

**DISTRICT JUDGE'S CIVIL MINUTES
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA – TUCSON**

U.S. District Judge: Scott H. Rash

Date: July 20, 2021

Case Number: CV-20-00335-TUC-SHR

Hennessy-Waller et al v. Snyder

APPEARANCES: Plaintiff(s) Counsel

Asaf Orr

Andrew J. Chinsky

Brent P. Ray

Defendant(s) Counsel

David T. Barton

Logan T. Johnston

Matter is before the Court for a Telephonic Conference regarding discovery.

The Court identifies an email to Chambers about the discovery dispute as Exhibit 1 to this hearing and Orders it admitted as part of the record.

The parties argue their positions and answer the questions of the Court.

Pursuant to the Discovery Order at Doc. 74, the Court finds the medical and psychological records as to DH are relevant from age 4, and as to JD from age 11, and shall be disclosed.

Deputy Clerk: Sara Jones

Court Reporter: Anni Bryan

30 minutes

Start: 10:33 am

Stop: 11:03 am

From: Kate King <kate@burnsbarton.com>
Sent: Thursday, June 24, 2021 3:01 PM
To: AZDdb_Rash Chambers
Cc: Asaf Orr; Ray, Brent; david_burnsbarton.com; Logan Johnston
Subject: D.H. and John Doe v. Jami Snyder - Case No. 4:20-cv-00335-SHR

CAUTION - EXTERNAL:

Good afternoon, The parties in this case have a discovery dispute. The parties are submitting the below explanation of the issue, pursuant to instructions previously received from [REDACTED]. Thank you.

Defendant's Request: Defendant asks the Court to order Plaintiffs to sign medical authorizations for Defendant to subpoena all of Plaintiffs' (1) mental health records from date of birth to present, and (2) other medical records from two years before Plaintiffs began expressing concerns about their gender to the present.

Basis for Defendant's Request: Plaintiffs' lawsuit alleges the Arizona Health Care Cost Containment System's funding decision to not cover "gender reassignment surgery" was unlawful. Plaintiffs (ages 15 and 17 when the Complaint was filed), allege they need male chest reconstruction surgery to treat their gender dysphoria. Defendant requested Plaintiffs' healthcare records both informally and formally through written discovery. Plaintiffs' mental health and medical records are discoverable under Rule 26(b)(1), as they are relevant to the claims and defenses and proportional to the needs of the case and Defendant's request for "authorizations" creates no burden or expense to Plaintiffs. They will also be confidential under the parties' protective order.

Plaintiffs allege they suffered physical and mental symptoms years before their gender dysphoria diagnoses. D.H. disclosed that D.H. was transgender at 13, but D.H. had "significant psychological distress at an early age, including severe anxiety and suicidal ideation"; as a young child, D.H. "began exhibiting signs of significant psychological distress including depression, prolonged crying episodes, anxiety, and insomnia"; at age 11, D.H. had "other stressors D.H. was trying to navigate," which caused D.H. to start losing hair; D.H. was hospitalized, including in intensive psychiatric care, four times beginning at age 11 for depression and suicidal ideation; and D.H. has a history of pervasive anxiety, chronic suicidal ideations and attempts, related self-harm issues, and oppositional disorder. (Doc. 1, ¶¶ 6, 7, 69, 70, 75, 78-80, 84; Doc. 5-2, ¶¶ 5, 6, 8, 12-13) John Doe began to socially transition to male at about age 11. In the early years, "John's biological parents were unable to care for him and provide a stable home environment." John has been diagnosed with PTSD: "chronic posttraumatic stress disorder stemming from early-life attachment trauma." John has been depressed, suffered anxiety, engaged in self-harm through cutting and burning, lost significant weight, and contemplated suicide. (Doc. 1 ¶¶ 10-11, 89; Doc. 4 ¶ 5; Doc. 4-1 ¶ 5; Doc. 4-2, ¶¶ 11, 20) Plaintiffs have also alleged, for example, physical pain and asthma suffered as a result of binding, "back pain" experienced by D.H., and a "change in D.H.'s overall health." (Doc. 1 ¶¶ 82, 99; Doc. 5-3 ¶ 12; Doc. 27 ¶ 12) It is unclear whether these medical issues have been appropriately and adequately addressed. Even the World Professional Association for Transgender Health's standards require a careful assessment of a patient's physical and mental health before there can be a recommendation for surgery. The requested records are relevant and discoverable. Before determining the merits of Plaintiffs' claims, the Court must first decide if AHCCCS's funding decision denies medically necessary care to Plaintiffs. To have standing, Plaintiffs must have suffered an "injury in fact" that is "concrete and particularized," not just "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992). The Court must also determine medical necessity under Plaintiffs' EPSDT claim (Count I), which defines EPSDT services as "Such other necessary health care, diagnostic services, treatment or other measures...to correct or ameliorate defects and physical and mental illnesses and conditions..." 42 U.S.C. §1396d(r)(5) (emphasis added). Medical necessity is an

element of Plaintiffs' EPSDT claim. The Court has already noted there are important differences between this case and *Toomey* (Doc. 23) (e.g., where there is no EPSDT claim) and *Toomey* is not binding on Defendant.

Plaintiffs' Response: Plaintiffs do not believe that their healthcare records are relevant to the resolution of the legal issues in this case and have not waived the privileges that safeguard the privacy of those records. But, as a compromise, Plaintiffs offered to release all medical and mental health records from the present until two years prior to the date D.H. and John Doe received letters from their respective mental health providers recommending they seek medical evaluation for male chest reconstructive surgery. This would give Defendant access to records dating back to April 2017 and July 2018 for D.H. and John Doe, respectively.

Basis for Plaintiffs' Response: Contrary to Defendant's assertion, this case does not hinge on whether male chest reconstruction surgery is medically necessary for D.H. and John Doe. Plaintiffs challenge the legality of a categorical ban on coverage for "gender reassignment surgeries" as applied to male chest reconstruction surgery. To succeed on the merits, Plaintiffs need only show that the procedure should be a covered Medicaid service.

As for establishing standing, the only relevant facts relating to D.H. and John Doe's medical histories are: (1) they have been diagnosed with gender dysphoria; and (2) their providers recommend male chest reconstruction surgery to treat their gender dysphoria. Those facts, however, are not in dispute. Defendant has provided Medicaid coverage of other services to treat D.H.'s and John Doe's gender dysphoria (D.H. Decl., Doc. 5 at ¶ 13; J. Doe Decl., Doc. 4 at ¶ 9; see also Def.'s Opp'n Mot. for Prelim. Inj., Doc. 18 at 3 (admitting that AHCCCS covers non-surgical treatments for gender dysphoria)), and their providers' recommendations are on record (Reed Decl., Doc. 5-2 at ¶ 10; Peck Decl., Doc. 4-2 at ¶ 17). And while we have stated this on previous occasions, we reiterate that the Plaintiffs are not asking the Court to order AHCCCS to find that these services are medically necessary for the Plaintiffs. Rather, the relief requested under all of Plaintiffs' claims is to enjoin enforcement of the categorical ban on coverage, which will then allow the Plaintiffs to pursue their claims through the normal process – namely to request the service and, if it is denied, to have an administrative hearing to contest the denial. Plaintiffs allege that federal law requires Defendant to afford them that opportunity. That is sufficient to establish harm and standing. See, e.g., *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("The injury in fact' in an equal protection case of this variety is the denial of *equal treatment* resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit."). The same analysis applies under Plaintiffs' EPSDT claim. In fact, the State of Arizona has already acknowledged the limited scope of relevant discovery in this type of case in *Toomey v. State of Arizona*, a case that also involves potential claims for male chest reconstruction surgery by class members under age 21. See Case No. 19-cv-00035, Doc. 128 at 11 ("The parties have narrowed the issues in this dispute by agreeing that the medical necessity of gender affirming surgery will not be an issue in this case. That is, if it is determined that the exclusion violates Title VII or the Equal Protection Clause of the Fourteenth Amendment, the Plan will then need to determine medical necessity on case by case basis."). The Court should similarly limit the scope of discovery here.

Finally, the disclosure of Plaintiffs' healthcare records is a significant burden on each of them, even if those records are subject to a protective order. Plaintiffs' medical records are protected by the doctor-patient and therapist-patient privileges, common-law doctrine that are rooted in a patient's right to privacy over their most deeply personal and sensitive information. See *Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing the psychotherapist-patient privilege).

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