it's one year old, correct -- about one year old?

A I'm not a part of the study anymore, so I don't know how long it's been going on, to be honest. You know, I'm not sure.

Q In your deposition, you mentioned that Dr. Robert Garofalo's portion of that study was about a year old. Wouldn't have that been contemporaneous with the beginning of that? I believe he's the principle investigator.

A He's the principle investigator for his site, yes, according to my knowledge.

Q Okay. So at least in Chicago it's a year old.

A Correct.

Q Thank you. And your rule in this first-of-a-kind study on medical safety was, quote -- again, at deposition 28, 13 -- page 28, line 13 -- "Just a minor part of hearing about that and

weighing in on that," correct?
A Correct.
Q And is that first-of-its-kind study in the United States on medical safety of treating adolescent gender identity issues returned any results yet?
A This is a study that looks at pubertal suppression, so -- which has been studied across the ocean in Europe, safety has been studied there. So to answer your question, has there been any results from the United States multi-site study? No. Has there been results from Europe? Yes.
Q Right. So to make clear, the answer to my question was, no, no results from the United States' study?
A No, no.
Q By saying, you know -- you're agreeing that that's a correct statement; that they have no results from this NIH study yet in the United States?
A The NIH United States multi-site study, I have not seen results.
Q No publications either?
A I have not seen publications.
Q And, in fact, isn't it true that you are not, quote, "primarily a researcher," unquote, and you've never been a project investigator in the research domain, again --
A I am not, right. I don't, as an identity, describe myself as a researcher.

Q Okay. You describe your role in research as, quote, from page 27 of your deposition, line 18, "I've simply been one to weigh in on various issues in making sure that the psychiatry lens is taken into account," correct?
A Correct.
Q And at your deposition, you carefully characterize your research role as simply being -- excuse me, strike that question.
And isn't it true that for adolescents receiving cross-X hormones, side effects can range up to such serious complications as venous thromboembolism, which is a clotting of the blood for certain people on estrogen, correct? That's from the transcript at page 156, line 19.
A Let me just get to that.
Q Sure.
A Line 56 -- I mean --
Q Transcript page 156.
A Oh, transcripts.
Q And about line 19.
A Yes. Hold on. I have learned that I can actually --
Q Sure.
A -- plug the number and that it will jump straight to it.
Q No worries, take your time.
A What is the page number again?
Q 1-5-6 of the transcript.
A Oh. Oh, oh, oh, okay. It's two pages off when -- again,

the number in the PDF.
Q Oh, the page number should be in the upper right corner, I believe.
A Yeah. No, it is, yes. But in the PDF file, it just is two numbers off.
Okay. So, yes, I testified that that -- there could be a thromboembolism venous -- thromboembolism, yes, I did testify to that.
Q Correct, thank you. And yes or no, Dr. Leibowitz, would you consider some venous thromboembolisms to be a dangerous medical condition?
A Absolutely.
Q And when you were last on the witness stand here in Easton, Doctor, I had asked if you could provide a sound statistical probability for future risks to your patients, risks such as becoming suicidal or regretting pursuing gender affirmation, correct? I asked that question.
A I recall you asking that question.
Q And you were not able to provide that kind of statistical probability, correct?
A Correct.
Q And, Dr. Leibowitz, you believe that it is absolutely not -- and that's a quote from the transcript at page 160, line 2 -- you believe that it's quote, "Absolutely not," unquote permissible to, quote, "align a person's gender identity so as to change

their gender identity to be congruent with the sex assigned at birth," correct?
A Correct.
Q And you had stated that it is, quote, "considered unethical to do so," correct?
A Correct.
Q And to support that statement, you claim that there is no evidence that is even possible to change someone's gender identity to align with the sex they were assigned at birth, correct?
A Correct.
Q But at your deposition, you had testified that it would be unethical -- this is deposition page 53 starting at about line 9 with a question -- your deposition --
A Ah-ha.
Q -- you got a little camera malfunction, there we go.
A I know, I know. I'm trying to get the deposition back up.
Q Sure. Now, don't stress. Just get the deposition up and we'll march on.
A Yep, yep, yep. Okay, there we go. Let's see here. Now it looks too large.
Q And it was page 53 of the deposition.
A Page 53 of the deposition, yes. Not stressed, so thank you for the comforting words. Let's see. And you were saying that -- okay, I'm with you.

Q Okay. And there at the deposition, that portion of testimony, you testified that it would be unethical to attempt a randomized controlled study to compare alternatives to your preferred gender affirmation model, correct?
A Again, this is a model that you're putting words into my mouth, so I'm going to push back on you. I've never called anything a gender affirmation model. So please restate the question.
Q Okay. The process of aligning gender -- excuse me -- the process of aligning a person's sex to their perceived gender is what I'm referring to, and I use the shorthand gender affirmation. You are preferring gender identity rather than the natal sex in the course of your treatments, correct?
A I think you mean the reverse, if I'm correct. You're telling me --
Q I'm sorry, excuse me, Doc, you're right. You're aligning sex to gender, gender identity is the determinative factor that you are going to affirm rather than a person's natal sex?
A Gender identity is not an issue of being affirmed or not. Gender identity is something that we try to come to a conclusion as to how that person identifies. And I believe I also stated in my deposition that if it were a lasting impersistence, which -- and you asked, is it last -- is there a difference between that, I said, no. So a persistent identity, you know, whether I affirm someone's identity or not, their identity is what it is.

So the answer to your question is, I ascribe to the standards of care that describe gender identity as stable and cannot be changed and aligning one's sex anatomy as best as one can for as much as the distress that one has is the approach that these eight top ten children's hospitals all take and follow the standards of care, yes.

Q And just to clarify that you are testifying now consistently with your -- excuse me -- prior testimony in your deposition, the question at deposition was, "Have you had an instance" -- this is at line 9 -- "Have you had an instance where you've recommended the alternate approach of bringing the perceived gender more in line with the body, the anatomy."

We clarified it was someone -- we were talking about someone who's diagnosed with gender dysphoria.

A Uh-huh.

Q Yes. I responded yes --

A I am testifying that --

Q -- when you have a gender dysphoria situation, and your answer was, "That would be unethical, so, no."

A Yes.

Q So your position today is consistent with that statement in the deposition?

A I've not -- I have not changed any positions, and, yes, it's consistent.

Q Okay, thank you.

A Sure.
Q Dr. Leibowitz, at your deposition, you also told me that providing gender alignment treatments or processes was contingent upon you obtaining informed consent from the patient or the parents/guardians, correct? That was also on page 53 up at line 2 through 8.
A There's no such term as gender alignment therapy. There's standards of care practice evidence-based care in the approach to gender dysphoria. So restate the question, please?
Q Again, the question was from the deposition. "From your experience, the patients that you've assessed and concluded there's a degree of gender dysphoria, as I understand it, the standard care out of WPATH now" --
A Yes.
Q -- "is to recommend some course of treatment that will basically align the body with the perceived gender. Is that a fair layman's statement of the WPATH approach?"
And your answer was, quote, "Assuming consent can be obtained and in a minor that's dependent on parents," correct?
A Obtaining consent is correct, yes.
Q Thank you. And when you were here in Easton last time, I had asked you, transcript 191 of page -- line 1, asked you directly, quote, "Do you have a consent form that you use in your practice?" And your answer there was, "Absolutely."
Is that correct?

A That is correct.
Q But isn't it true your patients do not sign any forms specific to you that document informed consent was obtained?
A I'm confused by that.
Q Let's go back to the deposition then, page 51. I had asked you, "Do they actually then sign an informed consent" -- excuse me -- "Do they actually then sign an informed consent form with you for treatments you're recommending?"
A They are signing an informed consent in the endrocrine clinic with whom I work.
Q Within your work. But specific to you --
A With whom -- I said whom I work.
Q We went through a similar conversation there, and then down at line 23, I asked, "Do they sign any form specific to you for informed consent then?" At the top of page 52, line 1, your answer was, "For not specific with me, no; specifically with me, no."
Is that statement on the top of page 52 an accurate statement?
A It depends on what you're referring to. And so in reading that, I said for and then dot, dot, which I presume I was -- I was interpreting what you were stating as hormone interventions, correct, if that's what you're referring to?
Q I am referring to any informed consent form that basically says, I, the patient, have consulted with Dr. Leibowitz for a

gender dysphoria condition -- and I'm obviously summarizing here -- but has --

A Yes.

Q -- your name on it and the patient's name on it affirming that they have received full, proper, informed consent from you as a treating physician. Is there any such form with your name on it and the patient's name signed?

A No.

Q Thank you. So the only record that you have of you properly advising one of your adolescent patients would be what you referred to in the earlier evidentiary hearing that there are entries made by you or your staff into patient records, correct?

A Yes.

Q Thank you. And, Dr. Leibowitz, while you're currently 100 percent engaged in gender identity issues and have been since November 16, isn't it true that you're working more in education research because that's your academic area of interest?

A More? No.

Q If you'd refer to your deposition, page 28, line 15.

A Hold on.

Q And the answer to the question there was, quote, "Currently, I'm working more on education research because I think education's my area."

Is that a correct statement?

A More than I had been compared to my previous scholarly activities, but not more than clinically.
Q And your clinical workload right now is about 55 percent, if I remember correctly, about half?
A A little over, yes.
Q Okay, thank you. Turning back to your interest -- your academic interest in education, you went on at page 28 to say that you were developing surveys. You're presently involved in developing surveys for providers, some providers, to compare providers who say they have worked with this population next to providers who say they have worked with this population -- referring, I believe, to a patient population -- to see where some of the gaps in knowledge may lie. That was a correct statement in your deposition also, right?
A It is, yes.
Q Thank you. And in addition to working on surveys and your roughly half-time clinical workload, you also devote a portion of your work to administrative work, as well as teaching and curriculum work?
A Correct. But we all know that in actuality, when you say -- that's how my salary is constructed, Counsel. But we all know that in the field of medicine that one plus one plus one does not equal three; it equals five.
So in all honesty, if you say -- if you lay out the percentages according to what my contract states, you know, yes,

55 percent of my salary is based on clinical care. In actuality, I tend to be one of those individuals working 80-hour weeks, seeing patients far more than what is expected of me, doing work on the weekends. Pretty much my entire life is rather consumed by my work. And so clinically, I'm working far more than what would be indicated in a contract or what I specify specifically.

Q Okay. Well, we're fortunately not looking to who signs your paychecks or anything in this inquiry, so -- and certainly our professions probably share the 80-hour weeks upon occasion. I think our counsel across the board would probably agree.

A We all probably could use a vacation right now.

Q And then looking back at Lurie Children's Hospital in Chicago, you also were not a full-time clinician at Lurie, correct?

A I was an 80 percent clinician, so, yes. I mean, over the -- if you -- if I may be precise again, in the interest of precision, I've calculated the amount of hours I've spent direct face-to-face with kids related to gender identity issues. It is, at best, minimum -- minimum, this is a -- 4,000 hours in my career have been spent direct face-to-face on gender identity issues with youth over the last nine'ish years. And that's a -- that's an underestimation. I was generous about no-shows and vacation time.

Q And when you made that calculation, did you keep notes and records from what you drew that calculation, or is that --

A I absolutely -- first of all, I would be -- I would invite you to subpoena every bill I've submitted to every insurance record with a diagnosis. I think that would violate HIPAA, and I'm not sure you'd be able to do, but I'm testifying under oath today, and I am stating this with absolute certainty that I have not seen kids for less than 4,000 hours in my career, and related to clinical work direct face-to-face care where I have managed across those 300 patients gender-related concerns.

Q Well, it's somewhat refreshing to be invited to subpoena documents, but --

A I mean, I don't know the legality of that, so...

Q Yeah. So clarify then, you testified 4,000 hours over -- slightly over -- or somewhat over nine years and approximately 300 patients, correct?

A Correct.

Q Thank you. So that would include the time you spent at Lurie Clinic at Boston Children's Hospital, correct?

A Indeed.

Q And, Dr. Leibowitz, earlier in this hearing, you had discussed the shift in the DSM-5. I mentioned this earlier where they went from the gender identity disorder nomenclature about five years ago and replaced it with new and different category of gender dysphoria, correct?

A Correct.

Q And we asked you when you were here at Easton last -- this

is transcript 145 at page (sic) 24 -- asked you, "Why did the classification change"? And you responded that at that time, you didn't fully understand why the nomenclature was used because five years ago, you were not an expert; is that correct?
A Let me scroll up to the point that you're referring.
Q Sure. Page 145 of the court transcript, lines 1 through 3.
A 145. Okay. "It refers to clinical distress that one experiences when their birth assign-assigned sex and their gender."

When you refer to that -- I'm not seeing what you're referring to.
Q Should be -- unless I have a typo, page 145 of the transcript.
A Line?
Q First line, I believe, should be the answer.
A Can you rephrase --

MS. MAR: When you say transcript, I believe you're referring to the hearing transcript?

MR. McCALEB: I'm sorry, the hearing transcript, yes.

THE WITNESS: I'm on the hearing transcript.

BY MR. McCALEB:
Q It's the top of page 146, I'm sorry.
A Okay. I see. "So I was not on the committee. I would say that I was not someone -- I would agree that I was not an expert, perhaps, five years ago." Correct, correct.

Q Okay, thank you. And I apologize for misleading you to the wrong page number there.
A Oh, that's okay.
Q And, Dr. Leibowitz, in your deposition, you testified that you followed the ethical principle of do no harm; isn't that correct?
A Indeed.
Q But when I asked you in court last time to give a statistical probability regarding whether your gender dysphoria patients might eventually be harmed by you following the standards of care with your recommendations, you couldn't answer that question and provide a statistical probability, could you?
A In psychiatry, okay, maybe this needs some context here, Counsel, there is a balance between not just do no harm, which is non-maleficence, but also beneficence, okay. And I did testify in court that I, when encountering a child or encountering an adolescent, and faced with split decisions that I need to make, and at that moment in time, it is reasonable, okay, after having done a full bio-psycho social assessment that includes understanding the family, various factors involved in the patient's personality and temperament to understand what is the advantage and disadvantage of pursuing an intervention, and what is the advantage and disadvantage of not pursuing an intervention. That is what I testified.
And so to quantify an unknown risk, okay, of a certain

-- a certain intervention, you're asking a psychiatrist to provide a quantifiable answer that is not quantifiable. So --

Q And --

A -- the answer is no, I cannot quantify harm, but I can certainly assure you that I follow practice that are, according to the American Academy of Child and Adolescent Psychiatry's Code of Ethics.

Q And to be clear then, there is no published peer review research that would help you quantify the risks to your patients, correct?

A That is not true because if you look at the WPATH standards of care, they talk about the various levels of potential risk that one may encounter with certain interventions.

And so for example, you brought up thromboembolism -- or I brought up thromboembolism. You referred to it again today. And one can say there's a risk for that, but the context of that risk is that it's certainly much higher if occasion to smoking, for example. So it is my job then to work with the endocrinologist and the patient in the family and say, to what degree is it ethical to provide this hormone if this patient is smoking? Are we going to do a cotinine test on them, which sort of detects nicotine derivatives in the urine. And if that cotinine test comes back positive, then are we going to withhold that treatment because of this risk.

So quantifiable, can I saw 3 times higher risk, 4 times

higher, 7.8 times higher? There's so many factors involved in every human situation that it would be absolutely impossible to quantify a risk in generally when there's individual factors involved in the care of each child, adolescent, and family.

Q So to make sure that you're consistent with your prior testimony --

A Yes.

Q -- the question that was before you on the transcript -- court transcript, page 199, was, ” What's the probability that your treatments might eventually cause harm to some of your patients?"

And your answer was directly, " I cannot answer that question," period.

Are you changing that testimony today?

A The answer -- no, I don't think that what I said changed that.

Q Okay, thank you.

A You're welcome.

Q Following that question in the transcript, 205, you went on to -- or rather, you addressed some of what you just talked about, Doctor, and that was that you trusted the organization setting the standards of care to have reviewed the literature and basically established ethical thresholds for you to follow; is that correct? You're relying --

A Yes.

Q -- on the organizations? Sorry, I talked over you there.
A Absolutely. I -- I -- and it's not just that I rely on an organization. I rely on the organization and the fact that other organizations that represent hundreds of thousands of physicians that ascribe to those practices and view those standards as ethical also, you know, find that to be ethical practice.

So I'm not just saying finding some organization and saying, oh, this is the organization I choose to listen to when everyone else doesn't. I'm finding that this is the organization that is supported by the rest of the medical organizations that have rigorous ethical standards.

If you may all excuse me and allow me to -- despite the quiet sign I put on my office door, there are people that are violating that, and they're going to just get me for less than 15 seconds, I would like to tell them to be quiet. Hold on.
Q Certainly. We'll give you a little break here.

MR. McCALEB: And I'm not watching the time. Do we need a break anyone or should we keep going?

THE WITNESS: Okay. Okay, I apologize. They got to be --

MR. McCALEB: I'm close to halfway through, plus or minus, so it's not horribly much longer.

MS. MAR: I think we can press on and then we'll take a break at the conclusion of your cross --

MR. McCALEB: Okay.
MS. MAR: -- if that works for --
THE WITNESS: Oh, that works for me.
THE COURT: That sounds fine to me.
MR. McCALEB: Okay.
THE WITNESS: I just -- I just didn't want people outside to not adhere to my quiet sign.
MR. McCALEB: That's -- if you succeed in doing that, Doc, share the secret with me. It doesn't work in my office either.
THE WITNESS: And it's a psychiatric practice, nonetheless, for kids, so...
MR. McCALEB: Maybe we can find some common ground in some areas.
THE WITNESS: I suspect we could in a lot of areas if we were able to talk, yes.
BY MR. McCALEB:
Q So to kind of a recap in a lot of what we've covered today, or up to this point, you would not offer to one of your gender dysphoric patients any treatment option that might be focused on conforming their gender identity to the birth sex, correct?
A As the professional organizations that I am a member of, neither myself nor the pretty much large majority, if not 90, close to 100 percent of the board-certified child psychiatrists I know would ascribe to that practice.

Q So that's a correct statement?
A Indeed it is.
Q Okay. And you maintain it's unethical to even conduct research that might look into alternative treatments that would align gender identity to birth sex, correct?
A I mean, when you propose a treatment -- and like I mentioned, I'm not primarily a researcher -- but when you propose a treatment, or a research study, for example, that randomizes certain individuals to one arm of an intervention and another, it has to go through an IRB, an institutional review board, Counsel, as I'm sure you're familiar.

I can pretty much assure you that given the multitude of evidence that does exist that might not be a randomized control trial -- and allow me to clarify -- there's different levels of evidence, and I hope the Court can understand that. There's cohort studies. There's case control studies. There's, you know, scientific consensus that is declared based on the overwhelming evidence and the fact that so many major mental health and medical organizations serving both youth and adults have come out against such practice that no IRB would even be willing to entertain a study that you are proposing to do.
Q But you'd agree, Doctor, setting aside for a moment the specific context and looking only at the strength of research that a randomized, controlled, blind study is one of the strongest forms of research; isn't that true?

A A randomized controls placebo double-blinded study is considered level one evidence. However, you know, our acquisition of knowledge -- fortunately, I've since -- since our testimony, have encountered, you know, a literature review of clinical judgment and that I would point to you to write down, you know, out of the institute for applied epistemology and medical methodology in Freiburg, Germany suggests that over reliance on a randomized control trial that -- especially when you can't do one -- over reliance on level one evidence really would reduce the need for a physician to make a decision.

If we had all -- if all knowledge was based and clinical judgment was based on level one evidence -- that's impossible to get, by the way -- then we could have robots treating patients. So there is -- you know, to weigh that against that type of framework, there's also tacit knowledge or implicit knowledge that comes with hours of experience. So for me, that would 4,000 hours of experience, at minimum. There's reflection in action that goes into clinical judgments. There's a lot more that goes into clinical judgment than just facts derived from studies that are impossible to obtain.

Q So for clarity, when you say level one, is it correct to think of that as the strongest level of evidence generically?

A I believe that according to whoever classifies evidence levels, level one is the strongest, yes.

Q And the German study that you just referenced, did that

speak at all to the exercise of clinical judgment -- let me rephrase that.

Does this German study speak at all to the exercise -- the reliability of the exercise of clinical judgment when there is no level one evidence to inform that judgment?

A In fact, it does. And it's not a study, I should say; it's a systematic literature review of clinical judgments. Gunver Kienle, M.D., she's an oncologist out of Freiburg, Germany. She's a senior researcher at the Institute for Applied Epistemology, the study of acquisition of knowledge, how that implicate -- affects clinical decision making. And it's a rather interesting study that I'd point you to.

Q Thank you.

A I'm sorry, paper, I should say.

Q Thank you.

A You're welcome.

Q And just briefly, you're certainly well versed in your expert declaration, paragraph 24, you state that "Restrictions on the ability of transgender youth to use gender identity appropriate facilities undermine my ability to help my patients because, in many cases, using a gender identity appropriate facility is an essential component of any appropriate treatment plan."

Did I read that correctly from your declaration?

A I just read it verbatim with you, yes.

Q Thank you. But when I asked you here in court in Easton last time if you could cite any peer reviewed published science journal articles documenting error rates, the claim that you make there that being admitted to privacy facilities such as locker rooms and restrooms of the opposite sex as a gender affirmation treatment, you were unable to provide any statistical data on that, correct?

A Again, not a term I'm familiar with, gender affirmation treatment. But what I can say about peer reviewed control trial studies on the effect of how bathrooms affect individuals with gender dysphoria, or individuals without gender dysphoria being exposed to various body types, the answer would be there's no peer review controlled studies of either type looking at the stress of a non-transgender person's reaction or traumatic reaction to seeing different bodies.

So the answer across the board would be there's no peer reviewed research in that area.

Q And --

A I'm relying on my statement on my clinical experience.

Q I'm sorry, I didn't quite catch that, Doc.

A So paragraph 24, restrictions on the ability of transgender youth to use gender identity appropriate facilities undermine my ability to help my patients, because in many cases -- not all, many -- using a gender identity appropriate facility's an essential component of any, not all, appropriate treatment

plans.

And I would say that, like I mentioned earlier, when we are evaluating youth with a gender identity concern, we are understanding the variation, the levels of distress that they may or may not experience as a result of not being able to align their sex anatomy with their gender identity and what part of social transition as well plays into that.

So the answer to the question is no peer review control studies, but 24 -- line 24 is based on the 4,000 of hours I've testified I've experienced clinic with those patients.

Q Thank you.

A You're welcome.

Q And for the sake of our dear court reporter, it helps to pace yourself just a little bit. I think we all fall in the habit of ramping up our velocity of speech, so...

A Yes. I wish I can see the court reporter, and my apologies to them.

Q No, that was just me kind of in vain on behalf of the court reporters across the country.

And then a declaration, paragraph 25, you asserted that the risks of not being able to use all of the clinically appropriate tools to manage gender dysphoria in children and adolescents are particularly brave, the consequences of that.

A Indeed.

Q Okay. And you discuss a little bit after that some issues about suicidal ideation and actual suicide rates there in your declaration. And after that discussion, which on deposition page 113, I asked you if suicidal ideation is necessarily caused by gender dysphoria. And there in your deposition -- excuse me -- had to clear my throat -- there in your deposition, you referred to Adkins' 2016 article, *Cell Farm and Suicidality in Children Referred for Gender Dysphoria*, correct?

A Uh-huh. Yes.

Q But you went on to state, quote, "There is no causal inference in that specific study," correct?

A Correct.

Q Okay.

A Correct.

Q Thank you. And then you turn to Dr. Ryan's article, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino, Lesbian, Gay and Bisexual Young Adults* and said, "It showed elevated suicidality for transgender youth and families that were, quote, rejecting of their transgender children as contrasted to accepting neutral parents."

And this comes out of the deposition at page 115, lines 2 to 18. But then you corrected yourself --

A (Indiscernible).

Q -- because you realize that survey actually did not address transgender youth; isn't that correct?

A Well, yes. I did correct myself. On the same group, by the way, Dr. Ryan, who is out of San Francisco State, did additional research based on the fact that gender non-conformity is linked with sexual orientation and people's perceived idea as to what someone's sexual orientation is, is largely connected to general non-conformity.

They also proved -- and I believe in the study that I'm about to say, which is also referenced in my declaration -- the Tumi study that young adult analyses -- and this is longitudinal research, by the way -- so young adults life outcomes connected to victimization in school settings as a result of perceived gender non-conformity by others. And whether they're gay, lesbian, bisexual, transgender, you know, again, it's all about the way that the child is perceived. I indicate that they found that victimization mediates poor psychosocial outcomes later on in life.

So correct, the family acceptance project study in pediatrics of 2009 confers this 8 to 9 times higher rate of suicide in LGB youth. But it is certainly reasonable to say that transgender youth are a far higher risk -- and I'm saying this anecdotally -- far higher risk for a more marginalized population than the non-transgender or gay, lesbian, bisexual of youth.

So I would be afraid to do a study almost, or to see the results of a study, if it were exclusively -- the same type

of study that were exclusively related to transgender youth.
Q So to be clear, Doc, when you speak anecdotally, are you still consistently -- speaking consistently with your prior statement that you cannot make causal inferences from the prior Adkin study or the longitudinal study you just mentioned?
A With statistical analysis, I cannot make causal inference.
Q Could not, correct.
A The statistical analysis, no.
Q Thank you. And also when you were speaking about the Ryan study, you clarified that there's a difference between being rejected by members of lawyer -- excuse me -- there's a difference between being rejected by members of one's own family as compared to social rejection at school, correct? That's in your deposition at page 115, line 20.
A Thank you. Hold on. Let me just get to that line. 115, line 20. It is -- family rejection and school, what's the word I use, school marginalization, are two different constructs.
Q Okay, thank you.
A But I did just quote to you the study about schools, so just for the record, I'm not sure that we got into the Tumi study in my deposition.
Q Okay, thank you.
A You're welcome.
Q And that was a longitudinal study you were just discussing that you just referred to, correct?

A It was a cohort study. It was retrospective, but it was certainly -- it was retrospective.
Q Also in your deposition, we discussed a little bit about the actuality of suicide. And you made the statement that it is quote, "impossible to estimate that, an actual suicide rate of transgender people." Deposition 114 at lines 10 and 11. That's correct?
A I'm not there yet, but I -- that sounds like something I would definitely agree to. It is impossible to know the rate of suicide for transgender people. And contextualizing that, it's because there are many individuals, transgender people are largely a hidden population, as has been described, meaning, there may be a lot more transgender people in society than we even can estimate because of a lack of ability or feeling like they can come out.

So if we -- if someone's never come out or declared their transgender identity, how can we know the rates of suicide once they have completed suicide.
Q So if I remember my math, numerator -- denominator's the bottom number. You're basically the denominator for that statistic may be very variable, correct?
A And it could be larger than what is known, yes.
Q Turning a little bit to the diagnosis process, Doctor --
A Yes.
Q -- you discussed one of the important tools you use, a form

of survey called a, quote, "psychometric instrument," correct?
A Yes.
Q I confess I like that word. So when I asked you to explain more about the psychometric instruments that you use to diagnosis gender dysphoria, you said that there were older and newer measures, and that the newer measures assessing broader categories were, in your opinion, better measures. And that's from your deposition at 36 -- page 36, starting about line 3.
A Yes.
Q Okay. But then you went on to say, in respect to those newer and better measures, they have not been -- quote, "They've not been scientifically validated yet, but are in the process of doing so."

Is that accurate, page 36, lines 9 and 10?

A We're a field in evolution, yes, correct.
Q Okay. And one of the approaches you use to diagnosis gender dysphoria is having your patient pursue some social transition; is that correct?
A Again, this is -- comes back to my thought about for the individual, okay, we're weighing the pros and cons of an intervention, or the pros or cons of withholding an intervention, and sitting together and collaboratively deciding what is the risk benefit of that.

So I don't just say, you need to socially transition. That's not how mental health treatment would work. If a kid, or

a child, I should say, or an adolescent comes to me and says, Doc, I'm experiencing this issue, my job is to say, well, okay, what are your -- let's talk about this. And what is the advantage of what you're thinking you want to do and have you thought through the hypothetical risks, and gathering a sense of -- a level of the sophistication behind which they make an answer. Similarly, asking them, well, what would be the detriment to doing so. Similarly, what would be the benefit to not doing so. What would be the detriment to not doing so?

And then it's a complex process for an individual. And so, yes, as a result of that process -- that iterative process, socially transitioning, and perhaps in increments. First, starting at home as my deposition indicated, first starting on vacation, perhaps. These are aspects that we come to the conclusion will help us actually better understand whether or not this is something that is persistent or lasting, to use the words earlier in the deposition.

Q Okay. So there's a --

A Does that help --

Q I'm sorry, I spoke over you.

A No, I asked if that helps clarify the stance or the --

Q Yes, and I think it answers what was intended to be a fairly simple question, that when you go through your analysis and are working with a patient, one of the methodologies you would look at using to help either diagnose or resolve gender

dysphoria would be some forms of social transition, correct?
A Correct. If -- let's pretend that a kid, or a child, or adolescent -- sorry, I tend to use the word "kid" and have learned that that's not the most professional term to use -- an adolescent were to go on vacation. They feel a certain way. They go on vacation. They're out of their environment. They proceed with what we would consider to be a social transition experiment, per se.

In my opinion, that is a far less invasive option than pursuing something that would be incrementally more irreversible, okay. And then they come back and they say, that actually was not the best way of addressing my distress. We sit. We process. We evaluate. We understand why. We understand why not. What were the factors? Are there temperament factors? Personality factors. Family factors. A lot of factors.

And so in certain situations, that type of intervention could lead one to feeling better about oneself and more willing and more able to pursue this further. And in other situations, it would lead that person to feeling, you know, perhaps this is something that I am purely just not ready for.
Q Okay. And among the various aspects of gender -- excuse me -- social transition, that include using the restrooms, locker rooms, similar privacy facilities of the opposite sex, correct?
A Correct.

Q Thank you. And, Dr. Leibowitz, I asked you at the deposition for kind of your historical understanding -- this is at page 92 of your depo -- asked you for your understanding of why we really have sex separated facilities, setting aside the transgender question, and you responded that you believed it to be prevent two people of opposite sexes from engaging in sexual behavior. That's your deposition 92, page about -- or, excuse me -- lines 10 through 14; is that correct?

A That is correct, but that was a presumption since I'm not a (indiscernible).

Q Correct. And as you know alleged as -- is alleged in this lawsuit, the social transition treatment process may include -- strike that. I mis-framed that question coming in here.

The practical effect of a social transition process, which includes access in the opposite sex facility, means that you would have a student who, for example, in this case, as it's alleged, is female by birth who still has the natural anatomy of a female, but may be strongly identified as a male. Isn't that correct?

A I apologize, Counsel. If you could just repeat that for me, that -- thank you.

Q I think I probably should repeat it for you.

A Yes.

Q The model we're looking at of social transition --

A Yes.

Q -- could lead us the point that we have in this case where Joel Doe has testified he saw a biological female in the boys' locker room, it would be possible -- and I'm speaking more in a hypothetical context because we don't know, I think at this point in this case exactly what was behind that young lady's presence -- but it would be possible that she could have been there as part of a social transition process where she was still anatomically her birth sex, but was identifying as a male. Isn't that a correct perception?

A Okay. The pronoun used here is a little confusing to me, so I'm going to avoid pronouns at this point.

Q Okay.

A So my take on that would be, what I stated in my deposition is part of a social transition process may include an individual using a bathroom of a different sex designation, correct? That's what you're referring to. And that this could put one of those kids into that bathroom, saying the school. And you just asked if this was a hypothetical situation that could happen. I would say that in a hypothetical situation, yes.

Q Okay.

A In an actual situation -- in an actual situation though, those youth with gender dysphoria who are in this process of exploring their -- the degree to which a social transition may alleviate their -- that incongruence that characterizes gender dysphoria are typically, if not most, just not wanting to go

into any bathroom of any gender, typically. And again, not all, but are typically not because they don't feel comfortable.

I mean, you heard Mr. DeStefano's testimony that I was able to read, and unfortunately, didn't get to hear in person, where he went into the female bathroom, perhaps long before he had transitioned -- I might be getting the facts wrong on the sequence -- and felt completely uncomfortable because he was told you cannot be in this bathroom. The females were uncomfortable with his being in that bathroom, and he was -- had genitals, I presume, I haven't done an x-ray on them, but that he had genitals of the female sex.

So a kid like that who's extremely resilient chose to use the nurse's bathroom to not make problems. And so I would find that a large degree of these youth who are in the process of transitioning socially, perhaps they actually themselves feel uncomfortable in a large setting -- a large overwhelming setting going into the bathroom until, for example, like Aidan DeStefano when a policy was enacted, I believe he testified, that finally he felt whole.

And so your hypothetical situation is accurate and that's what I stated hypothetically is accurate. But in actual clinical practice, youth are choosing to use private facilities because they have not yet begin to feel comfortable living fully as the gender -- in the gender role of their gender identity.

And I hope the court reporter got all that.

Q She's smiling.
A I apologize.
Q I trust she did.
A Okay.
Q And just to clarify on your use -- excuse me -- on social transition being in part a diagnostic tool as well as a remedial tool --
A Yes.
Q -- the purpose in that from your declaration, paragraph 14, is to determine whether and the extent to which living in the affirmed gender improves the psychological and emotional functioning of the individual.
A Yes.
Q Is that correct?
A Yes.
Q Thank you. And you also discussed in your declaration -- excuse me, your deposition -- a little bit about the timeline of diagnosis on page 41, starting about line 22, and this actually goes on to the next page. But the gist of that was you told me in your deposition it could take about half a year to say that a patient was not gender dysphoric, but it could take longer to confirm or say that the patient was gender dysphoria; is that correct?
A There's a variability of time in which it can take, yes, to appropriately diagnosis whether someone meets the criteria for

gender dysphoria.
Q Okay. And you also testified, page 98 of your deposition, that you had had a very few gender dysphoric patients over the years who had stopped going to public schools; is that correct?
A It is.
Q And you also testified at deposition page 102, lines 14 through 19, that none of those students left their schools solely because of an issue over access to school privacy facilities. Isn't that correct?
A May you point me again to that page?
Q Sure. Page 102, the deposition --
A Yeah.
Q -- lines 14, and the answer specifically is on lines 18 and 19. No student said this solely explains my reason to leave.
A No student -- and my answer today -- no student said this was the sole reason to leave.
Q Correct, thank you. And per your testimony here in court, Dr. Leibowitz, you aspire to providing, quote, "evidence-based medicine," do you not?
A I do, yes.
Q Thank you. But isn't it true that there is only limited evidence to support a clinician who is trying to determine if and when social transition is appropriate for a particular patient? This is from your transcript, page 154, starting at line 16. I had asked, "How does a clinician determine if and

when social transition is appropriate treatment for a particular patient?"

And you explained a bit about your role of clinician. And at the end of that discussion on lines 21 to 23, you said, "We want to provide evidence-based medicine, and this is an area that let's acknowledge that there is some limited evidence when it comes to that."

Is that a correct statement?

A That is a correct statement as there's limited evidence in many conditions, not exclusive to gender dysphoria, that child psychiatrists are faced to weigh complex ethical decisions, risks, benefits across the board.

Q But it is true in respect to gender dysphoria and the social transition, that there is limited evidence?

A In -- in the -- one must determine the level of evidence that exists. Whether it's limited, that's obviously there's very -- there's limited level one evidence, we can say, but there's actually plenty of level two evidence. So by limited evidence, I should clarify. Limited evidence, according to your definition of the standard, which is the randomized control of placebo, you know, longitudinal studies that are perhaps impossible to get. So given that, the next best step for a physician following the Code of Ethics, according to the American Academy of Child Psychiatry, is to do no harm and to -- so do good. Beneficence is equally as important as non-maleficence.

So, yes, to isolate that statement and not contextualize it does a disservice to child psychiatrists across the country providing good care in good conscience, in good faith.

Q Well, I think the context was set by the question. I think the answer speaks for itself.

A Thank you.

Q And it's -- you also discussed a little bit the interesting situation where you have a patient who may be gender dysphoric, you -- I'm sorry, this goes to your deposition on page 74 starting with the second line and continuing to the fifth line on the top of the next page. So I was asking about the diagnostic component to social transition. And you responded that -- starting at about line 7, page 74, "Should I not be able to have a definitive conclusion in my mind as to whether or not this person meets the criteria for gender dysphoria, I would consider that person to be under a category that I made up, quite frankly, a gender dysphoria provisional category."

A Correct.

Q That's correct, okay.

A Yes.

Q And the gender dysphoria provisional patients are patients for whom you might use a social transition process as a way of clarifying whether or not they're really gender dysphoric?

A I mean, if you read the entire statement thereafter, so --

and let me just sort of clarify what --
Q Let me try and maybe save you a long answer here, because I am trying to summarize a little bit and just clarify.
A Okay.
Q This is actually a fairly simple, straightforward question.
A Okay.
Q You've been doing an analysis. You put in this category you made up of gender dysphoria provisional, and as a good doctor, you want to get them out of that provisional category.
A Yes.
Q One of the tools you might use to do that, a useful tool could be social transition; is that correct?
A Aspects of social transition, correct.
Q Okay, thank you. So with that in mind, if you can try and put yourself in the mind of Joel Doe who testified that he saw an adolescent female disrobing near him in the locker room, as Joel Doe stood there that day, he would have no way of knowing if that person who appeared to be female was in actuality cisgendered boy; that is, a person who's gender identity and sex align, or that female appearing person could have been a transgender girl, or that female appearing person could have been provisionally gender dysphoric, and may eventually be found to be either cisgender or transgender. The point of that question is from Joel Dole's perspective, he would have no way of knowing if that person thought themselves to be cisgender,

transgender, or provisionally gender dysphoric; is that not true?
A It is complete speculation on my part to know what Joel Doe was thinking and educated on related to differences in sex anatomy and gender identity.
Q Would he have any objective way to know with that girl -- excuse me -- with that female-appearing person thought herself to be --
A I cannot --
Q -- unless someone told him?
A I cannot speculate what Joel Doe is aware of or what he can objectively know.
Q Is it possible -- is it possible that for a person, a patient who is provisionally gender dysphoric, that that person may ultimately identify as one of the non-binary genders?
A Anything is possible.
Q Okay, thank you. And turning to your deposition at page 75, we're discussing social transition again and the various aspects of it.
A Yes.
Q And on page 75, line 7 to 9, you summarize -- again, there's very limited science and standards on the nuance of these approaches, referring to social transition; isn't that correct?
A Indeed. Indeed.

Q Okay. And, Doctor, earlier you told us that many transgender patients are particularly modest about exposing themselves in the course of using facilities like locker rooms and restrooms?
A I find that to be the case.
Q Yes. And you also testified in your deposition at page 101 beginning at line 12 was the question and you helpfully restated my question for me down at line 20. But the summary of that was restating your question, this was your answer to my question, and it had to do with whether that modesty concern would be resolved by an individual facility, you said, "Restating your question, would a private locker room help a transgender, or a transgender individual, or for any individual that feels uncomfortable in the setting of bodies being revealed, the choice to use a privacy -- a private area for a facility to me makes sense."
That was your testimony at deposition.
A Okay.
Q Is it not correct then that an individual facility would fully protect the patient's concern about their personal modesty?
A As I said in the deposition, if a patient is uncomfortable using a particular sex-segregated facility and chooses as a result to use a separate facility, then I see that as certainly reasonable.
Q Okay, thank you. And isn't it true, Dr. Leibowitz, that

when you recommend social transition or -- I don't want to mischaracterize what you do here -- that when you're guiding one of your patients through a social transition process, that the only person that you are advocating for and medically treating is that individual patient, correct?

A Right. I can only advocate for the patients that sign a treatment contract with me and come to my clinic, yes.

Q So if you -- I'm sorry, were you starting to say something?

A No.

Q Okay. I just -- little (indiscernible) up there, my apologies.

So if you set aside what is an extremely rare situation, what's called a Tarasoff obligation where you have a patient who's actually expressing a desire to physically help -- hurt someone, excuse me -- setting that rare situation aside, isn't it true that you give absolutely no consideration to potential adverse impacts on other persons that might result from your patient accessing, for example, a multi-user locker room as part of their social transition?

A Humans are complex, and the reactions within which people can give to someone that they may or may not know about their anatomy can be exponential. It's impossible for me to quantify or tell you every possible single reaction that someone else might have to one of my patients.

So for me to be treating an endless amount of possible

reactions seems to be -- I would be working 24/7 to do that beyond a my 80-hour work week, and it would be seemingly like chasing -- a dog chasing its tail.

Q So to be clear on this, you would stand --

A Yes.

Q -- by your prior statement in your deposition that, quote, "When I'm providing care to an individual, the only person that I'm advocating for and medically treating is that individual," correct?

A Correct.

Q Okay.

MR. McCALEB: If I may, Your Honor, just consult briefly with co-counsel and maybe we can turn it over or take a break, I think. But let me see if we want to toss in a couple more questions here.

THE COURT: Certainly.

(Pause)

MR. McCALEB: I guess we're up for a break. We have no further questions on direct, Your Honor.

THE COURT: Very well.

MR. McCALEB: Cross, excuse me.

THE COURT: We are going to stand in recess for ten minutes.

THE CLERK: All rise.

(Break was taken from 11:08 a.m. to 11:23 a.m.)

THE CLERK: All rise.

THE COURT: You may be seated, thank you.

The court is called to order. All parties previously present are again present. The witness continues to visit us on the screen from what we'll term the witness stand.

And first I'll ask Mr. Brown, does the School District have any questions of Dr. Leibowitz?

MR. BROWN: No, we do not, Your Honor.

THE COURT: Very well.

And is Attorney Mar is going to do the questioning or Attorney Roper?

MS. MAR: I will, Your Honor, thank you.

THE COURT: Very well. Counsel, you may proceed.

CROSS-EXAMINATION

BY MS. MAR:

Q Dr. Leibowitz, you were asked a number of questions on cross-examination about what Mr. McCaleb has called treatment methods. So I'd like to ask you some questions about those methods used at your clinic. Can you hear me, by the way?

A No. You said about what treatment methods?

Q I'm going to try moving the microphone closer. Does that help?

A Yes, thank you.

Q You were asked on cross-examination about your treatment methods, quote/unquote, so I'd like to ask you about the

treatment methods used at your clinic. Are the treatment methods used at your clinic consistent with accepted standards?
A They are.
Q Where are those standards documented?
A In the WPATH Standards of Care, as well as the Endocrine Society Guidelines and other practice guidelines from other, you know, that are relevant for discipline.
Q All right. Now, for those in the courtroom, I'm going to hand out copies of what's been marked Exhibit I-19 for identification. And, Dr. Leibowitz, this is the document that I had emailed you and asked you to have available for just this moment. So I will hand these out.
A I have it handy.
MS. MAR: May I approach?
THE COURT: Certainly, Counselor.
Thank you very much.
BY MS. MAR:
Q Dr. Leibowitz, do you recognize this document?
A Yes.
Q What is it?
A It is the Standards of Care for the *Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th edition.
Q And I'll just remind you, as Mr. McCaleb did, to speak slowly so that the court reporter can hopefully capture everything you have to tell us.

And is Exhibit I-19 what we have all been referring to as the WPATH Standards of Care?
A Yes.
Q Are the Standards of Care accepted as the appropriate protocols for any major medical or mental health professional organizations?
A Yes.
Q Can you tell me which organizations?
A I can tell you that the American Academy of Child and Adolescent Psychiatry sites the Standards of Care in its own practice parameter. I believe that the American Medical Association, the American Psychology Association, the American Psychiatric Association, the American College of Gynecology and Obstetrics, the American Psychoanalytic -- I don't know the acronym -- but the Psychoanalytic Group, the Endocrine Society, the American Academy of Pediatrics. I -- I am sure there's a social work group. There's the American Family Association. AFTA has indicated it adheres to these standards. Basically, groups constituting memberships that in its entirety, as I testified, are more than hundreds of thousands of providers.
Q And among those groups you listed included some professional pediatric groups. The American Academy of Pediatrics, as well as the American Academy of Child and Adolescent Psychiatrists, right?
A Yes.

Q Now, how widely used are the Standards of Care for the treatment of adolescence with gender dysphoria?
A Well, often youth that present in treatment to a psychiatrist are not necessarily -- the provider, I should say, is not necessarily familiar with the details of the standards of care. So many of those providers will either refer those youth to a clinic that specializes and deal with these issues, or across the country, they will email me.

At least for the child psychiatrists, I am up at 5:30 in the morning usually catching up on emails, getting emails from providers in Montana, in New Mexico, in Arizona, Alabama, Mississippi. I've gotten emails. I've spoken at the Arkansas Child Psychiatry spring retreat. I've spoken at the North Carolina Child Psychiatry retreat.

Essentially, psychiatrists are all slowly becoming educated on these issues. And in my capacity as chairman of the sexual orientation gender identity issues committee for ACAP, one of our missions is to be able to provide child -- the profession of child psychiatry with what the current and most up-to-date standards are.

So how widely are they used? I try -- my goal is to make myself actually less relevant so that I don't have to be the -- one of the few individuals in the country so that is so well versed in these standards. It's difficult carrying that weight. I think that all child psychiatrists should be as well

versed in the standards as I am.
Q And for those providers who are current with the up-to-date Standards of Care --
A Yes.
Q -- how common is it for those providers to treat adolescents with gender dysphoria according to the Standards of Care?
A Meaning, do the providers adhere to the standards?
Q Correct.
A Well, I'll be honest with you, Counsel, I haven't pulled all the providers that claim to treat all of these youth. So according to my experience encountering clinicians at these trainings that I am a part of faculty-wise, I can only hope that they -- that they people that are educated in the Standards of Care adhere to them. So it's common for those that are educated in the Standards of Care to be adhering to them.
Q Now, do those protocols and the Standards of Care for the treatment of adolescence with gender dysphoria, can they --
A Yes.
Q -- include hormone therapy?
A Yes.
Q Can they include puberty suppression?
A Yes.
Q So that means that for an adolescent with gender dysphoria who's treated -- according to the Standards of Care, that

adolescent may have received puberty suppression, hormone therapy, or perhaps both; is that correct?
A They may have, yes. You saw an adolescent in court receiving that treatment, yes.
Q And for an adolescent who has received those treatments, let's take the example of an adolescent transgender boy who's been treated with puberty suppression and hormone therapy.
A Okay.
Q How does the appearance of that patient compare to the appearance of a boy who was assigned the sex male at birth?
A Assuming that they are not revealing genitalia, virtually indistinguishable.
Q And what about if the transgender boy had also received a double mastectomy, or I think what you described on direct examination as top surgery, comparing the appearance of that boy, perhaps with his shirt off and nothing but shorts on, how would his appearance compare to the appearance of a boy who was assigned the sex male at birth?
A My apologies, Counsel. I thought you were referring in the first example of those who had also had the mastectomy. So, yes, virtually indistinguishable would be the answer --
Q Virtually --
A -- with the shirt off, yes.
Q Virtually indistinguishable with the shirt off?
A Correct. If not completely indistinguishable.

Q If not completely indistinguishable.
A Yeah.
Q Now, is it unusual to fine transgender students who have undergone those kinds of treatments that you've described at high schools across the country?
A There are many transgender students with these treatments at high school across the United States.
Q Now, you were asked many questions on cross-examination about the role that informed consent should play and the --
A Yes.
Q -- treatment for adolescents with gender dysphoria.
A Yes.
Q Do the Standards of Care address the need to obtain informed consent before beginning hormone therapy or other physical interventions?
A They do.
Q And do the Standards of Care call for parental consent before beginning hormone therapy or other physical interventions when treating adolescents who are under age 18?
A They do.
Q You were also asked a series of questions on cross-examination about whether there are randomized controlled studies that support the Standards of Care. Now, in your experience as a board-certified psychiatrist, are you familiar with any courses of treatment that are generally accepted in the

field of psychiatry even though there are no randomized controlled studies?
A Indeed there -- indeed I am.
Q Can you give us an example?
A Many of the psychotropic medications we use, for example, have not been put through a randomized control double line procedure. Even the approach to using psychiatric medication within a pregnant woman, for example, or a pregnant minor, we don't have randomized control trials.

I would be speaking -- I don't want to swear by this, so -- but I can say that within autism spectrum patients, there are treatments that we do not have randomized control trials. Again, you know, withholding say, an applied behavioral treatment to -- I forgot -- there's something called ABA, applied behavioral analytics, that's a treatment that exists to put kids through one arm and then withhold it from another arm to see how they do when we have some evidence sufficient enough to know that this is helpful would be unethical.

So there's -- throughout the field of mental health, plenty of aspects of emotional health and psychological health and psychiatric disorders that don't have the level one evidence that one would hope one could have as the gold standard, yes.
Q Now, you gave us the example of using psychiatric medications in a pregnant woman or perhaps a pregnant minor as an example of course of treatment where there are no randomized

controlled studies. Why are there no randomized controlled studies in that situation?
A Because one has to apply the ethical principle of do no harm. And to withhold treatment from someone and put -- say, one were to put a pregnant woman through a course and put another pregnant woman -- another pregnant woman through a different course and randomize them, take, for example, a pregnant psychotic woman or a pregnant manic woman, you cannot just let that person be manic or psychotic. You have to do no harm. You have to protect that woman from her psychiatric disturbance. And so, therefore, it would unethical to allow a psychiatric disturbance to progress.
Q Now, you were also asked on cross-examination whether there are peer reviewed or randomized or published scientific articles, basically a variety of scientific articles documenting the need for adolescents with gender dysphoria to be able to use sex segregated facilities consistent with their gender identity.
A Yes.
Q Have you had experience working with patients like that, so adolescent patients who are being treated for gender dysphoria and who actually are able to use school facilities consistent with the gender identity?
A Correct.
Q And how did the ability to use those sex integrated facilities consistent with gender identity affect the wellbeing

of those patients?

A I think I mentioned when one's gender identity and sex anatomy is consistent with each other, we take for granted as individuals our -- a simple basic right to use a restroom or a locker facility, which happens on average, what, three, four, or five times a day for a person.

Over the course of a life, for an individual who's using a sex segregated facility, hypothetically -- let's talk about hypothetically for an individual who meets criteria for gender dysphoria. They've been through this long process. We've explored all factors. We have made, you know, the best decisions to our knowledge that this is something that is appropriate treatment for them. That constant need to use the opposite sex segregated facility from their gender identity essentially is this burden that gets lifted for those kids the minute they are able to use the restroom that they feel most appropriately suits their identity.

And I think I read in the transcript in between his -- Aidan DeStefano was very clear that he felt that, yes, this final recognition of I am who I am. And I just don't think anyone could dispute the psychological benefit that he experienced as a result of that, if you just talk to them for five minutes.

I mean, I haven't personally, but I have plenty of other situations where I've had youth come in my office and I've

said, how's it felt for you that first time that you've used that restroom. Some were a little wary about, oh, well, I was so nervous going into it because I didn't want anyone to know that I was born this way. But then I went in, I realized, nothing happened, and nobody even knew and we moved on. And now I just feel this sense of relief, this sense of emotional alignment, this sense of happiness.

Story after story like that is sufficient evidence, in my mind, that that is potentially for appropriate individuals a correct course of action for them.

Q Now, let's talk about the other end of the spectrum. Have you had experience with patients who were being treated for gender dysphoria who were not allowed to use school facilities consistent with their gender identity?

A Yes, I have.

Q And what were the consequences that you saw in those students' emotional wellbeing?

A As I mentioned to Counsel McCaleb and in my deposition and both here at the hearing, these are youth that are essentially leaving school. They are -- either they're holding it in all day and that is clearly not a healthy course of action that our pediatricians have indicated to me to not go to the bathroom. These are kids that just avoid going on to a sports team that they may perhaps feel comfortable purely because they know they don't want to have to use a different locker room if they're

forced to use a certain locker room. They might get home schooled. It only puts them into a situation where their life goes on delay.

Many families will opt to move to a new school district that they hear, you know, in quotes, is more respectful, has a policy that they perceive does not discriminate against them. And they blend into those schools. Later on -- some have blended into the school later on very easily, and others continue to be home schooled or don't pursue their GED, and then there's all sorts of debates between parents and kids that anyone in the courtroom who's appearing can tell you could be challenging over future aspirations, going to college.

Their lives are hampered. Their lives are hampered and not able to psychologically feel that society is accepting them for who they am. And I said it in the deposition. I said it last time, and I'm going to say it again, when someone forces or society forces an individual to use a restroom based on the sex that they were assigned at birth, operative word being "forced," that can erode their psychological wellbeing and it can reduce them to the presence of a genital.

Q I think you testified just now that being forced to use facilities that are not congruent with someone's gender identity, for an adolescent with gender dysphoria can erode their psychological wellbeing. What affect might that have on the psychological distress that that adolescent is experiencing,

which you testified is one of the criteria for being diagnosed with gender dysphoria in the first place?

A Again, you know, humans are complex. I will say this to both sides. Humans are complex. And I believe that for me to sit here and say that this automatically will lead to something would be not true.

What I will say is that it can exacerbate psychiatric illness. And there is plenty of level two evidence, cohort studies, case control studies, prospective studies that demonstrate that harm.

Q Now, you testified that obviously humans are complex, individuals are different. I'd like to ask you about one particular human, Aidan DeStefano.

A Okay.

Q And I believe you testified that you have not met him; is that right?

A I said one sentence to him as I was rushing out of the courtroom to catch my plane that got delayed because of the thunderstorm. I said, Nice to meet you, good luck on your -- you know, being in court, and that was the extent of the 5.8-second interaction I had with him.

Q But you have had the opportunity to review his testimony in this case?

A I read it. I read it about twice.

Q Since you've read his testimony, you know that Aidan

testified that if her were barred from using the boys' restrooms and the locker rooms, which he was able to use during his senior year at BASH, he would still be able to use the nurse's office. What's your reaction to that?

A So, you know, Aidan struck me a very resilient adolescent. He really for years just was comfortable using the type of facility that was single stalled or singular use restroom. I get the sense that Aidan's personality and psychological character structure is one that he wants to please others and not make rifts, not make waves. That was my overall impression of his testimony, which I think is great.

I would love to work with every kid who -- who every child similar to Aidan. Sadly, that's not the case as I -- you know, you mentioned humans are complex. Not all individuals have that ability to be able to deal with perceived othering or being marginalized in the way that Aidan does.

So for Aidan, that seemed to have been a choice that he made and worked out for him, and he has a lot of support, I believe, if I read correctly, in the transcript. For other youth, it's not so easy.

So everybody's got different psychiatric issues, predispositions to various psychological disorders. Various temperaments. We're very careful when we're approaching an individual to do a very comprehensive -- as I also mentioned, I error on the side of comprehensive. I get to know the families

and the youth that I'm working with. I am not just focused narrow-minded on their gender identity assertion.

So I think that that adheres to board certified psychiatric practice. I passed those boards. That's what we're required to do. And so different kids have different temperaments. Not everybody's going to react in the resilient way that Aidan did.

Q And you've anticipated my next question. So Aidan, as you testified, is someone who appeared to be very resilient. For someone who is not as resilient, for someone who is not been, as you described it, comfortable for years using a single-user facility, what are the possible consequences of being told that he can't use the restrooms and locker rooms that match his gender identity?

A Possible include any worsening of psychological distress, any worsening of psychiatric illness. Again, those kids are less resilient are more at risk, and for other factors as well.

So what's really interesting here is that the youth who are probably more resilient are those are the ones that could probably manage going into a locker room with confidence like Aidan. Yet, the kids who are really those who are just -- they don't want to have gender dysphoria. There's a lot of kids that have sat in my office and said, Doctor, I don't want to be dealing with this. I don't want to have to face these complex decisions. I just want to be recognized for the person that I

am.

And I am there to help understand, well, what is like for you to not be recognized in that way? Open-ended questions, not presumptuous in nature. I think that's the way we try to assess psychological distress here with these youth. And many will say it increases my anxiety, it increases my depression. Many of the parents will attest to that.

Many of the schoolteachers will send reports. You know, certain teachers have been actually strong advocates on behalf of their students despite policies that have led those students to not feel accepted. And I'll have discussions with teachers telling me, Doctor, you know, I'm concerned about this child, this adolescent, how can I help. What can I do?

So there's just endless amounts of outcomes, depending on endless amounts of constellation of symptoms that youth present with.

Q Now, you testified that some of those adolescents who are barred from using facilities consistent with their gender identity might be more at risk. And you testified those risks might include for some adolescents depression and anxiety. Do those risks also include a risk of suicide attempts?

A Youth who are marginalized, there's an association between victimization, marginalization, rejection with suicidal ideation and suicide attempts, yes. In my clinical experience, that is absolutely the case.

Q Now, I know you testified earlier that it's impossible to accurately capture the number of transgender people who commit suicide, because, of course, we don't know the full extent of who may or may not be transgender. But for the adolescents where we do know that they are transgender, are there any statistics available sort of quantifying that risk that adolescents with gender dysphoria may attempt suicide?

A I believe in one of the studies I've quoted, nearly half of trans kids, adolescents I should say, are at risk for suicidal ideation. And, you know, it's important to note that there's a lot of -- to understand the full picture, no study's perfect, so in certain data, yes, half. In others, for the younger kids, it's something like five times the amount, you know. They vary in the studies. And I think it depends on if you're looking at gender non-conforming children versus gender dysphoric children. Parsing out how many youth fall into which category is the task of the researcher.

So essentially way higher than the population that does not deal with the gender identity issue. It's certainly safe to say there's associations, yes.

Q Just to clarify, I think you testified that there are studies that show that nearly half of adolescents with gender dysphoria will attempt suicide. Did I hear that correctly?

A There is one study that I cited that attests to that. There's other studies that have higher rates that I am offhand

not recalling, but I could get you data.
Q And all of those --
A They're in my record.
Q And all of those studies show higher rates among this population than among adolescents generally?
A Correct.
MS. MAR: I have nothing further, Your Honor.
THE COURT: Thank you very much, Counselor.
Mr. McCaleb, do you have any recross?
MR. McCALEB: If I may, Your Honor, just one moment --
THE COURT: Certainly, sir.
MR. McCALEB: -- for co-counsel.
(Pause)
MR. McCALEB: I do have just one question on recross, Your Honor.
THE COURT: Certainly, sir.

RECROSS-EXAMINATION

BY MR. McCALEB:
Q Dr. Leibowitz, your attorney gave you a copy of the WPATH guidelines.
A Yes.
Q If you'd refer to page 16 there, there's a statement about the middle of the page that is a statement we've heard from you several times today to the effect that -- well, I'll read it. "Treatment aimed at trying to change a person's gender identity

and expression to become more congruent with sex assigned at birth has been attempted in the past without success." And it concludes at the end of that paragraph, "Such treatment is no longer considered ethical."

A Thank you for pointing that out.

Q Yes. There are four authorities cited: Gelder and Marks, 1969; Greenson, 1964; Cohen-Kettenis and Kuiper, 1984; and Pauly 1965.

A Yes.

Q Have you reviewed any of those authorities?

A I know Peggy Cohen-Kettenis extremely well. I'm presenting with her next month at the Pediatric International Immigrant Society Guidelines and have talked to her in depth. So I've talked to one of those authors. She's a leading international authority figure on this issue. Have I read that specific paper? It's been time. It's been some time.

Q Do you recall when you read it?

A No.

Q Did you have an English translation of the article to read?

A I don't recall.

Q Do you read Dutch?

A I would only be able to read an article in English.

Q Okay, thank you. The article is in Dutch, Doctor, in case you're curious.

A Thank you. Thank you.

Q Okay.

MR. McCALEB: I have no further questions then on cross, Your Honor.

THE COURT: And nothing further from the Intervenor?

MS. MAR: I have no further questions, Your Honor. I think there are still two housekeeping matters relating to this witness. The first is --

THE COURT: And I have just a few questions for him. So let me just ask.

Doctor, if you don't mind, I just have a few questions because you've opened up a whole area that could make this even more complicated.

THE WITNESS: Okay.

EXAMINATION

BY THE COURT:

Q Could you first -- sir, could you explain to me the difference between transsexual, transgender, and gender non-conforming?

A Okay. Are you comfortable if I were to have a different courtroom view? Right now I feel like the Wizard of Oz, or is that okay?

Q Well, I wouldn't mind it except I don't know how to do it.

A Oh, okay. Well, just because I like to talk to someone and look at them --

Q Understood.

A -- and be -- I want to be respectful to you.
Q Oh, certainly, sir.
A Okay. So the terminology has evolved, okay, just to clarify for you. Terminology has evolved over the times. Transsexual is a term that had previously been used to indicate individuals who had gone through the complete transition. So those who have gone through what some call sex reassignment surgery, now others are calling it gender confirmation surgery. I try to just follow the terminology that someone comes to me with and says what's comfortable for them. So transsexual historically was that.

That then became a challenge only because there were so many people that identified as completely the other sex, but had no ability or access to -- since insurance companies have largely not approved these interventions, if they couldn't financially afford that type of procedure, technically, they hadn't had the procedure but they would identify in that way.

So from the term transsexual, the transgender has evolved to indicate largely the larger overwhelming group of people, whether they've pursued some degree of transition or not, socially, medically, or surgically, and is more acceptable because people can't afford the surgeries.

Now, gender non-conformity is something that's a much broader term that really exclusively refers to gender role behavior. So for -- oh, someone's -- oh, now I see -- I see a

new view. Okay.

So gender non-conformity -- oh, and I see myself on the screen, wow. Gender non-conformity is something that -- someone who identifies as the gender that their sex anatomy would typically indicate, but may be more feminent. Say it's a boy who identifies as a boy and they prefer stereotypically feminine things that are associated with girls. That could be a gender non-conforming child or a gender non-conforming person.

Even one might say my use of hand motions, hand gestures would be gender non-conforming, just to simplify it, as opposed to for say someone born female, a female person who identifies as female, has sex anatomy who's female, but their gender expression or role might be more masculine. They could be considered gender non-conforming.

Q Now, do you believe -- it sounds like there's a spectrum because it sounds like some gender non-conforming at some time in their life, some of them will also be gender dysphoric. Is that a fair statement?

A So there's developmental --

Q I took that right out of the Standards of Care, by the way.

A Yes, good for -- yes, already reading. I mean, it's -- there's a developmental association between gender non-conformity in childhood and gender dysphoria later on in adolescence. But not all gender non-conforming children will evolve into gender dysphoric adolescence.

And so it's -- I mean, I know we're talking here about adolescence, but I think it's a really important distinction to make between children and adolescents, which if you're immersed in this field, is debates that go on really are developmentally based.

So, for example, it's very difficult -- and I was deposed on this issue and Counsel McCaleb said I gave a very cogent answer, if I recall -- that it's impossible to predict the outcome based on the studies that we have. And again, there's different studies that followed young gendered non-conforming into adolescence and determined how many of these kids are going to be transgender, how many are not, you know, varied with respect to who they were looking at in the first place.

Q Now, does how you treat them have an impact on that, or is it completely genetic?

A Well, are we talking about --

Q Does the environment have anything to do with it?

A -- children, or are we talking about adolescents?

Q Yes. So an adolescent is gender non-conforming.

A Okay.

Q And so they come to your office and they're experiencing some distress over this, but not enough that you would diagnosis them as gender dysphoria.

A Correct.

Q Now, your treatment -- course of treatment, does that have any impact on whether they ultimately decide to be gender dysphoric or not?
A So gender non-conformity is not a diagnosis.
Q Okay.
A So there's nothing to treat except the manifestations that are diagnoses. If they're gender non-conformity leads to depression, or if it leads to anxiety, or if it leads to psychosis, I mean, that's a very outlier example.

But if they're gender non-conformity leads them to developing a recognized psychiatric issue, I'm going to treat psychiatric issue. I'm going to treat their depression. I'm going to ask them why does your gender non-conformity lead to depression and in what ways and minimize the degree to which those ways influence the gender non -- influence the patient's depression. That again, as I will state and is stated time and time again in the Standards of Care, is not an attempt to actively change someone's identity.
Q Okay. Now, everyone has to conform in an organized society. So there's a certain amount of conformity that we all have to go through. And yet, there's also this right to be ourself and our right to express ourselves, to be who we are.
A Yes.
Q But in being who we are, we still have to follow certain societal norms, et cetera. Is this -- this idea of gender

non-conformity, if that's not a -- that's not a psychiatric diagnosis, so --

A Correct.

Q -- there's nothing wrong with it one way or the other. It's not a mental disorder.

A No.

Q Why is gender -- why is transgender a diagnostic in the DSM-5 and considered a mental condition or mental -- is it a mental illness?

A It's a -- this is a big debate that many scholars have spent hours and papers writing about.

First, the term transgender refers to a person's self-assertion or their identity. So it's important to distinguish between --

Q And not to interrupt you, but that means it can be tested. Like you can't -- there's no physiological way to tell if they're transgender. They have to tell you they're transgender.

A Someone comes and says to me I'm transgender, right. Now, in my mind as a psychiatrist, that doesn't mean that I automatically believe that they meet criteria for a gender disorder, okay.

My job is to determine whether they need classification of gender dysphoria. Some kids may hear the term transgender and they may be conflating terms. They may be conflating gender role and gender identity. And again, I'm

there to tease that out. That's not -- we don't just make an assumption that there's an A priority need to treat gender dysphoria if someone comes in with gender non-conformity.

The point being, kids without gender dysphoria, okay, who are gender non-conforming, are also going to be in the locker room and are going to be in the locker room of their birth-assigned sex and be gender non-conforming and no one has sort -- like those kids, for example, are not necessarily distressed by that because their identity is still corresponding with their sex anatomy.

Q You just started --

A And so it's a matter --

Q -- answering the question that I had here.

A Yes.

Q Because there's this spectrum, we know that -- I would imagine with transsexual, we don't have many transsexual individuals in the high school setting, because that involves actually either reassignment or whatever those two words you said are used for transsexual.

A Right.

Q They're actually changed biologically from one sex to another; transsexual.

A According to the previous sort of convention of using the term. The term is not used as much anymore, but, yes. Yes.

Q So if there was a transsexual in a high school setting,

they would go to their new --
A Yes.
Q -- where they identify, because they're now biologically changed.
A I just think it's important that we shouldn't change someone's body prematurely. I think it sets poor precedent --
Q Right.
A -- to make someone go through an unethical treatment at that point in time --
Q Right.
A -- just to be able to use the bathroom that most fits their gender identity.
Q Now -- oh, I agree. And I would think in this area probably patience and it should be a very measured decision before someone starts having any type of surgery in any field --
A I --
Q -- but certainly this.
A I -- which is why I advocate for mental health involvement on all children when it comes to these decisions.
Q Because especially when I read in the Standards of Care that you can be gender non-conforming and some gender non-conform, yet some point in their life may become gender dysphoric and then go back to gender non-conforming. So like the spectrum of -- gender non-conforming, you agree, should use the bathroom of their birth, of whatever biological sex they

are.
A I don't think it's up to me to decide what -- who should use what bathroom.
Q Oh, you want to leave the decision to me.
A I think that -- you know, I'm not -- I'm not here to talk about societal conventions; I'm here to talk about the effect that societal conventions have on a growing evolution of --
Q Okay.
A -- and recognition of diversity in society --
Q Well, if --
A -- that previously didn't exist.
Q -- if someone has not been diagnosed as gender dysphoric --
A Yes.
Q -- but they're gender non-conforming --
A Yes.
Q -- they would not be considered transgender.
A They don't -- they would likely not identify as transgender.
Q So if they're not transgender, they can't use the bathroom of their identity; they would use the bathroom of their biological sex?
A I cannot say what makes them comfortable or not. I mean, people who are gender non-conforming can -- may use a bathroom that is single-sex bathroom. Again, you know, there's so many individual factors, Your Honor, when it comes to who's comfortable with what and --

Q Well, the other thing that you said that was very interesting to me was this whole transit. I thought it was going to be much easier than this. I thought you either were transgender or you were not. And obviously, from your testimony, that is not the case. That it can change. That it's -- you use the word explore that people don't know for certain, so they have to explore their sexual identity and there's a process to that. And during that process, they may decide that, no, they are their biological sex, or they may decide, no, I identify more with the other sex. And the certainty that we saw with Aidan DeStefano, he was -- there was certainty there. He knew he was a boy in a girl's body.

A Yes.

Q But it sounds to me that that isn't the norm, or am I wrong?

A I would -- I would not say -- I would actually argue against that, Your Honor. I would say that it is more of we as the clinicians in our attempt to do no harm to these youth, we want to be served. So kids or youth or children or adolescents, they come in with a lot of certainty, similar to Aidan, okay.

Their certainty doesn't automatically imply my certainty, if that makes sense. Because they're asking -- the endocrinologist that I work with to provide a hormonal intervention that has potential, you know, irreversible effects on them, you better believe that we are not going to just simply

after day one of hearing someone come in and say I'm transgender, I want hormones, not take a degree of exploration to understand their cognitive capacities, their personality capacity, their psychiatric functioning. We're both assessing for what's called eligibility, if you look at the Standard of Care, and readiness.

So even if someone meets criteria for gender dysphoria, which I said to Counsel McCaleb, that that could take a long time to figure out for kids who are trickier, more complex. Remember, I'm a psychiatrist, so I tend to see the more complex cases.

My psychology colleagues tend to see a lot more straightforward cases. Aidan did not see a psychiatrist like me. He saw a therapist who it was a lot more clear-cut.

So the fact of the matter is, is we're looking at all sorts of different factors to make sure that kids are not conflating concepts, and that they're not being overly influenced by, you know, other aspects of life. And I think it's important to make that distinction, regardless of whether you believe there's this great science behind it or not, every field of medicine started with, you know, a point where the science was not (indiscernible) trial level one study with (indiscernible).

Cancer did not start with known chemotherapy agents. Eight out of the ten best children's hospitals in this country

on the honor roll are providing these treatments according to the Standard of Care that you have in front of you.

So whether we all can, you know, put the treatment of trans youth on the stand or not, I think that that's not the issue here. The issue is really, this is happening, and these kids psychologically need to have accommodations provided to them that don't discriminate against them and exacerbate the very harm that we in clinical practice are trying to address.

Q And that's a great answer, and I understand that whole idea about self-worth and the importance of being accepted by your peers for who you are. And I would love to be able to rule that everyone should be accepted as to who they are and what they are and that --

A Me too.

Q -- everybody has individual worth, because everybody does have individual worth. But when it comes to this spectrum --

A Yes.

Q -- you seem to suggest -- and I don't want to put words in your mouth, so I want to clarify it -- you seem to suggest that gender non-conforming would normally go to the bathroom of their biological sex, to the locker room or their biological sex.

Gender dysphoric would generally either go -- and you didn't exactly say this -- but would go to the bathroom or the locker room of their identity, not their biological sex. And transsexual, we don't really have to get into because we're in a

high school setting.

I just wonder, how is the school supposed to know whether someone is gender non-conforming or whether they are gender dysphoric?

A You're asking me to rain on school policy decisions that I'm not trained to --

Q I knew that was going to be your answer.

A Right. And -- and -- and, you know, I could tell you what I think, but I don't think that my answer matters --

Q Can I try to guess what you think?

A You can try, absolutely.

Q Here's what I -- here's what I would guess you would think, is that you would leave it up to the student, because you don't believe anyone would deliberately go into another locker room of the opposite sex unless they were actually gender dysphoric, or so far on that gender non-conforming that it was a little before the line, a little over the line, but you would leave it to the student to go into the locker room that they identify with as their sex.

A I don't think I can make a gross declaration like that, to be honest. Actually, I would disagree with you, that I don't think I can make a gross declaration that a student comes in, goes to the principal and says, principal, this is what it is, because there's such variability. We're trying to put kids in boxes. You know, transsexual, it doesn't matter. Transgender,

the bathroom of their biological sex. Gender non-conforming, the bathroom of -- I'm sorry, the reverse. You know what I meant.

Q Yes. Of course, sir.

A I think that's putting kids in boxes. The point being, we need to have private facilities, in my opinion, for all individuals who are uncomfortable with all bodies. That's the -- that, I think, is what's important here is having a private -- if someone is uncomfortable with other bodies, or diverse forms of bodies -- there are kids -- I think I testified there are kids with disorders of sex development whose genitals or whose puberty doesn't happen in accordance with what everybody expects, and that has a more known biological cause at this point in time, so where should those kids go. Into which bathroom should those kids go?

So essentially, there should be -- schools should provide, in my opinion, a private bathroom for kids, non-transgender or transgender, to use should differing body types evoke or elicit discomfort. And I think that that is where I would stand on that.

I do believe that schools have to follow rules. I believe that students should not walk into principal's offices and secretly tape them, just like I believe a school -- a student should not be able to just go and cut class. Rules need to be adhered to. And how the school comes up with a way to

navigate that is in the hands of the wise school administrators.
Q And I appreciate that answer. Aidan DeStefano -- Mr. DeStefano mentioned gender fluid locker rooms, or gender fluid bathrooms.
A Yes.
Q Is that what you mean by this idea that regardless, you don't want to change in the boys' room or the girls' room, you go into the gender fluid bathroom?
A As I was reading Aidan's testimony, I actually felt that he misused the term gender fluidity with gender neutrality. That's -- I think he mistaken gender fluidity and gender neutrality.
Q But you almost seem to suggest that other students who don't have a gender identification problem, they may need more privacy when they change, that they would be uncomfortable, even if -- if I understood you correctly, that because of their body type, because of whatever reason, they would uncomfortable changing in front of others, even of their own sex, and that they also would be served by having a private area they could change?
A I agree with that, yes.
Q Okay. Doctor, anything else you want to clarify? Anything else you want to say for the record?
A This is obviously a complex issue. We're a field in evolution. We cannot apply a double standard to this issue. And the fact of the matter is, is there are kids walking around

-- many of these kids walking around in schools across the United States with treatment for this issue, whether people agree or disagree that the treatment should happen.

And that -- as a result, it is absolutely crucial that we evolve with the times and leave those who are in charge in policy to make policies that evolve to respect and provide dignity to all humans, and therefore, provide the ability to respect these humans without discriminating and doing anything at the expense of others. That is my statement today.

Q And it was very well said. I just want to see if Counsel have any questions in light of my questions.

THE COURT: Attorney Mar, do you have any questions in light of the Court's questions?

MS. MAR: I did just want to clarify one topic, Your Honor.

THE COURT: Certainly, please.

CROSS-EXAMINATION

BY MS. MAR:

Q Dr. Leibowitz, the Court was asking you questions about why the condition of being transgender as in the DSM, and yet gender non-conformity is not. And I just wanted to clarify, you know, is being transgender in the DSM or is the word transgender in the DSM?

A The word transgender, is it in the DSM? I don't believe that the word transgender is in the DSM, no.

Q So when we talk about the DSM, are we, in fact, talking about gender dysphoria?
A Correct.
Q And can you explain for us, do all transgender people have gender dysphoria?
A Not all transgender people have gender dysphoria. Like I said, if we have a spectrum of sex anatomy, right, we have diverse anatomies that are explained by various medical conditions: congenital adrenal hyperplasia, for example, alpha reductase inhibitor -- all sorts of variations and differences or disorders of sex development, and there is evolving research on the brain, okay. So there is evolving research that shows brain structures differ. We didn't get into that too much. There's an excellent review article from the Amsterdam team that points to the various brain structure differences between individuals with gender dysphoria and of the same birth assigned sex as those without gender dysphoria, so differences between them.

So it's very conceivable to say that we have a spectrum of gender diversity and a spectrum of distress and response to an identity that differs from sex anatomy.

THE COURT: I --

THE WITNESS: Therefore, clinical distress is at the end, the important tool that as a psychiatrist, I am there to assess.

THE COURT: And I have to interrupt just for a moment because I -- that's an important that I misunderstand -- misunderstood, I think.

I thought the difference between transgender and gender non-conforming is when you're diagnosed with gender dysphoria.

THE WITNESS: It is -- it is -- it can be very difficult with the terminology. I will admit, Your Honor, it took me a while as well to get the terminology.

Transgender is not a diagnosis. Transgender is how someone comes in and identifies, and it's not something that, in my opinion, a clinician should impose on a person. It is highly correlated to individuals with gender dysphoria. Gender dysphoria is the clinical classification for individuals who are transgender and choose to pursue gender transition.

Some transgender individuals may experience this incongruence and choose never to transition, simply because the experience was not distressing enough to them to do so. That shouldn't omit them from society -- like, we should not erase them from society. And I think that it's a careful distinction to make, but we cannot just impose an identity on to somebody.

THE COURT: Okay. Thank you very much.

Excuse me interruption. You may proceed.

MS. MAR: Thank you, Your Honor.

///

BY MS. MAR:
Q And, Dr. Leibowitz, I don't want to oversimplify your testimony, but I heard you make a distinction there that I thought was very helpful, and I want to see I've gotten it right.

So whether or not someone is transgender relates to how they self-identify, their own identity.
A Yes.
Q Whether or not someone has gender dysphoria though turns on whether they experience what you've called the clinical distress from the incongruence --
A Yes.
Q -- between their gender identity and their assigned sex. So again, the difference there, as I think I understood you say it is, the difference between an identity being transgender and actually a condition, which is characterized by clinically significant distress, and that condition is gender dysphoria.
A Indeed you have it correct, Attorney.

MS. MAR: All right. I'm going to quite while I'm head, Your Honor.

THE COURT: Thank you, Counselor. That's it?

MS. MAR: I have no further questions. I don't know if other counsel does and I --

THE COURT: Mr. McCaleb, do you have any questions for Dr. Leibowitz?

MR. McCALEB: No, Your Honor.

THE COURT: And, Mr. Brown, any questions?

MR. BROWN: No, Your Honor.

THE COURT: And, Attorney Mar, you indicated that we have two housekeeping issues we have to take care of before we let Dr. Leibowitz back to his work.

MS. MAR: That's right, Your Honor. The first is, I did show everyone the Standard of Care, and, of course, we've all been discussing them. I don't think I actually moved them into evidence, so I'd like to do that now.

THE COURT: And, Mr. McCaleb and Mr. Brown, is there any objection to the admission of Intervenor's Exhibit 19?

MR. McCALEB: No, Your Honor.

MR. BROWN: No objection.

THE COURT: Without objection, Intervenor's Exhibit 19 is admitted into evidence.

(Intervenor's Exhibit 19 was received in evidence.)

MS. MAR: And the second housekeeping item, the Court may remember that at the beginning of Dr. Leibowitz's direct examination, I moved to him qualified as an expert in gender dysphoria, in gender identity issues generally among children and adolescents. And at that time, Mr. McCaleb objected. And I think the Court had agreed to defer consideration of that question.

So I just wanted to bring that issue up again and move

for the qualification of Dr. Leibowitz as an expert in those areas.

THE COURT: Thank you very much, Counselor.

Mr. McCaleb?

MR. McCALEB: Yes, Your Honor. First, I also have a housekeeping issue in that his -- Dr. Leibowitz's deposition is not formally entered into evidence and I'd like to move that in. It's Plaintiff's 65 in the previously-provided folder.

THE COURT: Is there any objection to Plaintiff's Exhibit 65?

MS. MAR: No, Your Honor.

THE COURT: Mr. Brown?

MR. BROWN: No, Your Honor.

THE COURT: Without objection, Plaintiff's Exhibit 65 is admitted into evidence.

(Plaintiff’s Exhibit 65 was received in evidence.)

MR. McCALEB: Thank you, Your Honor.

As to recognizing Dr. Leibowitz as an expert, clearly, he's a well-versed, well-informed and very compassionate individual. But I think under the legal standards that apply here, it's inappropriate to be using his testimony. And I look particularly to the question of fit with the facts in this case.

And what we have in this case, as we're going to learn at length on the 11th, is a situation where we have members of the opposite sex, and sex is defined objectively, biologically

and physiologically, using opposite sex facilities, and from our position, creating a violation of bodily privacy.

So that's, I think, the key fact relevant to this case. And as fascinating as so much of his testimony has been, when you start looking at what Dr. Leibowitz has testified to in respect to this social transition and the use of privacy facilities, it is rather remarkable how often he said there's little evidence, there are no studies. There is no thorough research that has been done on whether this type of affirmation treatment is effective, whether there are risks in the future for those who are undergoing it. And as you heard him testify, his sole concern is his patient. He is not looking for potential impacts on other students who, like Joel Doe, have psychological impacts from the exposure.

So I think under U.S. vs. Shift, 602 F.3d 152, talks about having a close or a reasonable fit of the testimony to the facts of the case, as much as Dr. Leibowitz has talked about this incredibly complex and what he characterizes as evolving science, the actual information he brings to the table that might help inform the school official is really no evidence.

And I think it's extremely telling that he did testify to the fact that using this facility was actually a diagnostic tool, which means he's putting students in there who may be gender non-conforming -- not he, excuse me -- under this theory, a student may come into school who is gender non-conforming or

gender dysphoric, but because the only thing -- and you'll hear this this afternoon from Dr. Cooper -- the school is not going to medical professionals. It's not seeking medical advice. It's only doing what makes the student comfortable.

So at the end of the day, we have these privacy facilities which are meant to protect privacy between boys and girls being used as a diagnostic tool and introducing children where there is no due diligence being done, even discover any of this, I think largely irrelevant science, applies.

So in terms -- using Dr. Leibowitz's testimony in this case, we, frankly, would move that it be stricken. We think it's irrelevant to the facts of the case. And we think what's he testified to, that this is evolving science, the first (indiscernible) disciplinary clinic is only ten years old. Only five years ago when the important transition from gender identity disorder to gender dysphoria happened, he admitted then that he wasn't expert enough to understand the change in the nomenclature. That's only 16 months ago.

So I would raise questions under Dalbert whether he's fully qualified. And I think more importantly, Your Honor, as -- again, as fascinating and complex, and even mind boggling as this is in some places, the relevance to the question of whether our adolescent kids are going to be at risk of exposure to the opposite sex in the facilities that are designed and designated for their privacy are as not well informed by the incredible

volume of information that Dr. Leibowitz has brought forth. So we would move that it be stricken, Your Honor.

THE COURT: And, Mr. Brown, do you have any objection to Dr. Leibowitz being accepted as an expert in gender dysphoria, and I believe it's an adolescent?

MS. MAR: And gender identity issues in children and adolescents.

MR. BROWN: I have no objection.

THE COURT: Very well.

Mr. McCaleb, your arguments, well-versed, go towards the weight to be given of the opinions of the expert. Dr. Leibowitz has met the threshold necessary to be accepted given his specialized knowledge, and he is accepted as an expert in gender dysphoria -- and say it one more time, please, Counselor.

MS. MAR: Gender identity issues in children and adolescents. Thank you, Your Honor.

THE COURT: Gender identity issues in children and adolescents. Very well.

Anything else before we allow Dr. Leibowitz to go back to work?

MS. MAR: Not from our end, Your Honor.

THE COURT: Very well.

Doctor, I want to thank you very much for your assistance here today and your testimony. You are now excused,

sir.

THE WITNESS: I appreciate everyone's flexibility with my schedule and I -- it was an honor. Thank you.

THE COURT: Certainly.

(Witness excused)

THE COURT: And I guess we should stand in recess, or do we have another expert that's going to -- or any other witness that's ready to go that will not take too long?

MR. BROWN: We have a witness who won't be here until 1:00, so it would seem that a recess might be appropriate.

THE COURT: Very well. Why don't we stand in recess until -- anything else we need to address before we stand in recess? All right. We'll stand in recess until 1:00 so you can -- is that enough time for you to get some lunch or --

MS. MAR: Your Honor, we could use a little more time than that.

THE COURT: 1:30?

MS. MAR: Yes, that'd be great.

THE COURT: Would that be better? All right. We'll stand in recess till 1:30.

MS. MAR: Thank you.

MR. McCALEB: Thank you.

THE CLERK: All rise.

(Lunch recess was taken from 12:30 p.m. to 1:37 p.m.)

THE COURT: Thank you very much. You may be seated.

The court is called to order. All parties previously present are once again present. And I believe this witness is coming, Mr. Brown, from the school district.

MR. BROWN: Yes, Your Honor.

THE COURT: Very well. You may call your witness, sir.

MR. BROWN: Defendants calls Dr. Brett Cooper.

THE COURT: And, Dr. Cooper, if you would just step up to the witness stand here and my deputy will swear you in.

Good afternoon, sir. If you'd stand and raise your right hand to be sworn.

THE DEPUTY CLERK: Do you swear or affirm that the testimony you are about to provide on the issue now before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

DR. COOPER: Yes.

THE COURT: Thank you very much, sir. And, sir, please be seated. And, sir, would you please state your full name, spelling your last name for the record.

DR. COOPER: It's Brett Adam Cooper. Spelling C-o-o-p-e-r.

THE COURT: Thank you very much, sir.

Counselor, you may proceed.

MR. BROWN: And, Your Honor, you may recall from our last hearing, we had a list of student pseudonyms that we were

using, and with your permission, I'd like to approach to give Dr. Cooper a copy of that list.

THE COURT: Certainly, sir.

THE WITNESS: Thank you.

DR. BRETT ADAM COOPER,

a witness, having been previously duly sworn, was examined and testified as follows via telephone:

DIRECT EXAMINATION

BY MR. BROWN:

Q And, Dr. Cooper, just to remind you, you have been provided with a list of pseudonyms. We are not using the names of students from Boyertown High School, other than Aidan DeStefano, who testified at our last hearing.

Dr. Cooper, by whom are you employed?

A Boyertown Area School District.

Q And in what capacity?

A I'm the high school principal.

Q How long have you served in that position?

A Eight and a half years.

Q So roughly since 2009?

A Yes.

Q And as principal, to whom do you report?

A I report to the assistant superintendent of schools, Mr. Scoboria.

Q Okay. And to whom does Mr. Scoboria report?

A I understand he reports directly to the superintendent of schools, Dr. Faidley.
Q Okay. And my understanding is Dr. Faidley has recently left the district; is that correct?
A That's correct.
Q And for the time being, who is serving as superintendent?
A As of last Tuesday, the Board of School Directors named an interim superintendent, David Krem.
Q Okay. And so to whom does the superintendent report?
A The Board of School Directors.
Q For the 2016-17 school year that recently concluded, what grades were contained at Boyertown High School?
A Ten through twelve.
Q And will that be the same in the coming 2017-2018 school year?
A No, it will not.
Q And why is that?
A We're completing a renovation project that will bring the ninth grade students to the high school with ten through twelve, so we'll be a nine through twelve building, and a restructuring of the entire school district.
Q Okay, thank you. And have there been any physical changes to the high school to accommodate the extra students?
A Yes.
Q And could you briefly describe some of those?

A We repurposed some current space that we have. Renovating the original high school itself. Added about 21, 22,000 square foot. I can't remember the exact number. Changed some of the existing facilities to try to bring them up to code and make it more conducive for 21st century learning.
Q Thank you. Does the school district have any official policies?
A The school board -- the district has many official policies that are established by the Board of School Directors.
Q Okay. And does the school district have any policy made by the school board pertaining to transgender students' use of restrooms or locker rooms?
A They do not.
Q Does the school district have any other type of written rules pertaining to transgender students' use of restrooms and locker rooms?
A Not written rules.
Q Okay. Prior to the 2016-17 school year, are you aware of any Boyertown transgender student whoever requested to use a restroom or locker room aligned with their gender identity rather than with their biological sex?
A No.
Q And prior to the 2016-17 school year, are you aware of any transgender student who made a request to use restrooms or locker rooms other than for their biological sex?

A No.
Q And the Court previously heard testimony from Aidan DeStefano. Do you know what restrooms Aidan DeStefano used at the high school prior to the 2016-17 school year?
A He was using the restroom in a nurse's office.
Q Okay, thank you. Are you aware that in May of 2016, the Obama Administration issued a Dear Colleague letter relating to the rights of transgender students?
A Yes.
Q And do you know roughly -- can you explain briefly what that Dear Colleague letter stated as far as transgender students?
A My understanding was that -- it just indicated that students were allowed to use restrooms which they identified with, the gender they identified with.
Q Okay. Now, prior to the issuance of that letter, did you ever ask the superintendent or the assistant superintendent for any guidance regarding transgender students?
A On occasion in the past when they had come up, I conferred with my direct report, which was Mr. Scoboria.
Q And did that have to do with Aidan DeStefano using the nurse's office?
A Yes.
Q After that Dear Colleague letter was issued, did the school district get any requests from any transgender students to use

the restrooms or locker rooms aligned with their gender identity?
A Not until the '16-'17 school year.
Q Right. So there were some though in the 2016-'17 school year?
A Correct.
Q And what has been the practice of the school district in dealing with those types of requests?
A We look at it on a case-by-case basis and what the students are most comfortable with.
Q Okay. Was Aidan DeStefano one of those students who requested to use facilities aligned with his gender identity?
A Yes.
Q If you look at the sheet in front of you, was Student A one of the students who made such a request?
A Yes.
Q And how about, was Student B on that sheet one of those students?
A Yes.
Q How did you learn of the request by those students?
A Through my grade level principals.
Q So the request went through the -- would you just briefly explain how the grade level principals work?
A Yes. The grade level principals basically oversee their specific grade that's assigned to them. Have one for each grade level in the building, a tenth grade, eleventh grade, and a

twelfth grade level principal. So they are doing most of the interactions between -- or with the students in coordination with the school counselors.

Q Now, other than the three students that we just mentioned, are you aware of any other transgender student at Boyertown High School who were asked to use facilities aligned with their gender identity?

A Yes, there were three others.

Q Okay. And who are those students by their pseudonyms?

A Student FF, GG, and HH.

Q Okay. And did those students ask to use the restrooms and locker rooms aligned with their gender identity?

A It was -- that's what was reported to me through the grade level principals.

Q Okay. Do you know how many of those students you expect return to Boyertown High School for the 2017-2018 school year?

A Three.

Q Okay. And which of those students are they?

A Student A, Student FF, and Student HH.

Q And why would the other three students -- students B, C, and GG -- not be returning?

A They have graduated.

Q Once a transgender student receives permission to use the restrooms aligned with the gender identity, are they permitted to use both the ones with their gender identity and their

biological sex?
A They just use the ones that they've identified with.
Q Okay. And are students who have not requested and received permission to use restrooms aligned with their gender identity allowed to use the restrooms or locker rooms of the opposite biological sex?
A No.
Q What happens if a student enters a restroom or the locker room of the opposite sex without having received permission?
A Well, if it's founded through investigating a report that may have been made is we assign consequences to the student for being in a location they're not permitted to be in.
Q Has that ever happened in your tenure as principal at Boyertown High School?
A Yes.
Q How many times would you say that's happened in the eight and a half years that you've been principal?
A Without giving an exact number, somewhere handful, two handfuls, five to ten.
Q Are you familiar with the term gender fluid?
A I believe so, yes.
Q Has the district received any requests regarding bathrooms and locker rooms from a student identifying as gender fluid?
A We have not.
Q Are you aware of any gender fluid students ever being

enrolled at Boyertown High School?
A I am not aware.
Q Are you familiar with the term third gender?
A I believe I am.
Q Has the district received any requests regarding bathrooms and locker rooms by a student identifying as third gender?
A We have not received any of those requests.
Q Are you aware of any third gender students ever being enrolled at Boyertown High School?
A I am not aware of any.
Q Are you aware that the four Plaintiffs in this case have expressed their objections to the district's practice of allowing students to use the restrooms and locker rooms aligned with their gender identity?
A Yes.
Q Did any of these Plaintiff students or their parents complain to you personally about the practice?
A Yes.
Q And who was that?
A It was the parents of -- give me a second to --
Q Sure.
A I'm not seeing it on a sheet.
Q Are you familiar with the student who in this case goes by Joel Doe?
A Yes.

Q Was it either Joel Doe or his parents who contacted you?
A It was the parents of Joel Doe.
Q And just for your information, in this case, they've been identified as John and Jane Doe. And how did they contact you?
A They contacted -- they contacted me and they spoke with my secretary to set up an appointment with me.
Q And did you have a discussion with them in person?
A Yes.
Q And what was discussed in that conversation?
A It was discussed -- they were asking -- they were -- initially, they were expressing their displeasure about our practice on transgender students using the facilities of which they identify with. And then they asked if I could put something in writing indicating what our practice was. And I did share with them that that was a practice that we were following since the Dear Colleague letter, and it had come out the previous year. And I also asked them, or said to them that we can make some alternative arrangements for their child if they too were uncomfortable with that -- with the situation that they were there about.
Q And what were the alternative arrangements that were offered for Joel Doe?
A We offered for their child to use the restroom in the nurse's office. And then there was also a unisex bathroom proximal to the gymnasium down near the (indiscernible) outside

the lobby that we also offered.
Q So you gave Joel Doe the opportunity to change for gym in either the nurse's bathroom or the single-user bathroom right by the gym?
A Yes.
Q Was that the only conversation you had with any of the Does?
A There was another -- it was a follow-up conversation that was an email that had been sent to me asking me once again for the original request of something in writing indicating what our practices were.

And at that point, I was waiting on some direction from my direct report, which is why I had not gotten back to them. I'm not sure how much time had passed, maybe a week. And then I received that email.

And then when Joel Doe had come to school after his assignment in the morning because he was in an alternative location in the morning at the career center, when he'd come back, it was indicated that he was not -- in an email he was not to go to class until she was able to speak with somebody in administration, at which time I'd gotten some information -- or I'd phoned my direct report, and he gave me an answer indicating that there would be no letter or anything in writing. And indicated that to her via phone conversation with Joel in my office. And I indicated that to her and then once again, I did offer the alternative changing arrangements for Joel.

Q Did you ever discuss the district's transgender practice with any of the other Plaintiffs in this case?
A I did not.
Q And are you aware that the mother of one Plaintiff, Jack Jones, the Mother's name is Jane Jones, or pseudonym is Jane Jones, that she's alleged to having a phone conversation with you regarding the issue?
A I don't recall a conversation if it happened.
Q As a result of allowing the students to use the restrooms and locker rooms aligned with their gender identity, has there been any disruption to the educational program or activities of the district?
A There have not.
Q Other than the concerns raised by the Plaintiffs in this case, were there any students or employee protests about the practice?
A No.
Q Were there any student or employee walk-outs over this practice?
A No.
Q How did the student community at Boyertown High School treat the transgender students, generally?
A Generally, our students have been accepted and integrated in with the population of students.
Q The student body ever confer any honors on one of the

transgender students?
A Yes.
Q What was that?
A They voted -- they voted him to be homecoming court on the king's court.
Q And what student was that that was voted on to the homecoming court?
A It was Aidan.
Q And you mentioned the king's court, what is the king's court part of the homecoming court?
A Well, the -- during homecoming, they -- we name a homecoming queen and also homecoming king. The queen's named at the game. The king's named at the dance the next evening after the game. But there's a court of queens -- proposed queens or possible queens in a court of possible kings, one to two from each grade level, that are voted on that court by their peers.
Q And so by being on the king's court, Aidan was recognized by his fellow classmates as a male student?
A Yes.
Q As principal of Boyertown High School, are you familiar with the locations of the restrooms and the locker rooms in the high school?
A Yes.
Q And did you, in fact, lead a tour of those facilities this summer at the request of the Plaintiffs?

A Yes.

MR. BROWN: Your Honor, I would request permission to show the witness Exhibits D-47, 53, and 54, maps of the high school.

THE COURT: I assume there's no objection?

MS. MAR: No objection.

THE COURT: Very well. Sir, you may proceed.

BY MR. BROWN:

Q Dr. Cooper, you've been provided with copies of Exhibits D-47, 53, and 54. Have you ever seen these documents before?

A Yes.

Q And what are they?

A They're layouts of the high school building.

Q And do these floor plans accurately depict the current layout of the high school?

A Yes, minus all the contractor debris.

Q So these display what it will be like in a few weeks hopefully when it's done, right?

A Yes.

Q Thank you. Now, if you look at the plans, especially D-53 and D-54, they show several multiple-user bathrooms throughout the school. Do all of those multi-user bathrooms have individual toilet stalls?

A The multi-user ones, yes.

Q And do each of the stalls in the multi-user bathrooms have

locking doors for privacy?
A Yes.
Q Now, for the upcoming 2017-2018 school year, are there any single user bathrooms that can be used by students of either sex in the high school?
A Yes, there are.
Q And how many of those single-user bathrooms are there? You can take a moment and look over the exhibits, if you'd like.
(Pause)
A Could be anywhere between four and seven only because some of them have to do with utilization during certain business in those areas by students.
Q Okay. So they are at least four single-user bathrooms that could be used by students pretty much anytime throughout the day?
A Yes.
Q Could you, looking at these exhibits, identify where those restrooms -- single-user restrooms are?
A Yes. On Exhibit D-54.
Q That's the first floor of the high school?
A Yes. Down in the music suite area, left-hand side of the drawing, it says "new single-family accessible toilet room."
Q Right.
A That's the location of one of them.
Q Was that restroom available during the 2016-'17 school year as well?

A Yes. And then --
Q Go ahead.
A -- if you look at the -- up near -- we call it the banana hall. It's like a curved area on the right-hand side of the drawing there.
Q In the lower right?
A Yes. There's a nurse's office, single toilet.
Q Okay. And that's a new restroom for the 2017-'18 school year?
A That's correct. The nurse's office was located somewhere else last year because of the construction.

Then there's -- on the top side of that same Exhibit D-54, you'll see another red arrow goes down to a highlighted yellow space that says single toilet room.

Q Right, in the upper right of the drawing?
A That is correct. And that's one that will be available.
Q Was that one available during the 2016-'17 school year?
A Yes, that was our current nurse -- I mean, that was our nurse's suite throughout the school year, temporary nurse's suite.
Q So that was the restroom that was offered to Joel Doe to change if he chose?
A Yes.
Q Okay.
A And then the fourth one, Exhibit D-53, if you look almost in

that -- a little bit slightly left to the middle of that page, it says "new single accessible toilet."
Q That's in the middle of the drawing for the second floor of the high school?
A Yes.
Q Okay.
A And then some of the other locations, if students are having business in those areas, or if you go to -- back to Exhibit D-54, you'll see one that says -- almost in the middle of the page, it says "attendance office single toilet."
Q Okay.
A And then there's -- and that's for anybody who has business in the attendance office, regardless of being a student-parent visitor coming in to pick students up.
The one right behind that, you'll see it says, "ISS room single toilet," and that's for our in-school suspension students. So that's all self-contained within the in-school suspension area.
Q Okay.
A And then there's one, if you go a little bit to the right, you'll see it's -- and it's in green, it says, "Office and principal single toilets." The one that's closer to the hallway is contained inside the office and for use for folks who have business in the office. So if students were in there with a principal and they need to use the facilities, they can access

that.

And then the last one is in the banana hallway. Again, I'm going to reference that curve spot. Approximately the word -- you'll see where it says "nurse's office single toilet," there's one that says "guidance single toilet." So anybody who has any business or operations in that counseling suite have access to that. So if a student is down there visiting and a counselor needs to use the restroom, they could use that facility.

Q So there are actually eight potential single-user bathrooms for students in the high school with four being available just for any student at any time; is that correct?

A Correct.

Q How many gym locker rooms are in the high school?

A We have two lockers -- two locker rooms for the students' use for physical education classes.

Q Would you point them out on the exhibits?

A Exhibit D-54, up in the left-hand quadrant of that paper, you'll see some orange highlighted areas. And you'll see the identifiers is the boys' locker room. And then just to the right of that, you'll see one that says "girls' locker room."

Q So those are the two orange areas right beside the gymnasium?

A Yes.

Q Now, are there any areas in those locker rooms where a

student could potentially change their clothes without being viewed by other students?
A There are also two team rooms contained within those locker rooms. And you'll see that they're identified there where I pointed out the boys' locker room. Just below that, you'll see, it says "boys' team room," that's a room that's located within the locker room itself. And then you'll see that's mirrored in the girls' locker room. There's a girls' team room located right within that facility also.
Q And I think on the third exhibit, D-47, possibly it shows those a little better if you could identify where those are.
A Let me get my bearings here. Yes, if you take a look -- they're not highlighted, but you can see they're identified as team room, I think it looks like a 911B. And that's the boys'. And then there's another one -- my eyes are tricking me -- I think it looks like 905E for the girls.
Q It's pretty small type on there.
A Yes.
Q So those are, for lack of a better term, little ante rooms off of the main locker rooms?
A Yes.
Q And do those team rooms have any lockers for the students to store their belongings?
A Yes, there's lockers in there.
Q Are there any other locker rooms or team rooms in the high

school, other than the ones you just pointed out?
A Yes. We have two additional ones.
Q Where would those be on any of these exhibits?
A If you look at Exhibit D-54, up in the upper left-hand corner, once again, you'll see the highlighted orange. There's a multi-user -- multi-user or team room locker room. And then there's also one above it, you'll see two shaded orange areas.
Q And would a student changing in one of those team rooms have to pass through the main locker rooms to get to the gymnasium?
A No.
Q And do those team rooms have lockers where students store their belongings?
A There's lockers in there, yes.
Q And approximately how far is the farthest team room from the gym?
A I'm going to guess maybe 150 -- 150 feet.
Q So would you say --
A Just down the hallway. You'll see that back hallway.
Q So would you say it's reasonably accessible for someone changing for gym to get to the gym in a reasonable amount of time?
A Yes.
Q So if a student at Boyertown High School does not feel comfortable changing in a locker room where there are transgender students present, does that student have to change in that locker

room with the transgender student?
A No.
Q But what other options are available?
A Well, we would -- we would allow for them to use one of those single -- single-user facilities.
Q So you have any of those four to eight single-user bathrooms that we discussed?
A Yes.
Q Is it possible a student could also change in one of the team rooms within the locker room?
A Yes.
Q Could it also be possible that arrangements could be made for a student to change in one of the team rooms that are outside of the locker room?
A Yes.
Q Are you aware of any transgender student who's asked for permission to shower in the locker rooms?
A I'm not.
Q As principal, have you ever received any information that a transgender student has showered in the locker rooms?
A I have not.
Q Can you describe what the showering facilities are like in the locker rooms, the gym locker rooms?
A In the locker rooms that the students use for the phys ed classes, it's a -- when we went through the renovation project,

they were basically gutted and redesigned so that there were no longer their traditional, we used to call them gang showers, for lack of betters terms, there were years ago, and went into single -- single-user showers that you could pull certain shower curtain across for privacy. And there were four stalls in each of the boys' and the girls'.

Q So a student who did take a shower now would be in a single-user shower with the ability to pull a curtain across for privacy?

A Yes.

MR. BROWN: Permission to approach, Your Honor.

THE COURT: Certainly, Counselor.

BY MR. BROWN:

Q Dr. Cooper, I handed you what has been marked as Exhibit D-36. Have you ever seen this document before?

A Yes. It's posted on our website.

Q Could you briefly describe what this document is?

A It's from Dr. Faidley, the superintendent, indicating that we were looking to, as a district, hire a firm to take a look at the locker room layouts throughout the school.

Q What was the purpose of looking at those locker rooms by the architect?

A To see if there were ways that they could make it more private for students.

Q And you said it was looking to talk to the architect and is

it true that this exhibit shows that a contract has actually been approved for the architect to do that work?
A Yes. The board school directors approved a contract. I'm not sure which meeting it was, but I know they have.
Q And what is the status of the work by the architect on this project so far?
A At this point, there's just been meetings to identify the different stakeholder groups that would be involved.
Q And so since no work has been done, this mean any privacy work done under this contract will be in addition to the privacy currently available to students?
A Correct.
MS. GORDON: Objection.
THE COURT: Overruled. I'll allow it.
MR. BROWN: Thank you, Dr. Cooper. No further questions.
THE COURT: Very well.
Attorney Gordon, are you going to be doing the cross-examination?
MS. GORDON: I will be, Your Honor.
THE COURT: You may proceed, Counselor.
MS. GORDON: Thank you very much.

CROSS-EXAMINATION

BY MS. GORDON:
Q Dr. Cooper, it's good to see you again.

A Hi.
Q Hope you enjoyed your vacation.
A Yes.
Q I would like to start out by making sure that we are talking about some terms that have become very important in this particular case. And I'm going to start with the term biological sex. Tell me if you agree with this definition.

Biological sex is defined by sex chromosomes, gonads, sex hormones, and non-ambiguous internal and external genital, it's binary either male or female.

Do you agree with that definition?
A I guess, if that's from the Webster's Dictionary.
Q That's from the DSM-5.
A Okay, yes.
Q Gender identity. Would you agree that gender identity describes a persons' internal sense of being a man or a woman or someone outside of a gender binary?
A Yes, if that's from the same dictionary.
Q I believe you agreed with that definition at your deposition at --
A Yes.
Q -- page 27.
A Yes.
Q And do you agree with that definition today --
A Yes.

Q -- for working purposes in our questioning here?
A Yes.
Q A transgender individual is a person who -- whose gender identity differs from their biological sex. Would you agree with that definition?
A Yes.
Q And so a transgender boy is a biological girl who identifies as a boy; would you agree?
A Yes.
Q And a transgender girl is a biological boy who identifies as a girl; would you agree?
(Cell phone rings)
A Yes.
Q I think we've just been interrupted by Sports Center.
MR. BROWN: Thought I turned this off.
BY MS. GORDON:
Q There were a couple of other terms that Mr. Brown spoke with you about. One is gender fluid. And you indicated that you were not aware of any students currently at Boyertown Area High School who identify as gender fluid; is that correct?
A That is correct.
Q What do you understand that term to mean?
A I understand gender fluid to mean a student that identifies as a -- as a boy in one situation, and perhaps a girl in another situation. In other words, it's fluid back and forth based on

situations that they may encounter.
Q And the school district has no particular plan in place or established practice for handling requests from gender fluid students; is that right?
A We have nothing in place other than the practices that we've used for our current status of transgender students.
Q Sir, you are a doctor?
A Yes.
Q And you have a PhD; is that correct?
A An EDD.
Q And you have several administrators at the school district who also are doctors; is that right?
A Yes.
Q None of them are medical doctors.
A No.
Q So is there anyone on your administrative staff, either in central administration or in the high school's administration, who's able to determine whether or not a student is gender non-conforming?
A No.
Q Is there any administrator at the high school who's able to determine whether a student is gender dysphoric?
A No.
Q Is there any administrator at the high school who's able to determine a student's gender identity?

A No.
Q You would be relying on what the student reports to you; is that right?
A Correct.
Q Can't look at an individual and determine what the person's gender identity is?
A Correct.
Q I believe you were hired at Boyertown Area High School as an assistant principal originally in August of 2005; is that right?
A Yes.
Q And since that time, until the last school year, the students at Boyertown Area Senior High, or BASH, were to use the locker rooms in the bathrooms that aligned with their biological sex; is that right?
A Yes.
Q And the practice that the administration began to utilize at the beginning of the last school year was a departure from that, would you agree?
A Yes.
Q The reason that the students in the school district were previously separated on the basis of sex was to protect their personal privacy from members of the opposite sex when they were using bathrooms and locker rooms; would you agree?
A Yes.
Q And you've even shared with us today that there would be

instances in the past when boys would be caught in the girls' common areas of their bathrooms, and they would be disciplined for that conduct, right?

A Yes.

Q And the same would be true, girls being caught in the common areas of the boys' bathrooms, again, they would be disciplined for being in there because they were not permitted to be in there because it violates the privacy of the boys using the facilities, right?

A Yes.

Q Since you started at Boyertown Area High School, there have always been toilet stalls in the bathrooms, right?

A Yes.

Q And those toilet stalls were always historically there to provide an added measure of privacy that the student would have from members of the same sex using those facilities, right?

A Yes.

Q But even those students who chose, like Mary Smith did, and other girls that she testified about, those students who chose to use the common areas of the bathroom to change their clothes, to disrobe, to remove their bras, to change their underwear, until last year, had an expectation that this administration would protect their privacy in those common areas. Is that true?

A Yes.

Q Since the beginning of the 2016-2017 school year, the

administration has now determined that students may use bathrooms and locker rooms based on their gender identity without any regard to their biological sex; is that correct?

A That's the practice, yes.

Q And this practice has resulted in biological males who identify as females using the girls' facilities and biological females who identify as males using the boys' facilities; is that correct?

A Yes.

Q Those facilities include both bathrooms and locker rooms.

A Yes.

Q So it's now the administration's position that a female student at BASH has no expectation of privacy from a biological male who identifies as a female when she is using the common areas of the bathrooms and the locker rooms at BASH?

MR. BROWN: Objection.

THE COURT: Basis?

MR. BROWN: It's more than he stated as far as what the expectation of privacy is.

THE COURT: It's cross-examination. I'll allow it.

THE WITNESS: Could you repeat the question, please?

MR. GORDON: Absolutely.

BY MS. GORDON:

Q It's now the administration's position that a female student at BASH has no expectation of privacy from a biological male who

identifies as a female when she is using the common areas of the bathrooms and the locker rooms.

A No expectation of privacy from the opposite gender, or just in general?

Q No expectation of privacy from a biological male identifying as a female.

A Yes.

Q And the same would be true of the boys?

A Yes.

Q The boys have -- it's the administration's position that when boys are using the common areas of the bathrooms and the locker rooms, that they have no expectation of privacy from a biological female who is identifying as a male coming in and using the facility at the same time?

A Yes.

Q When the decision was made by the administration to permit transgender students at BASH to use facilities of the gender they identify with, the administration did not inform the students or the parents, did they?

A No.

Q The administration intends to continue this practice; that is, permitting students -- transgender students to use the facilities of the sex with which they identify. You intend to continue that practice into the 2017-2018 school year, do you not?

A Yes.
Q Before you had changed your practice, had your administration received a single complaint from a female student that a girl who identifies as a boy was sharing her bathroom or locker room?
A We had -- there were situations where students have reported that somebody from the opposite gender was in a common area or restroom.
Q When did that occur?
A It happened -- in my tenure, I could probably count it on one or two hands where it's been reported -- it had been reported and students received consequences.
Q And was this report that present in the bathroom was a girl who identifies as a boy, or was it simply that there was a girl -- because you've told us about situations where girls were in the boys' common areas, it was reported to you and disciplinary action was taken. My question is slightly different.
A Oh, I'm sorry. I was -- I was -- I thought your question was just that.
Q Right, no.
A If you could repeat it.
Q Yeah, slightly different. Before the policy change last school year, was there ever a complaint by a female that another girl who's identifying as a boy was using her bathroom and locker room?

A Before the -- once the practice was -- it's not a policy, it's a practice, so, yes.
Q I still think we're missing communication, so...
A Okay.
Q Before the school changed its policy -- let me ask it this way. Did the school change its practice based on complaints that girls were making that there were other girls in their bathroom who identified as boys and shouldn't be using their bathrooms, even though they're the same biological sex? Did you ever get a complaint like that?
A Before we changed our practice?
Q Yes.
A No.
Q So this was not a situation where the school district decided that it needed to permit biological females who identify as males to use the boys' facilities because the girls were uncomfortable with the biological girl identifying as a boy using their facility? That was not the situation, was it?
A No.
Q And the same would be true if I asked those same questions with respect to boys.
A Correct.
Q You never had those types of complaints?
A No.
Q Your administration has been very supportive of transgender

students at the high school. Would you agree?
A I think we're supportive of all students; yes, I would agree.
Q And that support of transgender students did not just begin last year with the change in your practice, did it?
A No.
Q The administration by Aidan DeStefano's own testimony and by testimony that you had offered in your discovery deposition has supported and encouraged transgender students in several ways. You have granted students' requests to be called by an initial as opposed to by their given name; isn't that right?
A Yes.
Q And you have supported transgender students by agreeing, at their request, to change their first names to align with the sex with which they identify; isn't that right?
A Yes.
Q You have encouraged teachers and staff to use pronouns that the students themselves prefer.
A Yes.
Q You've given them access to single-user bathrooms when they were uncomfortable using bathrooms of their own biological sex; isn't that right?
A Yes.
Q You've provided counseling support. You've spoken of the guidance counselors that you have had, and they have been

available to these transgender students to support them, to encourage them, to counsel them; is that right?
A As they are available to all of our students, yes.
Q And as you had already testified in response to Mr. Brown's questions, you've supported the election of a transgender student to the king's court last year for homecoming; is that right?
A Yes.
Q You would agree that there are many ways that this school district can support transgender students without giving them access to privacy facilities of the sex with which they identify?
A Yes.
Q You've stated that there is no written transgender policy.
A Correct.
Q And there's also no written criteria on which the administration bases its decisions when granting access to bathrooms and locker rooms based on gender identity.
A Correct.
Q Your unwritten criteria, as I understand it, is reduced to this consideration, what will make the transgender student comfortable; is that right?
A What will make the student comfortable, yes.
Q And this is the only criteria that central administration has told you to consider.
A Well, that's what we base it on. I mean, there's many conversations that exist between a counselor and the student --

Q But you have --
A -- before they get to that level.
Q I apologize for speaking over you.
A That's okay.
Q Are you finished?
A Yes.
Q You testified several times in your discovery the position that when you received requests from transgender students, either to have a name change or to access the facilities of the gender with which they identify, that you, on most occasions, consulted with Mr. Scoboria, your immediate supervisor and the assistant superintendent of schools, correct?
A Correct.
Q And your direction from Mr. Scoboria was, do what makes the transgender student comfortable.
A Yes.
Q To be clear, a student does not need to dress or groom in a manner stereotypical of the opposite sex to be granted access to the other sex's facilities, correct?
A Yes.
Q And a student does not need to change their name or the pronouns used when addressing them in order to be granted access to the facilities of the opposite sex, correct?
A That's not written down as a policy, no, that is correct.
Q And it's not happened?

A Right, correct.
Q You've not imposed that criteria on any --
A Correct.
Q -- transgender student.
A That is correct.
Q A student does not need to receive hormone treatments before they're given access to the facilities of the sex with which they identify, do they?
A That is correct.
Q And the student certainly is not required to undergo sex reassignment surgery before being permitted to use bathrooms and locker rooms of the sex with which they identify at BASH; isn't that correct?
A Correct.
Q You have never turned down a request from a transgender student, have you?
A We have not.
Q And the district intends to continue to make decisions regarding transgender students' access to bathrooms and locker rooms based on what makes them most comfortable, correct?
A Yes.
Q The action that was taken by the board on May 23, 2017, which was approving a contract from KCBA to evaluate architectural approaches to enhancing student privacy, you indicated that the status of that is simply in meetings, correct?

A Yes.
Q And you are still, after approximately three months -- and by you, I don't mean you the administration, KCBA -- in simply under this approximately $9,000 contract to evaluate options, they're still identifying shareholders and there is no plan in place to enhance the privacy of any of the locker rooms or bathrooms at BASH at this time?
A To my knowledge, it's just identifying stakeholder groups at this point. The district is currently in transition between superintendents.
Q You spoke of the availability of team rooms in two different locations. You have team rooms, if I understand correctly, that are contained within the girls' general locker room and the boys' general locker room, correct?
A Yes.
Q And then you have also team rooms that are on the other side of the gymnasium that are kind of their own self-contained team rooms, if you will, and those team rooms have lockers, and they have two stalls, and they have two urinals, and they have gang showers; is that right?
A Correct.
Q Those team rooms can be made available to transgender students; is that right?
A They can be made available to any student, yes.
Q There's no reason why the transgender students could not use

those team rooms.
A Or any student, correct.
Q And likewise, the transgender students can use the single-user bathrooms as well, correct?
A Yes.
Q Is it the district's intention to make those team locker rooms available only to those students who are uncomfortable with transgender students using their locker rooms?
A To make them available to any student who is uncomfortable, yes, based on whatever the situation may be.
Q So there could be a situation where if transgender students continue to have access to the boy's locker room, there could be a situation where a boy is uncomfortable with having someone of the opposite biological sex in their locker room and chooses to use the team room. And likewise, there can be a transgender student who is not comfortable using the facility of either sex who also would end up in the same team room, correct?
A Yes.
Q Is it true, sir, that a student is not required to stop using the privacy facilities of their own biological sex, even if they ask for a name change?
A Could you repeat that, please?
Q Yes. So a student comes to you and asks to be referred to by their initial or by a name that is more aligned with the sex with which they identify. Let's just -- to make it easier, we

have a biological girl who has requested a name change and what's to be called a name that is more traditionally a boy's name. All right? You've had that situation happen, correct?

A Yes.

Q That girl is not precluded from using the girls' facilities, having requested a change in her name?

A That is correct.

MS. GORDON: I think those are all the questions I have.

THE COURT: Very well, thank you very much.

Is it going to be Attorney Roper?

MS. ROPER: It is, Your Honor.

THE COURT: Do you have any questions for the witness?

MS. ROPER: I have a few.

THE COURT: You may proceed, Counselor.

CROSS-EXAMINATION

BY MS. ROPER

Q Dr. Cooper, can you see me if I sit here at the table?

A Yes.

Q I know we're looking between monitors. Dr. Cooper, a few minutes ago when Counsel for the Plaintiffs was asking you about the criteria for a transgender student being able to use facilities that align with their gender identity, and you were talking about what makes the students comfortable, you also began to say, but there's more than that. There are many

conversations. Could you explain what you were trying to say at that point?
A Well, before a student makes that request, typically, there's multiple conversations that happen between the school counselor and that student on what their wishes are and how they're identifying themselves as. And so I guess what I was trying to say is it's not just a spur of the moment thing; it's something that there's -- from my understanding and conversations with my grade level principals and counselors, there's a lot of conversations that exist between those two.
Q Have you been personally familiar with the students who have been granted access to facilities that align with their gender identity rather than their sex assigned at birth?
A I know some more than others.
Q Okay. Are you aware of any student who has requested that accommodation who has not -- is not going by an initial or a name that is aligned with their gender identity?
A I don't know of any.
Q Okay. Do you know of any transgender male, so a student who identifies as male, who has asked to use the boys' facilities who grooms and dresses like a girl?
A I don't know of any.
Q And how about the flip side? Any transgender girl who grooms and dresses as a boy that has asked to use the girls' facilities?

A I don't know of any.
Q Do you know of any student -- transgender student who has asked to use the facilities that correspond with their gender identity who has not first made use of single-user facilities and avoided the facilities that correspond with their sex assigned at birth?
A Not to my knowledge.
Q Do you affirmatively know that -- whether or not students who have asked to use facilities that correspond with their gender identity have previously been using single-user facilities.
A I know some of our transgender students did use some single-user facilities.
Q And do you know of any student who's -- to your knowledge, who's gone directly from using facilities that correspond with the sex assigned at birth to next day using facilities that correspond with their gender identity?
A I don't have any knowledge of that, no.
Q Dr. Cooper, could you look at the diagram of the first floor of the high school as it is going to be once the construction is finished? I think that was D-54, am I correct?
A Yes.
Q Okay. And you had pointed out a single-user bathroom that is on the left-hand side of the page. It is labeled "new single family accessible toilet room." Do you see what I'm referring

to?
A Yes.
Q How far is that from the gym?
A Seventy feet.
Q Okay. And if a student chose to change there, where could that student put his or her belongings after changing for gym?
A With the teacher.
Q Okay. By the way, you've referred to the gym. Is there, in fact, more than one gym at Boyertown Senior High?
A Yes, we have three.
Q Okay.
A And a fitness center and a weight room.
Q Okay. And students who are in physical education courses, which of those facilities do they use?
A Any of five of those. There are three gyms, a fitness center, and a weight room.
MS. ROPER: Your Honor, may I have just one moment to confer with my co-counsel?
THE COURT: Certainly, Counselor.
(Pause)
BY MS. ROPER:
Q Dr. Cooper, of the transgender students you are aware of at Boyertown Area Senior High, are there some who have not asked to use the facilities that correspond with their gender identity?
A Not that I'm aware of.

Q Okay.

MS. ROPER: I have no further questions at the moment.

THE COURT: Thank you, Counselor.

And, Attorney Brown, do you have any redirect of the witness?

MR. BROWN: Yes, just a few.

THE COURT: Certainly.

REDIRECT EXAMINATION

BY MR. BROWN:

Q Dr. Cooper, Ms. Gordon was speaking with you. She mentioned that the district has been supportive of transgender students. And she mentioned that the district has provided access to single-user bathrooms and to counselors. Is the access to single-user bathrooms only available to transgender students?

A No.

Q Is it, in fact, available to all students?

A Yes.

Q How about access to counselors at the high school, is that only available to transgender students?

A No.

Q Is that available also to all students at the high school?

A Yes.

Q You were also asked about whether the district has to accept the word of a transgender student. Do you recall that -- being asked that?

A Yes.
Q What would the district do if you believed that a student wasn't actually a transgender student, but was just attempting to go into the locker rooms of the other sex?
A I mean, it hasn't happened. Obviously, we would take a look at that situation and do some more research and, you know, what is the intent? What's the background? What is -- what conversations have existed before that request between the counselor and that student.
Q So permission wouldn't just be granted automatically?
A No.
Q Do any of the single-user bathrooms currently have lockers in them?
A No.
Q Is there any plan to put lockers in any of the single-user bathrooms?
A Yes.
Q And what single-user bathrooms will be getting lockers?
A We are looking at the -- the one that says "new single-family accessible toilet room" that's proximal to the gym.
Q Okay.
A One in the nurse's office -- the new nurse's office, that suite. And near the banana hallway there. Then one up in the -- the '16-'17 school year nurse's suite up in the right-hand corner there, it says "single-toilet room." Putting one there. And

then if -- and that's in Exhibit D-54.

And if you look at D-53, there will be one going into the new single-accessible toilet. It's up in the 600s there.

Q So for this upcoming school year, at least four of the single-user bathrooms will also have locker rooms where a student could store their belongings?

A There will be a locker place in there, yes.

Q There was also a discussion about the expectation of privacy. For a student who does not want to change in a locker room with a transgender student, is the district committed to making facilities available for that student to change outside of the presence of a transgender student?

A Yes.

MR. BROWN: That's all that I have, Your Honor.

THE COURT: Thank you, Counselor.

Attorney Gordon, any recross?

MS. GORDON: Just one moment, Your Honor.

THE COURT: Certainly.

(Pause)

MS. GORDON: Just a follow up to Mr. Brown's last question or two.

CROSS-EXAMINATION

BY MS. GORDON:

Q Let me see if I understand this correctly. As a student at BASH, if you were uncomfortable changing in the locker room

assigned to your biological sex because students of the opposite sex are permitted to use that locker room based on their gender identity, then you will be directed or you will be given the opportunity to use the team locker room?

A The opportunity, yes.

Q And if you are a transgender student and you do not feel comfortable changing in the locker room assigned to your biological sex, you can go ahead and use the locker room that aligns with your identity; that is, the locker room of the opposite sex?

A It could be that or a single-user.

MS. GORDON: Thank you. That's all I have.

THE COURT: Attorney Roper, anything further of the witness?

MS. ROPER: Nothing, Your Honor.

THE COURT: Mr. Brown, anything further?

MR. BROWN: No, nothing further, Your Honor.

THE COURT: And, sir, I just have one question. What are you asking this Court to do, if anything?

THE WITNESS: I'm sorry?

THE COURT: What are you asking this Court to do?

THE WITNESS: I'm just -- I get my direction from the central office administration, so --

THE COURT: Understood, all right.

Any questions in light of the Court's question?

Very well, sir. Thank you very much.

THE WITNESS: Sure.

THE COURT: You may step down.

(Witness excused)

THE COURT: All right. We have completed Mr. Cooper's testimony. Was there any other testimony Counsel wanted to try to get on the record today?

MS. ROPER: Sadly, I'm afraid we don't have anyone else available today. So we have, I think, discussed additional dates with the Court. I don't know if you want to talk about those or other housekeeping items.

THE COURT: Sure, if you're prepared to discuss that.

MR. BROWN: I just have a real quick one other housekeeping issue as far as the exhibit numbers. I believe the exhibits that Dr. Cooper looked at today, these maps might have been entered under a different exhibit number. But just for the sake of clarity of the transcript, at the risk of redundancy, I would ask that Exhibits D-53 and D-54 be admitted for the record.

THE COURT: Is there any objection from Plaintiff?

MS. GORDON: No objection.

THE COURT: Any objection from Intervenor?

MS. ROPER: No.

THE COURT: D-53 and 54 are admitted into evidence without objection.

MR. BROWN: Thank you, Your Honor.

(Defendant's Exhibits 53 and 54 were received in evidence.)

MS. GORDON: Your Honor, just to report on one open matter left from the last hearing that we had, and that was the admissibility of Plaintiff's Exhibit 64, which is a declaration by Student G. Following our conference call with Your Honor, I believe on the 25th, if I'm not mistaken, we received from the school district a copy of handwritten notes made by Dr. Foley. Those seem to correspond with much of what is in the declaration. We are going to work together as counsel to craft a stipulation of facts, and we will submit that to Your Honor I believe the next time we are together.

THE COURT: Great.

MS. GORDON: Is that something that we would be permitted to file, assuming it's all properly redacted or were filed under seal, whatever the case may be, but may we just go ahead and file that also, Your Honor, or do you want to present it in some other fashion?

THE COURT: It makes no difference whether we present in open court and determine what redaction's necessary or whether it has to be under seal, or whether it be separately filed. But it would stipulated that I would consider that as part of the factual record in this case.

MS. GORDON: Very good.

MS. ROPER: Thank you.

THE COURT: It might be easier just to submit it while we're in court just so it flows with the rest of the evidence being submitted.

MS. GORDON: Very good.

THE COURT: And, Attorney Roper.

MS. ROPER: Oh, I just wanted to make sure we were all on the same page as to the schedule. We're not able to get Dr. Faidley back in court, so we will be doing a trial deposition, which will be submitted to Your Honor, and we will be back here next Monday so that you can hear from Dr. Josephson.

THE COURT: Dr. Josephson. And he is the Plaintiff's expert?

MS. GORDON: He's the Plaintiff's expert, Your Honor.

And we would like to take about a five-minute recess, if we could, and we need to discuss a matter and then we'd be prepared to address the Court again.

THE COURT: Certainly.

MS. GORDON: Is that acceptable?

THE COURT: Let's stand in recess for -- let's make it ten minutes.

MS. GORDON: Thank you.

MS. ROPER: Thank you.

THE COURT: Let's stand in recess for ten minutes.

THE CLERK: All rise.

(Recess was taken from 2:50 p.m. to 3:00 p.m.)

THE CLERK: All rise.

THE COURT: You may be seated. Thank you.

The court is called to order. All parties previously present are once again present.

Attorney Gordon.

MS. GORDON: Your Honor, thank you for the opportunity to conference as counsel. We have considered the evidence that has been entered in this case. We considered the testimony that Your Honor has heard even today. And based on that, the Plaintiffs are withdrawing their rebuttal expert, Dr. Josephson.

THE COURT: Very well. So that means -- and that was our only expert for Monday?

MS. GORDON: Yes.

THE COURT: Okay. Does that leave any -- is the record -- other than that stipulation, of course -- is the record closed then?

Attorney Roper.

MS. ROPER: Not until Dr. Faidley's deposition is taken --

THE COURT: Oh, yes, of course.

MS. ROPER: -- and submitted to the Court. And then, of course, we have -- we are working out amongst us in terms of how we submit the deposition -- the other deposition testimony. And we're very close to completing that, Your Honor.

THE COURT: Okay, great. So the record is very close

to being closed.

There was one other issue that the Court had, and that had to do with the transcript. And there was discussion of a transcript being filed under seal and a separate redacted transcript being publicly available. Have Counsel been able to do anything in that regard?

MS. GORDON: Your Honor, we confess we've not gotten to that. So I think it's going to be a pretty simple matter of properly redacting and probably coming to an agreement on the redactions and then filing the entire transcript under seal. And so we will commit to getting that done here within the week.

THE COURT: Okay.

MS. GORDON: Would you like us to submit the redacted version to you for your review? I believe that we were instructed --

THE COURT: I'm certain I'll be satisfied with the redactions, but I do need a copy of the --

MS. GORDON: So --

THE COURT: -- redacted version.

MS. GORDON: Yes. At some point, I believe we received a communication, perhaps even from the court reporter, that you wanted to be involved in the redaction process. But I just wanted to make sure I understood what we were to do and --

THE COURT: The only thing I wanted to be involved in, is I received a standard notice from the clerk that someone has

requested the transcript. And normally, I sign those and make everything available immediately. This one I have not. I was concerned that it might result in inadvertently an unredacted transcript being released. So -- and I'll continue to not sign that document to authorize the release of the transcript until we're sure that the transcript that would be available would be the redacted version.

MS. GORDON: We will make that a priority so Your Honor can respond to that request.

THE COURT: Very well.

All right. Anything else?

(No response)

THE COURT: Well, I do appreciate everything that you've gotten completed up to this point. And obviously, the submissions have been outstanding.

All right. Then we will stand in recess. Everybody have a great rest of the day.

IN UNISON: Thank you, Your Honor.

THE COURT: Oh, one moment, please.

THE CLERK: (Indiscernible).

THE COURT: So are we cancelling next Monday's hearing all together?

MS. GORDON: Yes.

THE COURT: Okay. We will cancel that. And I hope all of you can find something else to do.

MS. ROPER: Thank you.

THE COURT: Have a great night.

THE CLERK: All rise.

(Proceedings concluded at 3:03 p.m.)

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C E R T I F I C A T I O N

I, Valori Weber, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

Valori Weber, CET-711

Date: August 3, 2017